

<b>Nationstar Mtge., LLC v Lynch</b>
2015 NY Slip Op 32927(U)
January 28, 2015
Supreme Court, Queens County
Docket Number: 14613/2013
Judge: David Elliot
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

05

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

NATIONSTAR MORTGAGE, LLC,  
Plaintiff(s),

Index  
No. 14613 2013

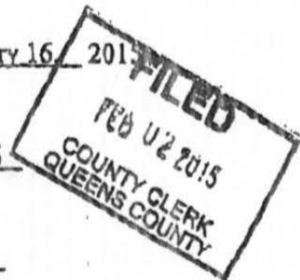
- against -

LORI LYNCH, et al.,  
Defendant(s).

Motion  
Date January 16 2013

Motion  
Cal. No. 96

Motion  
Seq. No. 1



The following papers numbered 1 to 9 read on this motion by plaintiff for an order, inter alia, appointing a referee to compute.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-5
Answering Affirmation - Exhibits.....	6-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this foreclosure action by filing a copy of the summons with notice and complaint, along with a notice of pendency, on August 1, 2013, regarding the real property known as 194-06 115<sup>th</sup> Avenue, St. Albans, New York 11412. According to the complaint, defendants Lori Lynch, Theodocia Lynch, and Renaldo Bailey, "for the purpose of securing to [plaintiff], its successors and assigns, the sum of \$511,263.95, duly made a certain bond, note, consolidation, extension, modification, recasting, or assumption agreement, as the case may be, wherein and whereby they bound themselves . . . in the amount of said money." Plaintiff further alleges that, as security for the payment of the

aforesaid indebtedness, defendants delivered to plaintiff a loan modification, referred to by plaintiff as "the Mortgage," which modified an original mortgage given by these defendants on October 6, 2008, to form a single first mortgage lien in the sum noted above. Plaintiff further indicates, inter alia, that plaintiff is the current owner and holder of the mortgage and note, that defendants "Lori Lynch and Theodocia Lynch" have failed to comply with the terms and conditions of said instruments, and that, as a result, plaintiff has elected to call due the entire amount due thereon. It is further noted that, in accordance with the usual relief demanded in a foreclosure action, plaintiff has demanded that it obtain a judgment that, unless discharged in bankruptcy, defendants Lori Lynch, Theodocia Lynch, and Renaldo Bailey, be responsible for any deficiency that may remain after foreclosure sale.

In support of its motion, plaintiff submits, inter alia, a copy of a note, dated October 6, 2008, executed by defendants Lori Lynch, Theodocia Lynch, and Renaldo Bailey, in favor of Golden First Mortgage Corp., a New York Corporation, for an loan in the amount of \$455,124.00. The note is indorsed in blank. Plaintiff also submits a copy of a mortgage, as security for said note, also dated October 6, 2008, and executed by defendants Lori Lynch, Theodocia Lynch, and Renaldo Bailey. Plaintiff also presents a Loan Modification Agreement, dated October 20, 2010, between defendants Lori Lynch and Theodocia Lynch and plaintiff, whereby the parties agreed to "amend[]" and supplement[]" the mortgage and note dated October 6, 2008. Notably, defendant Renaldo Bailey did not execute this modification agreement.

Plaintiff also submits the affidavit of Jaclyn Holloway, assistant secretary for plaintiff, who swears that she has personal knowledge of the facts stated therein by virtue of, inter alia, her employment with plaintiff. Ms. Holloway states that plaintiff received the original note, with blank indorsement, on July 6, 2010, and that plaintiff has been in continuous possession thereof since that time through commencement of the within action. She further details that the mortgage loan is in default for the failure to remit the February 1, 2011 payment and all subsequent payments, that demand letters were sent to each of the three defendants, that the 90-day notices were sent by both regular and certified mail to each of the three defendants, and that, despite same, the default was not cured and the action was commenced.

It appears, by virtue of the affidavits of service submitted on plaintiff's motion, that all defendants were served with process, and that none answered or otherwise appeared herein, except for defendant Lori Lynch and Renaldo Bailey-Bey, s/h/a Renaldo Bailey, who served their verified answers dated September 18, 2013, and September 8, 2014, respectively. As to defendant Lori Lynch, her answer contains a general denial and the following affirmative defenses: standing, non-compliance with RPAPL § 1304 (two copies not delivered), and non-compliance with the regulations of the Department of Housing and Urban Development (HUD).

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff has established that the defenses set forth by defendant Lori Lynch are without merit. As to the standing defense, plaintiff has established that it has standing to maintain this action by virtue of the affidavit of Ms. Holloway coupled with the note containing a blank indorsement, same which demonstrates that the note was physically delivered to plaintiff prior to commencement of the action (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]; *U.S. Bank, N.A. v Colymore*, 68 AD3d 752 [2009]; *see also* UCC 3-202). Plaintiff has also submitted true copies of the 90-day notices sent to this defendant and as detailed by Ms. Holloway. Finally, as to defendant's claim regarding plaintiff's alleged failure to comply with HUD regulations, defendant has not demonstrated that same is a valid defense to a foreclosure proceeding (*see e.g. Mortgage Elec. Sys., Inc. v Rosser*, 8 Misc 3d 1003 [A] [Sup Ct Suffolk County 2005]). In any event, it would appear that plaintiff engaged in loss mitigation efforts with this defendant via the loan modification agreement.

As to defendant Ronaldo Bailey, his answer also contains general denials and the following affirmative defenses and/or counterclaims: standing, improper service of process, economic hardship, dispute of debt and defendant not having executed the loan modification agreement. The issue of standing was established by virtue of the above. As to improper service of process, though it is undisputed that this defendant was not served within the 120-day period as required by CPLR § 306-b, he waived such a defense by failing to move for dismissal on that ground within 60 days of having served his pleading (CPLR 3211 [e]).

Further, defendant cannot rely on a financial hardship as a defense to a foreclosure action. It is noted that several foreclosure settlement conferences were held in this court (CPLR 3408) and the action did not result in modification of the loan. It is further noted that defendant, if he be so advised, may still independently work with plaintiff – during the pendency of this action – to obtain a modification.

Despite the aforementioned discussion, plaintiff has not established, prima facie, its entitlement to summary judgment on the relief demanded in the complaint. "Under general contract rules, an obligation may not be altered without the consent of the party who assumed the obligation" (*Bier Pension Plan Trust v Estate of Schneerson*, 74 NY2d 312 [1989]; 22A NY Jur 2d Contracts § 483). That principal would appear to apply to the subject loan transaction (*see e.g. 78 NY Jur 2d Mortgages* § 261).

Here, despite the fact that defendant Reynaldo Bailey executed the note and mortgage, and is an owner of the property, together with the Lynches, plaintiff agreed to permit a modification of the loan without obtaining defendant Bailey's signature. In fact, plaintiff appears to acknowledge that the modification would, otherwise, generally be unenforceable absent some exception, the exception cited by counsel being partial performance by the parties. However, plaintiff submits no evidence, in admissible form, to establish that partial performance by the non-signatory to the modification agreement, applies in this instance; of course, counsel's affirmation as to the application of partial performance to this case is without probative value (*see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]). Neither is the court persuaded to, in effect, deem defendant Bailey to have executed the modification for its apparently beneficial terms (as compared to the terms of the original note). Though the court makes no determination with respect to same, it is noted that, though the terms of the loan modification agreement provide for a lower interest rate, lower monthly payment, and later maturity date, the unpaid principal balance noted in the modification is greater than the amount originally borrowed, the former consisting of "the unpaid amount(s) loaned to Borrower by Lender plus any interest and other amounts capitalized."

Accordingly, the motion is granted only to the extent that: (1) the caption is amended to delete "John Doe" therefrom; (2) the affirmative defenses of defendant Lori Lynch are stricken; (3) the affirmative defenses of defendant Theodocia Lynch are stricken with the exception of that defense relating to his not having executed the modification agreement; (4) the remaining defendants are in default in answering or otherwise appearing herein. The motion is otherwise denied without prejudice and with leave to renew (within the time limits set forth in the CPLR or by any subsequent order) upon proper proof.

Dated: January 28, 2015

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

**FILED**  
 FEB 02 2015  
 COUNTY CLERK  
 QUEENS COUNTY