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SHORT FORM ORDER

INDEX No. 09605/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 10/9/14
SUBMIT DATE: 5/1/15
Mot. Seq. 001 - MD
Status Conf. Date: 7/30/15
CDISP Y____ N X

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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

DANA BROWN, RUSSELL BROWN, III, BROOKHAVEN MEMORIAL HOSPITAL, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, TOWN SUPERVISOR, TOWN OF ISLIP, JPMORGAN CHASE BANK, NA, "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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ROSICKI, ROSICKI & ASSOC.
Attys. For Plaintiff
26 Harvester Ave.
Batavia, NY 14020

KLEMANOWICZ, HOLMQUIST
Attys. For Defendant Brown
300 Old Country Rd.
Mineola, NY 11501

Upon the following papers numbered 1 to 6 read on this motion for accelerated judgments, substitution of parties and an order of reference; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers _____; Answering papers 5-6; Reply papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion (#001) by the plaintiff for accelerated judgments on its complaint, the deletion of certain party defendants and an order of reference is considered under CPLR 3212, 3215 and RPAPL § 1321 and is denied; and it is further

***ORDERED*** that a status conference is scheduled for July 30, 2015 at 9:30 a.m., in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York. Counsel are directed to appear at this conference.

The plaintiff commenced this action in April 2013 to foreclose the single lien of consolidated mortgages given by the Brown defendants. A first note and mortgage was given to RBC Mortgage Company on September 9, 2003 which secured the principal indebtedness of A note of the same date in the amount of $235,000.00. A second gap note was executed by the Brown defendants in favor of the plaintiff on May 11, 2007 to secure a gap mortgage executed by them on the same day in the amount of $105,057.60. The Browns also executed on that date a consolidated mortgage note in favor of the plaintiff in the principal amount of $329,000.00, which note stated on the face thereof that it "amends, restates in their entirety and is given in substitution for the notes described in Exhibit A of the New York Consolidation, Extension and Modification Agreement dated the same date as this Note". The first note and mortgage of September 9, 2003 and the gap note and mortgage of May 11, 2007 were the subject of the Consolidation, Extension and Modification Agreement [CEMA] of May 11, 2007 between the plaintiff and the Brown defendants, to which the consolidated note referred. A consolidated mortgage indenture was also prepared and dated May 11, 2007, but the same was not executed by the Brown defendants.

In its complaint, the plaintiff alleges that the Brown defendants defaulted in their payment obligations on May 1, 2011 and that such default remains uncured. Following service of the summons and complaint, defendant Russell Brown, III appeared herein by answer and therein challenged the plaintiff's standing to prosecute its claims for foreclosure and sale. By the instant motion, the plaintiff seeks summary judgment against the answering defendant, default judgments against all other defendants joined herein by service of process, the deletion of the unknown defendants listed in the caption and a substitution of the plaintiff by its purported assignee. The motion is opposed by answering defendant Brown. No reply papers were received by the court from the plaintiff.

Entitlement to a judgment of foreclosure is established, as a matter of law, where the plaintiff produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact (*see* ***Midfirst Bank v Agho***, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***US Bank Natl. Ass'n. v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]). This standard is, however, enlarged to include a demonstration that

the plaintiff is possessed of the requisite standing to pursue its claims where, and only where, the defense of standing is due and timely asserted by a defendant possessed of such defense (*see* ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Midfirst Bank v Agho***, 121 AD3d 343, *supra*; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, *supra*; ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; ***Citimortgage, Inc. v Stossel***, 89 AD3d 887, 888, 934 NYS2d 182 [2d Dept 2011]; ***U.S. Bank, N.A. v Adrian Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

"Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also provide evidence that it received both the mortgage and note by a proper assignment which can be established by the production of a written assignment of the note or by physical delivery to the plaintiff of the mortgage and note" (***US Bank Natl. Ass'n v Madero***, 125 AD3d 757, 2015 WL 542170 [2d Dept 2015]; *see* ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***Midfirst Bank v Agho***, 121 AD3d 343, *supra*). Delivery of the note to a custodial agent of the plaintiff will suffice to establish the standing of a foreclosing plaintiff under the foregoing rule (*see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, *supra*]; ***HSBC Bank USA, Natl. Ass'n v Sage***, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 1307, 956 NYS2d 271 [3d Dept 2012]; ***Wells Fargo Bank, N.A. v Wine***, 90 AD3d 1216, 1217, 935 NYS2d 664 [3d Dept 2011]).

In cases wherein the plaintiff is the original lender and its standing is challenged by the interposition of a due and timely standing defense, the plaintiff need not establish its ownership or holder status of the note and mortgage via a written assignment or physical delivery to it or to any of its custodial agents. Instead, the plaintiff will have standing where it demonstrates that it (or its predecessor by merger or acquisition) has maintained possession of the subject note and mortgage since the origination of the loan and that such possession continued through the commencement date of the foreclosure action (*see* ***Wells Fargo Bank, NA v Ostiguy***, 127 AD3d 1375, 2015 WL 1565673 [3d Dept 2015]; ***PNC Bank, Natl. Ass'n v Klein***, 125 AD3d 953, 2015 WL 774579 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Hudson***, 98 AD3d 576, 949 NYS2d 703 [2d Dept 2012]; ***Suntrust Mtge. Inc. v Andriopoulos***, 39 Misc3d 1208[A], 971 NYS2d 75 [Sup. Ct. Suffolk County 2013]).

Here, the plaintiff was not the original lender of the first mortgage loan of September 9, 2003 as RBC Mortgage Company extended the loan monies in exchange for the first note and mortgage of the same date. In an affidavit of merit and amount due by an employee of the plaintiff dated June 30, 2014, the plaintiff alleges to be the owner of the first note and mortgage by virtue of a written assignment that was executed by a nominee of the original lender on April 26, 2007. This assignment is attached as one of the several documents presented as Exhibit A of the moving papers. There are no allegations by the plaintiff's employee regarding the plaintiff's possession of the gap

note and mortgage or of the consolidated note executed on May 11, 2007 at the time of the commencement of this action.

In a separate "affidavit of possession" dated August 7, 2014, authored by an employee of the proposed new plaintiff, namely, Bayview Loan Servicing, LLP, the affiant asserts that the first note of September 2003 was delivered to the plaintiff on May 11, 2007, the date on which the gap note and mortgage and the consolidated note and mortgage were executed by the defendants and that these documents remained in the plaintiff's possession at the time of commencement of this action. The Bayview affiant goes on to allege that the "note was thereafter acquired by Bayview Loan Servicing, LLC as assignee of the JP Morgan Chase Bank National Association" and that Bayview "has maintained possession of that first note since said transfer". The affiant then refers the reader to "Exhibit A" which does not contain an assignment of the note and mortgage by the plaintiff to Bayview. However, attached to Exhibit C of the moving papers is a written assignment executed by the plaintiff on April 4, 2014 purportedly transferring the first mortgage, the gap mortgage and the Consolidation, Extension and Modification Agreement [CEMA] of May 11, 2007 to Bayview Loan Servicing, LLC. No allegations are advanced regarding the whereabouts and possession of the May 11, 2007 gap note, gap mortgage and the consolidated note at the time of the commencement of this action.

Upon its review of the record, the court finds that the plaintiff's submissions were insufficient to establish, prima facie, that it possessed each of the relevant note or notes at the time of the commencement of this action. The written assignment of the first note executed by a nominee of the original lender dated April 26, 2011, upon which the plaintiff's affiant relies, is inconclusive with respect to the issue of an effective transfer of the note as no facts are advanced establishing the assignor's possession of the first note at the time of the assignment nor of any delivery to the plaintiff prior to the commencement of this action. Although the plaintiff was the original lender of the gap note monies and the payee of both the gap note and the consolidated note of May 11, 2007 in the consolidated amount of $329,00.00, there are no allegations by the plaintiff's affiant regarding the plaintiff's continued possession of the gap note or of its continued possession of the consolidated note of May 11, 2007 from that date through the date of the commencement of this action. In addition, questions of fact exist with respect to the relevance and/or vitality of the first note and of the gap note in view of the fact that the consolidated note states on the face thereof, that it "amends, restates in their entirety and is given in substitution for the notes described in Exhibit A of the New York Consolidation, Extension and Modification Agreement dated the same date as this Note", namely, the first note of September, 2003 and the gap note of May 11, 2007 (*cf.*, ***Benson v Deutsche Bank Nat. Trust, Inc.***, 109 AD3d 495, 970 NYS2d 794 [2d Dept 2013]). The "affidavit of possession" authored by an employee of Bayview Loan Servicing, LLC, the purported assignee of the plaintiff, failed to remedy the defects in the affidavit of the plaintiff's employee as the Bayview affidavit did not supply due proof in admissible form as to the plaintiff's possession of the relevant note or notes at the time of the commencement of this action.

Dismissal of the complaint as demanded in the affirmation of defense counsel is not warranted since there is no proof in the record that the plaintiff lacks standing as a matter of law. The record reflects that the Brown defendants honored their obligations to pay the monthly installments due under the terms of the consolidated note and the mortgages that were the subject of the Consolidation Modification and Extension Agreement [CEMA] of May 11, 2007 for some four years following their execution of the CEMA and other loan documents on that date and their receipt of the additional loan monies advanced by the plaintiff under the May 11, 2007 gap note and mortgage. In so doing, the Brown defendants may have ratified the consolidated loan and effected a waiver of all standing defenses and claims resting on the plaintiff's purported lack of possession and/or ownership of the consolidated note and the mortgages securing said note (*see* ***IRB-Brasil Resseguros S.A. v Portobello Intern. Ltd.***, 84 AD3d 637, 923 NYS2d 508 [1st Dept 2011]; *see also* ***Confidential Lending, LLC v Nurse***, 120 AD3d 739, 992 NYS2d 77 [2d Dept 2014]; ***Moweta v Citywide Home Improvements of Queens, Inc.***, 267 AD2d 438, 700 NYS2d 845 [2d Dept 1999]; ***Verela v Citrus Lake Dev., Inc.***, 53 AD3d 574, 862 NYS2d 96 [2d Dept 2008]).

In view of the foregoing, the instant motion by the plaintiff for summary judgment and the other relief demanded in the moving papers is denied. Proposed order has been marked "not signed".

Dated: May 14, 2015

THOMAS F. WHELAN, J.S.C.