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| Central Mtge. Co. v McClelland |
| 2012 NY Slip Op 32338(U) |
| September 6, 2012 |
| Supreme Court, Richmond County |
| Docket Number: 131062/10 |
| Judge: Joseph J. Maltese |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:131062/10
Motion No.:002, 003**

CENTRAL MORTGAGE COMPANY,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**VINCENT MCCLELLAND,
DENISE MCCLELLAND,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
NEW YORK ENVIRONMENTAL CONTROL BOARD,
“JOHN DOE #1” through “JOHN DOE #12,” the last twelve
names being fictitious and unknown to plaintiff, the persons or
corporations, if any, having or claiming an interest in or lien
upon the premises, described in the complaint,**

Defendants

The following items were considered in the review of the following motion for summary judgment and cross-motion to amend the answer or in the alternative summary judgment.

| <u>Papers</u> | <u>Numbered</u> |
|---|--------------------|
| Notice of Motion and Affidavits Annexed | 1 |
| Notice of Cross-Motion and Affidavits Annexed | 2 |
| Affirmation in Opposition and in Reply | 3 |
| Replying Affidavits | 4 |
| Exhibits | Attached to Papers |

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The plaintiff moves for an order granting it summary judgment permitting it to foreclose and sell property located at 230 Natick Street, Staten Island, New York 10306. The defendants, Vincent McClelland and Denise McClelland (“the McClellands”) cross-move to amend their answer, and alternatively for summary judgment dismissing the plaintiff’s action. The plaintiff’s motion is denied, and the McClellands cross-motion to dismiss the plaintiff’s complaint is granted.

It is undisputed that the McClellands refinanced their property located at 230 Natick Street, Staten Island, New York with Quicken Loans in the amount of \$375,000. According to the McClellands they disclosed their jointly filed tax returns to Quicken Loans employee, Dejuon McClendon which showed an average income of \$34,000 per year. The McClellands maintain that within two weeks of the original closing date they were provided with a copy of the residential loan application that they completed by telephone with Mr. McClendon. It is alleged that this was the first time that they saw that their monthly household income was listed at \$6,100 per month, or \$73,200 per year.

The plaintiff's attorney affirmation in support of its motion for summary judgment states at paragraph 13 that:

The Note and Mortgage are now held by Plaintiff [Central Mortgage Company] having been assigned by physical delivery on May 1, 2007, when Mortgage Electronic Registration System as nominee for Quicken Loans Inc. And Quicken Loans Inc. physically delivered the subject note and mortgage to Central Mortgage Company with the full intent of surrendering all rights therein and thereto, and Central Mortgage Company accepted all rights, title, and interest in and thereto. (See Assignee's Affidavit of Physical Delivery annexed hereto)

The "Assignee's Affidavit as to Assignment of Mortgage" averred to by Teresa Swayze, an Assistant Vice President of Central Mortgage Company states that:

The transfer and assignment of the subject note and mortgage first became effective on May 1, 2007, when Mortgage Electronic Registration Systems as nominee for Quicken Loans Inc. and Quicken Loans Inc. physically delivered the subject note and mortgage to Central Mortgage with the full intent of surrendering all rights therein and thereto, and Central Mortgage Company accepted all rights, title and interest in and thereto.

Ms. Swayze executed a second affidavit in support of the plaintiff's motion for summary

judgment wherein she states at paragraph 8 that:

. . .the said Note and Mortgage are now held by the plaintiff, having been assigned as follows:

Assignor: Mortgage Electronic Registration Systems, Inc.,
as Nominee for Quicken Loans, Inc.
Assignee: Central Mortgage Company
Dated: May 19, 2010 Recorded: July 23, 2010
Land Doc #: 346013

The plaintiff's attorney states that the recording of this assignment was done to memorialize the physical transfer of the documents.

But, the mortgage itself contains the following language:

. . . "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. MERS is organized and existing under the laws of Delaware . . . FOR PURPOSES OF RECORDING THIS MORTGAGE MERS IS THE MORTGAGEE OF RECORD.

It is clear that the mortgage between Quicken Loans and the McClellands only permitted MERS to record the mortgage. In *Bank of N.Y. v. Silverberg*, the Appellate Division, Second Department concluded that ". . . because MERS was never the lawful holder of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff."¹ It is without question that the assignment of a mortgage and the accompanying note may be done by physical transfer.² But in this case the purported physical transfer was accomplished by

¹ 86 AD3d 274 [2d Dep't 2011].

² *LaSalle Bank N.A. v. Ahearn*, 59 AD3d 911 [3rd Dep't 2009], citing *Flyer v. Sullivan*, 284 AD 697 [1st Dep't 1954].

MERS as nominee, who by contractual definition had no interest in the note. This court recognizes the authority of Quicken Loans to physically transfer the mortgage and note to the plaintiff. However, Ms. Swayze is not an employee of Quicken Loans, nor does she state that she was employed by Central Mortgage Company on the date of the alleged transfer. Additionally, she does not enumerate which records kept by Central Mortgage Company she reviewed to aver that Central Mortgage Company took physical possession of the mortgage and note on May 1, 2007.

Furthermore, Ms. Swayze's affidavit makes no reference as to how MERS obtained the physical note, nor does she reference when, if ever, Quicken Loans granted MERS any authority of the note it held in connection with the mortgage on 230 Natick Street, Staten Island, New York in order to effectuate the purported physical transfer of the mortgage and note. Consequently, the "Assignee's Affidavit as to Assignment of Mortgage" executed by Ms. Swayze is insufficient to support a finding of physical transfer of the mortgage and note to the plaintiff on May 1, 2007. Given the Appellate Division, Second Department's holding in *Silverberg* the purported transfer of the mortgage and note by written instrument in on May 19, 2010, nearly 3 years after the purported physical transfer, is also without any effect. Therefore, the plaintiff failed to demonstrate standing bring this action. The plaintiff's motion for summary judgment is denied, and the defendants' cross-motion for summary judgment is granted.

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that the cross-motion made by Vincent McClelland and Denise McClelland for summary judgment dismissing the plaintiff's complaint is granted and the complaint is dismissed without prejudice; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

ENTER,

DATED: September 6, 2012

Joseph J. Maltese
Justice of the Supreme Court