

Bank of New York Mellon v Olivero
2014 NY Slip Op 33483(U)
December 9, 2014
Supreme Court, Suffolk County
Docket Number: 29189/12
Judge: Arthur G. Pitts
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**Supreme Court of the State of New York
IAS Part 43 - County of Suffolk**

FILED

PRESENT: Hon. ARTHUR G. PITTS

**THE BANK OF NEW YORK MELLON
FKA THE BANK OF NEW YORK AS
TRUSTEE FOR THE CERTIFICATE
HOLDERS OF THE CWABS INC.,
ASSET-BACKED CERTIFICATES,
SERIES 2005-17,**

Plaintiff,

- against-

**VICTOR R. OLIVERO, ANGELA M.
OLIVERO, GE MONEY BANK, LVNV
FUNDING LLC A/P/O CAPITAL ONE,
AND "JOHN DOW #1" THROUGH
"JOHN DOE #10", the last ten names
being fictitious and unknown to the
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 Complaint,**

Defendants.

ORIG. RETURN DATE: 9-18-14

ADJOURNED DATE: 10-2-14

MOTION SEQ. NO.:001-MG

PLTF'S/PET'S ATTY:

**BRYAN CAVE LLP
1290 AVENUE OF THE AMERICAS
NEW YORK, NY 10104**

DEFT'S/RESP'S ATTY:

**DeLISA LAW GROUP, PLLC
475 MONTAUK HIGHWAY
WEST ISLIP, NY 11795
Atty for Deft., Angela Olivero**

Upon the following papers numbered 1 to 39 read on this motion summary judgment
Notice of Motion and supporting papers 1-35 Notice of Cross-Motion and supporting papers _____
Affirmation/affidavit in opposition and supporting papers 36-39 Affirmation/affidavit in reply and supporting papers ____ Other ____;
(and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that plaintiff The Bank of New York Mellon FKA The Bank of New York as Trustee for The Certificate Holders of the CWABS Inc., Asset-Backed Certificates, Series 2005-17's motion for summary judgment and an order of reference is granted under the circumstances presented herein. It is further

ORDERED that simultaneously with the execution of the within decision and order, the proposed order of reference is signed and entered.

The matter at bar is one sounding in foreclosure which was commenced by the filing of a summons and complaint on or about September 19, 2012. Issue was joined on or about October 24, 2012 by service of defendant Angela M. Olivero's verified answer with affirmative defenses and counterclaims. By way of its verified complaint, the plaintiff alleges that defendants defaulted on the loan by failing to make the monthly payment and interest due on December 1, 2008 and any payments due thereafter. They were further advised by letter dated March 24, 2011 of their default and on or about June 4, 2012, a 90 -Day Notice was mailed to the defendants via certified mail and regular mail. On April 9, 2013 this matter was placed on the foreclosure settlement conference calendar and then scheduled for an additional appearance on July 9, 2013. The defendant failed to submit an application for a loan modification and the conference was marked "held." A preliminary conference has not been held although the plaintiff has responded to the some of the defendant's discovery demands and objected to others. The plaintiff now moves for summary judgment and an order of reference.

The following salient facts are not in dispute: On or about November 22, 2005 defendants Victor R. Olivero and Angela M. Olivero obtained a loan in the amount of \$266,900.00 and executed a note in the plaintiff's predecessor in interest, America's Wholesale Lender ("AWL") favor. At the same time the defendants executed a mortgage encumbering the premises located at 46 Malba Drive, Shirley, Suffolk County, New York to Mortgage Electronic Registration Systems, Inc ("MERS") as nominee for AWL. The mortgage was recorded in the Office of the Suffolk County Clerk on or about December 12, 2005. The plaintiff avers that the note was endorsed in blank by AWL prior to the commencement of this action and further submits that it has been the owner and holder of the note and mortgage since on or about December 8, 2005. On that same date the mortgage was assigned by MERS to the plaintiff, which is evidenced by a written assignment dated September 13, 2011, that was recorded on October 5, 2011.

It is well settled that once a mortgagee establishes a prima facie case for foreclosure by proffering documentary evidence of the mortgage, the mortgage note and the mortgagor's default in payment, the burden shifts to the mortgagor to come forward with admissible evidence to warrant denial of judgment. (see *Greater New York Savings Bank v. 2120 Realty*, 202 A.D.2d 248, 608 N.Y.S.2d 463 [1st Dept. 1994]) Herein, the plaintiff has met its burden and has established its entitlement to judgment as a matter of law. In opposition thereto, defendant Angela Olivero alleges that plaintiff lacks standing to commence the instant action.

““In a mortgage foreclosure action, a plaintiff has standing where 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 was commenced’ (*Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532, see *US Bank N.A. v. Cange*, 96 A.D.3d 825, 826, 947 N.Y.S.2d 522; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753-754, 890 N.Y.S.2d 578; *Countrywide Home Loans, Inc., v. Gress*, 68 A.D.3d 709, 888 N.Y.S.2d 914) ‘Either

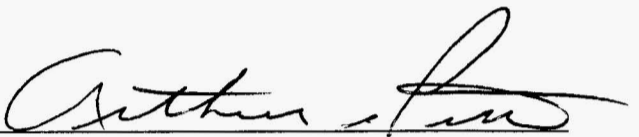
a written assignment of the underlying note of the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.’ (see *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 939 N.Y.S.2d 120)” (*Homecomings Financial, LLC v. Guldi*, 108 A.D.3d 506, 507-508, 969 N.Y.S.2d 470 [2nd Dept 2013])


Notwithstanding the defendant’s objections, the plaintiff has proffered evidence which establishes that the subject mortgage had been assigned to it, that it was the owner of the note and mortgage prior to the commencement of the action. As such, it had standing and there is no basis to deny the plaintiff’s motion for summary judgment. Accordingly, pursuant to the foregoing and under the circumstances presented herein, the plaintiff’s motion for summary judgment is granted and an order of reference is simultaneously executed.

This shall constitute the decision and order of the Court.

So ordered.

**Dated: Riverhead, New York
December 9, 2014**



J.S.C. 

CHECK ONE: ___ FINAL DISPOSITION XX NON-FINAL DISPOSITION