SHORT FORM ORDER

INDEX
NO.: 10969-10

SUPREME COURT - STATE OF NEW YORK
IAS PART 34 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 2-27-14
ADJ. DATE
Mot. Seq. # 002 MG

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THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE BENEFIT OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2007-12,

Plaintiff,

-against-

PETER A. TOLLNER; KANUENG TOLLNER; "JOHN DOE 1" to "JOHN DOE 25", said names being fictitious, the persons or parties intended being the persons, parties , corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/~~Order to Show Cause~~ by the plaintiff, dated February 5, 2014, and supporting papers (including Memorandum of Law dated February 5, 2014);~~(2) Notice of Cross Motion by the , dated , supporting papers;~~(3) Affirmation in Opposition by the defendants, dated March 13, 2014, and supporting papers; (4) Reply Affirmation by the plaintiff, dated April 9, 2014,~~and supporting papers; (5) Other ___ (and after hearing counsels' oral arguments in support of and opposed to the motion)~~; it is

ORDERED that this motion by plaintiff for leave to renew and reargue its prior motion for an order of reference appointing a referee to compute the amount due in this action is considered pursuant to CPLR 2221 and is granted as to renewal; and it is further

ORDERED that upon renewal, plaintiff's application pursuant to CPLR 3212 for summary judgment on its verified complaint, dismissing the affirmative defenses and three counterclaims, amending the caption, fixing the defaults as to the non answering defendants pursuant to CPLR 3215 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 plaintiff is directed to forthwith serve an executed copy of the order of reference amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that within 30 days of the entry date of this order, plaintiff shall serve a copy of the order of reference with notice of entry upon all parties who have appeared in this action and thereafter file the affidavit of service with the Clerk of the Court.

This is an action to foreclose a residential mortgage on premises known as 60 Groves Drive, Flanders, New York. On May 25, 2007, defendant Peter A. Tollner executed a fixed rate note in favor of Wilmington Finance Inc. (Wilmington) agreeing to pay the sum of $296,250.00 at the yearly rate of 7.875 percent. On the same date, defendants Peter A. Tollner and defendant Kaneung Tollner executed a mortgage in the principal sum of $296,250.00 on the subject property. The mortgage indicated Wilmington to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Wilmington as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on July 19, 2007 in the Suffolk County Clerk's Office. Thereafter, on January 28, 2010, the note and mortgage was transferred by assignment of mortgage from MERS, as nominee for Wilmington to The Bank of New York Mellon fka the Bank of New York, As Trustee for the benefit of CWABS, Inc., Asset Backed Certificates, Series 2007-12. Plaintiff asserts that it had possession of the original note with affixed allonge when the instant foreclosure action was commenced.

Countrywide Home Loans sent a notice of default dated March 17, 2009 to defendant Peter A. Tollner stating that he had defaulted on his mortgage loan and that the amount past due was $19,166.50. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on March 24, 2010. Defendants interposed an answer with affirmative defenses and counterclaims and plaintiff interposed a reply.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 11, 2011 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 Suzanne M. Berger, Esq. in support of the motion; the Affidavit of Hans H. Augustin, Esq.; the Affidavit of Michele C. Sexton, AVP, Operations Team Lead at Bank of America, N.A., loan servicer for plaintiff; a revised mandatory attorney affirmation of Courtney J. Peterson pursuant to the March 2, 2011 Order of the Chief Administrative Judge; the pleadings; the note, mortgage and assignment of mortgage; the pooling and servicing agreement; a certificate of merger; proof of notices pursuant to RPAPL 1320, 1303 and 1304; a 30-day notice of default; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon defendants' counsel; and, a proposed order appointing a referee to compute. Answering defendants have submitted opposition to the motion and plaintiff has submitted a reply affirmation.

"[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 Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see* ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; *see also* ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendants as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendants' default in payment under the terms of the loan documents (*see* CPLR 3212; RPAPL §1321; ***Bayview Loan Servicing LLC v 254 Church St.,*** LLC, 129 AD3d 650, 9 NYS3d 589 [2d Dept 2015]; ***Wells Fargo Bank v DeSouza***, 126 AD3d 965, 3 NYS3d 629; ***Jessabell Realty Corp. v Gonzales***, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]).

Where, as here, standing is put into issue by a defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see* ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; *citing* ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *see also* ***US Bank, NA v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). In a mortgage foreclosure action "[a] plaintiff has standing if it is the holder or assignee of both the subject mortgage and of the underlying note when the action is commenced" (***Emigrant Sav. Bank-Brooklyn v Doliscar***, 124 AD3d 831, 2 NYS3d 539 [2d Dept 2015]; *citing* ***Aurora Loan Servs., LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]; ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]). 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, the plaintiff established that it took possession of the note containing an indorsement in blank on an allonge attached to the note prior to the commencement of the action (*see* ***US Bank N.A. v Dellarmo***, 94 AD3d 746, 942 NYS3d 122 [2d Dept 2012]; *citing* ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus established, *prima facie*, its has 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]).

In their opposing papers, defendants re-asserted their pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendants contend, *inter alia*, that: that the assignment was executed by a party without authority to do so; the Trustee plaintiff cannot be the rightful owner of the mortgage; due to the securitization, the note and mortgage were bifurcated; there was no assignment of the mortgage into asset-backed security within 90 days of trust formation; and, MERs as nominee does not have the power to assign the mortgage to plaintiff.

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. Recent cases emanating from the Appellate Division, Second Department have held that once the plaintiff establishes that the note was transferred to it on a day certain, which is prior to the commencement of the action, the plaintiff's standing is established as a matter of law since "[i]t can reasonably be inferred from these averments that physical delivery of the note was made to the plaintiff ..." thus obviating the need for "further detail" (***Aurora Loan Servs., LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept 2014]; *see also* ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; ***Central Mtge. Co. v McClelland***, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013] ["The plaintiff also established its standing as the holder of the note and mortgage by physical delivery prior to commencement of the action with evidence that its custodian received the original note in October 2005 and received the original mortgage in February 2006 and safeguarded those original documents in a secure location"]). Here, the proof submitted in support of plaintiff's application provided a delivery date of August 25, 2007, which predated the commencement of the action, as the date on which plaintiff obtained physical possession of the note, which also effected a transfer of the mortgage under the principal incident rule (*see* ***Wells Fargo Bank, N.A. v Parker***, 125 AD3d 848, 5 NYS3d 130 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Arias***, 121 AD3d 973; ***PHH Mtge. Corp. v Israel***, 120 AD3d 1329, 992 NYS2d 355 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931).

Here, answering defendants have 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]). Notably, defendants do not deny that they have not made payments of interest or principal on the note (*see* ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]).

Neither the defenses raised in their answer nor, those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment. Accordingly, the motion for summary judgment is granted against the answering defendants. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered herein is granted. 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* ***Green Tree Serv. v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

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

Dated: August 3, 2016

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION