MEMORANDUM DECISION SHORT FORM ORDER

INDEX No. 32763/2007

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12/27/13
Submit. DATE: 01/03/14
Mot. Seq. # 003 - MG
Mot. Seq. # 004 - XMD
Order Appointing Referee - Signed
CDISP Y____ N X

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CITIBANK, N.A. AS TRUSTEE

Plaintiff,

-against-

DONALD MacPHERSON, 110 NORTH SEA COMPANY, INC., BELESKA HOMESTEAD, INC., EUROPEAN AMERICAN BANK & TRUST COMPANY, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR GREENPOINT MORTGAGE FUNDING, INC., PEOPLE OF THE STATE OF NEW YORK and "JOHN DOE #1-5" and "JANE DOE #1-5", said names being fictitious, it being the intention of plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

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FEIN, SUCH & CRANE, LLP
Attys. For Plaintiff
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IRWIN POPKIN, ESQ.
Atty. for Defendant MacPherson
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Upon the following papers numbered 1 to 11 read on this motion by plaintiff for accelerated judgments and the appointment of a referee to compute and cross motion by defendant MacPherson to renew; Notice of Motion/Order to Show Cause and supporting papers 1-5; Notice of Cross Motion and supporting papers 6-8; Opposing Papers: 9-10; Reply papers ____; Other 11 (affirmation); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the plaintiff for an order awarding it summary judgment against the answering defendant and default judgments against the remaining defendants joined by service of process, identifying and/or deleting unknown defendants and an order appointing a referee to compute, is considered under CPLR 3212, 3215, 1003 and RPAPL §1321 and is granted; and its further

ORDERED that the cross motion (#004) by defendant, Donald MacPherson, for an order permitting him to renew his prior motion (#001) for dismissal of the plaintiff's complaint on the grounds that the plaintiff lacks standing to prosecute its claims is considered under CPLR 2221 and is denied.

The plaintiff commenced this residential foreclosure action in October of 2007 following defendant MacPherson's default in payment under the terms of the $1,560,000.00 mortgage note. In lieu of answering, the said defendant moved, in November of 2007, to dismiss the complaint on the grounds that the plaintiff lacked standing to prosecute its claims for foreclosure and sale due to the absence of sufficient allegations regarding the plaintiff's ownership and or possession of the mortgage and or the note by way of assignment (*see* ¶¶ 3, 4, 5 & 6 of the affirmation of Irwin Popkin, Esq. dated November 15, 2007 in support of the motion to dismiss attached in the appendix to the instant cross motion). These claims were premised upon defense counsel's predicate assertion that:

> "[F]oreclosure of a mortgage may not be brought by one who has no title to it" (Kluge v Fugazy, 145 AD2d 537, 538, 536 NYS2d 92, 93 (2d Dept., 1988). Conspicuously absent from the complaint is the allegation that the plaintiff is the owner or holder of the mortgage sought to be foreclosed by this law suit" (*see id.*, ¶ 2) [1].

By order dated April 9, 2008, this court denied the defendant's motion to dismiss the complaint finding that the plaintiff established its standing under "a written assignment of both the note and mortgage effective prior to the commencement of this action". As authority for this finding, this court relied upon two appellate case authorities emanating from the Second Department wherein the plaintiff was found to be the *holder of the note* and, by virtue thereof, the holder of the mortgage at the time of the commencement of the action by virtue of the tender and transfer of the note (*see* Order dated April 9, 2008, *citing* ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***Federal Natl. Mtge. Ass'n v Youkelsone***, 303 AD2d 546, 755 NYS2d 730 [2d Dept 2003]). No other case authorities were relied upon nor cited by the court in its concise order denying defendant MacPherson's motion to dismiss the complaint pursuant to CPLR 3211. No appeal from such order was taken and perfected by defendant MacPherson. It thus remains a final and binding determination that the plaintiff had standing to prosecute the claims interposed herein.

Following the issuance of the April 9, 2008 order, defendant MacPherson served an answer to the complaint in which four affirmative defenses were advanced. The first of such defenses contained

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[1] Contrary to the contentions of the defendant, the issue of the plaintiff's standing is not an element of a claim for foreclosure and sale and thus need not be pleaded and proved by the plaintiff in the first instance, as such issue merely constitutes an affirmative defense which is waived if not timely asserted by a defendant possessed of such defense (*see* ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 243–244, 837 NYS2d 247 [2d Dept 2007], *citing* ***Matter of Fossella v Dinkins***, 66 NY2d 162, 167–168, 495 NYS2d 352 [1985]; ***Dougherty v City of Rye***, 63 NY2d 989, 991–992, 483 NYS2d 999 [1984]; ***Matter of Prudco Realty Corp. v Palermo***, 60 NY2d 656, 657, 467 NYS2d 830 [1983]; ***Security Pac. Natl. Bank v Evans***, 31 AD3d 278, 279, 820 NYS2d 2 [1st Dept 2006]; *see also* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***HSBC Bank USA, N.A. v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Bank of New York v Alderazi***, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]).

a re-assertion of the standing defense that was litigated by defendant MacPherson on his prior motion to dismiss and rejected by this Court as unmeritorious in its April 9, 2008 order. While no motion to strike such defense was made by the plaintiff following service of the complaint, the plaintiff, who is now represented by different counsel, contends in the papers submitted in support of its motion for summary judgment and other relief, that the re-assertion of the standing defense in the answer of defendant MacPherson is precluded by the law of the case doctrine. The plaintiff nevertheless adduced proof of its standing as well as its entitlement to the summary judgment demanded by it against defendant MacPherson. While the opposing papers did not address the plaintiff's law of the case citation, defendant MacPherson again challenged the standing of the plaintiff and its proof. However, the court rejects all such challenges since any and all re-assertions of the standing defense by defendant MacPherson is precluded by the law of the case doctrine, the applicable arm of the broader finality doctrine (*see* ***Martin v City of Cohoes***, 37 NY2d 162, 165, 371 NYS2d 687 [1975]; ***Carbon Capital Mgt., LLC v American Express, Co.***, 88 AD3d 933, 932 NYS2d 488 [2d Dept 2011]; ***Aames Funding Corp. v Houston,*** 85 AD3d 1070, 926 NYS2d 639 [2d Dept2011]).

By the instant cross motion (#004), defendant MacPherson seeks an order for renewal of his motion to dismiss the plaintiff's complaint. The singular ground stated is that a change in the law warrants such relief. In support thereof, defense counsel relies upon the decision issued by the Appellate Division, Second Department in ***Wells Fargo Bank, N.A. v Marchione*** (69 AD3d 204, 887 NYS2d 615), which issued on October 20, 2009. Therein, the Second Department determined that "a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment" and it rejected the plaintiff's attempt to rely upon a written assignment of the mortgage that was executed after the commencement of the action by filing even though it stated that it was effective prior thereto (*see id.*, at 206-209; *see also* ***LaSalle Bank Natl. Assn. v Ahearn***, 59 AD3d 912, 875 NYS2d 595 [3d Dept 2009]).

For the reasons stated below, the cross motion (#004) is denied while the plaintiff's motion-in-chief (#003) is granted.

"'A motion for leave to renew is left to the sound discretion of the trial court'" (*see* ***Derby v Bitan***, 112 AD3d 881, 977 NYS2d 405 [2d Dept 2013]; *quoting* ***Matheus v Weiss***, 20 AD3d 454, 454–455, 797 NYS2d 774 [2d Dept 2005]; *see* ***Johnson v State of New York***, 95 AD3d 1455, 1456, 944 NYS2d 348 [3d Dept 2012]). By statutory fiat, renewal motions can be based upon, among other things, "a change in the law" *provided* that such change would have changed the court's prior decision (CPLR 2221[e][2]). Thus, where a case authority relied upon by a trial court in arriving at its prior determination is reversed or abrogated and such case authority was "either controlling or essential to that prior determination", leave to renew may be granted (***Caryl S. v Child & Adolescent Treatment Serv., Inc.***, 238 AD2d 953, 661 NYS2d 168 [4th Dept 1997]). Where it is neither, leave to renew should be denied (*id.*).

Here, defendant MacPherson advanced no claims of the invalidity of any retroactive written assignment of either the mortgage or the note in his submissions on his original motion for dismissal of the plaintiff's complaint. Instead, he argued that the plaintiff's failure to plead and prove its standing via a written assignment warranted a dismissal of the complaint. Specifically, he alleged, through his

counsel, that the plaintiff "had to have been the owner of the mortgage at the time the foreclosure action was commenced" and that the complaint contained "no reference to the assignment of the note" (*see* ¶¶ 5-6 of counsel's affirmation in support). While defense counsel asserted in reply papers that the assignment of the mortgage produced by the plaintiff did not effect a transfer of the note because the assignor, MERS, had no ownership interest therein and that the subject mortgage note was not commercial paper properly negotiated, no claim as to the invalidity of a retroactive assignment was made.

The defendant's reliance on this new argument that is premised upon a purported change in the law by which retroactive assignments executed subsequent to the commencement of a mortgage foreclosure action were allegedly held to be insufficient to confer standing on a foreclosing plaintiff, is clearly misplaced as that argument was not advanced on the original motion. It thus played no role in the court's decision. Accordingly, the defendant's predicate for the instant cross motion is irrelevant, immaterial and legally insufficient to warrant the granting of renewal on the sole ground advanced, namely a "change in the law".

That which is relevant, material and controlling is the fact that this court rejected the contentions and arguments advanced by defense counsel in the original moving and reply papers and it sustained the plaintiff's standing upon the authority of the two appellate cases cited wherein the courts upheld the standing of foreclosing plaintiffs who were in possession a mortgage note which was a negotiable instrument (*see* ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, *supra*; ***Federal Natl. Mtge. Ass'n v Youkelsone***, 303 AD2d 546, *supra*). Since neither of the two case authorities relied upon by the court have been reversed or abrogated, the court finds that the defendant failed to demonstrate any entitlement to renewal based upon a change in the law that would have changed this court's prior determination to deny MacPherson's motion for dismissal of the complaint. For these reasons, the cross motion (#004) by defendant MacPherson for renewal is denied in its entirety.

In addition, the court finds merit in the plaintiff's claim that the instant cross motion by the defendant is untimely and/or should be denied on grounds of laches. The defendant's interposition of this motion four and half years after the issuance of the cases on which the defendant cites as effecting a "change in the law" constitutes undue delay. Such delay, coupled with the failure of defendant MacPherson to appeal from this court's April 9, 2008 order, warrants the imposition of an estoppel to preclude the defendant from challenging an unappealed, final and binding prior order of this court wherein the standing of the plaintiff to prosecute its claims for foreclosure and sale was sustained (*see* ***Stein v Doukas***, 98 AD3d 1026, 950 NYS2d 773 [2d Dept 2012]).

Left for determination is the plaintiff's motion for summary judgment against answering defendant MacPherson and for default judgments against the remaining defendants including those served as John Does whose true name identification is sought pursuant to CPLR 1024. The moving papers, sufficiently established the plaintiff's entitlement to the accelerated judgments demanded by it pursuant to CPLR 3212 and 3215 against all defendants joined herein by service of process by the plaintiff's production of the note and mortgage and due evidence of a default in payment on the part of defendant MacPherson (*see* CPLR 3212, 3215, 1003 and RPAPL § 1321; ***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]).

Although not required to do so because of the prior adjudication of the plaintiff's standing made in the order of this court dated April 9, 2008, the plaintiff's moving papers established that the plaintiff was the holder of the note and thus the mortgage as of December 21, 2006 which was well before the commencement of this action in October of 2007 (*see* ***Aurora Loan Serv., LLC v Taylor*** ____AD3d_____, 2014 WL 443959 [2d Dept 2014]; ***HSBC Bank, USA v Sage***, 112 AD3d 1126, 977 NYS2d 446 [2d Dept 2013]). The moving papers further established the plaintiff's entitlement to all other relief demanded, including the appointment of a referee to compute amounts due under the subject note and mortgage (*see* ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***LaSalle Bank, N.A. v Pace,*** 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd,* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]). The plaintiff's motion for this relief and all other requested relief set forth in its moving papers is thus granted.

The proposed order appointing a referee to compute, as modified by the court, has been signed simultaneously herewith.

DATED: 2/20/14

THOMAS F. WHELAN, J.S.C.