

**Loancare v Fox**

2015 NY Slip Op 30005(U)

January 6, 2015

Supreme Court, Suffolk County

Docket Number: 24107-12

Judge: Arthur G. Pitts

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
IAS PART 43 - SUFFOLK COUNTYPRESENT: HON. ARTHUR G. PITTS

Justice of the Supreme Court

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x  
LOANCARE, A DIVISION OF FNF SERVICING, INC.

Plaintiff,

-against-

GEORGE FOX, JR.  
ALEXANDRA FOX  
BILL JACINO  
CARILLON NURSING AND REHABILITATION  
CENTER LLC  
HUNTINGTON HOSPITAL  
and "JOHN DOE #1" to "JOHN DOE #10", the last  
10 names being fictitious and unknown to plaintiff,  
the persons 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.

MOTION DATE: 11-21-13 (001)  
1-09-14 (002)ADJ. DATE:  
MOT. SEQ. #001 - MG  
002 - XMD**COPY**McCABE, WEISBERG & CONWAY, P.C.  
Attorneys for Plaintiff  
145 Huguenot Street, Suite 499  
New Rochelle, N. Y. 10801ELIAS N. SAKALIS, ESQ.  
Attorney for Defendants  
430 West 259<sup>th</sup> Street  
Bronx, N. Y. 10471

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 19; **Answering Affidavits and supporting papers** \_\_\_\_\_; Replying Affidavits and supporting papers 20 - 21; **Other** \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (001) by plaintiff, Loancare, a Division of FNF Servicing, Inc. (Loancare), for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendants George Fox, Jr. and Alexandra Fox (defendants), fixing the defaults as against the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

**ORDERED** that the cross motion (002) by defendants for an order pursuant to CPLR 3212 dismissing

the complaint due to a purported lack of standing on the part of the plaintiff or, in the alternative, denial of plaintiff's motion on the basis that discovery has not taken place, is considered under CPLR 3211 and 3212 and is denied; and it is further

**ORDERED** that the caption is hereby amended by striking therefrom defendants "John Doe #1" through "John Doe #10"; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

\_\_\_\_\_  
LOANCARE, A DIVISION OF FNF SERVICING, INC. x

Plaintiff,

-against-

GEORGE FOX, JR.  
ALEXANDRA FOX  
BILL JACINO  
CARILLON NURSING AND REHABILITATION  
CENTER LLC  
HUNTINGTON HOSPITAL

Defendants.

\_\_\_\_\_  
x

This is an action to foreclose a mortgage on property known as 77 Prince Street, Patchogue, New York. On August 9, 2008, defendants executed a fixed rate note in favor of Somerset Investors Corp. (Somerset) agreeing to pay the sum of \$225,630.00 at the yearly interest rate of 7.000 percent. On said date, defendants also executed a mortgage in the principal sum of \$225,630.00 on the subject property. The mortgage indicated Somerset to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Somerset as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on October 31, 2008 in the Suffolk County Clerk's Office. Thereafter, on April 16, 2012, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Somerset, to Government National Mortgage Association. On the same date, the mortgage was assigned from Government National Mortgage Association to plaintiff, Loancare.

Saxon Mortgage Services, Inc. sent a notice of default on September 6, 2011 to defendants stating that they had defaulted on their note and mortgage and that the amount past due was \$10,319.89. As a result of their continuing default, plaintiff commenced this foreclosure action on August 8, 2012. In its complaint, plaintiff

alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to pay the installment due on June 1, 2011. Defendants interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on August 29, 2013 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affirmation of Mark Golab, Esq. in support of the motion; a Certificate of Merit pursuant to CPLR 3012-b; the affidavit of Tiffany Vuong, vice president of Loancare; the pleadings; the note, mortgage and assignments of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendants; and, a proposed order appointing a referee to compute. Defendants have submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint on the grounds that plaintiff does not have standing.

"[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" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). "The burden then shifts to the defendant to demonstrate 'the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff'" (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendants' default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (see *U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff.

Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3–202; § 3–204; § 9–203[g]). Here, Tiffany Vuong avers that plaintiff has been in continuous possession of the note and mortgage since April 16, 2012, which was prior to the commencement of this action (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, its standing to prosecute this action.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In their opposing papers, defendants re-assert their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendants contend that a question of fact exists with respect to the plaintiff's standing as MERS never actually owned the loan and mortgage and was merely a nominee for the note holder. Counsel also argues that MERS lacked the authority to assign the mortgage.

The court finds that none of defendants' allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the uncontroverted facts establish that plaintiff physically possessed the original note, which was indorsed in blank, prior to the commencement of the action and that the mortgage passed as an incident to the note upon its physical delivery on April 16, 2012. Here, neither the defenses raised in their answer nor, those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Likewise unavailing is the defendants' claim that the plaintiff's motion is premature due to the absence of discovery, as defendants failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion are exclusively within the knowledge and control of plaintiff (*see* CPLR 3212 [f]; *Deleg v Vinci*, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]; *Fenko v Mealing*, 43 AD3d 856, 841 NYS2d 378 [2d Dept 2007]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Lopez v WS Distrib. Inc.*, 34 AD3d 759, 825 NYS2d 516 [2d Dept 2006]; *see also Arazashvilli v Executive Fleet Mgt., Corp.*, 90 AD3d 682, 934 NYS2d 341 [2d Dept 2011]).


With respect to their remaining affirmative defenses, defendants have failed to raise any triable issues of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering defendants have failed to demonstrate, through the production of competent and

admissible evidence, a viable defense which could raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]).

Based on the foregoing, plaintiff’s motion for summary judgment is granted as against defendants George Fox, Jr. And Alexandra Fox. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Plaintiff’s request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (*see Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: January 6, 2015

  
\_\_\_\_\_  
J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION