

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

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SBC 2010-1, LLC.,

DECISION/ORDER

Plaintiff,

-against- Index No.: 380330/2011

AL-FLAMINGO REALTY LLC, et als.

Defendants.

_____X

The following papers numbered 1 to 14 read on the below motions noticed on November 12, 2013 and December 24, 2013, and duly submitted on the Part IA15 Motion calendar of **February 18, 2014**:

Papers Submitted	Numbered
Pl.'s MSJ, exhibits,	1,2
Def.'s Cross-Motion, exhibits	3,4
Pl.'s Reply Aff., Opp. To Cross-Motion, exhibits	5,6
Def.'s Reply Aff., exhibits	7,8
Pl.'s NOM, exhibits.	9,10
Def.'s Aff. In Opp, exhibits	11,12
Pl.'s Reply Aff., exhibits	13,14

Upon the foregoing papers in this commercial foreclosure action, the plaintiff SBC 2010-1 LLC ("Plaintiff") has filed a motion for summary judgment against all of the defendants on Plaintiff's claims for foreclosure, and appointing a referee to compute the amounts due Plaintiff on the Note and Mortgage being foreclosed in the action. The defendant Al-Flamingo Realty LLC. ("Defendant") opposes the motion and filed a cross-motion for an order dismissing the action, removing and discharging the Receiver, directing that Plaintiff pay costs and expenses occasioned by the filing of a frivolous claim, and filing of false affirmations under CPLR 8303-a.

By letter dated September 9, 2013, Plaintiff's counsel withdrew its pending motion for summary judgment. Defendant, however, did not withdraw its cross-motion. Plaintiff subsequently renewed its motion for summary judgment, and the instant cross-motion, seeking the same relief, followed. These motions for summary judgment will be resolved in the

following Decision and Order.

After filing its initial motion for summary judgment, the Plaintiff had later filed a motion for leave to file a supplemental affirmation in opposition to the cross-motion and in further support of their motion for summary judgment, with an initial submit date of November 12, 2013. Defendant had opposed that motion. Plaintiff's subsequent motion for summary judgment (initial submit date of December 24, 2013) includes the arguments contained in the proposed supplemental affirmation, and therefore obviates the need to decide that November motion. In the interest of completeness and judicial economy, this Court nevertheless will grant that motion to the extent that this Court has considered the arguments contained in the supplemental affirmation, as well as Defendant's arguments in opposition thereto, in resolving the present motions for summary judgment.

I. Background

Plaintiff submits an affidavit from David Brecher, an "ultimate manager," in support of its motion. The property at issue in this action is located at 1304 Chisholm Street, Bronx, New York. The property is a mixed-use building containing two retail units and two residential units. On or about May 3, 2007, Defendant allegedly executed an Amended and Restate Promissory Note ("Note") pursuant to which it promised to pay to the order of Washington Mutual Bank ("WaMu") the original principal balance amount of $517,000. As security for the Note, Defendant allegedly executed and delivered to WaMu an Amended and Restated Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing (the "Mortgage"). On September 25, 2008, the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver for WaMu. On or about that same date, FDIC entered into a Purchase and Assumption Agreement with JPMorgan Chase Bank ("Chase"), pursuant to which Chase became the owner of substantially all of the assets of WaMu including the loans owned by WaMu, including the subject loan.

On or about November 2, 2010, Chase and Plaintiff entered into a Loan Purchase and Sale Agreement ("LPSA") wherein Plaintiff agreed to purchase several loans from Chase, including the subject loan. On or about November 8, 2010, the sale to Plaintiff of all loans under the LPSA was closed. Upon closing, the Loan and all related documents were transferred to

Plaintiff effective as of that date. As evidence of the transfer, Chase allegedly executed and delivered to Plaintiff, among other things, an Allonge to Promissory Note, an Assignment of Mortgage, and an Assignment of Loan Documents. Mr. Brecher states that, "[s]ince Chase was unable to locate the original Note, Chase also delivered to [Plaintiff] an affidavit of Lost Note." The lost-note affidavit is dated October 2, 2009. The motion claims that Defendant defaulted on the Note and Mortgage by its failure to make the payments of principal and interest due on September 1, 2010.

Plaintiff now moves for, among other things, summary judgment against Defendant on the issue of liability. Defendant's verified answer asserted an affirmative defense of lack of standing. Plaintiff argues that the answer should not be considered since it was filed by a non-attorney on behalf of the Defendant corporation. In any event, Plaintiff argues that it has presented documentary evidence disproving the standing defense, and demonstrating the chain of assignments of the loan from WaMu to Plaintiff. Plaintiff also claims that the U.S. Bankruptcy Court has previously determined the propriety of the transfer of the Loan from WaMu to Chase.

Defendant opposes the motion and cross-moves for summary judgment, dismissing this action and discharging the receiver, and seeks the imposition of sanctions against Plaintiff. Defendant argues that Plaintiff cannot establish a valid claim and/or a valid assignment from WaMu to Chase and from Chase to Plaintiff, with no proof that "Judy Martinez" an unidentified officer of Chase, actually was employed by Chase or authorized to sign any document for Chase. In an affidavit, Nassr M. Saidi of Defendant claims that he had attempted to make a payment on the mortgage, but as of September 1, 2010, the mortgagor refused to accept the payments, alleging an assignment, and advised that a new lender would contact him with the new information. Plaintiff, however, then waited until the loan was in default and then refused to reinstate it, causing this action to be commenced. He alleges that Plaintiff refused to provide items in Paragraph #5.1(c) of the mortgage, the "conditions precedent to commencement" of this action. Defendant claims that Plaintiff does not have, and has never had, the original note, mortgage, nor can Plaintiff obtain a Certificate of Conformity regarding the assignment from WaMu, to Chase, to Plaintiff.

Defendant refers to the June 12, 2013 U.S. Bankruptcy Court decision. In it, the Bankruptcy Court considered arguments regarding the Plaintiff-claimant's standing to bring an

action on this Note. Notably, the court directed Plaintiff to provide a copy of the lost note affidavit and inform the court of its position with respect to the requirement to post a bond before seeking to recover on the Note, in accordance with the Uniform Commercial Code. Plaintiff was also directed to obtain evidence from Chase with respect to the certificate of conformity and if necessary with respect to the lost note. Defendant argues that Plaintiff cannot provide a valid "lost note affidavit" since Plaintiff never received the Note, and no one from Chase and/or Plaintiff could state that he or she was ever in possession of the original Note or attest to what happened to the original Note. Defendant provides e-mail exchanges between Plaintiff and Chase which evince Chase's inability to secure a certificate of conformity to validate the assignment documents in accordance with the CPLR. Regarding its request for sanctions, Defendants assert that Plaintiff's former counsel[1] made false statements to the Bankruptcy Court and in support of the original, withdrawn summary judgment motion that Plaintiff was in possession of the original Note.

In reply, Plaintiff argues that Defendant does not submit any substantive arguments but rather relies on "technical" defenses of lack of standing. Defendant does not deny its execution of the Note and Mortgage, and concedes that the copy of the Note submitted to the Court is a true and accurate copy, and acknowledges its monetary default in failing to make payments due and owing from after September 2010. They again assert that the answer must be stricken since it was signed by defendant's principal, and not an attorney. Plaintiff argues that the propriety of the assignment from WaMu to Chase was resolved by the Bankruptcy Court. Plaintiff argues that a certificate of conformity is not required under these circumstances, and in any event, the documentation submitted in support of their motion establishes the assignment as a matter of law.

Defendant argues in a reply affirmation that, *inter alia*, the lost note affidavit is in improper form, that Plaintiff cannot produce a certificate of conformity, that sanctions remain warranted since Plaintiff knew it did not have possession of the original Note when it filed its initial motion for summary judgment, and that the Bankruptcy Decision did not conclusively

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[1]Defendant also claims that Plaintiff's current counsel has no standing to bring this motion since they never formally substituted as counsel. Plaintiff, however, has supplied the consent to change attorney in reply papers, and same was filed on October 7, 2013.

resolve the propriety of the assignment from WaMu to Chase.

II. Applicable Law and Analysis

"A prima facie showing to warrant summary judgment foreclosure of a mortgage requires the movant to establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment." (*Witelson v. Jamaica Estates Holding Corp. I*, 40 AD3d 284 [1st Dept 2007]).

At the outset, this Court finds that Defendant has properly asserted the defense of standing in its Answer. Plaintiff asserts that the Answer must be stricken because it was submitted by a non-attorney on behalf of the Defendant-corporation. Plaintiff, however, did not reject the answer upon receipt in November 2010 (CPLR 2101[f]), or otherwise notify Defendant of the objection before its summary judgment motion was filed. Defendant in any event cured this default by later securing counsel, and Plaintiff also failed to articulate that a substantial right has been prejudiced by this delay (*see, e.g., Du-Art Film Laboratories, Inc. v. Wharton Intern. Films Inc.*, 91 A.D.2d 572 [1st Dept. 1982]).

