SCAN

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

CYNBTHIA REID,

Plaintiff,

-against-

LARRY B. LITTON, LITTON LOAN SERVICING LP, LITTON LOAN SERVICING, INC. AND THEIR SUCCESSORS

Defendants.

TRIAL/IAS, PART 5
NASSAU COUNTY

RETURN DATE: 9/23/10

SEQUENCE NO:4, 5, 6

INDEX NO.:016713/08

The following papers read on this motion (1-5):

Defendants' Notice of Motion (No. 4) 1
Plaintiff's Notice of Cross Motion (No. 5) and
Affirmation in Opposition to Defendants' Motion..... 2
Defendants' Affirmation in Reply and
in Opposition to Plaintiff's Cross Motion..... 3
Plaintiff's Application for an Order to Show Cause (No. 6).....4
Defendants' Affirmation in Opposition.....5

Defendants' motion for summary judgment to dismiss the complaint pursuant to CPLR 3212 is **granted** and plaintiff's cross motion to vacate the prior foreclosure judgment and motion to stay the post-foreclosure holdover proceeding are **denied** for the reasons set forth herein.

When the plaintiff defaulted on her mortgage payment for her home, the original mortgagee (OPTION ONE MORTGAGE CORPORATION, hereafter "OPTION ONE") filed an action for foreclosure (INDEX NO.: 16567/06). After the completion of foreclosure proceeding with final judgment and sale of the property in issue, plaintiff filed this separate plenary action with a different index number against the defendants including the assigned mortgagee (LITTON LOAN SERVICING LP, hereafter "LITTON LOAN") alleging defendants' lack of good faith effort to resolve the issue with plaintiff's

request for loan modification and absence of notice of the assignment. Plaintiff sought the remedy of $10,000,000 as sanctions.

Defendants filed for a motion for summary judgment to dismiss the complaint based on various grounds such as failure to state a cause of action upon which relief can be granted, including unjust enrichment, unclean hands, lack of damage, res judicata, collateral estoppel, non-joinder of necessary party for the action. Defendants also sought recovery of attorney fees and costs as a sanction for filing a frivolous claim in violation of **22 NYCRR §130**.

In plaintiff's opposition and cross motion, plaintiff argued that this Court should vacate the prior foreclosure judgment and sale. Plaintiff alleged various grounds such as lack of personal jurisdiction by improper service, insufficient evidentiary bases and invalid default judgment in violation of **CPLR §3215 (f)**. As an alternative remedy, plaintiff asked this Court to consolidate the prior foreclosure action with the current action by arguing that the two cases are based on the same fact and law. Plaintiff also requested a sanction against defense counsel for unauthorized practice of law alleging that counsel aided or abetted the secretary of LITTON LOAN by signing an affidavit which is beyond her capacity and without knowledge of New York Law.

Under **CPLR §3212**, the Court may grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to the judgment as a matter of law. *See* **Alvarez v. Prospect Hosp.**, 68 NY2d 320; **Miller v. Journal News**, 211 AD2d 626. The initial burden of proof is on the moving party to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. **Ayotte v. Gervasio**, 81 NY2d 1062. Once the movant satisfies his burden of proof, the burden shifts to the non-movant to show that there is material issue of fact to be determined by the fact finder by laying bare facts. *See* **Federal Deposit Ins. Corp. v. Hyer,** 66 AD2d 521; **Noy v. Everest Equities, Inc.**, 27AD3d 629; **Hanson v. Ontario Milk producers Co-op., Inc.,** 58 Misc.2d 138. The non-movant's burden can be satisfied by an affidavit of the person with actual personal knowledge of the relevant fact but not by mere conclusory statement.

See **Palo v. Principio**, 303 AD2d 478; **Osorio v. Deer Run Assocs.,** 231 AD2d 504; **South Bay center, Inc. v. Butler, Herrick & Marshall,** 43 Misc.2d 269.

Regarding the first cause of action, defendants' lack of good faith effort, the Court finds that the defendants have met their burden of proof for this summary judgment motion. Defendants offered sufficient proof such as the letters on January 25, 2007 and March 1, 2007 warning of foreclosure for the default. Letters with information to reach the person in charge of the loan. The letter of July 15, 2008 denying plaintiff's loss mitigation request maintaining that plaintiff had insufficient income compared as further described by the plaintiff in her communication with Rya Lewis of the Wintour Group on July 23, 2008 in response to plaintiff's complaint to New York State Banking Department, explaining its denial of plaintiff's application. By So-Ordered Stipulation before the judgment of foreclosure, defendants also consented with the plaintiff to have 50 days to pay off the loan after completion of the alleged on-going contract for sale of the property in issue. All those communications and incidences occurred subsequent to plaintiffs default in her payments of the loan after the first payment on April 1, 2006 and before the foreclosure judgment was entered on February 23, 2007. The Court finds that those are sufficient to show defendants' good faith effort to resolve the issue without foreclosure. Plaintiff's complaint was conclusory and plaintiff did not satisfy the non-movant's burden of proof to defend her cause of action against defendants' motion for summary judgment.

Regarding the second cause of action, the Court finds that those communications described above gave more than enough notice to the plaintiff about the assignment of the note from OPTION ONE to LITTON LOAN. The letters also warned about the impending foreclosure action and urged the plaintiff to respond immediately. Defendants met their burden for the summary judgment motion. However, even though the complaint does not clearly articulate in proper legal terms, the Court finds that the complaint raises at least some arguable issue about the standing of the original mortgagee in the foreclosure action. The original mortgagee OPTION ONE filed the complaint for foreclosure action on 10/10/06. According to the defendants' affidavit, OPTION ONE transferred the note to LITTON LOAN on 11/13/06 while the foreclosure action was pending. However, there was no amendment of the pleading and LITTON LOAN did not

join the action as a plaintiff. The final judgment of foreclosure was rendered with the same caption of OPTION ONE as the sole plaintiff who had no right to enforce the note and foreclose the mortgage after it transferred the note to LITTON LOAN. The Court cannot reach a conclusion on this issue because the evidence is limited and neither party argued this matter. The Court; therefore, finds there is material issue to be tried and the motion for summary judgment may not be granted.

In spite of the presence of a presumptively triable issue, however, the Court has no option but to dismiss this matter *sua sponte*. By allowing this plenary action to proceed, this Court will permit a collateral attack on the foreclosure judgment rendered by another trial court. Only the Court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion upon various grounds such as excusable defaults, newly discovered evidence, lack of jurisdiction or vacatur. *See* **CPLR §5015 (a)**. A separate plenary action is not a proper proceeding for a relief from a prior judgment or order by another trial court. *See* **St. Clement v. Londa**, 8 AD3d 89; **North Shore Environmental Solutions, Inc. v. Glass**, 17 AD3d 427; **Cramer v. Sabo**, 31 AD3d 998. Proper procedure to challenge the trial court's judgment is filing a motion to vacate the judgment or to reargue in the same court or appealing to the Appellate Division. *See* **Rakosi v. Daniel Perla Associates, L.P.**, 3 AD3d 431.

Based on the same grounds of **CPLR §5015 (a)**, this Court denies plaintiff's cross motion without determining the merit of her argument. Motion to vacate the foreclosure judgment must be filed in the same court which rendered the judgment.

Plaintiff's cross motion to consolidate the foreclosure action with this action raises a separate issue. To avoid unnecessary costs or delay, the actions may be consolidated when the pending actions involve a common law or fact. *See* **CPLR §602**. Absent a showing of substantial prejudice by the party opposing the motion, the trial court has sound discretion to grant the motion for consolidation. *See* **Beerman v. Morhaim**, 17 AD3d 302; **Flaherty v. RCP Assoc.**, 208 AD2d 496; **Stephens v. Allstate Ins. Co.**, 185 AD2d 338; **Zupich v. Flushing Hosp. & Med. Ctr.**, 156 AD2d 677. In this case, the foreclosure action is not pending any more. There was a final judgment of foreclosure. The property was sold and then assigned to a new owner, Residential Funding Real Estate

Holdings, LLC which may or may not be a related company to the defendants. The relationship between the new owner and the defendants cannot be considered under these circumstances and may be ultimately irrelevant to this plenary action. Consolidation of the foreclosure action with this case will be prejudicial to the defendants because of the delay and the costs of litigation.

Both parties requested sanctions against each other. The Court finds that the plaintiff's claim is not frivolous but there is misunderstanding and confusion about the law and procedure. The Court also finds that there is insufficient evidence that the defense counsel actually aided the alleged unauthorized practice of law.

Accordingly, it is

ORDERED, that defendants' motion for summary judgment to dismiss the complaint under **CPLR §3212** is **granted**; it is further

ORDERED, that the case is **dismissed** by this Court *sua sponte* under **CPLR §5015 (a)** to avoid a collateral attack on the prior foreclosure judgment; it is further

ORDERED, that plaintiff's cross motion for vacatur or consolidation is **denied;** and it is further

ORDERED, that both parties' motions for sanctions are **denied**.

Defendant shall serve a copy of this Order on the plaintiff, with Notice of Entry, within 10 business days upon receipt from any source.

This constitutes the Order of the Court.

Dated: Dec 23, 2010

ENTERED
FEB 07 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE