

**Park Natl. Bank v Lops**

2011 NY Slip Op 32505(U)

September 16, 2011

Sup Ct, Nassau County

Docket Number: 21522-09

Judge: Steven M. Jaeger

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SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK

Present:  
**HON. STEVEN M. JAEGER,**  
Acting Supreme Court Justice

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PARK NATIONAL BANK,

Plaintiff,

-against-

JOSEPH LOPS, THOMAS F. LIOTTI, LAW  
OFFICE OF THOMAS F. LIOTTI and "JOHN  
DOE NO. 1" to "JANE DOE NO. 10," inclusive,  
the last ten names being fictitious and unknown  
to plaintiff, the persons of parties intended being  
the tenants, occupants, persons or corporations,  
if any, having or claiming an interest in or lien  
upon the premises described in the complaint,

Defendants.  
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TRIAL/IAS, PART 43  
NASSAU COUNTY  
INDEX NO.: 21522-09

MOTION SUBMISSION  
DATE: 7-5-11

MOTION SEQUENCE  
NO. 1

The following papers read on this motion:

- Notice of Motion, Affirmation, and Exhibits X
- Affirmation in Opposition and Exhibits X
- Affidavit in Further Supporting Application for the
- Appointment of a Referee in a Mortgage Foreclosure Action X
- Plaintiff's Memorandum of Law in Support of Motion X
- Plaintiff's Memorandum of Law in Further Support of Motion X

Motion by U.S. Bank National Association as successor in interest to the Federal  
Deposit Insurance Corporation, Receiver for Park National Bank (U.S. Bank), to appoint  
a referee to compute pursuant to the Stipulation between U.S. Bank and defendant  
Joseph Lops, for summary judgment against defendant Thomas F. Liotti and the Law  
Office of Thomas F. Liotti and to amend the caption is determined as hereinafter  
provided.

## BACKGROUND

Park National Bank commenced this action on or about October 21, 2009 to foreclose a mortgage given by defendant Joseph Lops to Green Point Mortgage Funding, Inc. on commercial property known as 3956 Merrick Road, Seaford, New York, to secure a promissory note dated June 8, 2007 in the original principal amount of \$330,000<sup>1</sup>. According to the complaint, defendant mortgagor, Joseph Lops, defaulted under the terms of the note and mortgage by failing to make monthly payments beginning May 1, 2009 and continuing thereafter.

After defendant Joseph Lops sought forbearance of the foreclosure proceedings, and an opportunity to cure his default and reinstate the loan, defendant mortgagor and U. S. Bank, as successor in interest to the Federal Deposit Insurance Corporation, Receiver for Park National Bank, executed a stipulation of settlement of the foreclosure action on March 8, 2010 wherein defendant admits in paragraph 2 that:

“(a) the Loan is in default; (b) he has no defenses to the Foreclosure Action and in the absence of a settlement Lender would have a right to the entry of a judgment of foreclosure and sale; and (c) the following amounts are due and payable thorough and including February 28, 2010 to cure the Default:

Accrued and unpaid monthly installments of principal, interest and escrow due on May 1, 2009 through and including March 1, 2010 (the “Monthly Arrears”)	\$40,275.84
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Accrued and unpaid Default Interest as set forth in of the Mortgage from May 1, 2009	
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<sup>1</sup>Defendant Law Office of Thomas F. Liotti has filed a notice of appearance and claim to surplus money dated March 22, 2010 based on a judgement against defendant Joseph Lops in the amount of \$21,916.25 entered in the County Clerk’s office on February 20, 2009 (index no. 005386-2008).

through and including March 3, 2010 ("Default Interest")	\$13,647.81
Late Charges	\$ 1,881.15
Legal Fees and Disbursements incurred with the underlying action, including estimated fees to draft this Stipulation of Settlement ("Fees")	\$ 8,786.50
TOTAL through and including February 28, 2010 ("Total Arrears")	\$65,610.75"

The stipulation of settlement further provides in paragraph 9 that, in the event of his failure to make payment in accordance therewith, defendant Joseph Lops consented to:

- "(a) the immediate appointment of a referee to compute amounts due under the Loan Documents
- (b) the entry of final judgment of foreclosure and sale; and
- (c) any such other or additional remedies, in Lender's sole discretion, as may be permitted under the Loan Documents or available to it at law or in equity."

Defendant Joseph Lops having defaulted under the terms of the stipulation of settlement by failing to make the required monthly payment of \$2,508.24, and the monthly arrearage payment of \$565., as agreed, beginning in June 1, 2010, plaintiff mortgagee has moved to enforce the stipulation of settlement, to appoint a referee to compute the amount due under the loan documents and to enter a final judgment of foreclosure and sale.

#### ANALYSIS

On a motion for summary judgment the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidentiary proof in admissible form to warrant judgment in its favor. *Ferluckaj v*

*Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]. In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject note and the holder or assignee of the subject mortgage at the time the action is commenced. *US Bank N.A. v Madero*, 80 AD3d 751 [2<sup>nd</sup> Dept. 2011]. Either a written assignment of the underlying note or the physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident. *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912 [3<sup>rd</sup> Dept. 2009].