Where standing is put into issue by the defendant in a mortgage foreclosure action, the plaintiff must prove its standing in order to be entitled to relief (*U.S. Bank, NA v. Collymore*, 68 A.D.3d 752 [2nd Dept. 2009]). Primarily, the record sufficiently establishes that the assignment of the loan from WaMu to Chase was valid. This issue was squarely addressed by the Bankruptcy Court. In its June 2013 Decision, the Court "... held [at a hearing] that Claimant [Plaintiff} had provided sufficient evidence of the assignment from WaMu to Chase by means of (1) the purchase and assumption agreement between Chase and the FDIC, as receiver for WaMu, and (2) an affidavit from Robert C. Shoppe, the Receiver in Charge for WaMu. Second, the Court noted that a proof of claim may be signed by an 'authorized agent,' and the record was sufficient to show that Mr. Horn was in fact Claimant's attorney and agent." This issue was, therefore, "actually litigated, squarely addressed and specifically decided" and will not be collaterally addressed before this Court (*North Shore-Long Island Jewish Health System, Inc. v. Aetna US Healthcare, Inc.*, 27 A.D.3d 439 [2nd Dept. 2006], citing *Ross v. Medical Liab. Mut. Ins. Co.*, 75 N.Y.2d 825 [1990] and *Kaufman v. Lily & Co.*, 65 N.Y.2d 449 [1985]). Moreover, the First Department has recognized Chase's status as WaMu's successor in interest, with

standing to foreclose on mortgages formerly held by WaMu (*see JPMorgan Chase Bank, N.A. v. Shapiro*, 104 A.D.3d 411 [1st Dept. 2013]).

The next issue, partially addressed by the Bankruptcy Court, is the validity of the alleged assignment of the loan between Chase and Plaintiff. "When a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity" (*Collymore, supra., citing Merritt v. Bartholick*, 36 N.Y.44, 45 [1867]; *Kluge v. Fugazy*, 145 A.D.2d 537, 538 [1988]). "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" (*Id.*, [internal citations omitted]).

Regarding this issue, Plaintiff submits, *inter alia*, a Loan Purchase and Sale Agreement, an Allonge to Note, an Assignment of Mortgage, and an Assignment of Loan Documents. Plaintiff also submits an "affidavit of lost note." The Assignment of Mortgage is signed by "Judy Martinez" and dated November 8, 2010, notarized in Dallas, Texas. The Assignment of Loan Documents is also signed by Judy Martinez, dated November 8, 2010, and notarized in Dallas, Texas. The affidavit of lost note is signed by Amy Longley of Chase, dated October 2, 2009, and notarized in the state of Texas.

Plaintiff argues that even if the assignment documents were invalid - as urged by Defendant- it would not invalidate Plaintiff's standing here since a note and mortgage may be transferred without a written assignment or by any writing evidencing the parties intent to transfer the loan. It is settled, however, that a transfer must be effected either in writing or by physical delivery of the note (*see General Obligations Law* §5-703).

Here, Plaintiff doesn't argue physical possession or delivery of the Note (*see Deutche Bank v. Haller*, 100 A.D.3d 680 [2nd Dept. 2011]), but rather submits certain writings purportedly evincing the transfer. The allonge, as submitted, is a single page that is not affixed to the Note (*UCC 3-202*). It is well-established that a "note secured by [a] mortgage is a negotiable instrument (see UCC 3–104), which requires indorsement on the instrument itself or on a paper so firmly affixed thereto as to become a part thereof' (UCC 3–202[2]) in order to effectuate a valid assignment of the entire instrument" (*Slutsky v. Blooming Grove Inn, Inc.*, 147 A.D.2d 208, 212 [1989]). Plaintiff does not have physical possession of the instrument, but asserts

rather that the Note was lost. Under Revised Article 3, the only occasions for allowing a person not in possession of an instrument to enforce it are where the instrument has been lost, destroyed or stolen, or where the instrument has been paid by mistake and the payment is recovered. (See Revised UCC § 3–301[iii], §§ 3–309, 3–418[d]. (*Bank of New York Mellon v. Deane*, 41 Misc.3d 494 [Sup. Ct., Kings Cty., 2013]). In order to permit a party to recover on a "lost" instrument, the party must submit due proof of: (1) ownership of the instrument; (2) the facts which prevent production of the instrument; and (3) the terms of the instrument (UCC §3-804; *Marrazzo v. Piccolo*, 163 A.D.2d 369 [2nd Dept. 1990]).

In this matter, the purported "lost note affidavit" annexed to Plaintiff's summary judgment motion, and dated October 2, 2009, is deficient. The affiant, Amy Longley of Chase, states that she made a due and diligent search but failed to locate the Note. Ms. Longley, however, does not make any statements about the Note's terms, as required under the statute. The affiant does not offer any facts surrounding the circumstances upon which she claims the Note was lost (*see Ventricelli v. DeGennaro*, 221 A.D.2d 231 [1st Dept. 1995]). The affiant/Plaintiff does not "include a copy of a form promissory note, assuming such a form was used" (*Brown Bark II, L.P. v. Weiss & Mahoney, Inc.*, 90 A.D.3d 963 [2nd Dept. 2011]). Accordingly, Plaintiff has failed to adequately set forth its prima facie entitlement to judgment as a matter of law[2].

