Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IA Part 38
Justice

CITIMORTGAGE, INC., x

Plaintiff,

-against-

JOSE A. PEREZ, ELEVID PEREZ, ET AL.,

x

Index Number 9093/ 2014

Motion Date November 16, 2015

Motion Seq. No. 1

The following papers read on this motion by plaintiff for summary judgment against defendants Jose A. Perez, Elevid Perez and Eufemio Perez, to strike the answer, affirmative defenses and counterclaims asserted by defendants Jose A. Perez, Elevid Perez and Eufemio Perez, for leave to appoint a referee to ascertain and compute the mortgage indebtedness, for leave to enter a default judgment against the non-appearing defendants and for leave to amend the caption; and this cross motion by defendants Jose A. Perez, Elevid Perez and Eufemio Perez pursuant to CPLR 3211(a)(1), (2), (3) and (7) to dismiss the complaint insofar as asserted against them and pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them, or in the alternative, for leave to conduct discovery and production of documents pursuant to CPLR 3101 and 3124.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-7
Notice of Cross Motion - Affidavits - Exhibits	8-12
Answering Affidavits - Exhibits	13-14
Reply Affidavits	15-18

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

Plaintiff commenced this action on June 11, 2014 by filing a copy of the summons and complaint. Plaintiff seeks to foreclose on a mortgage given by defendants Jose A. Perez, Elevid Perez and Eufemio Perez (defendants Perez) on the subject real property known as 3217 106th Street, East Elmhurst, New York to secure repayment of a note, evidencing a loan in the original principal amount of $573,475.00 plus interest, from Knightbridge Mortgage Bankers LLC (Knightbridge). In the complaint, plaintiff alleges that it is the holder of the subject note and mortgage and defendants Perez defaulted under such documents by failing to pay the monthly mortgage installment due on April 1, 2009 and thereafter, and as a consequence, plaintiff elects to declare the entire mortgage debt to be due and owing.

Defendants Perez served a combined answer, asserting various affirmative defenses, and interposing eight counterclaims. The remaining defendants are in default in appearing or answering the complaint.

By order dated April 28, 2015, the Court Attorney Referee noted that the case met the criteria for the Residential Foreclosure Part and had been in the Part for eight months. The Court Attorney also noted that defendant borrowers had failed to submit a "complete package" for review despite several adjournments, but plaintiff had consented to a 45-day stay to allow them another opportunity to do so. She directed plaintiff to appear for a status conference on February 2, 2016 and to file an application for an order of reference by that date.

Following the expiration of the stay, plaintiff made the instant motion pursuant to CPLR 3212 for summary judgment against defendants Perez to strike their answer, affirmative defenses and counterclaims, for leave to appoint a referee to compute the sums due and owing plaintiff, and for leave to amend the caption substituting the name of Victor Perez and Eva Sanchez in the place and stead of defendants "John Doe #1" and "Jane Doe #1," respectively, and deleting the names of defendants "John Doe #2" through "John Doe #10," and "Jane Doe #2" through "Jane Doe #10." Defendants Perez oppose the motion, asserting lack of subject matter jurisdiction, lack of standing and lack of capacity. They cross move pursuant to CPLR 3211(a)(1), (2), (3) and (7) to dismiss the complaint, and pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them, or in the alternative, for leave to conduct discovery. The remaining defendants have not appeared in relation to the motion or cross motion. Plaintiff objects to the late submission of opposition papers and the cross motion by defendants Perez.

As a threshold matter, to the extent defendants Perez assert lack of subject matter jurisdiction as a first affirmative defense in their answer, the Supreme Court indisputably has the power to entertain mortgage foreclosure actions, like this one (*see Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239, 244 [2d Dept 2007]). In addition, lack

of standing is not tantamount to a lack of subject matter jurisdiction (*see id.*; *see also U.S. Bank v Emmanuel*, 83 AD3d 1047 [2d Dept 2011]). That branch of the motion by plaintiff to strike the first affirmative defense of defendants Perez is granted, and that branch of the cross motion by defendants Perez pursuant to CPLR 3211(a)(2) to dismiss the complaint insofar as asserted against them based upon lack of subject matter jurisdiction is denied.

To the extent defendants Perez assert lack of personal jurisdiction based upon improper service as a third affirmative defense, they failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of their answer, and have made no application to extend the period of time upon the ground of undue hardship (CPLR 3211[e]). As a consequence, such defense is deemed waived (CPLR 3211[e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]). That branch of the motion by plaintiff to strike the third affirmative defense of defendants Perez is granted.

To the extent plaintiff objects to the late submission of opposition papers and the cross motion, the court, in an exercise of discretion, accepts and considers the opposition papers and cross motion of defendants Perez. Plaintiff has failed to show it suffered any prejudice by the late submission (CPLR 2214[b]; 2215; *Dinnocenzo v Jordache Enters., Inc.*, 213 AD2d 219 [1st Dept 1995]).

With respect to that branch of the motion by plaintiff for leave to amend the caption, plaintiff caused Victor Perez, s/h/a "John Doe #1," and Eva Sanchez, s/h/a "Jane Doe #1" to be served with process at the subject premises. Plaintiff has determined the other fictitiously-named defendants are unnecessary party defendants. That branch of the motion for leave to amend the caption as proposed is granted.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY
----------X
CITIMORTGAGE, INC.

Plaintiff

Index No. 9093/2014

-against-

JOSE A. PEREZ, ELEVID PEREZ, EUFEMIO PEREZ, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, QUEENS SUPREME COURT, JPMORGAN CHASE BANK, N.A., CCU, LLC, WORLDWIDE ASSET PURCHASING, LLC, EMPIRE PORTFOLIO INC., MIDLAND FUNDING LLC, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK, CHASE MANHATTAN BANK USA N.A., CREDIT ACCEPTANCE CORP., NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, SAGE FINANCIAL LTD., FIA CARD SERVICES, N.A. F/K/A BANK OF AMERICA, N.A., INTERNAL REVENUE SERVICE, VICTOR PEREZ, and EVA SANCHEZ,

Defendants
----------X.

In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of the default (*see Washington Mut. Bank v Schenk*, 112 AD3d 615 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 856 [2d Dept 2009]; *Aurora Loan Servs., LLC v Thomas*, 53 AD3d 561 [2d Dept 2008]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also establish its standing to be entitled to relief. A plaintiff may show that it is the holder or assignee of both the subject mortgage and underlying note (*see Bank of N.Y. Mellon v Gales*, 116 AD3d 723, 724 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 682 [2d Dept 2012]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]). "[W]ritten assignment of the underlying note or the physical delivery of the note prior to the commencement of the

foreclosure action is sufficient to transfer the obligation" (*Bank of N.Y. Mellon v Gales*, 116 AD3d at 724 [internal quotation marks omitted]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d at 682; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

In support of that branch of its motion seeking summary judgment against defendants Jose A. Perez, Elevid Perez and Eufemio Perez, plaintiff submits, among other things, a copy of the pleadings, the mortgage and note, an assignment, affirmations of its counsel, and an affidavit of Natasha Stringer, a "Business Operations Analyst" employed by plaintiff.

Plaintiff claims it has standing by virtue of its physical possession of the note at the action was commenced, and because it was the assignee of the mortgage and note at the time of the commencement.

Ms. Stringer states in her affidavit that her knowledge is predicated upon her review of the business records of plaintiff related to the mortgage loan, and her personal knowledge of the manner they are kept and maintained. She also states that her review shows that plaintiff was in physical possession of the "original Note" since August 28, 2008, and that the "original Note and Mortgage are stored together in the collateral file." She additionally states that "the Note bears an endorsement from [Knightbridge] to [plaintiff] and a further endorsement in blank," and cites the note annexed to her affidavit as "Exhibit A" as the "true and correct copy of the Note."

