

**US Bank Natl. Assoc. v Perkins**

2010 NY Slip Op 32423(U)

August 5, 2010

Sup Ct, NY County

Docket Number: 110256/2009

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

US BANK NATIONAL ASSOCIATION,  
AS TRUSTEE FOR CMLTI 2007-AR5  
3476 Stateview Boulevard  
Ft. Mill, SC 29715,

Plaintiff,

- against-

KATHLEEN PERKINS A/K/A KATHLEEN E.  
PERKINS, BOARD OF MANAGERS OF THE  
C-VIEW CONDOMINIUM, NATIONAL CITY  
BANK, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU,

JOHN DOE (Said name being fictitious, it  
being the intention of Plaintiff to designate  
any and all occupants of premises being  
foreclosed herein, and any parties,  
corporations or entitles, if any, having or  
claiming an interest or lien upon the  
mortgaged premises.),

Defendants.

INDEX NO. 110256/2009

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

**FILED**  
AUG 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Plaintiff US Bank National Association, as Trustee for CMLTI 2007-AR5 ("plaintiff"),  
brings this action to foreclose a mortgage executed by defendant Kathleen Perkins a/k/a

Kathleen E. Perkins ("defendant") for a residential condominium unit. The Note of Issue has not been filed. Before the Court is plaintiff's motion for summary judgment, pursuant to CPLR 3212, seeking judgment in its favor and dismissal of defendant's answer, and an order of reference to determine the amount due.<sup>1</sup> Defendant has responded in opposition to the motion, and plaintiff has filed a reply.

#### BACKGROUND

On July 20, 2009, plaintiff commenced the present action to foreclose a mortgage executed by defendant and recorded on November 2, 2006, in the amount of \$975,000. The mortgage secured an adjustable rate note for a residential condominium unit located at 645 East 11th Street, New York, New York.

In the complaint, plaintiff alleges that it is a national banking association and was assigned the mortgage from Wells Fargo Bank, N.A. ("Wells Fargo") on July 10, 2009. Plaintiff claims that defendant defaulted on the mortgage and underlying note by failing to make the required monthly principal and interest payments and other charges, and it seeks foreclosure and sale to collect the amounts due. Defendant filed a verified answer on August 11, 2009, admitting execution of the mortgage, denying the default allegations, and raising several affirmative defenses.

On January 8, 2010, plaintiff filed the present motion, seeking summary judgment in its favor and dismissal of defendant's answer, among other relief. In support of the motion, plaintiff submits, *inter alia*, an "Affirmation of Merit and Amount Due" by Herman John Kennerty, the Vice President of Loan Documentation at Wells Fargo; an "Affidavit" of Marc A. Kline, a Vice President of Loan Documentation at Wells Fargo; an "Affirmation of Regularity" by plaintiff's

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<sup>1</sup>Plaintiff also seeks to amend the caption to substitute "Rob Rugan," a tenant at the mortgaged premises, as a party defendant in place of "John Doe," and to delete the address of plaintiff from the caption.

counsel; and copies of the mortgage, note and mortgage assignment. The affidavits of Kennerty and Kline -- witnesses with purported personal knowledge about the alleged default -- were signed and notarized outside of the State of New York and it is undisputed that neither contain a "certificate of conformity" as required by CPLR 2309(c) (*see Green v Fairway Operating Corp.*, 72 AD3d 613 [1st Dept 2010]). Kennerty's affidavit purports to confirm that there was in fact a default and sets forth the amounts allegedly owed. Kline's affidavit contains arguments in support of the motion, attaches copies of the mortgage and note, and confirms the amounts due.

In opposition to the summary judgment motion, defendant relies upon her own affidavit and the affirmation of her counsel. In her affidavit, she asserts that she has been attempting to obtain a modification of the terms of the underlying loan with Wells Fargo, and that her modification application is still pending. She argues that plaintiff's motion should be denied because: (1) the affidavits of Kline and Kennerty are not competent evidence because they do not contain the requisite certificate of conformity; (2) plaintiff lacks standing to bring this action because it has not demonstrated that it is a foreign bank; and (3) plaintiff lacks standing because the mortgage assignment did not include an assignment of the underlying note. Plaintiff does not address the merits of the "certificate of conformity" argument in its reply.

#### DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of

the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, “the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

“In order to establish prima facie entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default” (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883 [2d Dept 2010]; *see also Bowery Sav. Bank v 130 East 72nd St. Realty Corp.*, 173 AD2d 364, 364 [1st Dept 1991]). The burden then shifts to the defendant to demonstrate the existence of a triable issue of fact as to a bona fide defense.

The Court finds that plaintiff has failed to offer sufficient evidence in support of its motion -- in admissible form -- to establish prima facie entitlement to summary judgment as a matter of law (*see Winegrad*, 64 NY2d at 853). It is well-settled that, in order to be admissible, an affidavit that is signed and notarized outside of the State of New York must be accompanied by a “certificate of conformity” certifying that the manner in which the acknowledgment or proof was taken conforms with the laws of the appropriate jurisdiction (*see CPLR 2309 [c]; Real Property Law § 299-a; see also Green*, 72 AD3d at 613; *Ford Motor Credit Co. v Prestige Gown Cleaning Serv., Inc.*, 193 Misc 2d 262, 264 [NY City Civ Ct 2002]).

Here, plaintiff has submitted copies of the mortgage and underlying note, but it has failed to submit a competent affidavit evidencing defendant’s default in the payment of the obligations under the mortgage. The affidavits of Kennerty and Kline do not contain the requisite certificates of conformity, and, therefore, these affidavits are not properly before the Court (*see Green*, 72 AD3d at 613 [plaintiff failed to show a meritorious cause of action where

the affidavit of her essential witness was sworn to in Dominican Republic and lacked the certificate of conformity required by CPLR2309 [c]).

In the absence of a sworn affidavit by a witness with personal knowledge of the facts regarding the alleged default, plaintiff's motion papers are devoid of the sworn factual proof necessary to sustain its motion for summary judgment (*see id.*; *Discover Bank v Kagan*, 2005 WL 1713576, \*1 [App Term, 2d & 11th Jud Dists 2005]; *Citibank (South Dakota) N.A. v Suen*, 2005 WL 3749143, \*1 [App Term, 2d & 11th Jud Dists 2005]; *Aries Fin., LLC v 12005 142nd St. LLC*, 2009 WL 3384467, \*2 [Sup Ct, Queens County 2009]; *Worldwide Asset Purchasing, LLC v Simpson*, 2007 WL 3400494, \*1 [City Ct, City of Auburn 2007]). Accordingly, plaintiff's motion for summary judgment is denied.

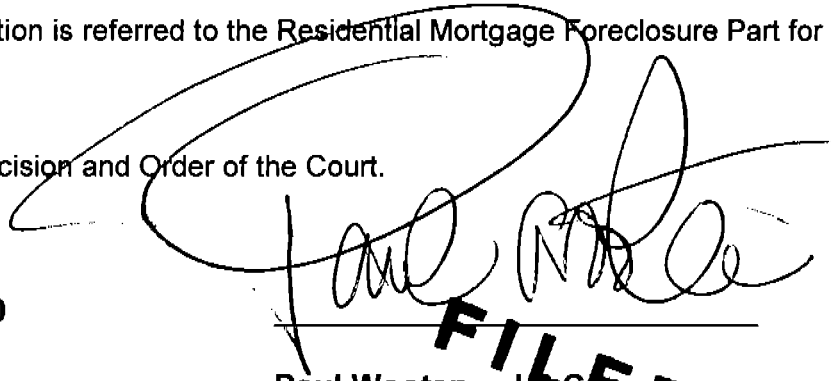
Having denied summary judgment on the certificate of conformity issue, the Court need not reach the remaining issues. This action shall be referred to the Residential Mortgage Foreclosure Part for a settlement conference.

For these reasons and upon the foregoing papers, it is,  
ORDERED that plaintiff's motion for summary judgment is denied; and it is further,  
ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendant.

ORDERED that this action is referred to the Residential Mortgage Foreclosure Part for a settlement conference.

This constitutes the Decision and Order of the Court.

Dated: August 5, 2010



Paul Wooten J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**FILED**  
400  
AUG 12 2010  
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