

**Capital One, N.A. v Majestic Holdings (USA), LLC**

2016 NY Slip Op 31498(U)

August 5, 2016

Supreme Court, New York County

Docket Number: 850222/14

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

-----X  
CAPITAL ONE, N.A.

Plaintiff

Index No. 850222/14

v

DECISION AND ORDER

MAJESTIC HOLDINGS (USA), LLC, et al.,

MOT SEQ 001

Defendants.

-----X  
NANCY M. BANNON, J.:

I. INTRODUCTION

In this mortgage foreclosure action, the plaintiff moves for summary judgment on the complaint and for an order of reference appointing a referee to compute the amount owed. The mortgagor, defendant Majestic Holdings (USA), LLC (Majestic), opposes the motion. Since there are no triable issues of fact as to either the plaintiff's standing to commence this action, or whether the defendant defaulted in the repayment of its mortgage loan obligation, the court grants the motion.

II. BACKGROUND

Majestic owns unit 712 in a Manhattan high-rise condominium located at 55 Wall Street. On October 25, 2006, it obtained a loan in the face amount of \$500,000 from GreenPoint Mortgage Funding, Inc. (GreenPoint), secured by a mortgage on the unit in

favor Mortgage Electronic Registration Systems, Inc. (MERS), as GreenPoint's nominee, which was recorded on November 13, 2006. Majestic simultaneously executed a note for the same amount in favor of GreenPoint. On September 9, 2009, MERS assigned the mortgage to GreenPoint and, notwithstanding that the note was initially made in favor of GreenPoint, the assignment recited that the mortgage was assigned to GreenPoint "TOGETHER with the notes described in said mortgage, and the moneys due and to grow due thereon." MERS recorded the assignment on May 20, 2010, and a corrective assignment on September 18, 2012. On October 23, 2012, GreenPoint assigned the mortgage to the plaintiff pursuant to a written assignment that did not include language purporting to assign the notes described in the mortgage. That assignment was recorded on November 28, 2012.

In March 2014, the plaintiff notified Majestic that it was in default under the note, and commenced this foreclosure action on June 16, 2014. The unverified complaint alleged that "[p]laintiff is the holder of the note. The Note was indorsed by blank indorsement and delivered to Plaintiff prior to commencement of this action." In its answer, Majestic set forth a general denial, and asserted that the plaintiff lacked standing.

Plaintiff moved for summary judgment on the complaint against Majestic and for an order of reference. In support of

its motion, it attached a copy of the mortgage and the assignments, as well as a copy of the note, executed by Majestic, which contained the stamped indorsement "WITHOUT RECOURSE," under which was stamped "PAY TO THE ORDER OF:" followed by a blank line, and the signature of GreenPoint's assistant vice president. In support of its motion, plaintiff also submitted the affidavit of Dolores Murray, who identified herself as an "authorized signer" for the plaintiff. She averred that, in the regular course of her responsibilities for plaintiff, she had access to and was familiar with plaintiff's business records relating to the servicing of mortgage loans, including loan transactions, repayments, and the receipt of documents from third parties. She specifically asserted that "[t]he original Note and Mortgage were transferred and delivered to" the plaintiff upon the assignment of the mortgage, and that "Plaintiff has been in continuous possession of the original Note since October 23, 2012." Murray further confirmed Majestic's default in repayment, and set forth the specific amounts owed in connection with the loan.

In opposition to the motion, Majestic argued only that the plaintiff was not an assignee of the note, that Murray's affidavit was insufficient to establish that the plaintiff was actually in possession of the note when this action was commenced, that the note contained no proper allonge, and that the note was not shown to be indorsed in blank, thus defeating

plaintiff's claim that it was a "holder" of the note with standing to foreclose the mortgage.

### III. DISCUSSION

A plaintiff in a foreclosure action can establish entitlement to judgment as a matter of law by producing evidence of the mortgage, the unpaid note, and the defendant's default. See VNB N.Y. Corp. v Pisces Props., Inc., 138 AD3d 583, 583 (1<sup>st</sup> Dept 2016). Where, as here, a defendant places the plaintiff's standing in dispute, the burden is placed on the plaintiff to establish its standing. See Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 769 (1991), U.S. Bank, N.A. v Collymore, 68 AD3d 752, 753 (2<sup>nd</sup> Dept 2009); see also Bank of Am., N.A. v Thomas, 138 AD3d 523, 523-524 (1<sup>st</sup> Dept 2016). While an assignment of the note will confer standing upon the assignee to foreclose the underlying mortgage (see Bank of N.Y. v Silverberg, 86 AD3d 274, 279 (2<sup>nd</sup> Dept 2011), "[t]he physical delivery of the note to the plaintiff from its owner prior to commencement of a foreclosure action may, in certain circumstances, be sufficient to transfer the mortgage obligation and create standing to foreclose." Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 361 (2015); see Bank of N.Y. Mellon Trust Co., N.A. v Sachar, 95 AD3d 695 (1<sup>st</sup> Dept 2012). Such circumstances are present here.

While Majestic correctly argues that the note was never

assigned to the plaintiff, the court rejects its contention that plaintiff was not a "holder" of the note, as the plaintiff satisfied its burden in this regard. Contrary to Majestic's contentions, Murray was not required to produce the original note, and there was no requirement that she explain in more detailed fashion how she came to know that the plaintiff was in possession of the note as of June 16, 2014, the date that the action was commenced. Rather, the affidavit was sufficient to establish both physical delivery and continuous possession. See Aurora Loan Servs., LLC v Taylor, supra, at 362; Wells Fargo Bank, N.A. v Walker, \_\_\_\_\_ AD3d \_\_\_\_\_, 2016 NY Slip Op 05605 (3<sup>rd</sup> Dept 2016); OneWest Bank FSB v Carey, 104 AD3d 444, 445 (1st Dept 2013). The court also rejects Majestic's contention that, notwithstanding the plaintiff's alleged possession of the note, the stamped indorsement on the last page of the note did not cause the plaintiff to become a "holder" of the note that would be entitled to foreclose on the mortgage. Although a "holder" of commercial paper is defined, as relevant here, as one in possession of paper payable to the bearer (see UCC 1-201[b][5] [21]; 3-202; Wells Fargo Bank, N.A. v Walker, supra), an indorsement in blank, in an of itself, renders a note payable to the bearer. See Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674, 674 (2<sup>nd</sup> Dept 2007); Peerrot v Mt. Morris Bank, 120 App Div 247, 249 (1<sup>st</sup> Dept 1907).<sup>6 of 10</sup> Accordingly, plaintiff

established its prima facie entitlement to judgment as a matter of law on the complaint against Majestic. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Majestic's suggestions that Murray might not have been working for the plaintiff between October 2013 and June 2014, and might not actually know when plaintiff came into possession of the note, are speculative at best, and insufficient to raise a triable issue of fact in opposition to the plaintiff's showing. See Aurora Loan Servs., LLC v Taylor, supra.

#### IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion is granted to the extent that it is awarded summary judgment on the issue of liability, with the full amount of damages to be determined by a referee, and the defendant's defenses and affirmative defenses are dismissed; and it is further,

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby

submitted to the JHO/Special Referee for such purpose:

the issue of the amount due to the plaintiff for unpaid obligations on the subject note, interest on those obligations, and costs, including attorney's fees;

and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further.

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special

Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

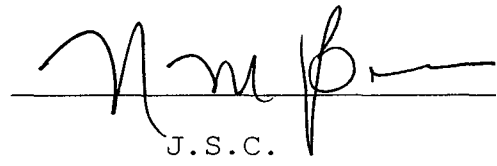
ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the Decision and Order of the court.

Dated: August 5, 2016



A handwritten signature in black ink, appearing to read 'NMB', is written over a horizontal line.

J.S.C.

**HON. NANCY M. BANNON**