Enhanced Acquisitions II, LLC v Sarla Sai, LLC
2015 NY Slip Op 31078(U)
June 12, 2015
Supreme Court, Kings County
Docket Number: 507168/13
Judge: David B. Vaughan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 4 Comm 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 29th day of May, 2015.

P R E S E N T:

HON. DAVID B. VAUGHAN,
Justice.

----------X

ENHANCED ACQUISITIONS II, LLC,

Plaintiff,

- against -

Index No.: 507168/13

SARLA SAI, LLC, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK DEPARTMENT OF FINANCE, ASHOK DHABUWALA, and JOHN DOE #1 through JOHN DOE #10, 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 upon the Premises described in the Complaint,

Defendants.

----------X

The following papers numbered 1 to 7 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	6-7

Upon the foregoing papers in this commercial foreclosure action, plaintiff, Enhanced Acquisitions, LLC (Enhanced Acquisitions), moves for an order: (1) pursuant to CPLR 3212, granting it summary judgment against defendants, Sarla Sai, LLC (Sarla Sai) and

003

Ashok Dhabuwala (Dhabuwala); (2) appointing a referee to compute the sums due and owing; (3) granting it a default judgment against defendants, the City of New York Environmental Control Board (ECB) and the City of New York Department of Finance (DOF); and (4) amending the caption to delete the John Doe defendants.

Background

The Promissory Note, Mortgage And Amendment's To The Promissory Note

On September 28, 2006, Sarla Sai borrowed $1,500,000.00 from State Bank of Texas, pursuant to a two-year promissory note executed by Dhabuwala, Sarla Sai's Manager (Promissory Note). The loan was secured by a "Mortgage, Assignment of Rents, And Security Agreement (New York)" (Mortgage), encumbering Sarla Sai's commercial property at 244-254 59th Street in Brooklyn (Property), which was recorded with the New York City Register on October 16, 2006 under City Register File Number (CRFN) 2006000578391. Paragraph 2 of the Mortgage provides that "[t]his Instrument is also a security agreement under the Uniform Commercial Code . . ."

As additional security for the loan, Dhabuwala signed an "Individual Guarantee" guaranteeing "*to Lender* the prompt . . . payment and performance of the Guaranteed Indebtedness" (Guaranty).[1] Paragraph 9 of the Guaranty states that "[t]his Guaranty is for the benefit of Lender and Lender's successors and assigns, and in the event of an assignment

---

[1] *See* page 1 of the Guaranty (emphasis added), a copy of which is annexed as Exhibit G to the August 26, 2014 Affirmation of Howard S. Koh, Esq. in support of plaintiff's summary judgment motion (Koh Affirmation).

of the Guaranteed Indebtedness . . . the rights and benefits hereunder . . . *may be transferred* with such indebtedness" (Koh Affirmation, Exhibit G at ¶ 9 [emphasis added]).

In October 2008, Sarla Sai and State Bank of Texas renegotiated the terms of the Promissory Note and the parties agreed to amend it to extend the maturity date from September 28, 2008 to March 28, 2009 in exchange for Sarla Sai's payment of $15,000.00. The "Amendment to Promissory Note" was effective as of September 28, 2008. In 2010, Sarla Sai and State Bank of Texas again renegotiated the terms of the Promissory Note and agreed to extend the maturity date to November 25, 2014.

The Mortgage Assignment

State Bank of Texas, on October 30, 2013, assigned the Mortgage to plaintiff, Enhanced Acquisitions, pursuant to an "Assignment of Mortgage" executed by the Vice President of State Bank of Texas, Linda Johnson, which was recorded with the New York City Register on November 22, 2013 under CRFN 2013000482904. (Mortgage Assignment). The Mortgage Assignment states that State Bank of Texas "hereby assigns unto Assignee [Enhanced Acquisitions], that mortgage . . . TOGETHER, with the bond(s), note(s),[2] obligations(s) described in said Mortgage, all documents evidencing and securing the indebtedness evidencing and securing the loan described in the Mortgage and the monies due and to become due thereon with interest" (Koh Affirmation, Exhibit H).

---

[2] This language in the Mortgage Assignment seemingly conflicts with record evidence reflecting that the Promissory Note was not validly assigned to Enhanced Acquisitions prior to the commencement of this action. As discussed herein, the Promissory Note attached to the summons and complaint is not indorsed on its face or on an allonge firmly affixed to the Promissory Note.

The Instant Foreclosure Action

Meanwhile, Enhanced Acquisitions commenced this foreclosure action against Sarla Sai, Dhabuwala, ECB, DOF and the "John Doe" defendants on November 15, 2013, by filing a summons, a notice of pendency and a verified complaint.[3]

The thrust of the complaint is that Sarla Sai, the "Borrower" and "Obligor" allegedly "failed to comply with the terms and provisions of the Note secured by the Mortgage, by failing and omitting to make any of the interest payments due after March 3, 2013" (Complaint at ¶¶ 3, 7 and 18). The complaint asserts two separate causes of action: (1) a claim seeking a foreclosure judgment against Sarla Sai (*id.* at ¶¶ 7-26), and (2) a claim for a deficiency judgment against Dhabuwala, the Guarantor (*id.* at ¶¶ 27-30). Regarding defendants, ECB and DOF, the complaint contains a single allegation, alleging that:

> "The [ECB] and the [DOF] are named as . . . defendant[s] herein because each has or claims to have or may claim to have some interest or lien upon the Property or some part thereof, which interest or lien, if any, has accrued subsequent to, and is subject and subordinate to, the lien of the Mortgage (*id.* at ¶ 4).

Regarding Enhanced Acquisitions's standing to foreclose, the complaint alleges that:

> "On October 30, 2013, State Bank of Texas executed an Assignment of Mortgage that assigned State Bank of Texas's interest in the Mortgage to Plaintiff . . .
>
> "Said Assignment of Mortgage has been sent for recording in the office for the recording of mortgages in the county in which said mortgaged premises were then and are now situated.

---

[3] The complaint was verified on November 14, 2013 by Rajan Patel in Dallas, Texas, a copy of which is annexed as Exhibit A to the Koh Affirmation.

> "On October 30, 2013, State Bank of Texas executed an Allonge to assign the interest in the Note to Plaintiff.
> . . . .
>
> "Plaintiff is the owner and holder of the Note and Mortgage" (*id.* at ¶¶ 12-14 and 16).

The Promissory Note And Unaffixed "Allonge"[4]

The complaint separately annexes copies of the Promissory Note with the two Amendments (Exhibits B, C and D, respectively), the Mortgage (Exhibit E), the Mortgage Assignment (Exhibit F)[5] and a one-page, undated document that is labeled "Allonge" (Exhibit G).

Notably, the six-page Promissory Note attached to the complaint as Exhibit B and identified in paragraph 7 of the complaint contains no indorsements, on its face or otherwise. The last page of the Promissory Note contains only a notary block and a notary stamp on the top half of the page; the bottom half of the page is blank (except for the page number). Therefore, the Promissory Note appears to have ample space on its face for an indorsement. While paragraph 16 of the complaint alleges that "[p]laintiff is the owner and holder of the Note . . ." the Promissory Note attached thereto is seemingly inconsistent with that allegation.

---

[4] The Official Comments to New York Uniform Commercial Code (UCC) § 3-202 (2) state that an "allonge" is an indorsement on a paper "firmly affixed" to an instrument "as to become an extension or part of it" that is sufficient for negotiation of the instrument (*see infra*).

[5] A copy of the Mortgage Assignment annexed to the complaint has a cover page that states "RECORD AND RETURN TO: David G. Moss, Esq. Meister Seelig & Fein LLP . . .", plaintiff's counsel of record. Presumably, that means that the Mortgage Assignment was prepared in anticipation of this litigation.

Importantly, paragraph 14 of the complaint independently alleges that "[o]n October 30, 2013, State Bank of Texas executed an Allonge to assign its interest in the Note to Plaintiff. A copy of said Allonge is attached hereto as Exhibit G." The purported "Allonge" attached to the complaint is centered on an otherwise blank piece of paper that states:

"Allonge

> This Allonge *is firmly affixed* to that certain Promissory Note dated September 28, 2006, in the original principal sum of $1,500,000.00, executed by Sarla Sai, LLC, a New York limited liability company, and payable to the order of State Bank of Texas. Said Promissory Note is amended by that certain Amendment to Promissory Note dated September 28, 2008 and that certain Amendment to Promissory Note dated November 25, 2009. It was so affixed when the endorsement below was placed hereupon" (*id.* at Exhibit G [emphasis added]).

While the "Allonge" (Exhibit G) explicitly states that it is "affixed" to the Promissory Note, the record reflects otherwise (*see* the unendorsed Promissory Note attached as Exhibit B). Directly under the foregoing language, the "Allonge" has an undated endorsement stating "Pay to the Order of Enhanced Acquisitions II, LLC, Without Recourse or Warranty, Express or Implied" and was purportedly signed by Rajan Patel, the "VP" of State Bank of Texas. Patel's signature is not notarized.

Defendants' Pre-Answer Motion To Dismiss

Sarla Sai and Dhabuwala, on December 18, 2013, made a pre-answer motion for an order, pursuant to CPLR 3211 (a), dismissing the complaint on the ground that "there is no indication that the Plaintiff Enhanced Acquisitions has any standing to bring this suit against Dr. Dhabuwala personally [because] there is no documentation that indicates that the

guarantee annexed to the complaint was assigned to Enhanced Acquisitions"[6] Defendants further contended that Enhanced Acquisitions lacked standing to foreclose because "the assignment of the Promissory Note is not notarized despite the fact that the document is to be properly 'endorsed'" (Horn Opposition Affirmation, Exhibit B at page 4).

Enhanced Acquisitions, in opposition, argued that "[t]he allonge, which assigned all the obligations under the Note to Acquisitions . . . makes no statement limiting Dhabuwala's obligations under the Personal Guaranty" and that the Mortgage Assignment "did, in fact, assign the Personal Guaranty, and all other obligations under the Note, to Acquisitions" (Horn Opposition Affirmation, Exhibit C at page 5). Enhanced Acquisitions also argued that "[a]t this pre-answer stage of the action," it is not required to prove its case, since it "properly alleged that it owns the notes, mortgages and guaranties in this action" (*id.* at page 7).

The April 2014 Decision And Order

The court (Ruchelsman, J.) issued an April 24, 2014 Decision and Order (April 2014 Order), joining defendants' dismissal motion for disposition with an "identical" dismissal motion filed in another foreclosure action also commenced by Enhanced Acquisitions, *Enhanced Acquisitions II, LLC v McSam Tribeca, LLC*, Kings County index No. 507174/13 (McSam Tribeca Foreclosure Action) (Horn Opposition Affirmation, Exhibit F at page 5).

---

[6] *See* defendants' December 17, 2012 memorandum of law in support of their motion to dismiss the Complaint at pages 3-4, a copy of which is annexed as Exhibit B to the September 9, 2014 affirmation of Michael S. Horn, Esq. in opposition to plaintiff's summary judgment motion (Horn Opposition Affirmation).

The defendants in both actions sought dismissal, pursuant to CPLR 3211 (a) (3), on the grounds that Enhanced Acquisitions lacked standing to foreclose.

The April 2014 Order, which was only issued under the caption and index number of the McSam Tribeca Foreclosure Action, discussed and analyzed Enhanced Acquisitions's standing to foreclose under the particular facts of the McSam Tribeca Foreclosure Action. The court plainly denied defendants' dismissal motion in the McSam Tribeca Foreclosure Action because "plaintiff has demonstrated standing" by annexing copies of the endorsed note and affixed allonge to the summons and complaint filed in that case (*id.* at pages 4-5).

The April 2014 Order contains a single paragraph regarding this foreclosure action (filed under index No. 507168/13) in the final paragraph of the five-page decision:

> "The motions filed under Index Number 507168/2013 are identical to the instant motion and the decision is identical as well. Therefore, the motions of the defendants seeking to dismiss the complaint under Index Number 507168/2013 are denied as well" (*id.* at page 5).

Thus, in denying defendants' dismissal motion, the April 2014 Order did not explicitly discuss and analyze the particular facts of this case.

Unbeknownst to the parties, the April 2014 Order was only entered in the McSam Tribeca Foreclosure Action on May 14, 2014, but was never filed and entered in this action. Enhanced Acquisitions, on May 16, 2014, served defendants with notice in this action that the April 2014 Order "was duly filed and entered at the office of the Clerk of the Supreme Court, Kings County, on May 14, 2014" (*see* Horn Opposition Affirmation, Exhibit G). Defendants, on June 9, 2014, thus noticed their appeal from the April 2014 Order (*id.*).

Defendants Answer The Complaint

Sarla Sai and Dhabuwala subsequently answered the complaint on June 19, 2014, denying the material allegations therein and asserting several affirmative defenses, including that "[p]laintiff does not have standing to bring the within action" (Answer at page 2-5). Defendants' answer further alleges that:

> "There is no indication that the Plaintiff Enhanced Acquisitions has any standing to bring this suit against Dr. Dhabuwala personally
>
> "Plaintiff has no documentation that indicates that the guarantee annexed to the complaint was assigned to Enhanced Acquisitions
>
> "The note that the assignment of the Promissory Note is not notarized despite the fact that the document is to be properly 'endorsed'" (*id.* at ¶¶ 3-5).

Sarla Sai and Dhabuwala also asserted cross-claims for indemnification and contribution.

Defendants, ECB and DOF, failed to answer or otherwise respond to the complaint.

Enhanced Acquisitions's Instant Motion

Enhanced Acquisitions, on August 26, 2014, moved for an order granting it summary judgment and an order of reference, a default judgment against ECB and DOF, amongst other relief, based on Attorney Koh's Affirmation and the August 25, 2014 affidavit of Rajan Patel (Patel Affidavit), the managing member of Enhanced Acquisitions and the Vice President of State Bank of Texas. Notably, the first page of the Patel Affidavit states that the document was signed and sworn to in the "State of New York" and "County of New York," yet the third page of the document reflects that it was notarized by Christopher R. Bell, a

Notary Public in Texas. Also, the Patal Affidavit does not include a certificate of conformity, as required by CPLR 2309 (c).[7]

Attorney Koh contends that "[o]n or about" October 30, 2013, State Bank of Texas executed the Mortgage Assignment and "an Allonge to assign its interest in the Note to Plaintiff" (Koh Affirmation at ¶¶ 6-7). Koh submitted copies of the Mortgage Assignment and a one-page, undated document entitled "Allonge" as Exhibits H and I,[8] respectively. Attorney Koh argues that defendants' standing affirmative defenses "are little more than a rehashing of positions already rejected by this Court" in the April 2014 Order (*id.* at ¶ 25).

The Patel Affidavit states that Patel "can confirm that all facts alleged in Mr. Koh's affirmation are true to the best of [his] knowledge" (Patal Affidavit at ¶ 2). Regarding Enhanced Acquisitions's standing to foreclose, Patel merely attests that:

> "Specifically, I also know that *on or about* October 30, 2013, State Bank of Texas assigned the Note and the Mortgage to Acquisitions. The assignment of the Mortgage was recorded with the Office of the City Register of the City of New York on November 22, 2013 and assigned CAR number 2013000842904. Copies of the documentary evidence demonstrating this assignment of the Mortgage and the Note are attached

---

[7] CPLR 2309 (c) provides that "[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation." Importantly, the Appellate Division, Second Department recently held that an out-of-state affidavit lacking a certificate of conformity is admissible if it substantially conforms to the statutory template for a certificate of acknowledgment or proof of execution set forth in Real Property Law § 309-b (1) (*Midfirst Bank v Agho*, 121 AD3d 343, 350-351 [2014]).