Entitlement to judgment of foreclosure may be established as a matter of law, where a mortgagee produces both the mortgage and unpaid note<sup>2</sup>, together with evidence of the mortgagor's default thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact. *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 833 [2<sup>nd</sup> Dept. 2009].

In opposition to plaintiff's motion, defendant Joseph Lops argues that U. S. Bank<sup>3</sup>, as purported successor in interest to the Receiver for plaintiff Park National Bank, lacks standing to maintain this action in that it has failed to proffer a proper chain of custody of the subject mortgage and note sufficient to justify foreclosure. The argument is unavailing, however, under the circumstances extant given the stipulation

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<sup>2</sup>The note represents the primary personal obligation of the mortgagor and the mortgage is merely the security for the obligation. *Corey v Collins*, 10 AD3d 341, 343 [1<sup>st</sup> Dept. 2004].

<sup>3</sup>U.S. Bank asserts that it purchased the loan at issue herein from the Federal Deposit Insurance Corporation as Receiver for Park National Bank pursuant to a purchase and assumption agreement.

of settlement wherein defendant Joseph Lops admits, *inter alia*, his default under the loan documents and the absence of any defense to the foreclosure action.

Significantly, paragraph 20 of the stipulation states that he had:

“the opportunity to be represented by an attorney of his choice in connection with the negotiations and execution of [the] Stipulation of Settlement.”

While the court is cognizant that a plaintiff must prove its standing<sup>4</sup> in order to be entitled to relief when standing to sue is put into issue (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2<sup>nd</sup> Dept. 2009]), notwithstanding the absence of any evidence that plaintiff lacks standing to litigate this matter, defendant mortgagor has waived the standing issue by acknowledging in the opening whereas clause of the stipulation of settlement that U.S. Bank is the:

“current owner and holder of a certain Mortgage, Assignment of Rents and Security Agreement dated June 8, 2007 (the “Mortgage”) executed by and between Green Point Mortgage Funding, Inc. (“Green Point”) and Joseph Lops (“Mortgagor”) which secures payment of the Promissory Note dated June 8, 2007 in the amount of \$330,000., together with interest thereon as more particularly set forth therein (the “Loan”).

A stipulation of settlement is essentially a contract and is subject to the general rules of contract construction. *Varveris v Fisher*, 229 AD2d 573, 574 [2<sup>nd</sup> Dept. 1996]. A written contract which is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms without reference to extrinsic materials outside the four corners of the document. *Goldman v White Plains Ctr. for*

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<sup>4</sup>Standing to sue requires an interest in the claim at issue in the lawsuit such that the law will recognize it as a sufficient predicate for determining the issue at the litigant’s request. *New York State Ass’n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004].

*Nursing Care, LLC*, 11 NY3d 173, 176 [2002], citing *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]. Stipulations of settlement are favored by the courts and will not be cast aside lightly. Only where there is cause, not here present, sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation. *Hallock v State of New York*, 64 NY2d 225, 230 [1984]. Defendant mortgagor's attempt to assert a defense based on lack of standing in response to the underlying foreclosure action settled by a stipulation of settlement is barred by the very language of the stipulation. The court notes that paragraph 19 of the stipulation of settlement provides that it:

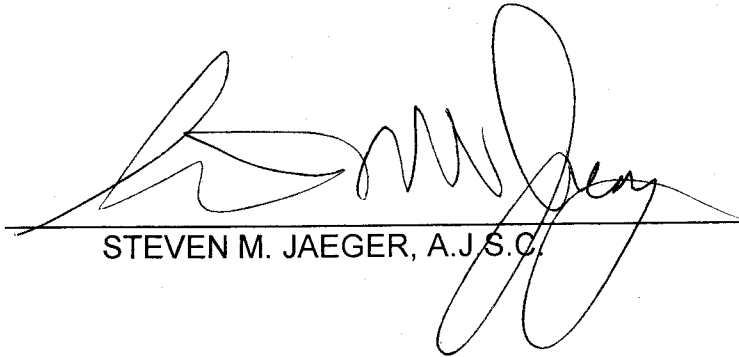
"constitutes the entire agreement of the parties hereto with respect to the settlement of the Foreclosure Action, it being understood and agreed that all prior and contemporaneous representations, statements, understandings and agreements, oral and written, between the parties concerning the subject matter of this Stipulation are merged into this Stipulation of Settlement, which alone fully and completely expresses their agreement and that same is entered into after full investigation."

Accordingly, the motion by plaintiff for summary judgment against defendant Thomas F. Liotti and the Law Office of Thomas F. Liotti, judgment creditor of defendant Joseph Lops, and to appoint a referee to compute the amounts due under the loan documents pursuant to the stipulation of settlement between U.S. Bank, as successor in interest to the Federal Deposit Insurance Corporation, Receiver for Park National Bank, is granted. Plaintiff shall submit a Judgment and Order on notice.

That branch of the motion which seeks to amend the caption to delete the defendants sued herein as "John Doe No. 1" through "Jane Doe No. 10", and to replace plaintiff Park National Bank with U.S. Bank National Association is granted.

This constitutes the Decision and Order of the Court.

Dated: September 16, 2011



STEVEN M. JAEGER, A.J.S.C.

**ENTERED**  
SEP 20 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE