

<b>National Loan Assn., LP v Ippolito</b>
2013 NY Slip Op 30518(U)
March 15, 2013
Supreme Court, Richmond County
Docket Number: 130163/12
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF RICHMOND

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NATIONAL LOAN ASSOCIATION, LP, a Delaware  
 Limited Partnership,

Plaintiff(s),

TP - 12

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

WILLIAM S. IPPOLITO, NEW YORK BUSINESS  
 DEVELOPMENT CORPORATION WORLD  
 TRADE CENTER SMALL BUSINESS RECOVERY  
 FUND, INC., and ‘JOHN DOE AND/OR JANE  
 DOE’, inclusive the parties being intended to be those  
 persons having an interest in or claiming an interest in  
 the premises described in the complaint by fortune of  
 being tenants, occupants, owners judgment creditors,  
 or lienors of any type or nature and or their heirs  
 successors or assigns, in all or part of said premises,  
 Defendant(s).

Index No. 130163/12

Motion Seq. No. 002

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The following papers numbered 1 to 2 were marked fully submitted on the 16<sup>th</sup> day of  
 January, 2013.

Papers  
 Numbered

Order to Show Cause of Defendant WILLIAM S. IPPOLITO,  
 with Supporting Papers, Exhibits  
 (dated November 9, 2012) \_\_\_\_\_

1

Affirmation in Opposition by Plaintiffs, with Exhibits  
 (dated December 17, 2012) \_\_\_\_\_

2

Upon the foregoing papers, defendant’s application is denied.

Plaintiff commenced this foreclosure action after defendant WILLIAM S. IPPOLITO  
 (hereinafter “defendant”) failed to make the required payments on a note and mortgage executed  
 by him on October 28, 2002 in the amount of \$900,000 with regard to commercial property  
 located at 484 Sharrots Road on Staten Island.

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In the current application, defendant seeks the entry of an order vacating a default judgment entered against him in the above-entitled action, and allowing him leave to file a late answer. In support, defendant has submitted, *inter alia*, a personal affidavit in which he states that he was not personally served with a copy of the summons and complaint in regard the subject action. In addition, defendant states that he has a valid excuse for his failure to answer the complaint given that he was in the hospital for heart surgery during the relevant time period, and was unable to retain counsel. He further states that he has a meritorious defense to the foreclosure action, *i.e.*, plaintiff's lack of standing, since the latter is not the lawful owner and holder of the subject note and mortgage. In this regard, defendant argues that the complaint fails to allege that the note was endorsed to plaintiff, and claims that the note in question remains in the name of plaintiff's predecessor. According to the defendant, the mere assignment of the mortgage is insufficient to transfer title to the existing obligation under the note, and that a written endorsement by or on behalf of the note holder is required to transfer its interest thereunder.

In opposition, plaintiff contends that on April 9, 2012, defendant was personally served with the summons, complaint and notice of pendency at his residence located at 492 Sharrots Road, Staten Island, New York, and has submitted a copy of an affidavit of service confirming same. In addition, plaintiff submits a copy of defendant's voter registration records which confirms that 492 Sharrots Road is his residence. Plaintiff further argues that defendant has neither answered nor appeared in the action, and has never previously moved to extend his time to answer the complaint. As a result, plaintiff was granted a default judgment, an Order of Reference to compute the amounts due, and leave to amend the caption to replace "John and/or

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Jane Doe” with the name of the tenant actually occupying the subject premises, Ampere Truck & Car Repair, Inc. According to plaintiff, Ampere Truck & Car Repairs, Inc. was also served with a copy of the Summons and Complaint in this action.

Directly addressing defendant’s motion to vacate the default judgment entered against him, plaintiff contends that defendant has failed to provide the required reasonable excuse for his failure to answer the complaint or a meritorious defense to the foreclosure action. According to plaintiff, defendant’s mere denial of service without alleging any specific facts in support thereof is legally insufficient to rebut the presumption of valid service evidenced by the affidavit of service. In this regard, plaintiff avers that defendant was served personally at his residence, and that a second copy of the summons and complaint was subsequently mailed to him at the same address (492 Sharrots Road). It is further alleged that service was made by mail upon the tenant, Ampere Truck & Car Repair, Inc. , at the mortgaged premises (484 Sharrots Road), and that another copy of process was served upon the Secretary of State of the State of New York. Finally, plaintiff argues that defendant has failed to submit any proof confirming that he was hospitalized during the time he was required to serve an answer. Accordingly, plaintiff argues that defendant is not entitled to vacate his default.

On the absence of a meritorious defense, plaintiff has also submitted the affidavit of Dewayne Horton, a manager in plaintiff’s Mortgage Loan Division, which explains that Sovereign Bank became the successor in interest to the original mortgage executed in favor of Independence Community Bank, and that Sovereign subsequently assigned the note and mortgage to plaintiff by way of (1) an assignment of mortgage dated December 15, 2011, which was recorded in

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Richmond County on January 24, 2012, and (2) the simultaneous delivery to plaintiff the original mortgage together with the original note and an annexed allonge endorsing same to plaintiff. Accordingly, plaintiff claims that it was both the owner and holder of the original note and mortgage and note prior to the commencement of this action on March 15, 2012.

Defendant's application is denied.

On the issue of proper service, plaintiff has submitted an affidavit of service which indicates that a copy of the summons and complaint was both personally served and mailed to defendant at his residence. In addition, the tenant, Ampere Truck & Car Repair Inc., was served by mail at the mortgaged premises, and a copy of the summons and complaint was also mailed to the Secretary of State. Under these circumstances, defendant's naked denial of receipt, without specific facts to rebut the statements made in the process server's affidavit, is legally insufficient to overcome the presumption of proper service created by the affidavit of service (*see Carrenard v. Mass*, 11 AD3d 501). Neither is there any independent evidence of defendant's alleged hospitalization.

Having failed to provide this Court with a reasonable excuse for his default in answering the complaint, it is unnecessary under CPLR 5015(a)(1) to consider the issue of a meritorious defense to the action (*see Wells Fargo Bank, N.A. v. Cervini*, 84 AD3d 789, 790).<sup>1</sup> In any event, it is the opinion of this Court that defendant has failed to rebut plaintiff's prima facie showing that

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<sup>1</sup> In addition, defendant has failed to demonstrate that he did not personally receive notice of the summons in time to defend (*see* CPLR 317). In fact, his alleged inability to retain an attorney due to his hospitalization constitutes some evidence of actual notice of the lawsuit against him.

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it is the owner of the subject mortgage and note at the time that the action was commenced. It is well settled that an action to foreclosure a mortgage may not be brought by one who has no title, and absent transfer of the debt, the assignment of the mortgage is a nullity (*see Kluge v. Fugazy*, 145 AD2d 537). Nevertheless “a written assignment of the underlying note or physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident” (*Bank of NY v. Silverberg*, 86 AD3d 274, 281 [citations and internal quotation marks omitted] ). Here, the proof submitted by plaintiff sufficiently establishes its possession and ownership of the subject mortgage and note to confer standing. In particular, plaintiff has produced a copy of the subject mortgage and note, together with an allonge dated December 15, 2011, which provides specific details regarding the debt and its chain of ownership, ultimately vesting in plaintiff.

Finally, notwithstanding defendant’s claims to the contrary, plaintiff has submitted satisfactory proof that a notice was sent to defendant on January 20, 2012, advising him of his default and the opportunity to cure same in accordance with the terms of the note (*see Plaintiff’s Affirmation in Opposition*, Exhibit G).

Defendant’s remaining contentions are without merit.

Accordingly, it is

ORDERED that the motion brought on by Order to Show Cause of defendant

WILLIAM S. IPPOLITO is denied.

Dated: MARCH 15, 2013

E N T E R,

/S/

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Hon. Thomas P. Aliotta

J.S.C.

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