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MEMO DECISION & ORDER

INDEX No. 1806-11

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/16/13
ADJ. DATES 1/17/14
Mot. Seq. # 001- MD;
Mot. Seq. # 002 - XMG
Case Disp; Yes

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DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the Indymac Indx Mortgage Loan Trust 2005-AR27, Mortgage Pass-Through Certificates, Series 2005-AR27 under the pooling and servicing agreement dated October 1, 2005,

Plaintiff,

-against-

JOSEPH TRENTINO, JOSEPHINE TRENTINO, "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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MCCABE, WEISBERG & CONWAY
Attys. For Plaintiff
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New Rochelle, NY 10801

HAROLD A. STEUERWALD, ESQ.
Atty. For Defendants Trentino
112 So. Country Rd.
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Upon the following papers numbered 1 to 17 read on this motion by plaintiff for accelerated judgments, deletion and/or substitution of parties and caption amendments to reflect same, and the appointment of a referee to compute and cross motion by defendant Trentino to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers 9-13 ; Opposing papers with replies: 14-15; 16-17; Other ; (~~and after hearing counsel in support and opposed to the motion~~, it is

ORDERED that this motion (#001) by the plaintiff for accelerated judgments against the defendants, substitution and deletion of parties, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215, 1024 and RPAPL 1321 and is denied; and it is further

ORDERED that the cross motion by the Trentino defendants for dismissal of the complaint due to a purported lack of standing on the part of the plaintiff and/or its purported failure to comply with contractual and statutory notice conditions precedent, is considered under CPLR 3015 and the Real Property Actions and Proceedings Law and is granted.

The plaintiff commenced this action to foreclose a mortgage given by defendants, Joseph Trentino and Josephine Trentino, on September 26, 2005, to secure a note executed on that same date to the plaintiff's predecessor-in-interest. The plaintiff alleges that the mortgagor defendants defaulted in their payment obligations on October 1, 2009 and that such default continues to date. Following service of the summons and complaint, the mortgagor defendants, Joseph Trentino and Josephine Trentino, appeared herein by service of an answer dated February 17, 2011 containing twenty affirmative defenses.

The plaintiff now moves for summary judgment against the Trentino defendants and for default judgments on its complaint against all other defendants joined herein by service of process. The plaintiff also seeks an order pursuant to CPLR 1001 deleting the unknown defendants named in the caption. The Trentino defendants oppose and cross move for dismissal of the plaintiff's complaint.

Entitlement to a judgment of foreclosure may be established, as a matter of law, where the plaintiff produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact (*see* ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***US Bank N.A. v Eaddy***, 79 AD3d 1022, 1022, 914 NYS2d 901 [2010]; ***Zanfini v Chandler***, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]). Where, as here, an answer served includes the defense of standing or lack of capacity to sue, the plaintiff must further establish its standing to succeed on a motion for summary judgment (*see* ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 242, 837 NYS2d 247 [2d Dept 2007]).

Here, the moving papers included copies of the mortgage, the note executed by defendants, Joseph Trentino and Josephine Trentino, on September 26, 2005, together with due evidence of a default under the terms thereof. The moving papers also included a copy of the note indorsed in blank by the original lender and an affidavit of the plaintiff's in which she avers that the plaintiff "is the holder and is in possession of, or is otherwise entitled to enforce the note given by Joseph Trentino" (*see* ¶ 3 of the affidavit of Monique McQueen attached to the plaintiff's moving papers).

The Trentino defendants' opposition to the plaintiff's motion is contained in cross moving papers wherein they assert, through their counsel, three affirmative defenses as grounds for dismissal of the complaint. These three affirmative defenses asserted in some form in eleven of the twenty numbered affirmative defenses set forth in the defendants' answer, are limited to the following; 1) that

the plaintiff lacks standing to prosecute this action; 2) that the plaintiff failed to comply with the contractual condition precedent requiring notice of the default; and 3) that the plaintiff failed to comply with the statutory notice condition precedent to commencement of this action imposed by RPAPL §1304. The Trentino defendants further contend that the plaintiff's motion is premature due to want of discovery and that questions of fact preclude the granting of summary judgment in favor of the plaintiff.

For the reasons stated below, the cross motion by the Trentino defendants is granted and the plaintiff's motion in chief is denied.

Although it is characterized as a cross motion to dismiss pursuant to CPLR 3211, the cross motion by the Trentino defendants is one for summary judgment as it was interposed subsequent to the service of the answer, is based upon affirmative defenses asserted therein, and is responsive to the plaintiff's motion for summary judgment. Absent the deliberate chart of a summary judgment course by the parties that is discernible from their submissions on the cross motion, this court would be required to give notice of its intention to convert the cross motion into one for summary judgment (*see* ***Wesolowski v St. Francis Hosp.***, 108 AD3d 525, 968 NYS2d 181 [2d Dept 2013]). Here, the record indicates that the parties laid bare their proofs with respect to the legal issues asserted in the cross motion thereby obviating the need for this court to give notice of its treatment of the defendants' cross motion as one for summary judgment pursuant to CPLR 3212, rather than one for dismissal pursuant to CPLR 3211 as denominated in the moving papers (*see* ***Whitby v Whitby,*** 106 AD3d 729, 964 NYS2d 247 [2d Dept 2013]; ***Nowacki v Becker***, 71 AD3d 1496, 897 NYS2d 560 [4th Dept 2010]; ***Toledo v West Farms Neighborhood Hous. Dev. Fund Co., Inc.***, 34 AD3d 228, 824 NYS2d 34 [1st Dept 2006]; ***Kavoukian v Kaletta***, 294 AD2d 646, 742 NYS2d 157 [3d Dept 2002]).

The first ground advanced by the defendants for dismissal of the complaint rests upon the the ground that the plaintiff lacks standing to prosecute its claims for foreclosure. As indicated above, the plaintiff's claim of standing rests solely on its claim of possession of the mortgage note as alleged by its agent Monique McQueen, which note bears an indorsement in blank by the original lender.

It is now well settled law that the standing of foreclosing plaintiffs, appearing personally or by their servicers (*see* RPAPL § 1302; §1304), is measured by their ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see* ***US Bank of NY v Silverberg***, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; ***Wells Fargo Bank, N.A. v Marchione***, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). "A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (***Aurora Loan Serv., LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014], *quoting* ***Bank of N.Y. v Silverberg***, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 932, 969 NYS2d 82 [2d Dept 2013]). "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, and the mortgage passes with the debt as an inseparable incident" (***U.S. Bank, N.A. v Collymore***, 68 AD3d at 752, 753, 890 NYS2d 578 [2d Dept]; *see* ***Aurora Loan Serv., LLC v Taylor***, 114 AD3d 627, *supra*; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, *supra*).

Under the principal/incident rule, a mortgage may not stand separate from the note evidencing the principal debt or obligation because the mortgage is merely security therefor (*see* ***Weaver Hardware Co. v Solomovitz,*** 235 NY 321, 331–332, 139 NE 353 [1923]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*; ***US Bank of NY v Silverberg***, 86 AD3d 274, 280, *supra*). Accordingly, a mortgage passes as an incident of the note upon such note's written assignment, physical delivery or its indorsement and delivery (*see* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, *supra*; ***One West Bank FSB v Carey***, 104 AD3d 444, 960 NYS2d 306 [1st Dept 2013]; ***Deutsche Bank Trust Co. Am. v Codio***, 94 AD3d 1040, 943 NYS2d 545 [2d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). In all cases wherein the plaintiff is one other than the original mortgage lender, a valid transfer of the note, which effects a valid transfer of the mortgage under the principal/incident rule, will resolve the standing issue in favor of the plaintiff (*see* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, *supra*; ***One West Bank FSB v Carey***, 104 AD3d 444, *supra*; ***US Bank Natl. Ass'n v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***Deutsche Bank Trust Co. Am. v Codio***, 94 AD3d 1040, *supra;* ***Bank of New York Mellon Trust Co. NA v Sachar***, 95 AD3d 695, 943 NYS2d 893 [1st Dept 2012]).

