SUPREME COURT OF THE STATE OF NEW YORK **Index No.:103571/08**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 001**

EMC MORTGAGE CORPORATION,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

FRED J. CARLO,
BOARD OF DIRECTORS OF
DEBMOR ESTATES HOMEOWNERS ASSOCIATION, INC.,
BOARD OF MANAGERS OF DEBMOR ESTATES CONDOMINIUM III,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
PEOPLE OF THE STATE OF NEW YORK, and
MRS. CARLO

Defendants

The following items were considered in the review of the following order to show cause.

Papers	Numbered
Order to Show Cause and Affidavits Annexed	1
Answering Affirmation	2
Supplemental Affirmation	3
Replying Affirmation	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Order to Show Cause is as follows:

On November 15, 2006, the defendant, Fred J. Carlo, ("Carlo") executed a mortgage and note with Amerifund Home Mortgage, LLC in the amount of $250,000 secured by 54 Jennifer Place, Unit #13A, Staten Island, New York 10314. According to the plaintiff, EMC Mortgage Corporation, Carlo failed to pay the installment due on April 1, 2008. The plaintiff failed to attach a notice of acceleration of the note, and Carlo denies ever receiving a notice to accelerate the note.

On August 12, 2008, Mortgage Electronic Registration Systems, Inc. as nominee for Amerifund Home Mortgage, LLC assigned the mortgage on 54 Jennifer Place, Unit #13A, Staten Island, New York 10314 to EMC Mortgage Corporation. The assignments states:

> Know that All Men By These Present in consideration of the sum of One and no/100th Dollars and other good valuable consideration, paid to the above Name assignor, the receipt and sufficiency of which is hereby acknowledged the Said Assignor hereby assigns unto the above named Assignee the said Mortgage, and the full benefit of all the powers and of all the covenants and Provisions therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage.

Seven days after the assignment on August 19, 2008, the plaintiff commenced this action by filing a summons and complaint with the Richmond County Clerk and simultaneously filed a notice of pendency on 54 Jennifer Place, Unit #13A, Staten Island, New York 10314.

On May 8, 2009 this court granted the plaintiff's ex-parte application for an Order of Reference. Subsequently, on August 10, 2009 this court granted the plaintiff's ex-parte application for a Judgment of Foreclosure and Sale. The plaintiff's attorney, Steven J. Baum, P.C. then noticed the foreclosure sale at the "Main Hall on the First Floor of the Supreme Court Building, 355 Front Street, City of Staten Island, New York on 12/7/2009 at 9:00 AM." A second notice of sale was scheduled for January 8, 2010 also at the "Main Hall on the First Floor of the Supreme Court Building, 355 Front Street, City of Staten Island, New York." And yet a third notice of sale was published for a sale to take place on May 4, 2010 once again in the "Main Hall on the First Floor of the Supreme Court Building, 355 Front Street, City of Staten Island, New York." The plaintiff states that the first date for the sale was cancelled by the plaintiff and that the second date of sale was cancelled due to a moratorium on foreclosure sales; and that the property was sold on the third date.

Set Aside Foreclosure Sale

The plaintiff first moves to vacate the foreclosure sale that took place on May 4, 2010 arguing that the three notices of sale were defective. It is common knowledge that foreclosure auctions in Richmond County are conducted at 18 Richmond Terrace, Room 106, Staten Island, New York. The former Homeport Courthouse located at 355 Front Street, Staten Island, New York never hosted such auctions. Carlo's attorney directs the court's attention to *Weil v. Laube*,[1] an Appellate Division, Second Department decision that affirmed the lower court's decision to set aside a foreclosure sale, where the sale took place inside the courthouse in a rotonda, rather than at the "main entrance" as was designated in the notice of sale. The trial court conceded that the discrepancy was approximately 20 feet from the site designated in the notice of sale, but it was sufficiently confusing to prospective bidders. In this case before this court, the differential in distance between 18 Richmond Terrace and 355 Front Street is approximately 1.3 miles. Therefore, the foreclosure sale that took place on May 4, 2010 must be set aside.

Vacate Default and Dismiss Complaint

The defendant, Carlo, argues that the judgment of foreclosure and sale entered on default must be vacated and the action dismissed because the plaintiff lacked standing to commence the action. Here, the plain language of the assignment given to the plaintiff from Amerifund Home Mortgage, LLC on August 12, 2009 grants the plaintiff an interest the mortgage only. The assignment is silent as to the transference of the corresponding note. The Court of Appeals spoke to this topic over one hundred years ago in the *Matter of Pirie,*[2] where it stated that, "[t]he collateral lien of the mortgage could have no legal existence when separated from the note and transferred to others than the holder of the note, but so long as the two remain together, owned

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[1] 227 AD 757, [2d Dept 1929].

