

<b>Everbank v Krompier</b>
2015 NY Slip Op 31160(U)
March 12, 2015
Supreme Court, Suffolk County
Docket Number: 12-20007
Judge: Daniel Martin
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**COPY**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. DANIEL MARTIN  
Justice of the Supreme Court

MOTION DATE 11-6-13  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 001 - MG

-----X

EVERBANK

Plaintiff,

- against -

BRYAN A. KROMPIER; TRACY M. KROMPIER; "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,

Defendant.

-----X

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Defendant Pro Se  
43 Sundown Drive  
Bellport, NY 11713

Upon the following papers numbered 1 to 16 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; ~~Notice of Cross Motion and supporting papers~~     ; Answering Affidavits and supporting papers 12 - 13; Replying Affidavits and supporting papers 14 - 16; ~~Other~~     ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion by plaintiff, EverBank, for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Bryan A. Krompier (defendant), to amend the caption of this action pursuant to CPLR 3025 (b), for an order fixing the defaults of the non-appearing, non-answering defendants, and for an order of reference pursuant to RPAPL 1321 is granted; and it is further

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**ORDERED** that the caption is hereby amended by substituting Lorretta Howard in place of defendants "John Does" and "Jane Does" and by striking therefrom the remaining "John Does" and "Jane Does"; and it is further

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

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EVERBANK

Plaintiff,

- against -

BRYAN A. KROMPIER; TRACY M. KROMPIER;  
 LORRETTA HOWARD,

Defendants.

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This is an action to foreclose a mortgage on property known as 43 Sundown Drive, Bellport, New York. On March 25, 2009, defendant executed a fixed rate note in favor of Franklin First Financial, Ltd., a New York Corporation (Franklin) agreeing to pay the sum of \$296,650.00 at the starting yearly interest rate of 4.875%. On said date, defendant and Tracy M. Krompier (collectively known as defendants) executed a mortgage in the principal sum of \$296,650.00 on the subject property. The mortgage indicated Franklin to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Franklin as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 4, 2009 in the Suffolk County Clerk's Office. Thereafter, on June 28, 2012, the note and mortgage were transferred by assignment of mortgage from MERS, as nominee for Franklin to plaintiff EverBank. The assignment of mortgage was recorded on August 3, 2012 in the Suffolk County Clerk's Office.

EverHome sent a 90-day notice pursuant to RPAPL 1304 to defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$12,422.15. As a result of his continuing default, plaintiff commenced this foreclosure action on July 3, 2012. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to pay the installment due as of September 1, 2011 and subsequent payments thereafter. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on December 14, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff submits among other things, the affidavits of Lorri Beltz, assistant vice president of EverBank and Alan Conine, vice president of early stage default of EverBank; the affirmation of Catherine Gran, Esq.; the pleadings; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendants in this action; and, a proposed order appointing a referee to compute. Defendant has submitted opposition to the summary judgment motion.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*see Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

Here, plaintiff has established its entitlement to summary judgment against the answering defendant as its submissions included a copy of the mortgage, the unpaid note together with due evidence of his default in payment under the terms of the loan documents (*see CPLR 3212; RPAPL §1321; Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [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]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC.*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011] ).

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

special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (*see* UCC § 3-202; § 3-204; § 9-203[g]). Here, Alan Conine avers that plaintiff took possession of the note on December 21, 2011, prior to the commencement of the action (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 338 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, its standing to prosecute this action.

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

In his opposing papers, defendant re-asserts his pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends that a question of fact exists with respect to the plaintiff's standing by reason of the assignment of mortgage, which is dated June 28, 2012, and the summons and complaint, which is dated July 2, 2012. Counsel also argues that since plaintiff purportedly was not the holder of the note and mortgage at the time of the service of the mortgage default notice, plaintiff does not have personal knowledge of any service of the same and cannot attest to such allegations. Neither the defenses raised in their answer nor those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Also unavailing is the defendant's contention that the record lacks proof that plaintiff provided him with a default notice. However, such assertion is unsupported by the record before the Court. Moreover, any alleged failure of plaintiff to satisfy any of the pre-commencement notice requirements, even if true, merely constitutes a defense to the action and does not deprive the Court of subject matter jurisdiction (*see Deutsche Bank Trust Co. Americas v Shields*, 116 AD3d 653, 983 NYS2d 286 [2d Dept 2014]; *Pritchard v Curtis*, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2012]; *Signature Bank v Epstein*, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]).

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

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

Dated: MARCH 12, 2015

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION