

531 Kosciusko Partners, LLC v Montesdeoca

2015 NY Slip Op 30416(U)

March 24, 2015

Supreme Court, Kings County

Docket Number: 500521/13

Judge: Carolyn E. Demarest

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At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of March, 2015.

PRESENT:

HON. CAROLYN E. DEMAREST,
Justice.

-----X
531 KOSCIUSKO PARTNERS, LLC,

Plaintiff,

- against -

Index No. 500521/13

ERIKA MONTESDEOCA, ERAM PROPERTIES, LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY DEPARTMENT OF FINANCE, THE CITY OF NEW YORK PARKING VIOLATIONS BUREAU and "JOHN DOE NO. 1" to "JOHN DOE NO. 10" inclusive, the last ten 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.

-----X

The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Memoranda of Law _____
Statement of Material Facts _____

Papers Numbered

72-74, 80-82, 99-100
84, 93, 96, 112, 119-120
123, 126
75, 122, 125
76

531 Kosciusko Partners, LLC (plaintiff) moves, in sequence #3, for an order (1) granting summary judgment as to its foreclosure complaint and dismissing the answer and counterclaims of defendants Erika Montesdeoca (Montesdeoca) and ERAM Properties, LLC (ERAM) (collectively, the Owner defendants), (2) granting default judgment against defendants New York State Department of Taxation and Finance, New York City Environmental Control Board, New York City Department of Finance and the City of New York Parking Violations Bureau (collectively, the Governmental defendants), (3) dismissing the complaint as against “John Doe No. 1” to “John Doe No. 10” and (4) appointing a referee to compute damages. Plaintiff also moves, in sequence #4, for an order appointing a receiver for the property underlying this foreclosure action, 531 Kosciusko Street, in Brooklyn (the Property). Montesdeoca moves, in sequence #5, for an order, pursuant to CPLR 3126, dismissing the action based on plaintiff’s alleged failure to comply with applicable discovery deadlines.

Background And Allegations

Underlying Facts

Greenpoint Mortgage Funding, Inc. (Greenpoint) made a loan to Montesdeoca of \$468,750 via a 30-year, adjustable-rate-mortgage note dated August 31, 2005 (the Note). Section 5 of the Note permitted the lender to demand immediate payment of the principal and all sums due upon any default under the Note or related documents. Section 14 explained

that the term “Lender” applied to any of Greenpoint’s representatives, successors or assignees. In connection with the Note, Montesdeoca also executed a mortgage on the Property in favor of Greenpoint (the Mortgage). Subsection 9 (c) of the Mortgage required the mortgagor to reimburse the mortgagee for the expenses of any related proceedings, including foreclosure actions.

Montesdeoca executed a modification to the Note with Capital One Bank (Capital One),¹ dated March 19, 2010 (the Modification). The Modification stated that the balance due on the Note, as of March 4, 2010, was \$433,161.03 and that payments were past due for January, February and March of 2010. It specified how Montesdeoca could make up for missed payments and extended the Note’s maturity date to December 1, 2035, but otherwise preserved the terms of the loan documents. Montesdeoca apparently transferred the property to ERAM in February 2011.

In January 2012, Capital One purportedly sent Montesdeoca a default notice and demand for payment of the entire amount due (the Demand Letter). It stated, in part, that “[a]ny payments received after this date will not reinstate the loan, which will remain due and payable.” Thereafter, Greenpoint apparently assigned the Note and Mortgage to the original

¹ The parties dispute Capital One’s role at that juncture: Montesdeoca alleges that Capital One represented that it had acquired the Note and Mortgage from Greenpoint, whereas plaintiff contends that Capital One merely acted as Greenpoint’s servicer. The parties do not otherwise dispute the propriety or effect of the Modification.

plaintiff herein, 650 Brooklyn LLC (650 Brooklyn), via an allonge and an assignment of mortgage, each dated June 22, 2012².

Situs Holdings, LLC (Situs), purportedly acting as 650 Brooklyn's servicer, sent Montesdeoca a "pre-negotiation agreement," dated July 10, 2012 (the PNA), which indicated a willingness to discuss the loan obligations upon Montesdeoca's agreement to its conditions.

Among other terms, the PNA stated,

"Borrower and Borrower Principal specifically acknowledge and agree that throughout the discussions contemplated by this Agreement:

* * * *

"• Borrower and Borrower Principal acknowledge and agree that there are no defaults by Lender under any of the Loan Documents and that Borrower and Borrower Principal currently possess no claim against Lender, including, but not limited to, setoff, estoppel, waiver, cancellation of instruments, rescission or excuse of performance under the Loan Documents by virtue of Lender's actions or any actions of Lender's agents, representatives, servicers, or predecessors-in-interest;"

Montesdeoca executed the PNA, which indicated she was represented by her present counsel, on April 12, 2013. The document was not executed by 650 Brooklyn. 650 Brooklyn's counsel, Kilpatrick Townsend & Stockton LLP (KTS), who is also counsel to plaintiff, purportedly sent Montesdeoca a notice of acceleration, dated November 17, 2012 (the

² It is noted that neither this allonge, nor the Assignment of Mortgage to 650 Brooklyn of June 22, 2012, references the modification executed on March 19, 2010.

Acceleration Notice). It stated that Montesdeoca had not submitted payment in response to the Demand Letter and demanded immediate payment of all amounts due.

Procedural History

(1)

650 Brooklyn commenced this action on February 1, 2013 and sought to foreclose on the Mortgage. It alleged that Montesdeoca had defaulted on the loan by missing payments on February 1, 2012 and subsequent due dates. Montesdeoca, 650 Brooklyn contended, had failed to cure the default, and it alleged that she owed \$416,898.25 in unpaid principal, plus interest, late charges and collection expenses, including costs and attorney's fees.

(2)

The Owner defendants, in their answer, asserted counterclaims against 650 Brooklyn for fraud and equitable estoppel. They alleged that Greenpoint, 650 Brooklyn and others conspired to defraud Montesdeoca and manipulated her into signing the Note and Mortgage. The Owner defendants asserted that Greenpoint had ceased operations long before it purportedly assigned the Note and Mortgage to 650 Brooklyn in June 2012 and that the party who executed the assignments, Douglas Bottner (Bottner), did not then work for Greenpoint. They also alleged that Capital One had possession of escrow funds owed to Montesdeoca and had agreed that it would apply such funds to the loan payments as they became due. They contended that months passed with no further communication until Situs sent Montesdeoca the PNA in July 2012. The Owner defendants claim that they also sent funds to Situs, which it never applied to the debt, and that no party ever notified them of the alleged default.

The Owner defendants' answer also raised 43 affirmative defenses, including assertions that no contractual obligations existed, that plaintiff and its predecessors breached their obligations under the loan documents, that plaintiff did not properly own or hold the loan documents, that the action was precluded by the doctrines of accord and satisfaction, unjust enrichment, inducement of breach, failure to mitigate damages, waiver, ratification, laches, estoppel, unclean hands, lack of jurisdiction, tortious interference, fraud, repudiation, detrimental reliance, frustration of purpose, impossibility and contractual illegality, that the plaintiff violated the federal Truth in Lending Act (TILA), that the complaint failed to state a claim, that the parties lacked privity, that the complaint failed to implead a necessary party and that the Note and Mortgage were void ab initio because of a lack of meeting of the minds, an illusory promise, lack of execution, their nature as adhesion contracts, ambiguous terms and as products of a mistake of law or fact or a misrepresentation.

(3)

650 Brooklyn allegedly assigned the Note to plaintiff herein via an allonge dated March 12, 2013 and assigned the Mortgage to plaintiff via an assignment of mortgage dated June 7, 2013. The attorneys for 650 Brooklyn, plaintiff and the Owner defendants executed a stipulation and consent to substitute plaintiff for 650 Brooklyn as the action's plaintiff, which was so-ordered by this court on February 13, 2014 (the So-Ordered Stipulation).

(4)

On December 10, 2013, plaintiff moved, via order to show cause, for an emergency order appointing a receiver of rents for the Property. This court's February 13, 2014 decision

and order dismissed the motion as not properly supported by pleadings, without prejudice to refile upon notice to all parties. Plaintiff thereafter moved again for the same relief, with notice to the appearing defendants. At oral argument on this motion, on May 7, 2014, this court denied the motion due to factual questions concerning plaintiff's right to foreclose. The court also directed the parties to meet to examine plaintiff's records for an account of how Montesdeoca's payments had been applied. The court further issued a preliminary conference order (the PCO), which required service of discovery demands and interrogatories by June 30, 2014, with responses within 45 days, and stated that "[t]he failure to comply herewith may result in preclusion from the introduction of such evidence." It also required deposition of plaintiff on September 9, 2014 and deposition of the Owner defendants on September 22, 2014 and stipulated that "FAILURE TO APPEAR FOR DEPOSITION AS SCHEDULED WILL BE DEEMED A WAIVER[;] FAILURE TO PRODUCE A SPECIFIED WITNESS FOR DEPOSITION WILL PRECLUDE SUCH WITNESS'S TESTIMONY AT TRIAL ON BEHALF OF THE PARTY FAILING TO PRODUCE."

Plaintiff's Summary Judgment Motion

(1)

Plaintiff now moves, in sequence #3, for an order (1) granting summary judgment as to the complaint and dismissing the Owner defendants' answer and counterclaims, (2) granting default judgment against the Governmental defendants, (3) dismissing the complaint as against "John Doe No. 1" to "John Doe No. 10" and (4) appointing a referee to compute damages. Plaintiff contends that Montesdeoca's execution of the PNA

constituted an acknowledgment that plaintiff has not breached any of its obligations under the loan documents and also functioned to waive any potential counterclaims against plaintiff. Plaintiff also argues that the PNA's terms require precluding evidence of any discussions that occurred after its execution, including any communications between Montesdeoca and 650 Brooklyn.

Plaintiff characterizes the Owner defendants' affirmative defenses and counterclaims as conclusory and mere attempts to delay inevitable foreclosure. Plaintiff urges that the Owner defendants' affirmative defenses should be stricken en masse, as the Owner defendants pleaded them "upon information and belief," without the requisite factual support. Plaintiff additionally urges that default judgment may be granted as against the Governmental defendants, as they have not appeared in the action.

In response to the Owner defendants' affirmative defenses to the effect that they owe no obligation to plaintiff (affirmative defenses 1, 16, 17, 20, 23 and 34), plaintiff contends that the evidence clearly establishes the Note and Mortgage as binding upon the Owner defendants and as properly assigned from Greenpoint to 650 Brooklyn and subsequently from 650 Brooklyn to plaintiff. It further contends that notices sent by Greenpoint and 650 Brooklyn, the Modification and notes of a telephone call by Montesdeoca to Capital One establish that Montesdeoca defaulted under the loan terms.

Plaintiff, addressing the Owner defendants' affirmative defenses to the effect that plaintiff does not properly own or hold the loan documents (affirmative defenses 2 through 5, 14, 15, 26, 27 and 30), urges that the evidence and Montesdeoca's execution of the PNA

establish that 650 Brooklyn properly held the loan documents when it commenced this action. The So-Ordered Stipulation, it further argues, constitutes an acknowledgment by the Owner defendants that plaintiff now holds the loan documents. Plaintiff urges that the allonges transferring the Note comply with the statute of frauds and that it has proper standing to pursue the case as the holder of the loan documents.

