

<b>FNBN 1, LLC v Patten</b>
2015 NY Slip Op 31704(U)
May 20, 2015
Supreme Court, Suffolk County
Docket Number: 11-8044
Judge: Jr., Andrew G. Tarantino
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SHORT FORM ORDER

INDEX No. 11-8044

**ORIGINAL  
WHEN BLUF**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**PRESENT:**

Hon. ANDREW G. TARANTINO, JR.  
Acting Justice Supreme Court

MOTION DATE 2-13-14  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 001 - MG

FNBN 1, LLC,

Plaintiff,

- against -

ELIZABETH PATTEN A/K/A BETTY PATTEN,  
INDIVIDUALLY AND AS EXECUTOR OF  
THE ESTATE OF MARY E. GREFE A/K/A  
MARY GREFE, WILLIAM H. GREFE, JR.,  
A/K/A WILLIAM H. GREFE A/K/A WILLIAM  
GREFE, JR., ROBERT FILLMORE GREFE  
A/K/A R. FILLMORE GREFE A/K/A ROBERT  
E. GREFE, JOHN A. GREFE A/K/A JOHN  
GREFE A/K/A JACK A. GREFE, NYS  
DEPARTMENT OF TAXATION AND  
FINANCE, UNITED STATES INTERNAL  
REVENUE SERVICE, NYS COMMISSIONER  
OF TAXATION AND FINANCE, MIDLAND  
FUNDING LLC D/B/A IN NEW YORK AS  
MIDLAND FUNDING OF DELAWARE LLC  
A/P/O CAPITAL ONE BANK, SUSAN  
SKUROW, CAPITAL ONE BANK, USA, N.A.,  
and "JOHN DOE" and "JANE DOE" the last two  
names being fictitious, said parties intended being  
tenants or occupants, if any, having or claiming an  
interest in, or lien upon the premises described in  
the complaint,

Defendants.

KOZENY, MCCUBBIN & KATZ, LLP  
Attorneys for Plaintiff  
395 N. Service Road, Suite 401  
Melville, New York 11747

ELIZABETH PATTEN a/k/a BETTY  
PATTEN, Individually and as executor of  
the Estate of Mary E. Grefe a/k/a Mary  
Grefe  
Defendant Pro Se  
20 Birch Road  
Briarcliff Manor, New York 10510

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; ~~Notice of Cross Motion and supporting papers \_\_\_\_\_~~; Answering Affidavits and supporting papers 14 - 31; Replying Affidavits and supporting papers 32 - 33; ~~Other \_\_\_\_\_~~; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (001) by plaintiff, FNBN I, LLC, pursuant to CPLR 3212 for, *inter alia*, summary judgment on its complaint as against defendant Robert Fillmore Grefe a/k/a R. Fillmore Grefe a/k/a Robert E. Grefe (defendant), for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

**ORDERED** that the caption is hereby amended by striking therefrom defendants “John Doe” and “Jane Doe”; 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

\_\_\_\_\_  
FNBN I, LLC, x

Plaintiff,

- against -

ELIZABETH PATTEN A/K/A BETTY PATTEN,  
INDIVIDUALLY AND AS EXECUTOR OF THE  
ESTATE OF MARY E. GREFE A/K/A MARY GREFE,  
WILLIAM H. GREFE, JR., A/K/A WILLIAM H. GREFE  
A/K/A WILLIAM GREFE,, JR., ROBERT FILLMORE  
GREFE A/K/A R. FILLMORE GREFE A/K/A ROBERT  
E. GREFE, JOHN A. GREFE A/K/A JOHN GREFE  
A/K/A JACK A. GREFE, NYS DEPARTMENT OF  
TAXATION AND FINANCE, UNITED STATES  
INTERNAL REVENUE SERVICE, NYS COMMISSIONER  
OF TAXATION AND FINANCE, MIDLAND FUNDING LLC  
D/B/A IN NEW YORK AS MIDLAND FUNDING OF  
DELAWARE LLC A/P/O CAPITAL ONE BANK, SUSAN  
SKUROW, CAPITAL ONE BANK, USA, N.A.,

Defendants.

\_\_\_\_\_ x

This is an action to foreclose a residential mortgage on premises known as 68 Beachwood Road, Cutchogue, New York. On May 25, 2006, Mary Grefe (decedent) executed a fixed rate note in favor of First National Bank of Arizona (First National) agreeing to pay the sum of \$600,000.00 at the yearly rate of 9.000 percent. On the same date, decedent also executed a mortgage in the principal sum of \$600,000.00 on the subject property. The mortgage indicated First National to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of First National as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 6, 2006 in the Suffolk County Clerk's Office. Thereafter, on March 26, 2008, the note and mortgage were transferred by assignment of mortgage from MERS, as nominee for First National, to First National. The assignment of mortgage was recorded on April 16, 2006 in the Suffolk County Clerk's Office. Subsequently, on January 31, 2011, the note and mortgage were transferred by assignment of mortgage from First National, to plaintiff FNBN I, LLC. The assignment of mortgage was recorded on June 28, 2013 in the Suffolk County Clerk's Office.

PennyMac Loan Services (PennyMac) sent a notice of default dated September 3, 2010 to Elizabeth Patten a/k/a Betty Patten as Executor of the Estate of Mary Grefe a/k/a Mary E. Grefe (Estate) stating that the home loan was in default and that the amount past due was \$49,486.85. As a result of the continuing default, plaintiff commenced this foreclosure action on March 14, 2011. In its complaint, plaintiff alleges in pertinent part that the Estate failed to comply with the provisions of the note and mortgage by failing to make the monthly installment due on March 1, 2010. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on January 15, 2013 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 affirmation of Lauren Currie, Esq. in support of the motion; the affirmation of Lauren Currie, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Bera Mena, default specialist for PennyMac; the pleadings; the note, mortgage and assignments 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' counsel; and, a proposed order appointing a referee to compute. Defendant has submitted opposition to plaintiff's 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" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mgt. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). "The burden then shifts to the defendant to demonstrate 'the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff'" (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept

2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage and the unpaid note together with due evidence of the Estate's default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

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, Bera Mena avers that plaintiff was the holder of the note and mortgage when the action was commenced and that First National assigned the note and mortgage to plaintiff by way of an assignment of mortgage dated January 31, 2011 (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 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]; *Aames 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 plaintiff's standing as plaintiff has not submitted any evidence that it owns the note and that the assignment of mortgage from First National to FNBN I, LLC is invalid.

The court finds that none of defendant's allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Defendant's asserted defense that the plaintiff lacks standing

to sue by reason of its non-ownership of the subject note and mortgage is refuted by the record before the Court. Where “the plaintiff is the assignee of the mortgage and underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action” (*Countrywide Home Loans v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept. 2009]; quoting *Federal Natl. Mtg. Assn. v Youkelsone*, 303 AD2d 546, 755 NYS2d 730 [2d Dept 2003]; see also *Wells Fargo Bank v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Here, the plaintiff claims ownership of the note and mortgage under a written assignment executed by the original lender in favor of the plaintiff which pre-dates the commencement of this action.

With respect to any of defendant’s remaining assertions and affirmative defenses, defendant has failed to raise any triable issues of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (see *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (see *Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]).

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 *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]).

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

Dated: May 20 2015

  
\_\_\_\_\_  
A.J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION