

Capital One, N.A. v Novogrodzki
2014 NY Slip Op 32824(U)
October 27, 2014
Supreme Court, New York County
Docket Number: 810127/11
Judge: Paul Wooten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

11/6/14
EA
E

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: PAUL WOOTEN J.S.C.

PART 7

Justice

CAPITAL ONE, N.A.

Plaintiff,

- against -

INDEX NO. 810127/11

MOTION SEQ. NO. 001

**JULIO NOVOGRODZKI, THE BOARD OF MANAGERS OF
THE MONDRIAN CONDOMINIUM, 42-52 West 39 LLC,
BLAKE COMPANY, LLC, "JOHN DOE #1" to "JOHN DOE
#10," the last 10 names being fictitious and unknown to
plaintiff, the person 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.

The following papers, numbered 1 to _____, were read on this motion for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits — Exhibits _____ **No(s).** _____

Cross-Motion: ☒ Yes ☐ No

In this mortgage foreclosure action, defendant Julio Novogrodzki (Novogrodzki) moves to dismiss the complaint alleging that Capitol One, NA (plaintiff) lacks standing to foreclose against Novogrodzki's property. Specifically, Novogrodzki contends that to possess standing plaintiff must prove it is both the holder or assignee of the subject mortgage and that it is the holder or assignee of the underlying note at the time the action was commenced, and that plaintiff fails to prove either. Also before the Court is a cross-motion by plaintiff for summary judgment, pursuant to CPLR 3212, against Novogrodzki, Blake Company, and 42-52 West 39 LLC; for a default judgment, pursuant to CPLR 3215, against defendant the Board of Managers of the Mondrian Condominium; to amend the caption

to delete defendants sued herein as "John Doe No. 1" through "John Doe No. 10;" for the appointment of a referee to compute the amount due to Capital One; and to conform the complaint to the evidence pursuant to CPLR 3025(c).

BACKGROUND

All parties agree that on June 15, 2005, Novogrodzki executed an adjustable rate mortgage loan, from Chevy Chase Bank, in the amount of \$1,200,000, against the condominium unit located at 250 East 54th Street, Unit 34D, New York, New York 10022. The Mortgage Note was recorded in the Office of the New York City Register on August 4, 2005, CRFN Number 2005000437273. A Mortgage Recording tax was paid on the \$ 1,200,000.00 principal indebtedness upon the recording of the Note. (see Plaintiff's cross-motion, Affidavit of Hue Pham [Pham Affidavit], Assistant Vice-President of Home Loans, ¶ 4; exhibit C). The parties also agree that the defendant has defaulted on the Mortgage Note and has an obligation to the Mortgage Note holder.

Plaintiff proffers that on July 13, 2009, Novogrodzki executed, acknowledged and delivered to Chevy Chase Bank a MERS Loan Modification Agreement against the said property, dated July 7, 2009. In the loan modification agreement the defendant acknowledged that he borrowed the sum of \$1,200,000 on June 15, 2005 from Chevy Chase Bank and delivered the Note to Chevy Chase Bank. The Loan Modification agreement was duly recorded in the Office of the New York City Register on April 8, 2011, CRFN Number 2011000127349. A Mortgage Recording tax with respect to \$180,000 of mortgage debt secured by the mortgage not theretofore paid, was paid upon the recording of the Note (see Plaintiff's cross-motion, Pham Affidavit, ¶ 10; exhibit F). On July 30, 2009, Chevy Chase Bank merged with the plaintiff (see *id.* ¶ 12; exhibit G). On or about April 7, 2011, MERS assigned the modified mortgage note to the plaintiff and changed the name of the nominee to the plaintiff (see *id.* ¶ 13; exhibit H). The Loan Modification Note agreement assignment was duly recorded in the Office of the New York City Register on May 11, 2011, CRFN Number 2011000127349. It is plaintiff's contention that the defendant has defaulted on the modified Mortgage Note and as a result thereof,

plaintiff is entitled to the relief it seeks in the complaint herein.

In support of his motion to dismiss, defendant maintains that plaintiff lacks standing to commence this foreclosure action because, among other things, plaintiff was not assigned the Chevy Chase Note, the Chevy Chase Note was not physically delivered to plaintiff, plaintiff was not in physical possession of the Chevy Chase Note at the commencement of this action, nor is it in plaintiff's possession today, and the assignment of mortgage is a nullity on a few grounds, including because it was done without the Chevy Chase Note.

DISCUSSION

A *prima facie* case for foreclosure is established through plaintiff's production of the mortgage documents and evidence of defendant's nonpayment (see *Waterfall Victoria Master Fund, Ltd. v Dingilian*, 92 AD3d 593, 593-594 [1st Dept 2012]; *2010-1 SFG Venture LLC v 34-10 Development, LLC*, 106 AD3d 455 [1st Dept 2013]). In moving for summary judgment in a mortgage foreclosure action, plaintiff establishes a *prima facie* right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default (see *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]; *LPP Mortgage, Ltd v Card Corp.*, 17 AD3d 103, 104 [1st Dept 2005]; *Hypo Holdings, Inc. v Chalasani*, 280 AD2d 386 [1st Dept 2001]). Once the plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (see *CitiFinancial*, 27 AD3d at 226; *Mahopac Nat. Bank v Baisely*, 244 AD2d 466, 467 [2d Dept 1997]). If defendant then fails to raise a triable issue of fact through admissible evidence based on its affirmative defenses, plaintiff shall be entitled to summary judgment (see *Fortress Credit Corp. v Hudson Yards, LLC.*, 78 AD3d 577 [1st Dept 2010]). Where the defendant has put standing into issue, the plaintiff can demonstrate its standing and entitlement to relief by demonstrating that 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 (see *U.S. Bank*,

N.A. v Collymore, 68 AD3d 752, 753 [2d Dept 2009]; *see also Bank of New York v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *Countrywide Home Loans, Inc. v Gress*, 68 Ad3d 709, 709 [2d Dept 2009]).

In reviewing the record presented to the Court, the Court finds that plaintiff has established its *prima facie* entitlement to summary judgment. Specifically, plaintiff has established defendant's default (see Pham Affidavit ¶¶ 15-17; exhibit J), and has established a chain of the transfer of the original 2005 Mortgage Note, from Chevy Chase Bank to the plaintiff, pursuant to loan modification agreement, duly executed and recorded on April 8, 2011, a bona fide Certificate Bank Merger agreement, dated July 30, 2009, and an assignment of the Mortgage Note to the plaintiff, dated on April 7, 2011 and duly recorded on May 11, 2011. The Court notes that while plaintiff cannot locate the original note, plaintiff properly submits a copy of the original Mortgage Note and submits an explanation for the Court to accept the copy in the form of the affidavit of Darlene Opalski (Opalski Affidavit), a manager in the Post-Closing Department of plaintiff, and formerly an employee of Chevy Chase Bank from November 15, 1995 to July 30, 2009, from the file management and control unit. Ms. Opalski establishes a chain of custody of Chevy Chase Bank's mortgage records and asserts that Chevy Chase Bank, plaintiff's predecessor, was in possession of the original note and that to the best of her knowledge neither Chevy Chase nor plaintiff ever gave, pledged, sold, assigned or transferred the note to another party (see Plaintiff's cross-motion, Opalski Affidavit, ¶¶ 1-10, exhibit I). The defendant has failed to raise a triable issue of fact in opposition.

CONCLUSION

Accordingly, it is

ORDERED that defendant Julio Novogrodzki's motion to dismiss the complaint for lack of standing is denied; it is further,

ORDERED that the plaintiff's cross-motion for summary judgment, pursuant to CPLR 3212, against Novogrodzki, Blake Company, and 42-52 West 39 LLC is granted; for a default judgment, pursuant to CPLR 3215, against defendant the Board of Managers of the Mondrian Condominium; to

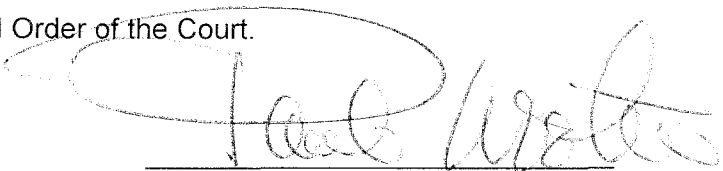
amend the caption to delete defendants sued herein as "John Doe No. 1" through "John Doe No. 10;" for the appointment of a referee to compute the amount due to Capital One; and to conform the complaint to the evidence pursuant to CPLR 3025(c) is granted; and it is further,

ORDERED that the plaintiff is directed to SETTLE ORDER WITH NOTICE; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 10/27/14


PAUL WOOTEN J.S.C.

1. Check one:

2. Check if appropriate:..... MOTION IS:

3. Check if appropriate:.....

- | | |
|--|---|
| ☐ CASE DISPOSED | ☒ NON-FINAL DISPOSITION |
| ☐ GRANTED | ☐ DENIED |
| ☒ SETTLE ORDER | ☐ GRANTED IN PART |
| ☐ DO NOT POST | ☐ SUBMIT ORDER |
| ☐ FIDUCIARY APPOINTMENT | ☐ OTHER |
| ☐ REFERENCE | |