Plaintiff contends that no accord and satisfaction or unjust enrichment occurred (affirmative defense 6), as there is no evidence of payment in full settlement by the Owner defendants and no allegation that plaintiff received an undue benefit. It characterizes the affirmative defenses asserting inducement of breach, tortious interference with contract and detrimental reliance (affirmative defenses 7, 18 and 32) as conclusory, as the Owner defendants fail to identify any underlying tort, any attempt to induce breach or even any breach by plaintiff or its predecessors. The Owner defendants cannot rely on lack of jurisdiction (affirmative defense 8), plaintiff urges, as it has introduced affidavits of service for each of the defendants.

Concerning the assertion that plaintiff or its predecessors failed to mitigate damages (affirmative defense 9), plaintiff argues that the Owner defendants fail to provide any explanation of what plaintiff could have done to mitigate defaults beyond its demands for payment and eventual commencement of this action. Plaintiff urges that it has adequately pleaded the elements of a foreclosure cause of action and, thus, that it has not failed to state a claim (affirmative defense 10). Plaintiff contends that the Owner defendants failed to offer any factual support for their defenses of waiver, laches and estoppel (affirmative defense 11)

or unclean hands (affirmative defense 12). The provisions of TILA (affirmative defense 13) do not govern herein, plaintiff urges, as it does not apply to commercial mortgages.

Plaintiff argues that the Owner defendants offer no reason why Greenpoint, Capital One or Situs are necessary parties (affirmative defense 19), as none has any remaining interest in the Property. In response to the Owner defendants' assertions of fraud (affirmative defenses 21, 25 and 31), plaintiff contends that they failed to plead such claims with the particularity required under CPLR 3016 (b), particularly as all allegations are made upon information and belief. It argues, in any case, that any fraud perpetrated by Greenpoint would not support a claim of fraud against plaintiff.

Addressing the Owner defendants' allegations that they did not receive notice as required by the loan documents or that plaintiff and its predecessors breached their loan obligations (affirmative defenses 22 through 24 and 29), plaintiff contends that Capital One, as Greenpoint's servicer, and 650 Brooklyn had notified Montesdeoca of the defaults and demanded payment. It further contends that Montesdeoca acknowledged her defaults in a January 2012 telephone conversation with Capital One. Plaintiff urges that disputes over the exact amounts owed may be resolved during computation of damages and that, if the Owner defendants can demonstrate that certain payments were not credited to their loan debts, that would reduce the amount recoverable herein. Plaintiff argues that the Owner defendants' claim that Montesdeoca should not be subject to a deficiency judgement (affirmative defense 28) would pose no obstacle to foreclosure. They urge, in any case, that Montesdeoca should be liable for any deficiency, under RPAPL 1371.

The Owner defendants' assertions that the loan documents are void, voidable or unenforceable (affirmative defenses 35-43), plaintiff argues, must fail because a person who signs an agreement is conclusively bound by its terms, absent fraud, duress or similar extenuating circumstances. Plaintiff urges that the terms of the Note and Mortgage are clear and that a mistake by Montesdeoca as to their effect cannot serve to void them. The Owner defendants, plaintiff contends, fail to point to any false representations by Greenpoint, and it again urges that allegations of fraud must be made with sufficient particularity under CPLR 3016 (b). Plaintiff contends that Montesdeoca's purpose under the loan documents was not frustrated, as she received the loan funds, and that, if any frustration of purpose occurred, it arose from her failure to timely repay the funds. No evidence, plaintiff argues, supports the Owner defendants' assertions of contractual impossibility or illegality. Plaintiff asserts that the Owner defendants' claim of repudiation relies on entirely self-serving statements that plaintiff or one of its predecessors instructed Montesdeoca to stop making loan payments and that the Owner defendants fail to plead factual details supporting such allegations.

Plaintiff additionally argues that its evidence repudiates the Owner defendants' fraud counterclaim and that the Owner defendants' counsel has misstated the facts. It also contends that the Owner defendants fail to establish the justifiable detrimental reliance necessary to support their equitable estoppel counterclaim and that they provide insufficient evidence to establish statements by plaintiff's predecessors that the escrow amounts would be applied to the loan payments due. Even if such discussions regarding the escrow funds occurred, plaintiff urges that they occurred after the Owner defendants had already triggered

acceleration by defaulting. Plaintiff contends that the Owner defendants do not claim that plaintiff or its predecessors made any representations regarding payments due after acceleration had been triggered. It stresses that the PNA explicitly stated that subsequent payments would not reinstate the loan, and it argues that no legal basis would support such a reinstatement anyway.

Plaintiff supports its motion with an affidavit from Bottner, who states that he was a vice president of Greenpoint when it entered into the Note and Mortgage with Montesdeoca and that he now works as a vice president for Capital One. He explains that Greenpoint, on December 1, 2008, appointed Capital One as its loan servicer, but that it never assigned the Note or Mortgage to Capital One. Greenpoint, Bottner urges, remains an active corporation, and he recounts that, as Greenpoint's authorized agent, he executed the allonge and assignment of mortgage transferring the Note and Mortgage to 650 Brooklyn.

Plaintiff also supports its motion with an affidavit from its managing member, Menachem Gold (Gold). Gold contends, among other things, that Montesdeoca's loan payments became irregular in 2009 and that she often made payments late, missed payments or subsequently reversed payments. He alleges that, even after Montesdeoca entered into the Modification, she continued to default, either missing payments or reversing them. Consequently, Gold recounts that Capital One, as Greenpoint's servicer, sent Montesdeoca the Demand Letter on January 6, 2012, and he asserts that Montesdeoca acknowledged her defaults in a January 11, 2012 call with Capital One. The PNA, Gold claims, evinces 650 Brooklyn's good-faith attempts to resolve Montesdeoca's defaults. Nonetheless, he contends

that Montesdeoca failed to make any loan payments from February 2012 through April 2013, though he acknowledges that Montesdeoca thereafter resumed making payments.

(2)

Montesdeoca, in opposition to plaintiff's motion, urges that the Gold affidavit and much of plaintiff's evidence should be precluded due to plaintiff's failure to timely comply with the PCO's discovery deadlines, particularly stressing that plaintiff failed to appear for deposition on September 9, 2014. Montesdeoca notes that the Owner defendants rejected plaintiff's discovery demands sent on June 30, 2014, as they were sent by KTS, which at that time was only plaintiff's co-counsel. Summary judgment, Montesdeoca urges, is premature when no discovery has yet occurred.

Montesdeoca argues that the documents plaintiff submits in support of its motion must be disregarded, as plaintiff fails to demonstrate their admissibility as business records under CPLR 4518 (a). She asserts that Gold's affidavit, even if considered, is insufficient to authenticate any evidence because he is the managing member of plaintiff, but has no apparent relation to, or personal knowledge of, Greenpoint, Capital One, 650 Brooklyn or Situs, who allegedly created or executed the various documents in question. She stresses that, although Bottner recounts that he worked for both Greenpoint and Capital One, he does not authenticate the Note, the Mortgage, the Modification, the allonge purporting to assign the Note to 650 Brooklyn or the corresponding assignment of the Mortgage. Montesdeoca also questions the authenticity of the copies of the Note and Mortgage that plaintiff submits, as she recalls initialing each page, yet plaintiff's copies bear no such initials.

Montesdeoca contends that 650 Brooklyn, as the original plaintiff, admitted that it did not properly hold the Note and Mortgage by denying the paragraph of the answer that alleged that it sought the protections of a holder in due course. She argues, in any case, that the allonges purportedly assigning the Note from Greenpoint to 650 Brooklyn and from 650 Brooklyn to plaintiff, must be disregarded, as they fail to comply with UCC 3-202. She contends that New York law requires the assignor of a negotiable instrument to indorse the instrument itself or, if insufficient space exists on the instrument, to use an allonge so firmly affixed to the note as to become a part of it. Plaintiff, Montesdeoca stresses, fails to demonstrate that insufficient space existed on the Note for indorsement or that the allonges were firmly affixed to the Note.

Montesdeoca also argues that Bottner fails to aver, in his affidavit, that he signed the allonge that purportedly assigned the Note from Greenpoint to 650 Brooklyn. Montesdeoca contends that Bottner's representation that he acted as a vice president of Greenpoint is refuted by Bottner's page on the website LinkedIn, which lists no such position. Greenpoint, Montesdeoca asserts, ceased doing business in 2007, according to news reports, and thus could not have assigned the Note and Mortgage in 2012. Additionally, Montesdeoca contends that the Modification indicates that Greenpoint had transferred the Note and Mortgage to Capital One by March 2010, and thus had nothing to assign thereafter.

Montesdeoca also asserts that the assignment intended to transfer the Mortgage to plaintiff must be disregarded, as it bears the stamp of a California notary, but plaintiff fails to submit a certificate of conformity, as required by CPLR 2309 (c). Furthermore, plaintiff

fails to demonstrate the binding effect of the allonge or assignment of mortgage from 650 Brooklyn to plaintiff, Montesdeoca urges, as it does not demonstrate that the Situs representative who executed it in fact possessed the authority to do so. Montesdeoca stresses that the So-Ordered Stipulation contains no admission that plaintiff properly owns and holds the Note and Mortgage.

Montesdeoca strenuously urges that Bottner does not refute the claims that he participated in a scheme to defraud her. She also contends that the PNA is not binding, as neither Situs, nor any other predecessor, or agent for, plaintiff, executed it. Accordingly, Montesdeoca characterizes the PNA as void due to fraud in the inducement or lack of a meeting of the minds.

Montesdeoca contends that questions of fact exist concerning whether she defaulted on payments due under the Note and Mortgage. She asserts that plaintiff or its predecessors induced any purported breach, by assuring her that escrow funds would be applied to the debt and by having her wire Situs \$20,000, which then vanished. Defendant Montesdeoca has annexed records reflecting these payments. She stresses that plaintiff and its predecessors never provided a record of how her payments were allocated and that over \$89,000 in payments remain unaccounted for. Plaintiff, Montesdeoca emphasizes, submits no evidence of having sent any mortgage statements to Montesdeoca. She urges that, overall, plaintiff introduces no admissible evidence of any loan default.

Montesdeoca additionally contends that plaintiff and its predecessors have breached the implied covenant of good faith and fair dealing. She urges that she has continued to send

payments, despite the lack of any loan statements, and that plaintiff, or its predecessors, frequently lost or refused to accept such payments. Plaintiff, Montesdeoca alleges, has failed to pay the necessary property taxes on the Property since it acquired the Note and Mortgage. She also urges that plaintiff has defied this court's May 7, 2014 order requiring plaintiff to open its books for inspection.

The court, Montesdeoca contends, should not only deny plaintiff's summary judgment motion, but should grant summary judgment dismissing the action. She asserts that the Owner defendants sufficiently pleaded their affirmative defenses, but requests leave to replead if they did not. In support of the various affirmative defenses, Montesdeoca urges that plaintiff has failed to establish its ownership of the Note and Mortgage or default thereunder, that plaintiff or its predecessors accepted payments from her and absconded with the escrow funds, but did not apply them to the debt, and that plaintiff has failed to pay the Property's taxes.

Montesdeoca supports her opposition with two affidavits from herself. In the first, she recounts that, upon her purchase of the Property, the former owner placed \$20,000 in an escrow account with Greenpoint to guarantee that she would resolve various building violations. Montesdeoca explains that the former owner never cleared these violations. She alleges that Capital One acquired the Note and Mortgage sometime before March 19, 2010 and, on that date, informed plaintiff, without prompting, that she qualified for a loan modification. Montesdeoca and Capital One thereafter executed the Modification, and she recounts that Capital One, not Greenpoint, thereafter sent her loan statements. Montesdeoca

asserts that Capital One sent her a January 23, 2012 letter, which stated that it had the escrow monies deposited by the Property's former owner, and it offered Montesdeoca the option of receiving the funds by check or having Capital One apply the funds to her monthly loan payments. Montesdeoca states that she selected the second option and received a January 31, 2012 letter from Capital One stating that the escrow funds would be applied to the payments due from February through November 2012.

Montesdeoca recounts that the next she heard anything regarding the loan was via a June 29, 2012 letter from Situs, which stated that 650 Brooklyn had purchased the Note from Greenpoint. She claims that she contacted Situs around July 3, 2012 to request a copy of the Note and Mortgage assignments, a letter from Capital One confirming that it sold the Note to 650 Brooklyn, a copy of the Note with indorsement and an updated loan statement and also to inform them of the escrow-funds arrangement. Situs, Montesdeoca alleges, responded to her by sending the PNA, and she asserts that this was the first time she became aware of a purported default. Montesdeoca alleges that she heard no more regarding the loan until 650 Brooklyn served the summons and complaint on April 8, 2013. She recounts that, later that month, a representative of Situs told Montesdeoca and her attorney that he could negotiate with them to bring the loan current and that he again sent a copy of the PNA, which Montesdeoca signed and returned. She states that the Situs representative told her to wire \$20,000 to Situs to reinstate the loan and that she sent this amount.

In May or June 2013, Montesdeoca reports that she received a letter from Michael Greenberg (Greenberg), then plaintiff's counsel as well as a member of plaintiff, which

stated that plaintiff had acquired the Note. She asserts that she sent numerous loan payment checks to Greenberg, as plaintiff's counsel, but that he neither refused them outright, nor deposited them. Montesdeoca alleges that she has never received any accounting of what became of the escrow funds or the \$20,000 that she wired to Situs, both of which were to be applied to her loan payments.

In her second affidavit, Montesdeoca reiterates that she continues to make loan payments to plaintiff even though she has received no loan statement since December 2011³. She states that, since July 2012, the Property's taxes have gone unpaid, despite her sending loan payments inclusive of escrow of taxes. Montesdeoca alleges that any default resulted from misrepresentations by Capital One, 650 Brooklyn or plaintiff.

(3)

In reply, plaintiff urges that it submits irrefutable evidence that Montesdeoca executed the Note and Mortgage, that plaintiff now holds these instruments and that Montesdeoca has defaulted under them. It argues that, in opposing the motion, she disregards the documentary evidence, particularly the terms of the PNA and records of the loan's payment history, the latter of which, it posits, demonstrates that Montesdeoca began missing loan payments as early as August 2009. Plaintiff characterizes Montesdeoca's request for preclusion of evidence due to PCO violations as in bad faith, as her attorney rejected plaintiff's discovery

³ Annexed as Exhibit 4 to the Owner defendants' opposition to plaintiff's summary judgment motion is a letter dated January 31, 2014, on a Situs letterhead, supplying a "Year End Statement" indicating a "Principal Balance as of 12/31/2013" of zero.

responses, which were sent on October 27, 2014, and as the Owner defendants failed to appear for their own deposition or respond to plaintiff's discovery requests.

Plaintiff urges that it properly has standing to prosecute the action, as the allonges and assignments demonstrate that it holds the Note and Mortgage. Contrary to Montesdeoca's contention that Greenpoint ceased operation in 2007, plaintiff stresses that Bottner explains, in his affidavit, that Greenpoint remains an active company. Plaintiff reiterates its argument that Montesdeoca acknowledged 650 Brooklyn as the proper holder of the Note by executing the PNA and acknowledged 650 Brooklyn's sale of the Note and Mortgage to plaintiff by executing the So-Ordered Stipulation.

The Owner defendants' allegations of fraud, plaintiff argues, lack the particularity required by CPLR 3016 (b) and rely on self-serving, uncorroborated assertions made by their counsel. Plaintiff contends that Montesdeoca acknowledged, in her affidavits, the efficacy of the Modification and otherwise contradicted the representations of her own attorney. It urges that Montesdeoca fails to introduce any evidence of, among other things, the escrow funds' existence, a Capital One acquisition of the Note and Mortgage, any arrangement concerning applying escrow funds to loan payments, any communications between Montesdeoca and Situs, any refusal by plaintiff or 650 Brooklyn to provide an accounting and any misrepresentations by plaintiff or its predecessors. Plaintiff posits that the court should, thus, apply an adverse inference against these allegations.

Plaintiff also urges that court rules require rejecting the affirmation of Montesdeoca's counsel in opposition to the motion, as it includes legal argument in a sworn statement and

greatly exceeds the applicable page limitation. It further argues that all portions of its statement of material, uncontested facts must be deemed admitted, as the Montesdeoca did not properly respond to it.

Plaintiff's Motion To Appoint A Receiver

(1)

Plaintiff also moves, in sequence #4, for an order appointing a receiver for the Property's rents and profits. It argues that the Mortgage's terms expressly entitle it to a receiver and that Real Property Law § 254 (10) supports enforcing such a clause. Plaintiff urges that the loan documents give it a right to take possession and control of the Property in the wake of a default and that Montesdeoca has refused to provide it a rent roll. Accordingly, it requests the appointment of Douglas Rosenberg as the Property's receiver.

In support of its motion, plaintiff submits another affidavit from Gold, who reiterates that the Owner defendants have failed to provide a rent roll and that the Mortgage's terms entitle plaintiff to the appointment of a receiver. He recounts that Montesdeoca executed an assignment of her interest in the Property's leases that permits plaintiff to possess, manage and operate the Property in the event of default. Gold again asserts that Montesdeoca acknowledged plaintiff's ownership of the Note and Mortgage by signing the PNA and the So-Ordered Stipulation. He states that the original Note and Mortgage are in plaintiff's possession and available for review. Montesdeoca, Gold alleges, first defaulted in August 2009 and made payments, thereafter, only erratically.

(2)

In opposition, Montesdeoca urges that the court has already denied two motions to appoint a receiver and that collateral estoppel requires denying this one as well. She contends that, as the court did not grant plaintiff leave to make a third motion to appoint a receiver, plaintiff should have framed the motion as seeking renewal or reargument. Plaintiff, Montesdeoca alleges, made this motion simply to harass her, and she urges that the court should assess sanctions against plaintiff for making a frivolous motion under Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (c).

Montesdeoca further recounts that she was forced to enter into a payment plan to prevent a tax-lien foreclosure on the Property because of plaintiff's refusal to pay the Property's taxes. She stresses that plaintiff has defied the court's May 7, 2014 order to open its books to the Owner defendants.

(3)

Plaintiff, in reply, urges that it has shown that foreclosure is warranted, particularly as the demonstrated history of erratic loan payments establishes Montesdeoca's default. It reiterates that the Mortgage terms expressly permit the appointment of a receiver during a foreclosure action. Plaintiff urges that it was not required to pay the Property's taxes as it did not receive the money from the Owner defendants to do so. It asserts, in any case, that tax payments bear no relevance to the motion at hand.

Plaintiff again contends that it has properly responded to the Owner defendants' discovery demands and completed its discovery obligations. It urges that Montesdeoca introduces no facts that would warrant denying the appointment of a receiver and that one

must be appointed to prevent the Owner defendants from continuing to use the rental income to fund their litigation. Finally, plaintiff contends that collateral estoppel poses no bar to this motion, as the issues were not resolved by previous denials, and that it need not have sought this relief via a motion to renew or reargue.

Montesdeoca's Motion To Dismiss Under CPLR 3126

(1)

Montesdeoca moves, in sequence #5, for an order, pursuant to CPLR 3126, dismissing the action or, alternatively, precluding plaintiff from offering any evidence or testimony. She contends that plaintiff has failed to comply with the PCO deadlines or to timely respond to the discovery requests and interrogatories she sent on June 2, 2014. Montesdeoca also urges that plaintiff did not appear for the PCO-ordered deposition on September 9, 2014 and never opened its books to the Owner defendants, as directed at the May 7, 2014 appearance. Consequently, Montesdeoca urges that the action should be dismissed or, at least, that plaintiff's affidavits and evidence should be precluded from consideration at this time.

Montesdeoca includes, in the evidence supporting this motion, a demand for documents with an affixed affidavit of service, in which Montesdeoca's counsel avers that he mailed the demand to Greenberg (then plaintiff's attorney) on June 2, 2014.

(2)

Plaintiff, in opposition, argues that the motion is moot, as it first received the Owner defendants' discovery demands on September 11, 2014 and thereafter provided responses within 45 days, as required by the PCO. It contends that it did not default in appearing for

deposition, as the parties had agreed that depositions should only occur after completing discovery exchange. Plaintiff characterizes Montesdeoca's motion as in bad faith, as she filed it before the deadline to respond to her discovery demands had even elapsed. It notes, in any case, that Montesdeoca also refused to respond to plaintiff's discovery demands and interrogatories, which it served on June 30, 2014, or to appear for a deposition as ordered by the PCO. Plaintiff's counsel contends that neither his office, nor Greenberg, received any earlier set of discovery demands from Montesdeoca and that she has failed to introduce evidence of timely service of such alleged demands. Plaintiff asserts that it sought to schedule depositions with Montesdeoca's counsel, but that he essentially refused to do so.

Plaintiff supports its opposition with an affidavit from Greenberg, who states that he never received any discovery demands while he was plaintiff's counsel and that he first saw Montesdeoca's demands on September 11, 2014, when KTS received them.

Discussion

Motion Sequence #3

(1)

“Summary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law” (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2011], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A summary judgment movant must show prima facie entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]). Failure to make such a showing requires denying the motion, regardless of the sufficiency of any opposition (*Vega*, 18 NY3d at 503). The opposing party overcomes the movant's showing only by introducing "evidentiary proof in admissible form sufficient to require a trial of material questions" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

(2)

A foreclosure plaintiff makes a prima facie showing for summary judgment by introducing the underlying note and mortgage and evidence establishing the defendant's default (*Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, 567 [2014]; *Emigrant Funding Corp. v Agard*, 121 AD3d 935, 936 [2014]; *Bank of N.Y. Mellon Trust Co. v McCall*, 116 AD3d 993, 993 [2014]). If a foreclosure defendant challenges the plaintiff's standing, the plaintiff must show proper standing "by demonstrating that it [was] 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" (*Kondaur Capital Corp. v McCary*, 115 AD3d 649,

650 [2014]; *see also* *U.S. Bank N.A. v Guy*, 125 AD3d 845, 2015 NY Slip Op 01443, *1 [2015]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 682 [2012]). A plaintiff may establish that it held the note “by showing either a written assignment of the underlying note or the physical delivery of the note” (*Guy*, 125 AD3d at ___, 2015 NY Slip Op 01443 at *2; *see also* *McCary*, 115 AD3d at 650; *Haller*, 100 AD3d at 682).

Here, although it has demonstrated standing, plaintiff fails to make a prima facie showing supporting summary judgment in its favor, as it does not submit any admissible evidence establishing Montesdeoca’s purported defaults under the terms of the Note and Mortgage. Plaintiff’s attorney contends that the loan-payment history submitted in support of its motion demonstrates default in the form of missing and irregular payments, even referring to this documentation as “the crux of Plaintiff’s proof regarding Borrower’s default.” But plaintiff fails to lay any foundation for admitting these records, which otherwise constitute hearsay (*see* CPLR 4518 [a]; *US Bank Natl. Assn. v Madero*, 125 AD3d 757, 2015 NY Slip Op 01265, *2 [2015]; *JP Morgan Chase Bank, N.A. v RADS Group, Inc.*, 88 AD3d 766, 767 [2011]). Although Gold avers that the copy of the loan-payment history included with the motion is “true and correct,” such statement is insufficient to lay a foundation under CPLR 4518 (a) as nothing indicates that Gold, a member of plaintiff, possesses first-hand knowledge of the truth or accuracy of the loan-history documents apparently created by, or on behalf of, Greenpoint and Capital One. Conversely, Bottner, who worked for Greenpoint and Capital One, makes no mention in his affidavit of the loan-payment history. Even were these documents admissible, they do not seem to provide any

accounting for the purported escrow funds, which Montesdeoca avers that Capital One assured her would be applied to her loan payments, or the \$20,000 that Montesdeoca alleges she wired to Situs. Plaintiff also fails to lay any evidentiary foundation for admitting the call log purportedly indicating that Montesdeoca admitted to defaulting on certain payments.

Contrary to Montesdeoca's arguments, nothing about the form of the allonges or use of allonges in place of indorsement on the Note itself present serious questions about the efficacy of the assignments (*see Guy*, 125 AD3d at ___, 2015 NY Slip Op 01443 at *2 [reversing grant of dismissal for lack of standing premised on prior note-holder's failure to indorse on note itself or firmly affix allonge]).⁴ Although plaintiff does not adequately demonstrate that it is the proper holder or assignee of the Note, as it fails to authenticate the signature of Situs's senior managing director on the allonge purportedly assigning the note from 650 Brooklyn to plaintiff⁵ (*see Fairlane Fin. Corp. v Greater Metro Agency, Inc.*, 109 AD3d 868, 870 [2013]; *NYCTL 1998-2 Trust v Santiago*, 30 AD3d 572, 573 [2006]; *see also Jerome Prince, Richardson on Evidence* §§ 9-101, 9-102, 9-103 [Farrell 2008]), or to demonstrate that Situs in fact possessed the authority to act on 650 Brooklyn's behalf (*see*

⁴ Montesdeoca's contention that the assignment purportedly transferring the Mortgage to plaintiff is inadmissible, as notarized in California but missing a certificate of conformity, is also without merit, as it, in fact, bears an acknowledgment block that substantially complies with the requirements of Real Property Law § 309-b (*see Midfirst Bank v Agho*, 121 AD3d 343, 347, 350-351 [2014]).

⁵ Although Montesdeoca contends otherwise, Bottner's affidavit does provide sufficient evidence to establish that he executed the allonge assigning the Note from Greenpoint to 650 Brooklyn. The Owner-defendants' challenge to Bottner's credibility based upon a LinkedIn page is pure speculation based upon inherently improbable hearsay unworthy of further comment.

Haller, 100 AD3d at 683; *Wells Fargo Bank, N.A. v Weekes*, 46 Misc 3d 1205[A], 2014 NY Slip Op 51895[U], *3 [Sup Ct, Kings County 2014]), and the language of the PNA, even if binding upon Montesdeoca,⁶ makes no explicit representations about the identity of the holder of the Note or Mortgage, pursuant to the Stipulation of February 13, 2014, consenting to the substitution of plaintiff for 650 Brooklyn. Owner defendants acknowledged that plaintiff had acquired all instruments evidencing the subject loan. Accordingly, plaintiff's standing is no longer subject to challenge; however, summary judgment must be denied as to plaintiff's foreclosure cause of action for lack of competent proof as to Owner defendants' default.

(3)

To the extent that this motion seeks to strike the Owner defendants' affirmative defenses under CPLR 3211 (b), this relief must also be denied. The parties' submissions leave various questions surrounding the Owner defendants' purported default and the alleged failure of plaintiff and its predecessors to properly account for and apply all payments submitted by Montesdeoca, making a conclusive determination as to the merits of some of

⁶ It appears unlikely that the PNA, a purported agreement concerning terms of loan-reinstatement negotiation, could be enforced against Montesdeoca, as no party ever countersigned it (*see Scheck v Francis*, 26 NY2d 466, 469-470 [1970] ["if the parties to an agreement do not intend it to be binding on them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed"]). In any case, even had plaintiff or one of its predecessors executed the PNA, the scope of its terms is expressly limited by the introductory phrase "throughout the discussions contemplated by this Agreement." As there is no indication that any settlement discussions ever occurred, such terms never became effective. Notably, the PNA was proffered by Situs, as servicer for "Lender" 650 Brooklyn in July 2012, but the note and mortgage were assigned to plaintiff in June 2013, shortly after Montesdeoca executed the PNA.

the affirmative defenses not possible, although it is clear that several of Owner defendants' forty-three affirmative defenses are conclusory and frivolous.

Plaintiff's arguments in support of summary judgment dismissing the Owner defendants' counterclaims primarily rely on Montesdeoca's alleged waiver of counterclaims in the PNA. Any binding effect of the PNA remains unestablished, and its terms thus do not support dismissing the counterclaims herein. Given the many questions surrounding interactions between Montesdeoca and plaintiff or its predecessors, summary judgment as to the Owner defendants' counterclaims on other grounds is also unwarranted.

The portion of plaintiff's motion seeking default judgment against the Governmental defendants is, given their failure to appear, granted. The portion of the motion seeking to dismiss the complaint as against the "John Doe" defendants is also granted. The remainder of the motion, however, must be denied.⁷

Motion Sequence #4

As plaintiff stresses, Real Property Law § 254 (10) clearly indicates that a mortgage covenant providing for the appointment of a receiver of rents and profits in the event of a

⁷ Plaintiff properly notes that Montesdeoca fails to rebut the statement of undisputed facts that plaintiff filed with the motion in compliance with procedural rules and that the length and content of the affidavit that Montesdeoca's counsel filed in opposition to this motion violated applicable rules (*see Taylor v African M. E. Church*, 265 App Div 858, 858 [1942] ["(t)he practice of embodying argument on the facts and law in an affidavit, including the citation of authorities, is improper and is disapproved"]; Rules of the Commercial Division of the Supreme Court [22 NYCRR] § 202.70 [g], Rule 17 [limiting affidavits and affirmations to 25 pages]; 22 NYCRR 202.70 [g], Rule 19-a [stipulating that statement of material facts will be deemed admitted unless rebutted by correspondingly numbered response]; *but see Al Sari v Alishaev Bros., Inc.*, 121 AD3d 506, 506-507 [2014] [indicating that deeming uncontested fact in statement of material facts to be admitted is "not required"]). Montesdeoca's counsel is reminded that he must follow the rules of the Commercial Division of the Supreme Court in litigating this action. Further gross violation of these rules shall result in appropriate penalties.

foreclosure action shall be enforced. Paragraph 38 of the underlying Mortgage herein contains such a clause entitling a mortgagee to the appointment of a receiver in any foreclosure action. However, because plaintiff has not yet established its right to foreclose, its motion in sequence #4 is denied.

Motion Sequence #5

Penalties for failure to timely participate in discovery processes are at the discretion of the court, but such a violation will not result in striking the pleadings or in dismissal “absent a clear showing that the failure to comply with discovery demands is willful [and] contumacious” (*Roug Kang Wang v Chien-Tsang Lin*, 94 AD3d 850, 852 [2012]; *see also Dimoulas v Roca*, 120 AD3d 1293, 1295 [2014]; *Liang v Yi Jing Tan*, 98 AD3d 653, 654 [2012]). Although Montesdeoca’s counsel submits an affidavit of service indicating that he mailed Greenberg (then plaintiff’s counsel) a document demand on June 2, 2014, to which plaintiff did not respond, Montesdeoca does not contest that plaintiff attempted to furnish a timely response to a second discovery demand. Although plaintiff may not have strictly complied with the deadlines set forth in the PCO, neither did the Owner defendants, and the evidence suggests that both parties are at least partially culpable for these discovery failures. No prior attempt was made to resolve the problems by motion or even conference with the Court. Accordingly, no penalty is currently warranted as against plaintiff and motion sequence #5 is denied, but the parties are directed to participate fully in discovery and comply with the deadlines ordered below. Accordingly, it is

ORDERED that plaintiff’s motion, in sequence #3, is granted to the extent that it seeks (1) default judgment against defendants New York State Department of Taxation and

Finance, New York City Environmental Control Board, New York City Department of Finance and the City of New York Parking Violations Bureau and (2) dismissal of the action as against the "John Doe" defendants, and is otherwise denied; and it is further

ORDERED that entry of a default judgment against defendants New York State Department of Taxation and Finance, New York City Environmental Control Board, New York City Department of Finance and the City of New York Parking Violations Bureau is stayed until a disposition of this matter as against Montesdeoca and ERAM is reached; and it is further

ORDERED that plaintiff shall serve this order, with notice of entry, on the defaulting defendants within thirty days of entry of this order; and it is further

ORDERED that the action's caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----- X
531 KOSCIUSKO PARTNERS, LLC,

Plaintiff,

- against -

Index No. 500521/13

ERIKA MONTESDEOCA, ERAM
PROPERTIES, LLC, NEW YORK STATE
DEPARTMENT OF TAXATION AND
FINANCE, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY DEPARTMENT OF
FINANCE and THE CITY OF NEW YORK
PARKING VIOLATIONS BUREAU,

Defendants.

----- X

and it is further

ORDERED that plaintiff's motion in sequence #4 is denied in its entirety; and it is further

ORDERED that Montesdeoca's motion in sequence #5 is denied; and it is further

ORDERED that defendants Montesdeoca and ERAM are directed to accept plaintiff's discovery responses and answers to interrogatories sent October 27, 2014 and to accept plaintiff's discovery demands and interrogatories sent on June 30, 2014 and respond to such by April 30, 2015; and it is further

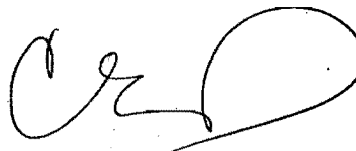
ORDERED that plaintiff make available its relevant books and records for inspection by the Owner defendants no later than April 30, 2015; and it is further

ORDERED that the parties complete their depositions by June 30, 2015; and it is further

ORDERED that the parties shall appear for a compliance conference in Part Comm-1, at 9:30 a.m., on July 8, 2015.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. CAROLYN E. DEMAREST