[8] Notably, the "Allonge" submitted as Exhibit I to the Koh Affirmation is identical to the undated, one-page "Allonge" annexed to the Complaint as Exhibit G.

> to Mr. Koh's affirmation as Exhibits H and I. Acquisitions remains the owner of the Note and Mortgage to this day and has not assigned the Note or Mortgage" (*id.* at ¶ 3 [emphasis added]).

Notably, Patel provides no testimony regarding the indorsement of the Promissory Note to the order of Enhanced Acquisitions, his execution of the Allonge and whether the Allonge was ever affixed to the Promissory Note.

Defendants' Motion For A Stay Pending Appeal

Defendants, on September 8, 2014, moved, by order to show cause, before the Appellate Division, Second Department for an order staying this foreclosure action pending their appeal from the April 2014 Order (Horn Opposition Affirmation, Exhibit K). According to Attorney Horn, "[t]he Appellate Division has indicated that the Court has not entered the [April 2014] Order regarding its decision on the Motion to Dismiss under Index No. 507168/2013 and has asked that the parties submit a consent order to enter the same" (*id.* at ¶ 14).

The April 2014 Order Was Never Entered In This Case

To date, the Kings County Clerk's minutes reflect that the April 2014 Order was never filed and entered in this foreclosure action (index No. 507168/13). The Kings County Clerk's minutes reflect that the April 2014 Order was only filed and entered under index No. 507174/13, corresponding to the McSam Tribeca Foreclosure Action.

Defendants' Discovery Demands

Defendants, on September 9, 2014, served discovery demands upon Enhanced Acquisitions, including a demand for the production and inspection of documents,

interrogatories and a notice to depose a corporate representative of Enhanced Acquisitions (*id.* at Exhibits L, M and N).

Defendants' Opposition To Summary Judgment

Sarla Sai and Dhabuwala oppose Enhanced Acquisitions's summary judgment motion on the grounds that: (1) it failed to establish a prima facie case; (2) the Patel Affidavit does not comply with CPLR 2309, which requires a certificate of conformity for affidavits signed and notarized out-of-state; (3) the Koh Affirmation submits unauthenticated documents that "lack any probative value"; (4) plaintiff's moving papers "failed to redact Defendant Dhabuwala's social security number" in violation of General Business Law § 399-dd; (5) plaintiff has failed to prove that it has standing and (6) it should be denied, pursuant to CPLR 3212 (f), because "facts essential to the motion exist but cannot then be stated due to the absence of discovery" (Horn Opposition Affirmation at ¶¶ 19-23). Defendants also submit a September 9, 2014 affidavit from Dhabuwala attesting to their need for discovery regarding the amounts allegedly owed and the relationship between Enhanced Acquisitions and State Bank of Texas.

Enhanced Acquisitions's Reply

Enhanced Acquisitions, in reply, submitted Attorney Koh's October 21, 2014 affirmation in further support of its summary judgment motion (Koh Reply Affirmation) and a September 30, 2014 "revised" affidavit from Patel, which had been "corrected" to reflect that the document was actually signed and notarized in Texas (Patel Revised Affidavit).

Enhanced Acquisitions contends that "[defendants' opposition to Acquisition's motion for summary judgment in foreclosure is, for the most part, the irrelevant repetition of a failed argument made in support of [defendants' denied motion to dismiss: namely, that Acquisitions lacks standing. The Court has previously rejected this argument and should not revisit it again" (Koh Reply Affirmation at ¶ 2).

Discussion

(1)

Summary Judgment Standard

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*see* CPLR 3212 [b]*; Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]*; Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Making a prima facie showing, then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox*

Film Corp., 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues" (*Ruiz v Griffin,* 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

Evidence presented by the non-moving party "must be viewed in the light most favorable to the non-moving party" (*see Vega,* 18 NY3d at 503 [internal quotation marks omitted]). Denial thus occurs "where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Benetatos v Comerford*, 78 AD3d 750, 752 [2010] [internal quotation marks omitted]; *see also Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2005] [denial of summary judgment required upon developing "any doubt as to the existence of a triable issue, or where the material issue of fact is arguable"] [internal quotation marks and citations omitted]).

(2)

The April 2014 Order Did Not Resolve Defendants' Standing Defense

Enhanced Acquisitions contends that there are no questions of fact regarding its standing to foreclose because defendants' standing defense was previously raised on defendants' motion to dismiss and was rejected by the court in the April 2014 Order. Essentially, Enhanced Acquisitions argues that its standing was previously resolved on the merits in the April 2014 Order, which constitutes the law of the case. The April 2014 Order, however, cannot constitute the law of the case regarding Enhanced Acquisitions's standing

because the April 2014 Order was never entered in this case, as mandated by CPLR 2220. Consequently, the April 2014 Order is unenforceable, as a matter of law.

CPLR 2220 provides, in relevant part, that "[a]n order determining a motion shall be entered and filed in the office of the clerk of the court where the action is triable . . . If a party fails to file any papers required to be filed under this subdivision, the order may be vacated as irregular, with costs." New York appellate courts have repeatedly held that an order that has not been entered in accordance with CPLR 2220 is unenforceable, as a matter of law (*Skolnik v Metro-North Commuter R.R.*, 13 AD3d 350, 350 [2004] [holding that plaintiff's motion to restore action to trial calendar was unnecessary "[a]s no order was entered upon the decision, the Supreme Court's ruling as embodied therein was without effect"]; *Raes Pharmacy, Inc. v Perales*, 181 AD2d 58, 63 [1992] [Holding that "order must be entered and notice of entry served before an order may be enforced or appealed"]; *James Talcott Factors, Inc. v Larfred, Inc.*, 115 AD2d 397, 400 [1985] [Holding that "[o]rdinarily an order must be entered and notice of entry served before an order may be enforced or appealed"]).

In any event, the April 2014 Order, which merely denied defendants' CPLR 3211 dismissal motion, was not a determination on the merits regarding plaintiff's standing. Indeed, with the exception of the final paragraph of the decision, the April 2014 Order only analyzes the particular facts at issue in the McSam Tribeca Foreclosure Action.

(3)

Plaintiff's Standing To Foreclose

"To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment" (*Campaign v Barba*, 23 AD3d 327 [2005]). "'Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief'" (*Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 973-974 [2014], quoting *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2011]; *see also Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]). "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder of the subject mortgage and of the underlying note at the time the action is commenced" (*MLCFC 2007-9 Mixed Astoria, LLC v 36-02 35th Ave. Dev., LLC*, 116 AD3d 745, 746 [2014]).

UCC § 1-201 (21) (A) defines "holder" as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." UCC § 3-202 (1) provides, in relevant part, that "[n]egotiation is the transfer of an instrument *in such form that the transferee becomes a holder*. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery" (emphasis added). Importantly, UCC § 3-202 (2) requires that "[a]n indorsement must be written by or on behalf of the holder and on the instrument

or on a paper so firmly affixed thereto as to become a part thereof" (emphasis added). The Official Comments to UCC § 3-202 (2) states that:

> "[s]ubsection (2) follows decisions holding that a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not sufficient for negotiation. The indorsement must be on the instrument itself or on a paper intended for the purpose which is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge."

Thus, according to the UCC, a plaintiff attains holder status of a promissory note by evidencing: (1) that the note was delivered to the plaintiff bearing, on its face or in an affixed allonge, a special indorsement payable to the order of the plaintiff *or* (2) that the note was delivered to the plaintiff bearing an indorsement in blank that is similarly affixed.

