

Citimortgage, Inc. v LePore
2012 NY Slip Op 32290(U)
July 13, 2012
Supreme Court, Suffolk County
Docket Number: 10538-10
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/6/12
ADJ. DATE _____
Mot. Seq. # 001 - Mot D
Mot. Seq. # 002 - XMD
CDISP: NO

-----X	:	
CITIMORTGAGE, INC.,	:	DAVIDSON FINK LLP
	:	Attys. For Plaintiff
Plaintiff,	:	28 East Main St.
	:	Rochester, NY 14614
-against-	:	
	:	RANK J. ROMANO, ESQ.
PETER J. LEPORE, JENNIFER R. LEPORE,	:	Attys. For Defs. Lepore
ET ALS,	:	51 East Main St.
	:	Smithtown, NY 1787
Defendants.	:	
-----X	:	

Upon the following papers numbered 1 to 11 read on this motion by plaintiff for accelerated judgments and to appoint a referee and cross motion by defendants Lepore to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 5-7; Answering Affidavits and supporting papers 8-9; Replying Affidavits and supporting papers 10-11; Other _____; ~~and after hearing counsel in support and opposed to the motion, it is~~

ORDERED that those portions of this motion (#001) by the plaintiff for accelerated judgments against the defendants and the appointment of a referee to compute is considered under CPLR 3212, 3215 and RPAPL 1321 and is granted only with respect to the plaintiff's First cause of action; and it is further

ORDERED that the second cause of action set forth in the plaintiff's complaint, wherein it demands a judgment extinguishing certain prior mortgages and/or liens and/or declaring them to be subordinate to the mortgage that is the subject of this action is considered under CPLR 3215 and RPAPL § 1501 and is dismissed; and it is further

ORDERED that those portions of this motion wherein the plaintiff seeks an order dropping as party defendants the unknown defendants listed in the caption is granted while the plaintiff's request for an order substituting the plaintiff's assignee is denied without prejudice; and it is further

ORDERED that the cross motion (#002) by the defendants, Peter Lepore and Jennifer Lepore, for an order dismissing the complaint or staying all proceedings pending a settlement conference is considered under CPLR 3211(a)(3) and 3408 and is denied.

In this mortgage foreclosure action, the plaintiff seeks foreclosure of a mortgage on certain real property situated in Suffolk County. The plaintiff also demands in a separate Second cause of action, that certain prior mortgages and/or liens asserted against the subject premises be extinguished and/or declared subordinate and inferior to the mortgage lien of the plaintiff. By the instant motion, the plaintiff moves for summary judgment on its claims for foreclosure against the answering defendants and the appointment of a referee to compute amounts due under the terms of the subject note and mortgage pursuant to RPAPL 1321. The plaintiff also seeks an order dropping as party defendants, the unknown defendants listed in the caption and an order substituting the post-action commencement assignee of the note and mortgage in the place and stead of the named plaintiff. The motion is granted only to the extent that accelerated judgments are awarded to the plaintiff on its First cause of action sounding in foreclosure and sale pursuant to CPLR 3212, 3215 and RPAPL 1321 and on its demands for an order dropping the unknown defendants as party defendants to this action.

The moving papers established the plaintiff's entitlement to summary judgment on its complaint to the extent it asserts claims against the answering defendants, Peter J. Lepore and Jennifer R. Lepore, as they included copies of the mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; *HSBC Bank v Shwartz*, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; *Countrywide Home Loans v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; *J.P. Morgan Chase Bank v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; *Ocwen Fed. Bank FSB v Miller*, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]).

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of one or more of the affirmative defenses asserted in their answer (*see Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021 907 NYS2d 22 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Wells Fargo Bank Minnesota Natl. Assn. v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]). The Lepores' opposition to the plaintiff's motion is set forth in an affirmation of counsel that is attached to the cross moving papers of the Lepores. Although the answer of the Lepore defendants contains eleven (11) affirmative defenses, the only defenses raised in the opposing/cross moving papers of the Lepores is an alleged insufficiency in the proof adduced by the plaintiff in support of its motion and a purported lack of standing on the part of the plaintiff.

Rejected as unmeritorious are the Lepores' challenges to the sufficiency of the proof upon which the plaintiff relies to support its motion for summary judgment. Contrary to the contentions of defendants' counsel, an affidavit made by the plaintiff is not required to support this motion, since the plaintiff is not seeking a default judgment against the Lepore defendants, but instead, is moving for summary judgment (*see* CPLR 3212 [b]; *cf.* 3215[f]; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]). The affidavit of the agent of the loan servicer and the other documentary submissions including the statutorily mandated notices regarding the defendants' default in payment under the terms of their \$432,000.00 mortgage loan are legally sufficient and comport with the requirements of CPLR 3212 (*see LaSalle Bank, NA v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct., Suffolk County, 2011]).

Also unavailing are the Lepore defendants' claims that the plaintiff's lack of standing warrants a denial of its motion for summary judgment and the granting of the Lepores' cross motion for dismissal pursuant to CPLR 3211(a)(3). A plaintiff has standing where it is either the actual holder, by way of ownership, indorsement and/or delivery of the note and mortgage, or the assignee of such note and mortgage, by way of delivery or written assignment, at the time the action is commenced (*see US Bank Natl. Assn. v Cange*, ___ AD3d ___, 2012 WL 2122540 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYSS2d 622 [2d Dept 2007]) or the servicer of such holder or assignee (*see* RPAPL 1302[1][a]; CPLR 3408[e]; *see also CW Capital Asset Mgt., LLC v Charney-FPG 114 41st Street, LLC*, 84 AD3d 506, 923 NYS2d 453 [1st Dept 2011]; ***Fairbanks Capital Corp. v Nagel***, 289 AD2d 99, 735 NYS2d 13 [1st Dept 2001]). Here, the record reveals that the original note bears an indorsement on the face thereof in favor of the plaintiff. Such indorsement is sufficient evidence of an effective transfer of the note to the plaintiff, which in turn, effected a concomitant transfer of the mortgage, all of which vests in the plaintiff the requisite holder status that is sufficient for standing purposes (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, *supra*). Contrary to the contentions of defendants' counsel, an assignment in favor of the plaintiff, is not necessary to establish the standing of the plaintiff.

The defendants' claims of an entitlement to a conference of the type contemplated by CPLR 3408 are unavailing. The record reveals that a conference of the type mandated by CPLR 3408 was previously scheduled and held on May 11, 2011 in the specialized mortgage foreclosure part of this court, at which, the defendants did not appear, and that no further conferences are required by Rule 3408 or any others. Nor are the defendants entitled to a judicially mandated loan modification (*see JP Morgan Chase Bank, Natl. Assn. v Ilardo*, ___ Misc3d ___, 940 NYS2d 829 [Sup. Ct. Suffolk County, 2012]). The remaining contentions of the defendants asserted in opposition to the plaintiff's motion and in support of the answering defendants' cross motion for dismissal are equally unavailing (*see Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intern. Chapel, HHH Parish, Long Island, New York, Inc.*, 35 Misc.3d 1228[A], 2012 WL 1877316 [Sup. Ct. Suffolk County, 2012]; *LaSalle Bank, NA v Pace*, 31 Misc3d 627, *supra*).

Under these circumstances, the defendants' cross motion (#002) for dismissal of the plaintiff's complaint is denied while those portions of the plaintiff's motion (#001) for summary judgment and dismissal of the affirmative defenses set forth in the answer of the Lepore defendants is granted only as to the First Cause of action set forth in the complaint. The moving papers established defaults in answering on the part of all other defendants joined as parties to the plaintiff's First cause of action for a judgment of foreclosure and sale. The plaintiff is thus entitled to the issuance of an order of reference by virtue of the award of accelerated judgments against all answering and non-answering defendants joined herein as necessary parties to the plaintiff's first cause of action for a judgment of foreclosure and sale (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Perla v Real Prop. Holdings, LLC***, 23 Misc3d 697, 874 NYS2d 873 [Sup Ct. Kings County 2009]).

