| **CitiMortgage, Inc. v Hodgson** |
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| 2016 NY Slip Op 31739(U) |
| September 15, 2016 |
| Supreme Court, New York County |
| Docket Number: 850287/2013 |
| Judge: Gerald Lebovits |
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**NEW YORK STATE SUPREME COURT**
**NEW YORK COUNTY: PART 7**

CITIMORTGAGE, INC.,

Plaintiff,

-against-

CHRISTINE HODGSON, BOARD OF MANAGERS OF DOWNTOWN CONDOMINIUM, MERS, AS NOMINE FOR CITIBANK, N.A., NEW YORK DEPT. OF HIGHWAY, PENN GLASS ENTERPRISES LTD., NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD AND NEW YORK CITY TRANSIT ADJUDICATION BUREAU and "John Doe" and/or "Jane Doe" #1-10 inclusive, the last ten names being fictitious and unknown to plaintiff, the persons intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

Index No.: 850287/2013
**DECISION/ORDER**
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff CitiMortgage, Inc.'s motion for summary judgment on the mortgage foreclosure cause of action and for the court to issue an order of reference, to strike defendant Hodgson's answer and counterclaims, and to amend the caption.

| **Papers** | **Numbered** |
|---|---|
| Plaintiff's Notice of Motion | 1 |
| Plaintiff's Memorandum of Law in Support | 2 |
| Plaintiff's Affidavit in Support | 3 |
| Defendant Hodgson's Amended Opposition to Summary Judgment | 4 |
| Plaintiff's Reply Memorandum of Law | 5 |
| Plaintiff's Reply Affirmation in Support | 6 |

*Akerman LLP*, New York (Ashley S. Miller of counsel), for plaintiff.
*Law Office of Susan Pepitone*, Forest Hills (Susan Pepitone of counsel), for defendant Christine Hodgson.

Gerald Lebovits, J.

Plaintiff, CitiMortgage, Inc. (Citi), moves for summary judgment and to strike defendant Christine Hodgson's answer and her affirmative defenses and counterclaims, and for the court to issue an order of reference to compute sums due under the mortgage. Citi argues that it is entitled to summary judgment because Hodgson defaulted under the terms of her note and mortgage, and Citi has provided the court with both documents along with evidence of her default. Citi also seeks an order of reference to compute sums due under the mortgage. Hodgson argues, among other things, that Citi lacks standing to sue.

I. Citi's Summary-Judgment Motion

Citi's motion for summary judgment is granted. For a court to grant summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact about the claim or claims at issue. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) In a mortgage-foreclosure action, a plaintiff moving for summary judgment must provide proof of both the unpaid note and the underlying mortgage along with sufficient evidence to establish the defendant's default. (*JP Morgan Chase Bank, Natl. Ass'n v Shapiro*, 104 AD3d 411, 412 [1st Dept 2013]; *Deutsche Bank Natl. Trust Co. v Gordon*, 84 AD3d 443, 443 [1st Dept 2011]; *Bank Leumi Trust Co. of N.Y. v Lightning Park*, 215 AD2d 246, 246 [1st Dept 1995].) After a plaintiff has made this prima facie showing, the burden shifts to the defendant to raise a triable issue of fact. (*Shapiro*, 104 AD3d at 412.)

The following facts are not in dispute. On or about May 10, 2007, Hodgson executed an Adjustable Rate Note in the principal amount of $602,000 — evidence of a loan from Citi to Hodgson. (Plaintiff's Affidavit In Support, Exhibit A.) Citi indorsed the note in blank. (Plaintiff's Affidavit In Support, Exhibit A.) When Hodgson executed the note, and to secure her promises under the note, she simultaneously executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Citi, which encumbered the premises located at 15 Broad Street, Unit 1728, in New York County. (Plaintiff's Affidavit In Support, Exhibit B.) The mortgage was recorded on May 24, 2007. (Plaintiff's Affidavit in Support, Exhibit B.)

MERS, as Citi's nominee, assigned the mortgage to Citi on July 19, 2010, and recorded the assignment on July 29, 2010, in New York County. (Plaintiff's Affidavit in Support, Exhibit E.) Hodgson defaulted on the terms of both her note and underlying mortgage by not tendering payment due on January 1, 2010. That default caused all her payments to be due immediately. Because of Hodgson's default, Citigroup N.A. (Citi-NA), Citi's parent company, sent Hodgson, on Citi's behalf, a demand letter on or around March 4, 2010. (Plaintiff's Affidavit In Support, Exhibit J.) On or about March 29, 2013, Citi-NA sent Hodgson a 90-day notice under RPAPL 1304. (Plaintiff's Affidavit In Support, Exhibit K.)

Citi has proven its prima facie case, entitling it to summary judgment. But because Hodgson has raised standing as an affirmative defense, Citi has the burden of proving standing to

entitle it to summary-judgment relief. (*See JP Morgan Chase Bank, Natl. Ass'n v. Hill*, 133 AD3d 1057, 1057 [3d Dept 2015].) A plaintiff in a mortgage-foreclosure action "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." (*Bank of New York v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011].) In New York, the note, not the mortgage, is the "dispositive instrument" that confers standing in a foreclosure action. (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015].) To demonstrate that it is the holder or assignee of a note, a plaintiff must provide proof of either a written assignment or physical delivery of the note. (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009].)

A. Physical Delivery of Note

Citi provides sufficient evidence to show that it had possession of the note before it commenced this foreclosure action against Hodgson. For business records to be admissible as evidence under CPLR 4518 (a), plaintiff must show that three requirements were met:

> "[F]irst, the record must be made in the regular course of business—reflecting a routine, regularly conducted business activity, needed and relied on in the performance of the functions of the business. Second, it must be the regular course of business to make the record—in other words, the record was made pursuant to established procedures for the routine, habitual, systematic making of such a record. Finally, the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made." (*People v Cratsley*, 86 NY2d 81, 89 [1995].)

Sherry Romine is a Business Operations Analyst for Citi who reviewed the records and documents relating to Citi's loan to Hodgson. (Plaintiff's Affidavit In Support, ¶¶ 3-5.) According to Romine, Citi has a "systems of record" it uses to "maintain, record and create information related to the residential mortgage loans it services." (Plaintiff's Affidavit In Support, ¶ 3.) Citi maintains these records as part of "the regular course of Citi's business as a loan servicer" and makes entries into the system at or within a reasonable time of the transactions related to the mortgaged property it services. (Plaintiff's Affidavit In Support, ¶ 4.) Therefore, Citi's records are admissible as business records.

The records indicate that Citi-NA "has been in physical possession of the note since at least June 12, 2007." (Plaintiff's Affidavit In Support, ¶ 10.) In particular, a notation in Citi-NA's tracking system shows that as of February 17, 2012, the note was in Citi-NA's O'Fallon, Missouri, location and that it "has remained there since." (Plaintiff's Affidavit In Support, ¶ 10.) Also, Romine personally reviewed the file containing the note and found the original note in the physical file. (Plaintiff's Affidavit In Support, ¶ 10.) Citi is a subsidiary of Citi-NA. Therefore, Citi was in possession of the note before commencing this foreclosure action.

B. Written Assignment of the Mortgage

MERS's assignment of the mortgage to Citi is valid. In a secured transaction, the security is incident to the debt. (*Silverberg*, 86 AD3d at 282.) Mortgage lenders and other entities use the MERS system to track the ownership and transfer of mortgages between various MERS-system members. (*Id.*) The Court of Appeals summarized MERS's function as follows:

> "The initial MERS mortgage is recorded in the County Clerk's office with 'Mortgage Electronic Registration Systems, Inc.' named as the lender's nominee or mortgagee of record on the instrument. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in MERS's private system. In the MERS system, the mortgagor is notified of transfers of servicing rights pursuant to the Truth in Lending Act, but not necessarily of assignments of the beneficial interest in the mortgage." (*Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90, 96 [2006].)

A "nominee" is one who is designated to act on an individual or entity's behalf as a representative, but with limited authority. (Black's Law Dictionary 1076 [8th ed 2004].) Here, the initial mortgage was between Hodgson, as borrower, and MERS, as nominee for Citi, the lender. (Plaintiff's Affidavit In Support, Exhibit B.) The mortgage provides that MERS is "a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns . . . FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD." (Plaintiff's Affidavit In Support, Exhibit B [emphasis in original].) Also, under the terms of the mortgage, "[t]he Note, or an interest in the Note, together with the Security Instrument, may be sold one or more times . . . ." (Plaintiff's Affidavit In Support, Exhibit B, Covenants.) Therefore, MERS had the authority to assign the mortgage to Citi.

Citing *Silverberg* (86 AD3d at 274), Hodgson argues that as the lender's nominee, MERS, never owned the note. Thus, Hodgson argues, the assignment is void. Hodgson's interpretation of the holding in *Silverberg* is incorrect. In that case, MERS purportedly assigned both the note and the underlying mortgage; according to the court, the assignment was beyond the limited scope of MERS's authority as nominee. (*See Silverberg*, 86 AD3d at 281.) Here, not only did Citi have possession of the note before commencing this foreclosure action, but Citi does not argue that MERS assigned anything other than the mortgage, which it had the authority to do as Citi's nominee. The remaining cases Hodgson cites are inapposite and do not support Hodgson's argument that Citi lacks standing to sue. Therefore, MERS's assignment of the mortgage was valid.

II. Hodgson's Affirmative Defenses and Counterclaims[1]

A. Standing

For the reasons stated above, Hodgson's first affirmative defense — that Citi lacks the capacity to sue — is without merit and is dismissed.

B. Failure to Submit Attorney Affirmation

Hodgson's second affirmative defense — that Citi failed to comply with Administrative Order 208/13 — is meritless. Administrative Order 208/13, which was issued on August 1, 2013, did away with the requirements of Administrative Order 431/11 for attorney affirmations in residential-foreclosure actions filed on or after August 30, 2013. (A.O. 208/13.) Instead, CPLR 3012-b applies to residential-foreclosure actions filed on or after August 30, 2013, and requires that attorneys in these types of actions file and serve a certificate of merit along with the summons and complaint. (*Bank of New York Mellon v Izmirligil*, 980 NYS2d 733, 741 [Sup Ct Suffolk County 2014].) Citi commenced this foreclosure action on October 1, 2013; thus CPLR 3012-b applies. Citi filed and served a Certificate of Merit on the same dates that Citi filed and served the summons and complaint. Hodgson's second affirmative defense is dismissed.

C. Violation of NY Banking Law §§ 595-a and 6-m and NY General Business Law § 349

This court will not consider Hodgson's third, fourth, and seventh affirmative defenses and her first through third counterclaims, which she asserts for the first time in her opposition

[1] In her answer, defendant Hodgson asserted four affirmative defenses and one counterclaim and labeled each as follows: First Affirmative Defense – Lack of Standing, Second Affirmative Defense – Failure to Mitigate Losses, Third Affirmative Defense – Covenant of Good Faith and Fair Dealing, Fourth Affirmative Defense – Unconscionability, Unclean Hands and Estoppel, and Fifth Affirmative Defense and First Counterclaim – Equal Credit Opportunity Act, 15 U.S.C. §1691(d)(1). In her opposition to plaintiff's summary-judgment motion, defendant Hodgson, for the first time, added six new affirmative defenses and three new counterclaims and labeled each as follows: First Affirmative Defense – Plaintiff Lacks Standing, Second Affirmative Defense – Plaintiff Fails to Produce Affirmations as Required by Law, Third Affirmative Defense and First Counterclaim – New York State Banking Law Section 595-A(1)(F), Fourth Affirmative Defense and Second Counterclaim – Plaintiff Violated Banking Law § 6-M, Fifth Affirmative Defense – Plaintiff Failed to Mitigate Losses, Sixth Affirmative Defense – Plaintiff's Breach of the Implied Covenant of Good Faith and Fair Dealing, Seventh Affirmative Defense and Third Counterclaim – Plaintiff's Violation of the New York State General Business Law § 349, Eighth Affirmative Defense and Fourth Counterclaim – Equal Credit Opportunity Act, 15 U.S.C. § 1691(d)(1), Ninth Affirmative Defense – The Court Must Exercise Its Equitable Jurisdiction, and Tenth Affirmative Defense – Defendant's Answer Must Not Be Stricken. The court will refer to Hodgson's affirmative defenses and counterclaims based on the numbering scheme in Hodgson's opposition to summary judgment.

papers to Citi's summary-judgment motion. Hodgson's third and fourth affirmative defenses are identical to her first and second counterclaims. She alleges that Citi violated New York Banking Law §§ 595-a and 6-m respectively. Her seventh affirmative defense is identical to her third counterclaim; she alleges that Citi violated GBL § 349. In general, "[a] court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint." (*Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012], citing *Mezger v Wyndham Homes, Inc.*, 81 AD3d 795, 796 [2d Dept 2011]; *accord Keilany B. ex rel. Xiomara S. v City of New York*, 122 AD3d 424, 425 [1st Dept 2014].) Hodgson never amended her answer to include her third, fourth, and seventh affirmative defenses and first-through-third counterclaims. Therefore, the court will not consider these defenses and counterclaims, all of which were asserted for the first time in Hodgson's opposition papers.

D. Failure to Mitigate Losses

Hodgson's fifth affirmative defense — failure to mitigate losses — is without merit. Hodgson argues that Citi failed to mitigate its losses related to the present foreclosure action. Specifically, Hodgson asserts that Citi "failed and refused to adequately respond to Ms. Hodgson's reasonable request for loss mitigation prior to filing this action and prior to and during the previous action." (Defendant's Opposition to Summary Judgment, ¶ 67.) Hodgson does not provide any support for this allegation beyond asserting conclusory statements. No controlling case law supports Hodgson's argument that Citi had a duty to mitigate its losses. Hodgson's fifth affirmative defense is dismissed.

E. Breach of the Covenant of Good Faith and Fair Dealing

Hodgson's sixth affirmative defense — breach of the covenant of good faith and fair dealing — is without merit. Every contract contains an implied covenant of good faith and fair dealing, that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Sec. Pac. Nat. Bank v Evans*, 62 AD3d 512, 514 [1st Dept 2009] [internal citations omitted].) Hodgson presents no evidence that Citi breached its covenant of good faith and fair dealing other than citing to two third-party lawsuits in which Citi (or its parent company Citi-NA) is a named defendant. (Defendant Hodgson's Opposition to Summary Judgment, at 16.) Hodgson does not show how Citi breached the implied covenant of good faith and fair dealing owed to Hodgson under the note and mortgage. This affirmative defense is dismissed.

F. Violation of the Equal Credit Opportunity Act

Hodgson's eighth affirmative defense and fourth counterclaim — violating the Equal Credit Opportunity Act (ECOA) — are dismissed. Evidence that the debtor is in default when it requests a loan modification on its existing loan is enough to show that the lender did not violate the ECOA. (*Marine Midland Bank, N.A. v Yoruk*, 242 AD2d 932, 933 [4th Dept 1997] ["Plaintiff established as a matter of law that it did not violate the ECOA or a regulation promulgated thereunder when it denied defendant an extension of credit by its submission of evidentiary proof in admissible form that defendant was not qualified for an extension of credit because he was in

default."].) Citi has provided evidence of the note, mortgage, and of Hodgson's default. (Plaintiff's Affidavit of Support, Exhibits A and B.)

G. Equitable Relief

The ninth affirmative defense — that the court must exercise its equitable jurisdiction — is meritless. Hodgson provides no evidence for her argument that she is entitled to equitable relief other than her vague conclusory statements. Hodgson states in conclusory fashion that "defendant has meritorious defenses and claims against the plaintiff." (Defendant Hodgson's Opposition to Summary Judgment, ¶ 104.) Hodgson's ninth affirmative defense is dismissed.

H. Striking Defendant Hodgson's Answer

That aspect of Citi's motion to strike Hodgson's answer with counterclaims is granted as explained above. Hodgson's defenses and counterclaims have no merit and are dismissed.

For the foregoing reasons, it is

ORDERED that plaintiff's motion is granted and that plaintiff shall settle order; and it is further

ORDERED that plaintiff shall serve a copy of this decision on all parties and the County Clerk's Office.

Dated: September 15, 2016

J.S.C.

HON. GERALD LEBOVITS
J.S.C.