

Aurora Bank FSB v Paoli
2012 NY Slip Op 32969(U)
December 12, 2012
Sup Ct, Richmond County
Docket Number: 131723/10
Judge: Thomas P. Aliotta
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

**AURORA BANK FSB, as attorney-in-fact for U.S.
BANK NATIONAL ASSOCIATION
as TRUSTEE OF THE LEHMAN BROTHERS
SMALL BALANCE COMMERCIAL MORTGAGE
PASS-THROUGH CERTIFICATES, Series 2207-1,
Plaintiff(s),**

TP 12

Present:

HON. THOMAS P. ALIOTTA

Index No. 131723/10

-against-

DECISION

**EDWARD DELLI PAOLI a/k/a EDWARD DELLI
PAOLI a/k/a EDWARD GERALD DELLI PAOLI,
GMQ, INC., JOSEPH MAROTTA, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF FINANCE,
and "JOHN DOE NO. 1" Through "JOHN DOE NO. 20"**

**Motion Nos. 605 - 002
1135 - 003**

Defendants.

The following papers numbered 1 to 4 were fully submitted on the 18th day of July, 2012:

Papers
Numbered

Notice of Motion for Summary Judgment of Defendant EDWARD DELLI PAOLI a/k/a
EDWARD GERALD DELLI PAOLI, with Supporting Papers and Exhibits,
(dated February 3, 2012).....1

Notice of Cross Motion of Plaintiff AURORA BANK, FSB, as Attorney-In Fact for U.S.
BANK NATIONAL ASSOCIATION as TRUSTEE OF THE LEHMAN BROTHERS
SMALL BALANCE COMMERCIAL MORTGAGE PASS-THROUGH
CERTIFICATES, Series 2207-1, with Supporting Papers and Exhibits,
(dated April 5, 2012)2

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Affirmation in Opposition to the Motion for Summary Judgment of Defendant EDWARD DELLI PAOLI a/k/a EDWARD GERALD DELLI PAOLI and in Support of the Cross Motion of Plaintiff AURORA BANK, FSB, as Attorney-In Fact for U.S. BANK NATIONAL ASSOCIATION as TRUSTEE OF THE LEHMAN BROTHERS SMALL BALANCE COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, Series 2207-1, with Exhibits,
(dated April 10, 2012)3

Reply Affirmation in Support of the Motion for Summary Judgment of Plaintiff AURORA BANK, FSB, as Attorney-in Fact for U.S. BANK NATIONAL ASSOCIATION as TRUSTEE OF THE LEHMAN BROTHERS SMALL BALANCE COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, Series 2207-1,(dated May 18, 2012)4

Upon the foregoing papers, the motion for summary judgment and dismissal of the complaint of defendant EDWARD DELLI PAOLI is denied; plaintiff’s cross motion, *inter alia*, for summary judgment is granted.

On November 16, 2010, plaintiff AURORA BANK FSB (hereinafter “AURORA”) commenced this foreclosure proceeding as attorney-in-fact for US BANK NATIONAL ASSOCIATION as TRUSTEE of the LEHMAN BROTHERS SMALL BALANCE COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, Series 2007-1, after defendant EDWARD DELLI PAOLI (hereinafter “defendant”) failed to make the payments due on a note and mortgage in the amount of \$500,000. The subject note and mortgage were executed by defendant on November 1, 2006 in connection with the purchase of commercial property located at 129 New Dorp Plaza, Staten Island, New York. The original mortgagee was Greenpoint Mortgage Funding Inc.

Insofar as ownership is concerned, it appears from the papers submitted to the Court that on January 18, 2007, Greenpoint Mortgage Funding Inc. assigned the note and mortgage to AURORA (f/k/a as Lehman Brothers Bank FSB). Thereafter, on August 24, 2010, *i.e.*, three months prior to

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the commencement of this action on November 16, 2010, AURORA assigned the subject note and mortgage to US BANK NATIONAL ASSOCIATION, (hereinafter “US BANK”).

In a separate transaction, which took place on or about February 29, 2007, it appears that LEHMAN BROTHERS BANK FSB had previously entered into both a Trust Agreement and a Servicing Agreement with US BANK with regard to the Lehman Brothers Small Balance Commercial Mortgage Pass-Through Certificates Series 2007-1, pursuant to which US BANK was named as the trustee for these Certificates, while LEHMAN BROTHERS was named as the servicer. Simultaneously, a Limited Power of Attorney was given to LEHMAN BROTHERS to act in the name, place and stead of the trustee, US BANK. Thereafter, and on April 24, 2009, LEHMAN BROTHERS changed its name to AURORA, whereupon, on April 28, 2010, a Limited Power of Attorney was executed by US BANK appointing AURORA to act on its behalf with regard to all the mortgage loans included in the aforementioned Trust and Servicing agreements.

