

**Green Tree Servicing LLC v Lopez**

2012 NY Slip Op 30922(U)

March 28, 2012

Supreme Court, Suffolk County

Docket Number: 10-20257

Judge: Joseph Farneti

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**COPY**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 10-6-11  
ADJ. DATE 11-10-11  
Mot. Seq. # 001 - MD  
# 002 - XMD

-----X  
GREEN TREE SERVICING LLC, :  
 :  
 : Plaintiff, :  
 :  
 : - against - :  
 :  
HILDA LOPEZ, VICTOR CASAS BAUTISTA, :  
"JOHN DOE #1" through unknown to plaintiff, the :  
persons or 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. :  
-----X

BERKMAN, HENOCH, PETERSON,  
PEDDY & FENCHEL, P.C.  
Attorney for Plaintiff  
100 Garden City Plaza  
Garden City, New York 11530  
  
EDWARD MAGGIO, ESQ.  
Attorney for Defendants  
47 Price Street  
Patchogue, New York 11772

Upon the following papers numbered 1 to 25 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1- 15; Notice of Cross Motion and supporting papers 16 - 22; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers 23 - 25; Other \_\_\_\_\_; it is,

**ORDERED** that this motion by plaintiff for an order granting summary judgment on its complaint; striking the answer of defendants Hilda Lopez and Victor Casas Bautista and dismissing their affirmative defenses; an order of reference appointing a referee to compute the amount due and owing to plaintiff; an amendment of the caption of this action; and awarding the costs of this motion is denied; and it is further

**ORDERED** that the cross-motion by defendants for an order granting summary judgment in their favor based on fraud and plaintiff's lack of standing is denied.

This is an action to foreclose a mortgage on property known as 723 Amsterdam Avenue, East Patchogue, New York. Defendants Hilda Lopez and Victor Casas Bautista signed a note dated July 22, 2008, for a loan in the sum of \$245,000.00 from the non-party lender BankUnited, FSB. The note indicated that the yearly interest would be 6.75 percent and the monthly payments \$1,589.07. The note was secured by a mortgage dated July 22, 2008, on the subject property which was signed by defendants

KAK

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Hilda Lopez and Victor Casas Bautista. The mortgage indicated that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender BankUnited, FSB and that for the purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage was recorded in the Suffolk County Clerk's Office on July 30, 2008. Defendants Hilda Lopez and Victor Casas Bautista allegedly defaulted on their loan payments due on August 1, 2009 and thereafter.

Plaintiff, Green Tree Servicing, LLC, commenced this action to foreclose the mortgage on June 4, 2010. Defendants Hilda Lopez and Victor Casas Bautista, then *pro se*, answered by affidavit dated July 6, 2010. Their answer asserts claims sounding in fraud. Defendants claim that they were regularly making their loan payments until they were offered a modification of their mortgage agreement, that they paid fees and other monies, and relied on directions to stop payments until the modification became effective, and that they received no further instructions only to find that their mortgage was being foreclosed. Their answer also questions the standing of plaintiff to commence this action inasmuch as defendants state that they did not enter into a mortgage agreement with plaintiff but were informed that plaintiff became the servicing agent for their mortgage loan.

Plaintiff now moves for summary judgment on its complaint, to strike the answer of defendants Hilda Lopez and Victor Casas Bautista, an order of reference appointing a referee to compute the amount due and owing to plaintiff, an amendment of the caption of this action to add Louis Casiano as a necessary party defendant in the place and stead of "John Doe #1" and to discontinue the action against defendants "John Doe #2" through "John Doe #12." Plaintiff asserts that defendants Hilda Lopez and Victor Casas Bautista admit in their answer their obligation under the note and mortgage and their default. Plaintiff indicates, upon information and belief, that defendants had hired and paid a third party in California to assist in the modification process. Plaintiff argues that defendants have failed to submit any proof that plaintiff made any statements or that defendants could reasonably rely on those alleged statements to their detriment. Plaintiff also asserts that the parties engaged in settlement conferences with defendants' counsel in attendance, exchanged financial documents and informed of any missing documents, and that by letter dated April 7, 2011, addressed to defendant Hilda Lopez, plaintiff advised that it was not considering the request for a modification because she withdrew the request on April 6, 2011. In support of its motion plaintiff submits, among other things, the pleadings, the note, mortgage and assignment of mortgage, and notices of default. Plaintiff's submissions include the affidavit of its vice president, William Ashley, signed and notarized in South Dakota, stating that "the said note and mortgage are now held by the Plaintiff having been physically delivered to the Plaintiff by Mortgage Electronic Registration Systems, Inc. as nominee of BankUnited, FSB and by BankUnited, FSB on July 22, 2008. Thereafter the said assignment of the note and mortgage was memorialized in a written assignment of mortgage."

Defendants Hilda Lopez and Victor Casas Bautista cross-move for summary judgment contending that they did not withdraw their request for a modification, that plaintiff will be unjustly enriched if the foreclosure occurs, and that plaintiff lacks standing to commence this action. In support of their cross motion, defendants submit their answer, the note, mortgage and assignment of mortgage, and the letter dated April 7, 2011, from plaintiff to defendant Hilda Lopez informing her that she withdrew her modification request one day prior.

To establish a *prima facie* showing of entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit evidence of the mortgage and note, and the defendant's default thereunder (see *Levitin v Boardwalk Capital, LLC*, 78 AD3d 1019, 912 NYS2d 101 [2d Dept 2010]). Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by a defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (see *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 934 NYS2d 182 [2d Dept 2011]). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, either by physical delivery or by execution of a written assignment before commencement of the action (see *id.*). An assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it (see *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]).

