

**Andreadis Capital, LLC v Segura**

2014 NY Slip Op 33143(U)

October 30, 2014

Supreme Court, Queens County

Docket Number: 18742/13

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

## MEMORANDUM

SUPREME COURT: QUEENS COUNTY  
IA PART 2

**HON. ALLAN B. WEISS**

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ANDREADIS CAPITAL, LLC,

INDEX NO. 18742/13

Plaintiff,

MOTION DATE: 6/4/14

- against -

MOTION SEQ. NO. 1

LUIS E. SEGURA, JESSICA V. SEGURA,  
MIDFIRST BANK, SECRETARY OF HOUSING  
AND URBAN DEVELOPMENT, TRAFFIC SPORTS  
USA, INC., CACV OF COLORADO, LLC,  
CRIMINAL COURT OF THE CITY OF NEW YORK,  
NYC PARKING VIOLATIONS BUREAU, NYC  
ENVIRONMENTAL CONTROL BOARD,

"JOHN DOE 1-10", said names being  
fictitious and unknown to plaintiff,  
the persons or parties intended being  
the tenants, occupants, persons or  
corporations, if any, having or claiming  
an interest in, or lien upon the premises  
described in the complaint.

Defendants.

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The plaintiff moves for summary judgment on its complaint against answering defendants Luis E. Segura, Jessica V. Segura and MidFirst Bank and striking the defendants' answers, the appointment of a referee, granting a default judgment against all defendants who have failed to answer and to amend the caption by changing to name of "John Doe 1" to *Ciro Lozano* and deleting the defendants "John Doe 2-10."

The defendant MidFirst Bank has cross moved for summary judgment dismissing the complaint against it and declaring that the mortgage held by MidFirst is superior to the plaintiff's mortgage.

The plaintiff commenced this action by filing a copy of the summons and complaint with notice of pendency on October 8, 2013. Plaintiff seeks to foreclose on a mortgage on the subject real property known as 91-13 31<sup>st</sup> Avenue, East Elmhurst to secure repayment of a note, evidencing a loan in the original principal amount of \$50,000. Plaintiff alleges that it is the holder of the mortgage and underlying obligation pursuant to an assignment and that the defendant defaulted under the terms of the mortgage and note.

Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law against the borrower defendants by submission of the mortgage, the unpaid note, the assignment of the mortgage and note, and proof of default. (*See GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2012]; *Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2010]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002].)

Defendant borrowers, have failed to demonstrate the existence of a triable issue of fact. (*See Capstone Business Credit, LLC*, 70 AD3d at 884; *EMC Mtge. Corp.*, 291 AD2d at 370.)

The affirmative defense of lack of personal jurisdiction was waived by the defendants as they did not move to dismiss within sixty days of the date it was raised in their answer.

The affirmative defense of standing raised by the borrowing defendants also fails. Once a plaintiff's standing is placed in

issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (see *U.S. Bank N.A. v Sharif*, 89 AD3d 723 [2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (*Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2011]). 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 (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2009]). Here, the plaintiff established standing through the assignment of the mortgage and note dated November 16, 2011.

Turning next to branch of the summary judgment against the defendant MidFirst and the cross motion by MidFirst. At the time of purchase of the premises, on August 27, 1999, the defendants, Seguras, took a loan in the amount of \$233,750 from National City Mortgage Co. d/b/a Commonwealth United Mortgage Company. By assignment dated June 16, 2003 that mortgage was assigned to Mortgage Electronic Registration System. By agreement dated June 4, 2005 that mortgage was modified. The mortgage was then assigned to MidFirst Bank by assignment dated November 26, 2006. On or

about January 29, 2013 MidFirst Bank entered into a loan modification agreement with the Seguras.

MidFirst alleges that it is the holder of a senior lien with priority over the plaintiff. The plaintiff contends that because the loan modification increased the outstanding balance of the loan, it prejudiced the plaintiff and therefore its loan has priority. This argument is without merit. An agreement modifying terms of a loan that prejudices a junior lienholder will result in the relinquishing of the senior lienholder's priority if they failed to obtain the consent of a junior lienholder (see *Shultis v Woodstock*, 188 AD2d 234 [3d Dept 1993]). This, however, is not the case if the such a modification is not prejudicial to the junior lienholder. Here, the loan modification did not extend new money to the borrowers, but instead, extended the time and manner of repayment and included the accrued interest, past due escrow and outstanding fees owed by the borrowers. The modification was not a consolidation and extension agreement, but was just a modification of the original terms of the mortgage. Additionally, under the terms of the original mortgage the lender reserved the right to modify the loan. A modified mortgage retains its priority over junior interests. Therefore, the Commonwealth Mortgage is the senior lien.

Accordingly, the motion for summary judgment against the defendants Luis E. Segura and Jessica Segua is granted. The branch

of the motion for summary judgment against the defendant MidFirst Bank is denied. The branch of the motion for a default judgment against non-answering defendants is granted. The caption is amended as proposed. A referee to compute shall be named in the order to be entered hereon.

The cross motion for summary judgment by the defendant MidFirst Bank is granted and the complaint is dismissed as against MidFirst Bank and it is further declared that the Commonwealth Mortgage, including the Loan Modification is superior to the Andreadis Mortgage.

Settle Order.

Date: October 30, 2014  
D:50

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J.S.C.