However, the moving papers failed to address, let alone establish, the plaintiff's possession of cognizable claims for relief pursuant to RPAPL Article § 1501 declaring the invalidity and extinguishment of the liens and interests of the defendants listed in the plaintiff's Second cause of action (*see* CPLR 3215[f]; RPAPL §§ 1515; 1519). Nor is it apparent that the plaintiff acquired jurisdiction over all persons whose interests might be affected by the granting of such relief (*see* RPAPL § 1511). The court thus finds that the plaintiff is not entitled to an order fixing the defaults of the defendants set forth in the plaintiff's Second cause of action, as it failed to assert facts which constitute cognizable claims for the declaratory relief demanded against the defendants targeted in the plaintiff's Second cause of action (*see* CPLR 3215[f]; ***Resnick v Lebovitz***, 28 AD3d 53, *supra*).

In addition, the court finds that the plaintiff abandoned its Second cause of action for declaratory relief by its interposition of this motion. It is axiomatic that the appointment of a referee to compute pursuant to RPAPL § 1321 is not appropriate unless all pleaded claims of the parties have been adjudicated by the court and the only issues left for determination are those concerning the long account (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, *supra*), which are limited in mortgage foreclosure actions to amounts due the plaintiff by reason of the obligor's default under the terms of the note, mortgage and/or guaranty sued upon and the other matters specified in RPAPL § 1321 (*see New York State Mtge. Loan Enforcement and Admin. Corp. v New Colony Camp Hous., Inc.*, 187 AD2d 955, 590 NYS2d 635 [4th Dept 1992]). Consequently, in a mortgage foreclosure, a plaintiff is only entitled to an order appointing a referee to compute amounts due under the subject note and mortgage it has been awarded judgment after trial or pursuant to CPLR 3212 and/or 3215 against all defendants joined to the action (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, *supra*; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, *supra*; ***Perla v Real Prop. Holdings, LLC***, 23 Misc3d 697, *supra*; ***HSBC Mtge. Serv., Inc. v Alphonso***, 16 Misc3d[A], 2007 WL 2429711 [Kings County Sup. Ct. 2007]). By moving for the appointment of a referee without establishing its entitlement to judgment on its claims for declaratory relief, the plaintiff effectively abandoned those claims. Accordingly, the Second cause of action set forth in the plaintiff's complaint is dismissed.

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The plaintiff's demands for an order dropping as party defendants the unknown defendants listed in the caption is granted. All future proceedings shall be captioned accordingly. The court, however, denies the plaintiff's application for an order substituting US Bank National Association as Trustee of Castle Peak 2010-1 Loan Trust in the place and stead of the current plaintiff, Citimortgage, Inc.

That a plaintiff may continue to prosecute an action notwithstanding an assignment of its interest in the subject matter is clear since the provisions of CPLR 1018 which govern substitution upon transfer of interests are permissive not mandatory (see *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Wine*, 90 AD3d 1216, 935 NYS2d 664 [3d Dept 2011]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 N.Y.S.2d 638 [2d Dept 2011]; *Tarr v Delsener*, 70 AD3d 774, 895 NYS2d 168 [2d Dept 2010]; *Buywise Holding, LLC v Harris*, 31 AD3d 681, 821 NYS2d 213 [2d Dept 2006]). It is equally clear that a substitution of plaintiffs may not be accomplished by a mere caption amendment since a non-party may not be substituted nor otherwise made a party-plaintiff to a pending action without its consent, and declared willingness to take up the prosecution of the claims of its predecessor-in-interest and its submission to the jurisdiction of the court. This rule is mandated by the provisions of CPLR 1001(a) which provide, among other things, that an unwilling plaintiff shall be joined as a defendant to the action. Moreover, the moving papers do not clearly establish an effective transfer, by assignment or otherwise, of the note and mortgage to the Trustee of Castle Peak or its holder status under the delivery or indorsement methods (cf, see *GRP Loan, LLC v Taylor*, 95 AD3d 1172, *supra*). The court thus denies the plaintiff's request for the substitution of its purported assignee pursuant to CPLR 1018. Such denial is, however, without prejudice to a new application for the same relief upon proper papers.

The Order appointing referee to compute, as modified by the court, has been signed simultaneously herewith.

DATED: 7/13/12


THOMAS F. WHELAN, J.S.C.