Defendants must produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Such defenses include waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the plaintiff (see *Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 895 NYS2d 199 [2d Dept 2010]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]).

Here, plaintiff failed to establish, *prima facie*, that it had standing to commence the action (see *HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). The affidavit from plaintiff's vice president, based on his review and personal knowledge of the facts and books and records maintained by plaintiff in his possession, is not in admissible form inasmuch as it was signed and notarized outside of the State of New York, and was not accompanied by the required certificate of conformity (see CPLR 2309 [c]; *PRA III, LLC v Gonzalez*, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008]; see also Real Property Law § 299-a [1]). In any event, the affidavit is unclear as to which entity, MERS or BankUnited, FSB, physically delivered the note to plaintiff so as to establish that plaintiff had physical possession of the note prior to commencing this action (see *HSBC Bank USA v Hernandez*, *supra*; *Citimortgage, Inc. v Stosel*, *supra*; *Deutsche Bank Natl. Trust Co. v Barnett*, *supra*; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). This is particularly important since the assignment only assigns the mortgage and there is no evidence that MERS initially physically possessed the note or had the authority from the lender to assign it (see *Aurora Loan Services, LLC v Weisblum*, *supra*). Therefore, the motion for summary judgment is denied.

With respect to the cross-motion for summary judgment by defendants Hilda Lopez and Victor Casas Bautista, it is deficient inasmuch as it lacks a copy of the complaint as well as affidavits from defendants Hilda Lopez and Victor Casas Bautista who have personal knowledge of the alleged modification transaction (see *Ahern v Shepherd*, 89 AD3d 1046, 933 NYS2d 597 [2d Dept 2011]). CPLR 3212 (b) requires that a motion for summary judgment must be supported by, among other things, a copy of the pleadings and an affidavit "by a person having knowledge of the facts" (see CPLR 3212 [b]; *Maragos v Sakurai*, 92 AD3d 922, 938 NYS2d 908 [2d Dept 2012]; *id.*). Although the motion papers indicate that defendants' counsel was present at the settlement conferences, it is unclear from the

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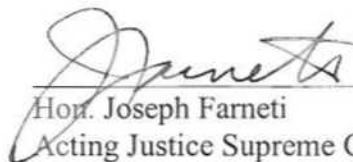
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cross-motion papers, which do not contain an affirmation in support in proper form by defendants' counsel, whether defendants' counsel had any personal knowledge concerning the alleged modification transaction (*see Rizzo v Rizzo*, 277 AD 888, 97 NYS2d 779 [2d Dept 1950]; *compare Davey v Dolan*, 46 AD3d 854, 851 NYS2d 576 [2d Dept 2007]). Therefore, the cross-motion for summary judgment is denied.

Accordingly, the motion for summary judgment, an order of reference, and related relief, and the cross-motion for summary judgment are denied.

Dated: March 28, 2012

  
\_\_\_\_\_  
Hon. Joseph Farneti  
Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION

COPY

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_  
JENELL GONZALEZ,

Plaintiff,

-against-

LEONARD SAMUELSON,

Defendant.  
\_\_\_\_\_

ORIG. RETURN DATE: OCTOBER 21, 2011  
FINAL SUBMISSION DATE: JANUARY 12, 2012  
MTN. SEQ. #: 002  
MOTION: MG

ORIG. RETURN DATE: OCTOBER 21, 2011  
FINAL SUBMISSION DATE: JANUARY 12, 2012  
MTN. SEQ. #: 003  
MOTION: MOT D

**PLTF'S/PET'S ATTORNEY:**  
WALLACE WITTY FRAMPTON & VELTRY, P.C.  
600 SUFFOLK AVENUE  
BRENTWOOD, NEW YORK 11717  
631-234-5678

**DEFT'S/RESP ATTORNEY:**  
ROBERT P. TUSA LAW OFFICES  
898 VETERANS HIGHWAY - SUITE 320  
HAUPPAUGE, NEW YORK 11788  
631-439-4200

Upon the following papers numbered 1 to 10 read on these motions \_\_\_\_\_  
FOR SUBSTITUTION AND DISMISSAL

Notice of Motion and supporting papers 1-3; Notice of Motion and supporting papers 4-6; Affirmation in Opposition and supporting papers 7, 8; Replying Affirmation and supporting papers 9, 10; it is,

**ORDERED** that this motion (seq. #002) by plaintiff for an Order appointing and substituting ROBERT P. TUSA LAW OFFICES as Administrator of the Estate of Leonard Samuelson, Deceased for the defendant; and amending the caption to add ROBERT P. TUSA LAW OFFICES as Administrator of the Estate of Leonard Samuelson, Deceased as a defendant in the place and stead of LEONARD SAMUELSON, is hereby **GRANTED**, without opposition, on condition that any recovery herein by plaintiff is limited to any applicable insurance coverage in effect on the subject date of loss; and it is further

**ORDERED** that this motion (seq. #003) by defendant for an Order, pursuant to CPLR 3126 (3), dismissing the complaint of plaintiff based upon her alleged repeated failure to appear for an independent medical examination, is hereby **GRANTED** solely to the extent that the Court shall address this issue at the compliance conference of this matter scheduled for **March 29, 2012, at 9:30 a.m.** in this Part.

The foregoing constitutes the decision and Order of the Court.

**Dated: March 28, 2012**

  
\_\_\_\_\_  
**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION