

**53 Montrose YMJ, LLC v 53 Montrose Ave Realty Corp.**

2015 NY Slip Op 31278(U)

July 7, 2015

Supreme Court, Kings County

Docket Number: 505206/13

Judge: Bert A. Bunyan

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 8 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 30<sup>th</sup> day of June, 2015.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

-----X

53 MONTROSE YMJ, LLC,

Plaintiff,

**DECISION AND ORDER**

- against -

Index No. 505206/13

53 MONTROSE AVE REALTY CORP., et al.,

Mot. Seq. No. 1, 2

Defendants.

53 Montrose Avenue  
Brooklyn, NY 11206  
Block 3050, Lot 39

-----X

The following e-filed papers read herein:

NYSCEF No.

Notice of Motion/Cross Motion/Supporting Affirmations  
(Affidavits)/Memorandum of Law Annexed \_\_\_\_\_

40-43, 44; 53-67

Affirmation (Affidavits) in Opposition and in Reply \_\_\_\_\_

69-76; 87; 92; 98-101;103; 105

In this action to foreclose a mortgage on a mixed-use property, plaintiff 53 Montrose YMJ, LLC (hereafter, plaintiff) moves in Seq. No. 1 for an order (1) pursuant to CPLR 3212, granting it summary judgment against defendant 53 Montrose Ave Realty Corp. (hereafter, defendant), and (2) pursuant to RPAPL 1321, appointing a referee to compute and report whether the premises should be sold in one parcel. Defendant opposes and cross-moves in Seq. No. 2 for an order (1) pursuant to CPLR 5015 (a), vacating defendant's default and/or compelling acceptance of its late answer, (2) vacating the order appointing the receiver, (3) pursuant to CPLR 3211 (a) (3), dismissing the complaint for lack of standing, and (4) pursuant to CPLR 3211 (a) (8), dismissing the complaint for lack of personal jurisdiction.

By short-form order, dated Oct. 29, 2014 (NYSCEF Doc. No. 89), the Court addressed certain branches of defendant's cross motion. Specifically, the Court granted defendant's cross motion to the extent that its answer was accepted as timely served by plaintiff, albeit without the defense of lack of personal jurisdiction. In addition, the Court in the same order denied the portion of defendant's cross motion which was for the vacatur of the order appointing the receiver. By stipulated order, dated Dec. 14, 2014 (NYSCEF Doc. No. 96), "[a]ll parties agree that Plaintiff is in possession of the original Note in this action." Thus, the only remaining issues, following the Court's Oct. 29<sup>th</sup> and Dec. 14<sup>th</sup> orders, are (1) whether plaintiff is entitled to summary judgment, and (2) whether defendant is entitled to dismissal of the complaint for lack of standing.

### ***Background***

On Sept. 3, 2013, plaintiff commenced the instant action to foreclose a mortgage encumbering a six-unit apartment building with a storefront at 53 Montrose Avenue in Brooklyn, New York. The mortgage was executed and delivered by defendant on Nov. 7, 2005 (hereafter, the Mortgage), to secure an adjustable-rate note in favor of non-party HFR Commercial Solutions, Inc. (hereafter, HFR) in the original principal amount of \$438,750 (hereafter, the Note). Concurrently, defendant executed and delivered to HFR an Assignment of Leases and Rents (hereafter, the Assignment of Leases and Rents). Plaintiff alleges in its verified complaint that:

- By Assignment of Mortgage, dated Sept. 28, 2005 [so in the original] (hereafter, Assignment #1), the Note and Mortgage were assigned by HFR to non-party Bayview Loan Servicing, LLC (hereafter, Bayview).

Assignment #1 was corrected pursuant to a Correction Assignment of Mortgage, dated Feb. 14, 2013 (hereafter, the Correction Assignment of Mortgage).

- On Apr. 15, 2009, Montrose entered into a modification agreement (hereafter, the Modification Agreement) with Bayview, increasing the principal amount then due under the Note to \$610,214.14.
- On Dec. 4, 2012, the Mortgage was assigned by Bayview to plaintiff, pursuant to a Corporate Assignment of Mortgage (hereafter, Assignment #2).
- Concurrently with the assignment of the Mortgage from Bayview to plaintiff, Bayview executed and delivered to plaintiff an Assignment of Assignment of Leases and Rents.

The record on the motion (NYSCEF Doc. No. 72) includes an undated Allonge to Note that is endorsed by Bayview to the order of plaintiff (hereafter, the Allonge).

According to the affidavit of plaintiff's Vice-President Israel Weinstock, dated Aug. 4, 2014 (NYSCEF Doc. No. 76, ¶¶ 6-7), the original Note, Allonge, and Mortgage were physically delivered by Bayview to plaintiff on Dec. 4, 2012.

Plaintiff further alleges in its verified complaint that defendant has failed to comply with the terms of the Note and Mortgage, in that defendant has failed to make monthly payments of principal and interest due under the Note starting on and after Feb. 1, 2009. According Mr. Weinstock's affidavit, dated Mar. 25, 2014 (in ¶¶ 11, 17), the loan was accelerated on Feb. 4, 2010.

### *Discussion*

A plaintiff seeking to establish prima facie entitlement to judgment as a matter of law in a mortgage-foreclosure action must produce the mortgage, the unpaid note, and evidence

of the payment default (*see HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773 [2d Dept 2015]). “If the plaintiff is not the original lender and standing is at issue, the plaintiff must also provide evidence that it received both the mortgage and note by a proper assignment” (*Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 726 [2d Dept 2014]). “[A] plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced” (*Emigrant Bank v Larizza*, 2015 NY Slip Op 05151, \*1 [2d Dept 2015]). “Either a written assignment of the underlying note or the physical delivery of the note to the plaintiff, prior to the commencement of the action, is sufficient to transfer the obligation” (*id.*).

Here, plaintiff has established its entitlement to summary judgment by production of the Note, Allonge, and Mortgage and the uncontested proof of payment default. Further, plaintiff has established, through admissible evidence, its standing as the holder of the Note and Mortgage by demonstrating that the Note was physically delivered to it before the commencement of this action (*see Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 932 [2d Dept 2013]). Specifically, the Aug. 4, 2014, affidavit submitted by plaintiff establishes that it obtained physical possession of the original Note, previously held by Bayview, together with the Allonge, on Dec. 4, 2012. This affidavit establishes that physical delivery of the Note and Allonge was made to plaintiff by Bayview on Dec. 4, 2012, before the inception of this action. Further, the Correction Assignment of Mortgage was executed and delivered on Feb. 14, 2013, likewise before the inception of this action. Since the exact

delivery date of the Note and Allonge is provided, and since the Correction Assignment of Mortgage was executed and delivered before the inception of this action, no further detail is necessary for plaintiff to establish standing (*see Aurora Loan Services, LLC v Taylor*, 114 AD3d 627, 628-629 [2d Dept 2014]; *see also U.S. Bank Natl. Assn. v Guy*, 125 AD3d 845, 847 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 974 [2d Dept 2014]; *Kondaur Capital Corp. v McCary*, 115 AD3d 649, 650 [2d Dept 2014]). Defendant, in opposition, has offered no evidence to contradict these documentary and factual averments and, therefore, has failed to raise a genuine issue of triable fact with respect to plaintiff's standing (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 932 [2d Dept 2013]). Assuming, without deciding, that the plaintiff should be denied a holder-in-due-course status, and that it is therefore not immune from personal defenses (here, unclean hands and culpable conduct), the Court has determined that they are insufficient to defeat plaintiff's motion for summary judgment dismissing these defenses (*see ICC Bridgeport Ltd. Partnership v Primrose Dev. Corp.*, 221 AD2d 417, 418 [2d Dept 1995]). Lastly, defendant's speculation and conclusory allegations questioning the intent of the parties to the Allonge, Assignment #1, and Correction Assignment of Mortgage are insufficient to defeat plaintiff's right to summary judgment (*see Hypo Holdings, Inc. v Chalasani*, 280 AD2d 386, 387 [1<sup>st</sup> Dept 2001], *lv denied* 96 NY2d 717 [2001]).

*Conclusion*

Plaintiff's motion for summary judgment and for other relief is granted. An order to that effect is simultaneously signed herewith.

Defendant's cross motion, to the extent not previously resolved by the Court's prior orders, dated Oct. 29, 2014, and Dec. 14, 2014, is denied.

This constitutes the decision and order of the Court.

ENTER,  
  
J. S. C.

HON. BERT A. BUNYAN  
JUSTICE N.Y.S. SUPREME COURT

**FILED**  
JUL -7 2015  
KINGS COUNTY CLERK'S OFFICE

