M E M O R A N D U M

SUPREME COURT NEW YORK
QUEENS COUNTY IA PART 11
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HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE DEUTSCHE ALT-A SECURITIES, INC. MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-BAR1,

Plaintiff,

-against-

LATA S. RAHMAN, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, MORTGAGE ELECTRONIC SYSTEMS, INC., LANCASTER MORTGAGE BANKERS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and "JOHN DOE #1" through "JOHN DOE #12" the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, parties or corporations, if any, having or claiming an interest in or a lien upon the premises being foreclosed herein,

Defendants.
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Index No.: 12279/2012

Motion Date: July 16, 2014

Seq. No.: 1

BY: STRAUSS, J.

The following papers numbered 1 to 9 were read on the motion of the plaintiff, seeking an order of reference, amendment of the caption, striking of the answer, and a default judgment as against all non-appearing defendants, and the cross-motion of the defendant Lata S. Rahman, seeking an order dismissing the action on the ground that plaintiff has failed to state a cause of action, or in the alternative, an order precluding the plaintiff from offering any evidence at trial by reason of plaintiff's failure to respond to defendant's discovery demands, or in the alternative, striking the matter from the trial calendar on the ground that outstanding discovery remains.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits.....	1 - 3
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Plaintiff submits a copy of the pleadings, wherein a copy of the Note along with a blank indorsement is included, thereby making it a bearer instrument. (NY UCC 3-204(2)). Plaintiff, as the holder of the indorsed-in-blank Note, sufficiently established that it has standing to commence and maintain the instant action. As plaintiff also points out, regardless of the assignment of the mortgage, it established that it had possession of said Note. Under well-established case law, plaintiff therefore, was the "assignee" of the Note at the time of commencement of this action. (*US Bank, N.A. v Collymore*, 68 A.D.3d 752 [2d Dept. 2009]["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."].) Additionally, plaintiff submits proof of defendant's default under the Note and Mortgage; along with compliance with the Notice requirements set forth under CPLR 1304.

As a general rule, “where a defendant raises the issue of standing, the plaintiff must prove its standing to be entitled to relief.” (*U.S. Bank, N.A. v Dellarmo*, 94 AD3d 746 [2d Dep't 2012]; *U.S. Bank, N.A. . Sharif*, 89 AD3d 723, 724 [2d Dept. 2011]; *Bank of New York v Silverberg*, 86 AD3d 274 [2d Dept. 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dep.t 2009].) “[T]o commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage.” (*Aurora Loan Servs. v Weisblum*, 85 AD3d 95 [2d Dept. 2011].) A plaintiff has standing if it is “both the holder or assignee of the subject mortgage, and the holder or assignee

of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint." (*Aurora Loan Servs. v Weisblum*, supra.) In this instance the plaintiff has demonstrated that at the time it commenced this action, it was the holder of the mortgage, the note having been indorsed in blank. (See, *Citimortgage, Inc. v Friedman*, 109 AD3d 573 [2d Dept. 2013].)

Here, plaintiff alleged that it established its prima facie case, in a foreclosure action, as a matter of law, by showing the existence of the mortgage, the unpaid mortgage note, ownership of the mortgage, and evidence of default. *(Argent Mortg. Co., LLC v Mentesana*, 79 AD3d 1079[2d Dept. 2010], ["[i]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default,"] [citing to *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482 [2d Dept. 2003]; *Campaign v Barba*, 23 AD3d 327 [2d Dept. 2005], ["[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment."].)

When taken as a whole, the various exhibits submitted herewith, including a copy of the subject Note and Endorsement to the plaintiff, the affidavit of Sherry Benight, Document Control Officer for the servicing agent and attorney-in-fact for the plaintiff, and the power of attorney for same, all indicate that the transfer of the subject Note was completed well before the commencement of this action. It is undisputed that the plaintiff is the successor to Lancaster Mortgage Bankers, and further, plaintiff's exhibits constitute prima facie evidence that plaintiff was the lawful owner of both the Note and Mortgage at the time that the action was commenced. (see, *Mortgage Elec. Registration Sys, Inc. v Coakley*, 41 AD3d 674 [2d Dept. 2007]; *Matter of*

Stralem, 303 AD2d 120; cf. *Midland Mtge. Co. v Imtiaz*, 110 AD3d 773 [2d Dept. 2003]; *Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept. 2013].)

In this instance, the endorsement, an apparent allonge, located on the bottom of the signature page of the Note, signed by the defendant, is sufficiently connected to the Note. UCC §3-202(2) states that "an indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." Since the endorsement is "affixed" to the note, by its presence on the execution page of the defendant, it is a valid negotiable instrument. (see, *HSBC Bank Usa National Association v Svetlana Roumiantseva*, 39 Misc3d 1239(A), 2013 WL 2500829 [Supreme Court Kings County 2013].) Additionally, as the Appellate Division determined in *Homecomings Financial LLC v Guldi, supra*, the necessity for the factual details of delivery exists only when there is no other evidence of actual possession. Thus, there is no requirement for a plaintiff to demonstrate how it obtained a note when it undoubtedly had possession of the note prior to the commencement of the action. Considering these assertions, any additional factual details regarding the delivery of the Note would be redundant.

Plaintiff seeks an order pursuant to CPLR 3212, granting summary judgment as against the defendants; striking defendant's answer; appointing a referee to compute, amending the caption, and striking the names of defendants "John Doe #1" through "John Doe #12". Defendant cross-moves without stating the proper CPLR provision upon which she seeks relief, but apparently seeks an order pursuant to CPLR 3211(a), dismissing the complaint on the ground that the complaint fails to state a cause of action as against the defendant.

It is a given that a mortgagee need not establish standing prior to making a claim for

foreclosure and sale; however, once it is challenged either in a pre-answer motion, or raised as an affirmative defense set forth in an answer, plaintiff is then required to establish standing in order to be entitled to the relief it requested in the complaint. (see *U.S. Bank Nat. Assn. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]); *Bank of New York v Silverberg*, 86 AD3d 280 [2d Dept 2011]; *Wells Fargo Bank Minnesota v Mastropaolo*, 42 AD3d 239 [2d Dept 2007].) "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action." (*Deutsche Bank Nat Trust Co. v Rivas*, 95 AD3d 1061 [2d Dept 2012], quoting *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]; see *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012].) "An assignment of the mortgage without an assignment of the underlying note or bond is a nullity, and no interest is acquired by it." (*HSBC Bank USA v Hernandez*, supra; see *Bank of New York v Silverberg*, supra.) However, a written assignment of the underlying note or the physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation and vest standing in the plaintiff, since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto. (see *U.S. Bank, NA v Sharif*, 89 AD3d 723[2d Dept 2011]; *Bank of New York v Silverberg*, supra; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752[2d Dept 2009].)

Although plaintiff submits only a copy of defendant's answer, and not the amended verified answer, the court will apply plaintiff's arguments as against the amended verified answer. Thus, to the extent plaintiff's motion seeks dismissal of defendant's sixth and ninth affirmative defenses, same are dismissed based upon the court's findings herein.

Defendant's cross-motion relies upon CPLR 3211, in seeking an order dismissing the complaint. "On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (See, *Parekh v Cain,* --- N.Y.S.2d ----, 2012 WL 2125829 [2d Dept.2012]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept. 2008]; see *Moore v Liberty Power Corp*., LLC, 72 A.D.3d 660[2d Dept. 2010], lv. denied 14 N.Y.3d 713, 2010 N.Y. Slip Op. 73808, 2010 WL 2301693 [2010]). "However, bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration." (*Garner v China Natural Gas, Inc.*,71 AD3d 825 [2d Dept. 2010]; *Riback v Margulis*, 43 AD3d 1023 [2d Dept. 2007].)

The court need not determine whether or not there is evidentiary support for the complaint, but rather, to determine if the plaintiff has alleged a cause of action. It is not the function of the court to evaluate the merits of the case on a motion to dismiss for legal insufficiency (See, *Parekh v Cain*, supra; *Leon v Martinez*, 84 NY2d 83 [1994]; *219 Broadway Corp. v Alexander's Inc.*, 46 NY2d 506 [1979]; *Carbillano v Ross*, 108 AD2d 776 [2d Dept. 1985].)

As for defendant's second, third and twelfth affirmative defenses, that she did not default, that she did not receive proper notice of said default, and further, that she tendered payment that plaintiff refused, defendant submits no proof as to payments having been tendered, and further, plaintiff submits sufficient proof that notice of said default was sent, and that plaintiff did not receive payment sufficient to cure said default. Defendant's conclusory denial of receipt of the

notice required by RPAPL §§ 1303 and 1304, as set forth in her amended verified answer, does not establish the absence of the serving and sending of such notice by the plaintiff or its agents. (see *U.S. Bank Natl. Assn. v Tate*, 102 AD3d 859 [2d Dept. 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724 [2d Dept. 2013]; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011].) Defendant, in opposition, and in cross, fails to submit any proof other than her own self-serving denial of receipt, and thus, defendant's second, third and twelfth affirmative defenses are also dismissed.

As to defendant's fourth, fifth, seventh, eighth and eleventh affirmative defenses, alleging that plaintiff and/or its predecessors engaged in improper conduct in connection with the issuance of the subject loan, failed to comply with conditions precedent to the commencement of the action, engaged in fraudulent acts and misrepresentations in the issuance of the subject loan, acted in bad faith and with "unclean hands", and failed to abide by court rules, defendant fails to proffer any evidence to support same. Defendant failed to plead any of these defenses with any particularity. Moreover, the court finds that defendant has failed to support such claims or sufficiently address them in her cross-motion, or in opposition, and therefore, all are dismissed.

As to defendant's tenth affirmative defense, that the plaintiff may not maintain the underlying action because plaintiff or its predecessors in interest were not licensed in this state, it is clear that out-of-state banking institutions, whose business in New York is for the purpose of lending money secured by real property, are exempt from the provisions of the BCL 1312 and Banking Law 200(4). Moreover, defendant, in her cross-motion fails to address this affirmative defense and accordingly, her tenth affirmative defense is also dismissed.

Although defendant makes references that plaintiff did not participate in good faith with

regard to providing proper verification of its calculations, while in the mandatory foreclosure part, she fails to provide any proof of same. CPLR 3408(f) provides that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible". However, it does not set forth any specific remedy for a party's alleged failure to negotiate in good faith. Moreover, although the procedures and rules governing CPLR 3408 settlement conferences as promulgated by the Chief Administrator of the Courts in 22 NYCRR 202.12-a(c)(4) further provide that "[t]he court shall ensure that each party fulfills its obligation to negotiate in good faith and ... that conferences not be unduly delayed... so that the rights of both parties maybe adjudicated in a timely manner", it, too, fails to provide a specific remedy or sanction for any perceived violation. In any event, it has recently been observed that "it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties." (*Wells Fargo Bank, N.A. v Meyers,* 108 AD3d 9, 20 [2nd Dept 2013].) In short, it has been recognized that systematic failures to achieve, e.g., a loan modification, may occur in the absence of fault.

As to those branches of defendant's cross-motion asserting that plaintiff has not responded to discovery demands, plaintiff's counsel contends that defendant never served it with such demands. Even allowing for defendant's argument that the plaintiff did not properly respond to her discovery demands, neither the cross motion nor the opposition papers sufficiently demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion that were exclusively within the knowledge and control of the parties were not submitted in an affidavit, at the minimum. (See e.g., *Deleg v Vinci*, 82 AD3d 1146 [2d

Dept. 2011]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736 [2d Dept. 2007].) Based upon the foregoing, the remaining contentions of defendant are either without merit, or need not be addressed.

Accordingly, plaintiff's motion is granted and the defendant's cross-motion is denied.

Motion Support shall review the Proposed Judgment.

Dated: September 29, 2014

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SIDNEY F. STRAUSS, J.S.C.