The Appellate Division, Second Department has long held that a promissory note secured by a mortgage is a negotiable instrument, which requires an indorsement on the instrument itself or on a paper so firmly affixed thereto as to become a part thereof, pursuant to UCC § 3-202 (2), in order to effectuate a valid assignment of the instrument (*Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 212 [1989] [holding that production of the note without any indorsement on the note itself or on a paper firmly affixed to the note indicates that the note was never validly assigned or transferred from the mortgagee].

Applying these well-settled principles of negotiable instruments, New York courts have repeatedly held that a purported mortgage assignee's production of a copy of an unendorsed promissory note with an unaffixed, undated allonge raises issues of fact regarding that party's standing to foreclose (*see HSBC Bank USA, N.A. v Thomas*, 46 Misc.

3d 429 [Sup Ct Kings County 2014] [holding that issues of fact regarding negotiation of promissory note precluded summary judgment where plaintiff produced undated allonge on a separate sheet of paper and note does not have an endorsement on its face]; *U.S. Bank Natl. Assoc. v Bresler*, 39 Misc. 3d 1205 (A) [Sup Ct Kings County [2013] [upholding denial of summary judgment upon reargument because plaintiff's production of undated indorsement on a separate page from promissory note failed to comply with UCC § 3-202 (2)]; *Indymac Bank F.S.B. v Garcia*, 28 Misc. 3d 1202 (A) [Sup Ct Suffolk County 2010] [denying plaintiff's application for an order of reference because alleged indorsement was on a separate page from the promissory note and was undated]).

Conversely, the Appellate Division, Second Department recently held that a plaintiff can establish "its standing as the holder of the note and mortgage by demonstrating that the note was in its possession and the mortgage had been assigned to it prior to the commencement of the action, *as evidenced by its attachment of the indorsed note*, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced" (*Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151 [2015] [emphasis added]). Presumably, the "indorsed note" attached to the pleadings in *Catizone* complied with UCC § 3-202 (2) because the indorsement was "on the instrument or on a paper so firmly affixed thereto as to become a part thereof."

Here, in contrast to *Catizone*, Enhanced Acquisitions commenced this action by filing a summons and complaint attaching a copy of the Promissory Note *without any indorsement*

on its face or firmly attached thereto. Instead, the complaint attached the undated "Allonge" as an independent document with a specific endorsement in the center of an otherwise blank page, which was purportedly executed by Patel as "VP" of State Bank of Texas to the order of Enhanced Acquisitions on an unspecified date. Although the purported "Allonge" explicitly states that it is "affixed" to the Promissory Note, copies of the Promissory Note in the record reflect otherwise. These record documents, on their face, do not evidence that the Promissory Note was properly assigned/negotiated in accordance with UCC §§ 3-202 (1) and 3-202 (2) through: (1) an indorsement by State Bank of Texas on the face of the Promissory Note itself or on an allonge *firmly affixed* to the Promissory Note, and (2) State Bank of Texas's subsequent delivery of the indorsed Promissory Note to Enhanced Acquisitions.

Notably, the verified complaint contains a single allegation regarding the transfer of the Promissory Note, alleging that "[o]n October 30, 2013, State Bank of Texas executed an Allonge to assign the interest in the Note to Plaintiff. A copy of said Allonge is attached hereto as Exhibit G" (Complaint at ¶ 14). While this verified allegation may establish that the "Allonge" was signed prior to the November 15, 2013 commencement of this action, it does not establish that the Promissory Note was effectively transferred to confer standing. The mere execution of an indorsement on a blank piece of paper does not create an "allonge" that is sufficient for negotiation of the Promissory Note, pursuant to UCC Article 3.

Although Enhanced Acquisitions submitted the Patel Affidavit and the Patel Reply Affidavit in support of its summary judgment motion,[9] Patel utterly fails to provide any factual testimony regarding the "Allonge" that purportedly bears his signature, including the specific circumstances under which the document was executed. Instead, Patel merely alleges that "I also know that *on or about* October 30, 2013, State Bank of Texas assigned the Note and Mortgage to Acquisitions" and references the Mortgage Assignment and the purported "Allonge" annexed to the Attorney Koh's Affirmation as "evidence demonstrating this assignment . . ." (Patel Affidavit at ¶ 3; Patel Reply Affidavit at ¶ 3 [emphasis added]). However, the record documents Patel references raise questions of fact regarding Enhanced Acquisitions's standing to foreclose that absolutely preclude summary judgment at this juncture, including whether the alleged indorsement designated as an "Allonge" was firmly affixed to the original Promissory Note before the Promissory Note was delivered to Enhanced Acquisitions.

---

[9] The Patel Affidavit is inadmissible because it erroneously states that it was executed in New York and notarized in Texas, and thus, it does not substantially conform to the template set forth in Real Property Law § 309-b (1) (*see Midfirst Bank*, 121 AD3d at 350-351). However, Enhanced Acquisitions corrected the jurat in the Patel Reply Affidavit, which the court will consider, since the reply is otherwise identical to the Patel Affidavit and defendants had an opportunity to address it (*cf. Yeum v Clove Lakes Health Care And Rehabilitation Center, Inc.*, 71 AD3d 739 [2010] [holding that proponent of summary judgment motion cannot meet prima facie burden with evidence submitted for the first time in its reply papers]).

(3)

Motion For Default Judgment
Against The Non-Appearing Defendants

CPLR 3215 (f) states, in relevant part, that "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due." To satisfy this statutory requirement, an affidavit submitted in support of a motion for a default judgment, pursuant CPLR 3215, "need only allege enough facts to enable a court to determine that a viable cause of action exists" and "defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]).

Here, Enhanced Acquisitions has failed to demonstrate that it is entitled to a default judgment against ECB and DOF, pursuant to CPLR 3215 (f), because it utterly failed to provide any proof of facts constituting a cognizable claim against those non-appearing parties. The Patel Affidavit is absolutely silent regarding the claims asserted against ECB and DOF. Although the verified complaint "may be used as the affidavit of the facts constituting the claim[s]" and "the amount due" from ECB and DOF (*see* CPLR 3215 [f]), the complaint contains a single, conclusory allegation stating that ECB and DOF are named as parties because "each has or claims to have or may claim to have some interest or lien

upon the Property or some part thereof, which interest or lien, if any, has accrued subsequent to, and is subject and subordinate to, the lien of the Mortgage" (Complaint at ¶ 4). Thus, ECB and DOF were only named as party defendants to this action because they may have an interest or lien upon the Property, making them necessary parties under RPAPL § 1311.[10] Enhanced Acquisitions, however, has failed to submit any proof of facts constituting a direct claim against ECB and DOF, entitling it to a default judgment against these necessary parties. Accordingly, it is

ORDERED that the branches of Enhanced Acquisitions's motion seeking an order granting it summary judgment against defendants, Sarla Sai and Dhabuwala, and for the appointment of a referee to compute the sums sue and owing is denied; it is further

ORDERED that the branch of Enhanced Acquisitions's motion seeking a default judgment against defendants, ECB and DOF, the non-appearing defendants, is denied; and it is further

ORDERED that the branch of Enhanced Acquisitions's motion seeking an order amending the caption by excising the John Doe defendants is granted; and it is further

---

[10] RPAPL § 1311 states, in relevant part, that any party "whose interest is claimed to be subject and subordinate to the plaintiff's lien, shall be made a party defendant to the action," including "[e]very person having any lien or incumbrance upon the real property . . ."

ORDERED that the caption of this action shall read as follows:

----------X

ENHANCED ACQUISITIONS II, LLC,

Plaintiff,

- against -

SARLA SAI, LLC, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK DEPARTMENT OF FINANCE, ASHOK DHABUWALA,

Defendants.

----------X

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID B. VAUGHAN

FILED

JUN 12 2015

KINGS COUNTY CLERK'S OFFICE