Holder status of a note and mortgage is established where the plaintiff possesses the mortgage note which bears, on its face or by allonge, a special indorsement payable to the order of the plaintiff or where it takes possession of a mortgage note that contains an indorsement similarly affixed (*see* UCC §1-201[20]; §3-202; §3-204; §9-203[g]; ***Spielman v Manufacturers Hanover Trust Co.***, 60 NY2d 221, 469 NYS2d 69 [1983]; ***Citimortgage, Inc. v Friedman***, 109 AD3d 573, 970 NYS2d 706 [2d Dept 2013]; ***US Bank Natl. Ass'n v Cange***, 96 AD3d 825, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept. 2007]; ***First Trust Natl. Ass'n v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *aff'd,* 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]). New York's Uniform Commercial Code (UCC) §1-201(20) defines "holder" as "a person who is in possession of a document of title, an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." A person becomes the holder of an instrument through its negotiation to him or her (*see* UCC §3-202[1]). Where the instrument is payable to order, it is negotiated by delivery and all necessary indorsements and where it is payable to the bearer by virtue of an indorsement in blank or otherwise, delivery alone is sufficient (*see id.*). Constructive delivery of an instrument such as a promissory note to an agent has been recognized as constituting a valid transfer by delivery (*see* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, *supra*; ***Depew Dev., Inc. v AT&A Trucking Corp.,*** 210 AD2d 974, 621 NYS2d 242 [4th Dept 1994]; ***Wolfin v Security Bank***, 170 AD 519, 156 NYS 474, 476 [1915]; *see also* ***Corporacion Venezolana de Fomento v Vintero Sales Corp.***, 452 F.Supp. 1108 [SDNY 1978]). The essential element of a constructive delivery is that it be made with the unmistakable intention of transferring title to the instrument (*see id* at 1117).

Here, the note was indorsed in blank so the plaintiff merely had to establish its possession of the note by delivery to it or a custodial agent prior to the commencement of the action. Appellate cases have instructed that delivery of a note indorsed in blank may be established in the following manner: 1) physical delivery of the note to the plaintiff or its custodial agent prior to the commencement of the action (*see* ***Kondaur Capital Corp. v McCary***, ____AD3d ____, 2014 WL 840564 [2d Dept 2014];

Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931, 932, *supra*); 2) possession of an indorsed note by the indorsee on a specific date that is prior to the commencement of the action, from which it may be reasonably inferred that physical delivery of the note was made to the plaintiff by the indorsee (*see* ***Aurora Loan Serv., LLC v Taylor***, 114 AD3d 627, *supra*); or 3) pre-commencement possession of the note by a custodial agent of a trustee plaintiff named in a pooling and servicing agreement, the relevant portions of which are put before the court with a redacted mortgage loan schedule identifying the subject loan as one in the pool of loans securitized under the pooling and servicing agreement (*see* ***HSBC Bank USA, Nat. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]).

Review of the evidentiary submissions of the plaintiff both in support of its motion for summary judgement and in opposition to the defendants' cross motion reveal that they were insufficient to establish its possession of the indorsed note by physical delivery to the plaintiff by the indorser or other possessor prior to the commencement of the action or pre-commencement possession of the indorsed note by a custodial agent of the trustee plaintiff under the pooling and servicing agreement with a redacted mortgage loan schedule identifying the subject loan as one in the pool of loans securitized under the pooling and servicing agreement. The affidavit of the plaintiff's agent was devoid of allegations of facts necessary to establish the pre-commencement delivery and thus standing on the part of the plaintiff to prosecute its claim for foreclosure and sale in this action.

In view of the forgoing, the plaintiff's motion for summary judgment (#001) and the other relief demanded is denied. The cross motion (#002) by the answering defendants is granted to the extent that the plaintiff's complaint is dismissed due to a lack of standing on the part of the plaintiff. Such dismissal is, however, without prejudice to a re-commencement, as this dismissal is not a determination on the merits (*see* CPLR 205(a); ***Homecomings Fin., LLC v Guildi***, 108 AD3d 506, 969 NYS2d 470 [2d Dept 2013]).

DATED: 3/18/14

THOMAS F. WHELAN, J.S.C.