

**Quicken Loans Inc. v Diaz-Montez**

2015 NY Slip Op 31285(U)

March 13, 2015

Supreme Court, Queens County

Docket Number: 700505/2014

Judge: Robert J. McDonald

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In this mortgage foreclosure action, plaintiff moves for an order striking the answer of defendant Maria Diaz-Montez; granting summary judgment against said defendant on the ground that the answer contains no valid defense and that no triable issue of fact exists; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sums due and owing to plaintiff; and amending the caption.

This foreclosure action pertains to the property located at 194-34 113<sup>th</sup> Road, St. Albans, Queens County, New York, 11412. Based upon the record before this court, defendant, Maria Diaz-Montez, entered into a mortgage with 1<sup>st</sup> Alliance Lending, LLC, on March 5, 2010, to secure a loan in the principal amount of \$390,150.00. Defendant also executed and delivered a Note to 1<sup>st</sup> Alliance lending, LLC. acknowledging the loan, the rate of interest, and the monthly installments. The Note contains an allonge endorsed in blank by 1<sup>st</sup> Alliance Lending LLC. The Mortgage was assigned to Quicken Loans by virtue of an assignment of mortgage executed on January 13, 2014. On November 5, 2012 a Consolidation, Extension and Modification Agreement was executed by the plaintiff and the defendant modifying the mortgage and increasing the principal amount payable to be \$428,994.90.

The plaintiff asserts that defendant defaulted on the note and mortgage when she failed to make her monthly mortgage payments beginning on October 1, 2012. Defendant has not made any mortgage payments since that time.

On March 23, 2012 the plaintiff notified the defendants of their default under the terms of the Note and Mortgage. The defendants failed to remedy their default and as a result, the plaintiff elected to accelerate the defendant's mortgage and brought an action to foreclose by filing a lis pendens and summons and complaint on January 23, 2014. Plaintiff asserts that all of the defendants have been duly served with a copy of the summons and verified complaint. Plaintiff also asserts that it is the holder of the note and the mortgage and has complied with RPAPL § 1304 by serving a 90 day pre-foreclosure notice on June 13, 2013.

Defendant, pro se, served a verified answer on March 3, 2014, containing a general denial and asserting affirmative defenses including lack of standing, lack of personal jurisdiction, and failure to serve 90 day pre-foreclosure notice. Other than Ms. Diaz-Montez none of the other defendants answered the summons and complaint.

A settlement loan conference pursuant to CPLR 3408 was held in the Residential Foreclosure Settlement Part on July 22, 2014. Defendant failed to appear although duly notified of the date of the conference. By order dated July 22, 2014, Referee Lance Evans directed the plaintiff to file an application seeking an Order of Reference.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Miranda L. Sharlette, Esq., the affidavit of merit of Laura A. Miller, a Loss Mitigation Officer of Quicken Loans Inc., a copy of the note and mortgage, copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of the 90 day notice of intent to foreclose, dated June 13, 2013; a copy of the RPAPL § 1304 notice served on the defendant with the summons and complaint.

In her affidavit in support of the motion, Laura Miller, a Loss Mitigation Officer, states that she has personal knowledge of the facts and circumstances of this foreclosure action based upon personal knowledge and an independent examination of the financial books and records maintained by the plaintiff on August 19, 2014. She states that the Note signed by the plaintiff on March 5, 2010 contains all allonges indorsed in blank making it a bearer instrument. On March 5, 2010 a mortgage was executed by the defendant to secure the sum of \$390,150.00. The mortgage was assigned to Quicken Loans by assignment of mortgage dated January 13, 2014. On November 12, 2012 a CEM Agreement was executed by the parties increasing the amount payable to the plaintiff to \$428,994.00. Ms Miller states that as of the date the foreclosure action was commenced the plaintiff was and remains in possession of the Note. A Notice of default required under the terms of the mortgage was sent to the defendant on March 12, 2013 and a 90 day pre-foreclosure notice was set on June 13, 2013.

In her affirmation in support of the motion, plaintiff's counsel asserts that the first and second affirmative defenses raised in the defendant's answer concerning lack of capacity to sue and lack of standing are without merit. Counsel submits a copy of the original note which has been endorsed in blank. In addition counsel submits an affidavit from Laura Miller stating that based upon her personal review of the business records relating to the loan in issue, plaintiff was in possession of the promissory note and mortgage prior to the commencement of the action. Counsel states that she certified the copy of the indorsed-in-blank Note on November 7, 2013 prior to the commencement of the action. Counsel also submits a copy of the affidavit of personal service indicating that the defendant was properly served pursuant to CPLR 308(2) by delivery of a copy of

the summons and complaint to a person of suitable age and discretion on January 29, 2014 at the subject property. Moreover, it is asserted that the defendant waived the personal jurisdiction defense by failing to move to dismiss the complaint on this ground within 60 days after the service of the answer. In addition counsel asserts that the RPAPL § 1304 90 day pre-foreclosure notices were sent by certified and first class mail.

In opposition to the motion the defendant submits the affirmation of counsel Sadatu O. Salami-Oyakhilome, Esq., stating that the defendant moved previously for a further foreclosure settlement conference. However, that motion was denied by Justice Strauss by decision and order dated December 4, 2014. Counsel states that the defendant is seeking to continue negotiations with the bank to modify the terms of the loan. Defendant contends that she now has the income necessary to obtain a loan modification.

Upon review and consideration of the plaintiff's motion, defendant's affirmation in opposition and plaintiff's reply thereto, this court finds as follows:

The plaintiff has made a prima facie showing that it is entitled to summary judgment. It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1<sup>st</sup> Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept. 1998]; State Mortgage Agency v Lang, 250 AD2d 595 [2d Dept. 1998]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

The plaintiff's moving papers demonstrate, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and therefore plaintiff is entitled to summary judgment on its claims against defendants (see Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]; North Bright Capital, LLC v 705 Flatbush Realty, LLC, 66 AD3d 977 [2d Dept. 2009]; Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1<sup>st</sup> Dept. 2007]; EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]).

As to the affirmative defense of lack of standing, plaintiff has supplied sufficient documentation to establish plaintiff had possession of the note and mortgage at the time of the commencement of the action and therefore the plaintiff had proper standing to commence the action. Further, plaintiff established by the affidavit of Ms. Miller that it was the holder of the note and mortgage when the action was commenced and that a 90 day pre-foreclosure notice was mailed to the defendant prior to the commencement of the action.

This Court finds that the evidence submitted by the plaintiff including a copy of the note and an affidavit from Ms. Miller stating that based upon her personal review of the records, plaintiff was in possession of the note and mortgage at the time the action was commenced was sufficient to confer standing to commence the action (see Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011][in a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced"]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). "Where a note is transferred, a mortgage securing the debt passes as an incident to the note" (Deutsche Bank Natl. Trust Co. v Spanos, 102 AD3d 909 [2d Dept. 2013]). Therefore, "either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept. 2012]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, the plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept 2011]; Bank of New York v Silverberg, supra)).

Defendant has failed to produce any evidence or an affidavit sufficient to establish the existence of a material issue of fact which requires a trial. Here, defendant does not submit a personal affidavit or any evidence in opposition to the motion other than an affirmation from counsel requesting a further foreclosure conference.

Therefore, the plaintiff's motion for summary judgment is granted and the affirmative defenses contained in the defendant's answer are stricken. Defendant's request for a further loan modification conference is denied (see decision of Justice Strauss dated December 9, 2014 denying defendant's motion for a loan modification conference). The possibility that loss mitigation efforts may occur or be contemplated is not a defense

to mortgage foreclosure see 240 ad 2d 633, Bank of N.Y. v. Agenor, 305 AD2d 438 [2d Dept. 2003]). As pointed out by the plaintiff, the defendant has not provided any evidence that she has applied for a loan modification.

Further, plaintiff is entitled to a default judgment against the non-answering defendants. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted as is the plaintiff's application for an order amending the caption deleting the John Doe defendants and substituting Carlos Santiago and Jane Smith as party-defendants.

Settle Order of Reference on notice.

Dated: March 13, 2015  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**