In the current application (Motion No. 605), DELLI PAOLI contends (1) that there is nothing in the papers to indicate that plaintiff is in possession of the endorsements of the subject note, (2) that AURORA commenced this action as attorney in fact for plaintiff, pursuant to a defective power of attorney that is dated subsequent to its alleged effective date, (3) that there is no proof that the person executing the power of attorney had the authority to do so, (4) that the limited power of attorney makes reference to Trust Agreements that may affect plaintiff’s ability to foreclose the mortgage which are not attached to the complaint, and (5) that plaintiff’s counsel has not complied with newly promulgated requirements regarding the notarizations and accuracy of the plaintiff’s filed documents.

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In its cross motion, plaintiff moves for summary judgment on the complaint, and requests that a referee be appointed to compute the amount owed on the subject Note and Mortgage. In support of its application, plaintiff submits the affidavit of Mariah Henderson, a Senior Special Assets Officer of AURORA, who claims personal knowledge of the facts stated herein including a detailed explanation the chain of ownership of the subject mortgage, obtained on the basis of her direct dealings with defendant as well as her duties with regard to the administration of the troubled assets (loans) for AURORA and other entities, including US BANK in its role as trustee of the LEHMAN BROTHERS SMALL BALANCE COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, 2007-1. Ms. Henderson's affidavit further states that based on her personal knowledge, defendant is in default of his obligations under the subject note and mortgage, having failed to make the monthly payment of \$5,341.08, due on December 1, 2009 and thereafter.

It is well settled that in order to establish a prima facie case of foreclosure, a mortgagee must present evidence establishing its ownership of the subject note and mortgage, and proof of defendant's default (Baron Assoc., LLC v. Garcia Group Enters., Inc. 96 AD3d 793 [and cases cited therein]). Once established, it becomes incumbent upon the defending mortgagor to submit proof sufficient to raise a genuine issue of fact regarding plaintiff's prima facie showing or in support of the affirmative defenses asserted in its answer (*see* Citibank, NA v. Van Brunt Props., LLC, 95 AD3d 1158).

As for defendant's challenge to plaintiff's possession of the notes, "standing" is an affirmative defense which must be raised by a defendant in a pre-answer motion or assertion in its answer (*see* CPLR 3211[e]; Wells Fargo Bank Minn, NA v. Mastropaolo, 42 AD3d 239). "A

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plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (HSBC Bank USA v. Hernandez, 92 AD3d 843). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (US BANK, NA v. Collymore, 68 AD3d 752, 754; *see* Aurora Loan Servs., LLC v. Weisblum, 85 AD3d 95).

Here, the papers submitted, *inter alia*, in opposition to defendant’s motion, establish that the subject note and mortgage were assigned to US BANK by AURORA, which acquired them by valid assignment from Greenpoint. Moreover, the Henderson affidavit establishes that the physical delivery of the original note and mortgage occurred prior to the commencement of the subject action. Therefore, it has been sufficiently established that US BANK was the owner of the unpaid note and mortgage at the time the action was commenced, and had validly conferred, *inter alia*, the authority to commence the subject action on its behalf to AURORA, as evidenced by the Limited Power of Attorney executed on April 28, 2010. This action was not commenced until November 16, 2010.

In this regard, defendant’s further challenge to the validity of the Limited Power of Attorney is unsupported by the assertion of any evidentiary facts sufficient to draw into question the authority of the signatories thereto and, therefore, is wholly devoid of merit. Equally without any evidentiary basis are the balance of defendant’s allegations in support of dismissal.

Having failed to raise any triable issue of fact impugning plaintiff’s prima facie showing that it was the holder and owner of the subject note and mortgage at the time of commencement, and that defendant had defaulted on his obligations under the subject note and mortgage (*see* Zuckerman v. City of New York, 49 NY2d 557, 562), plaintiff is entitled to entry of summary judgment and the

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appointment of a referee to compute (see Household Fin. Realty Corp. of NY v. Wynn, 19 AD3d 545).

Submit Order.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C

Dated: December 12, 2012