

**New Century Mtge. Corp. v Horowitz**

2013 NY Slip Op 30494(U)

March 9, 2013

Sup Ct, Greene County

Docket Number: 07-1187

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

NEW CENTURY MORTGAGE CORPORATION,

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 07-1187**  
**RJI NO. 19-07-3277**

STEVEN D. HOROWITZ, PATRICIA A. CAMERON,

Defendants.

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Supreme Court Greene County All Purpose Term, February 7, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Plaintiff, New Century Mortgage Corporation (hereinafter “NCMC”), commenced this action to foreclose a certain Note and Mortgage, both dated March 30, 2006 (hereinafter “Note and Mortgage”), given to it by the Defendants. Upon Defendants’ default in answering, this Court granted NCMC’s motion for the appointment of a referee on October 22, 2007 (hereinafter “Order of Reference”) and subsequently, on November 29, 2007, a Judgment of Foreclosure and Sale (hereinafter “Judgment”). No sale has yet occurred.

NCMC now moves, pursuant to CPLR §§5019(a) and 2001, to substitute its previously filed “Affidavit of Merit and Amount Due” with a newly executed one, an Order validating this Court’s prior Order of Reference and Judgment, along with an Order amending the name of plaintiff. Defendants oppose the motion. Because NCMC established its entitlement to the relief it seeks, its motion is granted.

Considering first NCMC’s motion to amend the caption, CPLR §1018 provides that “[u]pon any transfer of interest, the action may be continued by... the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action.” (*see generally* GRP Loan, LLC v Taylor, 95 AD3d 1172 [2d Dept 2012]).

On this record, NCMC established that it transferred its interest in the Note and Mortgage after commencing this action. In support of its motion, NCMC submitted the “Affidavit of Merit and Amount Due” of Mireya Valencia, Wells Fargo Bank, N.A.’s Vice President Loan Documentation (hereinafter “Valencia Affidavit”). She alleges that Wells Fargo acts as servicer for Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc Trust 2006-NC4 (hereinafter “Deutsche Bank”). Based upon her review of the business records relative to the Note and Mortgage, she alleges that Deutsche Bank currently holds the note and is the mortgagee of record. She supports such assertion with a copy of the Note, endorsed in blank, and a copy of a duly recorded mortgage assignment, dated December 7, 2011 (hereinafter “Assignment”). The Assignment memorializes NCMC’s December 6, 2011 assignment of the Mortgage to Deutsche Bank. Upon such showing, NCMC sufficiently demonstrated that it transferred the Note and Mortgage to Deutsche Bank after commencing this action and is entitled to an amendment of the caption to reflect the Note and Mortgage’s new ownership.

Accordingly, this portion of NCMC's motion is granted and the caption is hereby amended to add Deutsche Bank as a named plaintiff herein.

NCMC similarly established its entitlement to substitute, *nunc pro tunc*, its newly filed Valencia Affidavit for its previously filed "Affidavit of Merit and Amount Due," executed by Kevin Marks on September 26, 2007 (hereinafter "Marks Affidavit").

After entry of the Judgment, the Chief Administrative Judge of the Courts issued Administrative Order 431/11 (hereinafter "AO/431/11"). It requires, in all residential foreclosure actions, plaintiff's counsel to submit an affirmation to the court, if not earlier, five business days prior to the scheduled foreclosure auction. The affirmation must contain, in part, counsel's statement confirming "the factual accuracy of the allegations set forth in... any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith." (AO/431/11).

In attempting to comply with AO/431/11, NCMC's counsel communicated with NCMC and was informed of "possible irregularities" with the Marks Affidavit. Due to such communication and to comply with AO/431/11, NCMC has now submitted an "Affidavit of Merit" its counsel can confirm, the Valencia Affidavit. Moreover, despite the Marks Affidavit's purported "irregularities," the substance of it and the Valencia Affidavit are substantially similar. The only monetary difference between the two consists of the Marks Affidavit's "\$125.00 for property inspections" notation; whereas the same total is described in the Valencia Affidavit as "Appraisals \$95.00 [and] Property inspections/ preservation \$30.00." Because these affidavits are substantively identical, Defendants are not prejudiced by their substitution.

Nor have Defendants demonstrated prejudice. Conspicuously absent from Defendants'

opposition is any comparative analysis of the Marks and Valencia Affidavits, or any allegation of prejudice by the substitution. Defendants' professed lack of knowledge of this actions' status is wholly irrelevant. So too is Defendants' lack of understanding of the plaintiffs involved or the Note and Mortgage's assignment. To the extent Defendants assert that Plaintiff lacks standing, such defense was waived by Defendants "failing to raise it in either an answer or a pre-answer motion to dismiss the complaint." (HSBC Bank USA, NA v Ashley, \_\_ AD3d \_\_ [3d Dept 2013]; Citibank, N.A. v Swiatkowski, 98 AD3d 555 [2d Dept 2012]; CitiMortgage, Inc. v Rosenthal, 88 AD3d 759, 761 [2d Dept 2011]). In addition, Defendants reliance on an "Independent Foreclosure Review" letter is misplaced. The letter raised no issue of prejudice relative to the affidavit substitution. Lastly, Defendants' claim of "serious factual and possibly legal issues" is wholly speculative, unsubstantiated and unavailing.

Because CPLR §2001 "permit[s] a mistake, omission, defect or irregularity... to be corrected, upon such terms as may be just" and Defendants will not be prejudiced by the substitution of the Valencia Affidavit for the substantially similar Marks Affidavit, NCMC's motion for substitution is granted, *nunc pro tunc*. (see generally Chase Home Mtge. Corp. v Marti, 279 AD2d 270, 271 [1st Dept 2001]; Krug v Offerman, Fallon, Mahoney & Cassano, 245 AD2d 603 [3d Dept 1997]). Accordingly, pursuant to CPLR §5019(a) and because the affidavit substitution does not affect a substantial right of Defendant, any irregularity underlying the Order of Reference and Judgment is hereby cured, *nunc pro tunc*.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Defendant is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 9, 2013  
Albany, New York



JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated December 3, 2012; Affirmation of Nicholas Perciballi, dated December 3, 2012, with attached Exhibits A-H.
2. Affirmation of Nicholas Perciballi, dated December 3, 2012.
3. Affidavit of Steven Horowitz, dated January 16, 2013, with attached Exhibit A.