[2] 198 NY 209 [1910].

and possessed by the same person, they operate together and are obligations for the payment of the same indebtedness."[3] The Appellate Division, Second Department in the 1988 case of *Kluge v. Fugazy*, held that a foreclosure action, ". . . may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity."[4] Essentially, the *Kluge* decision found that because the plaintiff did not have title to the mortgage and note, it lacked standing to bring the action in foreclosure.

The plaintiff argues that proper delivery of the mortgage and the note is all that is required to maintain an action for foreclosure. And that delivery without a written assignment will suffice to maintain a foreclosure action.[5] In the matter before this court, the plaintiff produces no evidence that the plaintiff possessed both the note and mortgage prior to the commencement of this foreclosure action. The assignment cited by the plaintiff references only the assignment of the mortgage, and not the note. While the mortgage and the accompanying note are submitted as exhibits in opposition to the defendant's order to show cause, there is no evidence demonstrating that both the note and mortgage were delivered to the plaintiff prior to the commencement of this foreclosure action.

Furthermore, the plaintiff argues that the defendant, Carlo, waived the defense of standing by failing to interpose an answer, or file a timely pre-answer motion, which asserted the defense of standing. To support this position the plaintiff relies on *Wells Fargo Bank Minn., N.A. v. Mastropaolo*,[6] where the Appellate Division, Second Department held that the failure of a defendant to either: 1) assert the affirmative defense of lack of standing in an answer; or 2) move to make a pre-answer motion to dismiss arguing lack of standing, would result in that defense

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[3] *Id., citing, Bergen v. Urbahn*, 83 NY 49, [1880].

[4] 145 AD2d 537, [2d Dept 1988].

[5] *See, e.g., Bergman on New York Mortgage Foreclosures*, § 16.05(1b)(a); *see also, Flyer v. Sullivan*, 284 AD 697, [1st Dept 1954].

[6] 42 AD3d 239, [2d Dept 2007].

being waived. In arriving at this holding the Appellate Division, Second Department reasoned from a string of cases that ". . . for purposes of the waiver rule set forth in CPLR 3211(e), standing and capacity to sue are sufficiently related that they should be afforded identical treatment."[7] Those cases hinged on the Court of Appeals decision in *Matter of Prudco Realty Corp. v. Palermo*.[8] *Matter of Prudco Realty* involved an appeal from a decision of the Appellate Division, Second Department of an Article 78 proceeding, where Prudco Realty Corp. challenged the determination of the Zoning Board of Appeals of the Town of Brookhaven, that granted the application of the intervenor S.F. Shopping Center, Inc. for a certificate of existing use for the operation of a gasoline station.[9] In reversing the Special Term's holding that Purdco Realty Corp. lacked standing, the Appellate Division, Second Department held, "[a]s an owner of property located within 200 feet of the subject premises, petitioner was, as a matter of law, an 'aggrieved' person on whom subdivision 7 of section 267 of the Town Law conferred the right to seek judicial review of the determination of the respondent Zoning Board of Appeals of the Town of Brookhaven."[10] In affirming the Appellate Division, Second Department's decision in *Matter of Purdco Realty* the Court of Appeals addressed the issue of standing by stating, ". . . without asserting the petitioner's lack of standing to challenge the Board's determination pursuant to CPLR 3211(subd [a], par 3). . . CPLR 3211(subd [e]) provides that such a defense is waived if not raised either by motion or in the responsive pleading . . ."[11] But the Court of Appeals decision in *Matter of Prudco Realty* lacks the thorough consideration of the legal concepts of "capacity" and "standing" that it elaborates on in later decisions.

The Court of Appeals decision in *Matter of Town of Riverhead v. New York State Bd. Of*

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[7] Id. at 243.

[8] 60 NY2d 656, [1983].

[9] *Prudco Realty Corp. v. Palermo,* 93 AD2d 837, [2d Dept 1983].

[10] Id. at 837.

[11] *Matter of Prudco Realty Corp. v. Palermo*, 60 NY2d 656, [1983].

Real Prop. Servs. held that "capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review."[12] In *New York State Assn. Of Nurse Anesthetists v. Novello*,[13] the Court of Appeals held that standing requires an interest in the claim at issue before the court. "Standing involves a determination of whether 'the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution.'"[14] The Court of Appeals has held that standing cannot exist where the complaining party was not injured,[15] and that, "[w]ithout both capacity and standing a party lacks authority to sue."[16] The Appellate Division, Second Department adopted these holdings in *Caprer v. Nussbaum*.[17]

The Supreme Court of the United States in the case *City of Chicago v. Morales,* held that while standing is not a Constitutional issue requiring adherence by state courts, it is persuasive authority.[18] In *Allen v. Wright*, the high court stated that the concept of standing goes to the very jurisdiction of a court's authority to hear a dispute.[19] In fact, the Appellate Division, First Department cited the decision in *Allen* by Supreme Court of the United States when it found that it was proper for a trial court to *sua sponte* dismiss a derivative action due to lack of standing

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[12] *Matter of the Town of Riverhead v. New York State Bd. Of Real Property Servs.*, 5 NY3d 36, 41 [2005].

[13] 2 NY3d 207, 211 [2004].

[14] *Matter of Graziano v. County of Albany*, 3 NY3d 475, 479 [2004].

[15] *Matter of Sarah K*, 66 NY2d 223, 240 [1985].

[16] *Matter of Graziano v. County of Albany,* 3 NY3d 47, 479 [2004].

[17] 36 AD3d 176, [2d Dept 2006].

[18] *See, City of Chicago v. Morales*, 527 US 41, [1999].

[19] *See, Allen v. Wright*, 468 US 737, [1984]; *see also, Matter of New York State Inspection, Security & Law Enforcement Employees v. Cuomo*, 64 NY2d 233, 241 n. 3[1984].

absent an objection to the plaintiff's standing by the defendants in *Stark v. Goldberg* .[20]

Here, it is presumed that at the time this matter was commenced, the plaintiff EMC Mortgage Corporation, a foreign business corporation, had the capacity to sue to foreclose a mortgage in New York state courts. However it should be noted that a search of the New York State Department of State Division of Corporations records indicate that the plaintiff corporation is currently "inactive –Termination May 19, 2011." But this fact is not at issue as the defendant has not challenged the plaintiff's capacity to sue in this motion under CPLR § 3211(a)(3).

The issue before this court is whether the plaintiff had standing to commence this action; and if the plaintiff did not have standing, did Carlo waive this defense by failing to interpose an answer raising it as affirmative defense, or by making a pre-answer motion to dismiss. This court concludes that the plaintiff has failed to submit evidence demonstrating that it had title to both the mortgage and note at the time it commenced this foreclosure action.[21] Furthermore, based on the current body of law, failure to have standing at the commencement of an action is a jurisdictional defect which is covered by CPLR § 3211(a)(2) and therefore not subject to the waiver provisions of CPLR § 3211(e).

In the case of *Deutsche Bank National Trust Company v. McRae*, Justice Timothy J. Walker stated:

> Today, with multiple (and often unrecorded) assignments of mortgage obligations and multiple securitizations often related to the same debt, the court should carefully scrutinize the status of the parties who claim the right to enforce these mortgage obligations. For the unrepresented homeowner, the issues of standing and real party in interest status of the foreclosing party are never considered. Without such scrutiny, there is a risk that the courts will give the judicial "seal of approval" to foreclosures against

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[20] 297 AD2d 203, at 281.

[21] *See, Kluge v. Fugazy*, 145 AD2d 408, [2d Dept 1988].

> unrepresented homeowners who have little, if any, understanding of these issues, much less the legal significance thereof.[22]

In its *Mastropaolo* decision, the Appellate Division, Second Department relied heavily upon a Court of Appeals' decision in a divorce case entitled *Lacks v. Lacks*.[23] In characterizing the decision in *Lacks*, the court stated, ". . . the Court of Appeals addressed the issue of whether, 'the residence requirements in matrimonial actions, often described as jurisdictional, involve a kind of subject matter jurisdiction without which a court is powerless to render a valid judgment.'"[24] However, the Court of Appeals described *Lacks* in the following terms,

> [t]he court has never before considered the unlikely question, until this case, whether the judicial error on an essential element of the cause of action was so fundamental as to permit vacatur of a final judgment, collaterally or after final judgment beyond ordinary appellate review. Had that ever been the problem unlikely until this case, perhaps the need for a less elastic and encompassing term than the word "jurisdiction" would have been apparent.[25]

In *Lacks*, after the final judgment of divorce had been rendered, the former wife challenged the jurisdiction of the court, arguing that her former husband failed to meet the one year residency requirement of Domestic Relations Law § 230. The Court of Appeals held, "[i]n no way do these limitations on the cause of action circumscribe the power of the court in the sense of competence to adjudicate causes in the matrimonial categories. That a court has no 'right' to adjudicate erroneously is no circumscription of its power to decide, rightly or wrongly."[26] In so holding, the Court of Appeals held that a trial court erring on an element of a cause of action was not tantamount to a jurisdictional defect.

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[22] *Deutsche Bank National Trust Company v. McRae,* 27 Misc3d 247, [Sup Ct, Allegany County, 2010].

[23] 41 NY2d 71, [1976].

[24] *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 AD3d 239, 243 [2d Dept 2007].

[25] *Lacks v. Lacks*, 41 NY2d 71, 76 [1976].

[26] Id. at 75-76.

In holding that standing is an affirmative defense which can be waived under CPLR § 3211(e), the Appellate Division, Second Department in *Mastropaolo* analogized Wells Fargo's lack of ownership of the mortgage and note at the commencement of the foreclosure to, ". . . a failure to satisfy residenc[y] requirements in a matrimonial action, [which] was not a jurisdictional defect that was 'so fundamental to the power of adjudication of a court.'" In *Lacks* the parties were married and the Supreme Court had the jurisdiction to issue a judgment of divorce. There was no real issue of subject matter jurisdiction. The fact that the husband was not a resident of New York for the requisite one year prior to his filing for divorce did not strip the Supreme Court of its power to issue a divorce absent a timely motion to challenge the lack of compliance with DRL § 230. But such an analogy cannot be applied to a judgment of foreclosure and sale where true ownership of the note and mortgage is at issue. The ownership of the note and mortgage goes to the very heart of this litigation.

In speaking of issues surrounding standing, Professor Siegel in his renowned treatise, *New York Practice*, 5th ed. § 136 stated in part:

> One not affected by anything a would-be defendant has done or threatens to do ordinarily has no business suing, and a suit of that kind can be dismissed at the threshold for want of jurisdiction without reaching the merits. When one without the requisite grievance does bring suit, and it's dismissed, the plaintiff is described as lacking "standing to sue" and the dismissal as one for lack of subject matter jurisdiction. A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy . . .[27]

Here, the plaintiff has not demonstrated ownership of the mortgage and note prior to the commencement of this action for foreclosure and sale. Absent a demonstration of both ownership of the mortgage and the note, the plaintiff lacks both the capacity and standing to sue the defendants. While the defendant may have waived his defense of lack of capacity, pursuant to CPLR §§ 3211(a)(3) and 3211(e), his defense of lack of standing is preserved under CPLR §

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[27] Siegel, NY Prac § 136, at 240 [5th ed].

3211(a)(2). The Court of Appeals has held that motions made pursuant to CPLR § 5015(a)(4) that challenge a court's jurisdiction are ". . . designed to preserve objections so fundamental to the power of adjudication of a court that they survive even a final judgment or order."[28] Furthermore, the Court of Appeals stated, ". . . the overly stated principle that lack of subject matter jurisdiction makes a final judgment absolutely void is not applicable to cases which, upon analysis, do not involve jurisdiction, but merely substantive elements of a cause for relief."[29]

Conclusion

It is the finding of this court that the New York Supreme Court has jurisdiction to adjudicate mortgage foreclosure matters. That is not the issue. Here, the plaintiff failed to have ownership of the mortgage and note at the time it filed and served its summons and complaint with the Richmond County Clerk. Therefore, the plaintiff lacked standing to commence this action at the time.

Here, the default judgment of foreclosure and sale was taken while the defendant was unrepresented by counsel. Consequently, he had no legal understanding of making an earlier technical motion to challenge the standing of the plaintiff. Since the notice of the sale is defective, the sale must set aside. Moreover due to the failure of the plaintiff to have ownership of the note and mortgage at the time it commenced this action, it lacked the capacity and standing to bring this action and to file a notice of pendency. Therefore, this action must be dismissed, without prejudice.

Accordingly, it is hereby:

ORDERED, that the foreclosure sale that took place on May 4, 2010 is vacated and set

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[28] *Lacks v. Lacks*, 41 NY2d 71, [1976]

[29] *Id.* at 77.

aside; and it is further

ORDERED, that the Richmond County Clerk is directed to vacate the notice of pendency on the property located at 54 Jennifer Place, 13A, Staten Island, New York 10314, Block 1548, Lot 2025; and it is further

ORDERED, that the order to show cause by Fred J. Carlo to vacate the judgment of foreclosure and sale dated August 10, 2009 and entered on August 13, 2009 is granted; and it is further

ORDERED, that plaintiff's action is dismissed without prejudice, and the Clerk of the Court is directed to enter judgment accordingly.

ENTER,

DATED: September 13, 2011

Joseph J. Maltese
Justice of the Supreme Court