Defendant's cross-motion sets forth the additional arguments that the various assignment documents are invalid because they were notarized out-of-state and do not contain a certificate of conformity as required by CPLR 2309. Plaintiff argues in its supplemental affirmation that since the assignment was properly acknowledged before a notary public in another state, there is no need for a certificate of conformity (citing, among others, *LaSalle Bank, NA v. Pace*, 31 Misc.3d 627 [Sup. Ct., Suff. Cty., 2011], *aff'd on other grounds,* 100 A.D.3d 970 [2nd Dept. 2012]).

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[2]Parenthetically, the court notes that Plaintiff need not post a security to enforce the allegedly lost instrument under these circumstances. See *Kwon v. Yun*, 606 F. Supp. 2d 344 (S.D. N.Y. 2009) (court, noting that Official Comment to UCC § 3-804 suggests that the posting of security to enforce a lost instrument is not mandatory, found there was "no reasonable ground" to require defendant in its counterclaim to enforce lost promissory note to post security where litigation had been pending more than four years, no other party had asserted any claims to note and there was no evidence that note had been negotiated or transferred to any other party).

Contrary to Plaintiff's arguments, this Court finds that such a certificate is required here - although it recognizes that the law surrounding this issue appears to remain unsettled (*cf. LaSalle Bank, N.A. v. Pace, supra*). While the First and Second Departments generally note that absence of a certificate is not "fatal," this requirement cannot simply be disregarded under CPLR 2001. *Matapos Technology Ltd. v. Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 (1st Dept 2009)(absence of a proper certificate is "not a fatal defect," but observed that "the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary." *Indemnity Ins. Corp. Risk Retention Group v. A1 Entertainment LLC*, 107 A.D.3d 562 [1st Dept. 2013][court reversed supreme court and granted default judgment motion, noting that the plaintiff submitted to the motion court "a certification from the Maryland secretary of state verifying and authenticating the qualification of the maryland notary public who notarized the affidavit."] *Hall v. Elrac, Inc.*, 79 A.D.3d 427, (1st Dep't 2010) ("as long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary") But see *Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520 [1st Dept. 2012][expert affidavit inadmissible since notarized out of state without a certificate of conformity]; *Diggs v. Karen Manor Assoc., LLC.*, 2014 WL 1702678 [1st Dept. 2014][noting that an originally-submitted affidavit was defective without an accompanying certificate in accordance with the statute]; *Green v. Fairway Operating Corp.*, 72 A.D.3d 613 [1st Dept. 2010][out of state affidavit without a certificate was not properly before the court]). In fact, the Appellate Division has held that denial of a lender's motion for summary judgment, albeit without prejudice, is appropriate under similar circumstances (*see Freedom Mortg. Corp. v. Toro*, 113 A.D.3d 815 [2nd Dept. 2014]).

Accordingly, the assignment documents, notarized out-of-state, are in improper form and cannot establish Plaintiff's entitlement to summary judgment. Still, this Court finds that this defect can be rectified upon a new motion if Plaintiff provides either a certificate of conformity, or a certification from the Texas Secretary of State "verifying and authenticating the qualification" of the Texas notary public(s) who notarized the various documents (*see Indemnity Ins. Corp. Risk Retention Group v. A1 Entertainment LLC.*, 107 A.D.3d at 563).

Although the Court finds that the assignment documents, as submitted are insufficient to warrant summary judgment in favor of Plaintiff at this juncture, the fact that they exist raises an issue of fact that warrants denial of Defendant's cross-motion for summary judgment, without

prejudice (*see Deutche Bank Trust Co. Ams v. Codio*, 94 A.D.3d 1040 [2nd Dept. 2012]).

In light of the foregoing, Defendant has also failed to demonstrate that this action is "frivolous" so as to be entitled to costs and fees (22 NYCRR §130-1.1). Defendant's request for the imposition of sanctions under CPLR 8303-a is inappropriate since none of the relief sought constitutes "damages for personal injury, injury to property, or wrongful death" (*see April M's Enterprises, Inc. v. Scott*, 218 A.D.2d 778 [2nd Dept. 1995]). Nevertheless, although it appears that Plaintiff's previous counsel had made certain representations that were inaccurate, such representations were withdrawn and not advanced by current counsel in this proceeding.

III. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment, and Defendant's cross-motion for summary judgment, are denied without prejudice, with leave to renew as noted above, and it is further,

ORDERED, that Plaintiff's motion for leave to submit a sur-reply is granted to the extent provided in the above Decision and Order, and it is further,

ORDERED, that Defendant's cross-motion seeing costs and expenses is denied.

This constitutes the Decision and Order of this Court.

Dated: 5/23, 2014

Hon. Mary Ann Brigantti-Hughes, J.S.C.