**OneWest Bank, FSB v Baccigaluppi**

2014 NY Slip Op 33827(U)

October 29, 2014

Supreme Court, Westchester County

Docket Number: 60243/12

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

# DECISION AND ORDER

**FILED & ENTERED**
**10/29/14**

**To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.**

**SUPREME COURT OF THE STATE OF NEW YORK**
**IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH**
**Supreme Court Justice**

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**ONEWEST BANK, FSB,**

Plaintiff,

**MOTION DATE:10/24/14**
**INDEX NO.: 60243/12**

-against-

**RONALD BACCIGALUPPI,**

**"JOHN DOE," "RICHARD ROE," "JANE DOE," "CORA COE," "DICK MOE," and "RUBY POE," the last six defendants named in quotation marks being intended to designate tenants or occupants in possession of the herein described premises or portions thereof, if any there be, said names being fictitious, their true name being unknown to plaintiff,**

Defendants.
--------------------------------------------------------------------------X

The following papers numbered 1 to 7 were read on this motion by plaintiff for an Order of reference, etc.

**Papers Numbered**

Notice of Motion - Affirmation (Goldstein) - Exhs. (A-I) .................... 1-3
Answering Affirmation (Spino) - Exhs. (A-C) .................... 4-5

Replying Affirmation (Kaufman) - Exhs. (Collectively)[1] ............................................ 6-7

Upon the foregoing papers, it is Ordered that this motion by plaintiff for an Order of reference and amendment of the caption is granted. Order signed.

Plaintiff prima facie has demonstrated entitlement to judgment through its submission of the executed note and mortgage, and proof of defendant Baccigaluppi's defaults thereunder.[2] See GRP Loan, LLC v. Taylor, 95 A.D.3d 1172, 1173-1174 (2nd Dept. 2012); Capstone Business Credit, LLC v. Imperia Family Realty, 70 A.D.3d 882, 883 (2nd Dept. 2010); EMC Mortgage Corp. v. Riverdale Associates, 291 A.D.2d 370 (2nd Dept. 2002).

Although defendant Baccigaluppi opposes the instant motion by arguing that plaintiff had failed to serve a proper RPAPL §1304 notice upon him and lacks standing herein, defendant's opposition is without merit and insufficient to interdict plaintiff's entitlement to the relief sought.

Firstly, defendant has defaulted in pleading. Notably defendant has not properly moved herein to vacate his default, nor has he made the requisite demonstration of

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[1]This Part's published Rules require separately tabbed motion exhibits.

[2]On December 3, 1999, defendant had executed a note and mortgage in favor of IndyMac Mortgage Holdings, Inc. on the subject premises, which thereafter both had been assigned to the Bank of New York Trustee, on or about December 9, 1999. On or about November 16, 2006, the note and mortgage were assigned from IndyMac Bank as attorney-in-fact for the Bank of New York Trustee to Mortgage Electronic Registration Systems, Inc. On or about December 8, 2006, defendant had executed a second note and mortgage on the subject premises in favor of Mortgage Electronic Registrations Systems, Inc, as nominee for IndyMac Bank, F.S.B. That same date, this second note and mortgage had been consolidated with the first note and mortgage to form a single lien in favor of MERS as nominee for IndyMac Bank, FSB. On or about September 18, 2008, MERS as nominee for IndyMac Bank F.S.B. assigned the consolidated notes and mortgages to plaintiff One West bank, FSB.

excusable default. See CPLR 5015. Consequently, defendant is not entitled at this late date to assert the affirmative defense of lack of standing. See Bank of New York Mellon Trust Co. v. McCall, 116 A.D.3d 993 (2nd Dept. 2014); Citibank, N.A. v. Herrera, 64 A.D.3d 536 (2nd Dept. 2009).

In any event, standing in a mortgage foreclosure action is established where, as plaintiff here has demonstrated, it is the holder of both the note and the mortgage at the time of commencement of the action. See Bank of NY v. Silverberg, 86 A.D.3d 274 (2nd Dept. 2011); Aurora Loan Services v. Weisblum, 85 A.D.3d 95, 108 (2nd Dept. 2011). The facts establish that the subject note had been endorsed in blank by the original lender, IndyMac Bank, FSB, and delivered to plaintiff, attendant to which the subject mortgage too had transferred, see HSBC Bank USA, Nat. Ass'n v. Gilbert, 120 A.D.3d 756 (2nd Dept. 2014); U.S. Bank Nat. Ass'n v. Faruque, 120 A.D.3d 575 (2nd Dept. 2014), and that the mortgage transfer to plaintiff thereafter had been further memorialized by written Assignment, dated September 18, 2009, and recorded on October 26, 2009.

Nor does defendant's claim that plaintiff had served an RPAPL §1304 Notice which included a factual misstatement warrant denial of plaintiff's request for relief.[3] Plaintiff, in accordance with the statutory requirements, had mailed to defendant, both by first class and certified mailing, a 90-day Notice, in 14-point type, containing the statutorily prescribed language and the addresses and phone numbers of more than five approved housing counseling agencies in the area. Defendant does not challenge that the Notice incorrectly

[3]Defendant does not deny having received said Notice but instead maintains that said RPAPL §1304 Notice incorrectly had advised defendant that, as of November 23, 2011, his loan had been in default for 83 days when it only had been in default 53 days. Cf. Aurora Loan Services, LLC v. Weisblum, 85 A.D.3d 95 (2nd Dept. 2011).

[* 4]

had advised that he had been in default of his loan at the time that said Notice had been sent, nor does defendant dispute the amount required to be paid in order to cure his default. Defendant also does not argue that plaintiff improperly had commenced this action less than ninety days after its having mailed the statutorily required Notice; instead defendant simply challenges the alleged misstatement regarding the number of days he then had been in default.

Defendant however admits that he had executed a HAMP Modification Agreement, on July 16, 2010. RPAPL §1304, subdivision 3, provides that "[t]he ninety day period specified in the notice ... shall not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts of the borrower ..." In this Court's view, not only is any factual misstatement set forth in the Notice regarding the number of days defendant's loan is in default an insufficient basis by itself upon which to deny plaintiff's instant motion, but plaintiff in any event had not been required to send defendant a RPAPL §1304 notice because defendant previously had "filed for an adjustment of [his] debts ..." and indeed had received same.

Finally, the Court finds no merit to defendant's additional argument that the subsequent assignment of mortgage to Ocwen Loan Servicing, LLC, on September 2, 2014, which assignment has yet to be recorded, constitutes a viable defense to plaintiff's right to proceed herein. Plaintiff however is directed to properly record this assignment, paying all applicable taxes, within thirty (30) days after the date hereof.

Dated: October 29, 2014
White Plains, New York

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J.S.C.

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