The copy of the note annexed to her affidavit (Exhibit "A"), however, bears additional markings beyond the specific indorsement to Knightbridge and the undated indorsement in blank. It also bears an undated specific indorsement to Golden First Mortgage Corp. by Kimberly Everhardt, as assistant vice president of plaintiff, which is crossed out by hand. The note further bears an undated indorsement in blank by Janet L. Sirus, a senior vice president of plaintiff. That indorsement has the handwritten word "VOID" across its face. Ms. Stringer makes no mention of these additional markings, and notably the copy of the note annexed to the complaint at the time of the filing of the summons and complaint bears no signed indorsement of any type. Rather, that copy of the note has an unexecuted, preprinted indorsement which reads "Pay to the order of CITIMORTGAGE INC. without recourse Knightbridge Mortgage Bankers LLC." Plaintiff has failed to explain the reason it included such unendorsed copy of note as an exhibit to the complaint if, in fact, it physically possessed the "original" note bearing the specific and "in blank" indorsements mentioned by Ms. Stringer. In addition, plaintiff does not indicate from whom it received physical delivery of the note (*see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *HSBC Bank*

USA v Hernandez, 92 AD3d 843 [2d Dept 2012]; *cf. Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2d Dept 2014], *affd* 25 NY3d 355 [2015]).

The assignment submitted by plaintiff is executed by Scott Scheiner, vice president, on behalf of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Knightbridge on May 13, 2010 and made effective on February 1, 2010. Knightbridge is not a party to the assignment, and the mortgage itself does not specifically give MERS the right, as the nominee or agent of Knightbridge, to assign the underlying note (*see Bank of New York v Silverberg*, 86 AD3d 274, 282; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). Plaintiff has failed to demonstrate that MERS physically possessed the note at the time it assigned it to plaintiff or had the authority from Knightbridge to assign it (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95). Under such circumstance, plaintiff has made no showing that MERS could transfer the note (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 282; *cf. Mortgage Electronic Registration Systems, Inc. v Coakley*, 41 AD3d 674 [2d Dept 2007]).

Under such circumstances that branch of the motion by plaintiff for summary judgment against defendants Perez is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *see Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680).

To the extent defendants Perez cross move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(1) and (3), issue has already been joined (*see* CPLR 3212; *Rich v Lefkovits*, 56 NY2d 276 [1982]). That branch of the cross motion by defendants Perez to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(1) and (3) is denied.

With respect to that branch of the cross motion by defendants Perez pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them based upon lack of capacity and standing, "[s]tanding and capacity to sue are related, but distinguishable, legal concepts (*see Silver v Pataki*, 96 NY2d 532, 537 [2001]; *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154-155 [1994]; *Caprer v Nussbaum*, 36 AD3d 176, 181-182 [2d Dept 2006]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006])" (*Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]). Here, although defendants Perez claim plaintiff lacked capacity to sue, in doing so, they do not claim plaintiff lacked power to appear and bring its claim to the court (*see e.g. Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d at 155), but rather that it lacked an interest in the mortgage sufficient to serve as a predicate for determining whether plaintiff is entitled to foreclosure (*see Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239). That branch of the cross

motion by defendants Perez for summary judgment dismissing the complaint insofar as asserted against them based upon lack of capacity is denied.

With respect to that branch of the cross motion by defendants Perez for summary judgment dismissing the complaint asserted against them based upon lack of standing, the submissions by the parties do not establish as a matter of law that plaintiff lacked standing to commence the action (*see HSBC Bank USA v Hernandez*, 92 AD3d 843; *Deutsche Bank Natl. Trust Co.,v Rivas*, 95 AD3d 1061 [2d Dept 2012]). Rather, there are issues of fact regarding plaintiff's standing as the lawful holder or assignee of the subject note on the date it commenced this action (*see MLCFC 2007-9 Mixed Astoria, LLC v 36-02 35th Ave. Development, LLC*, 116 AD3d 745 [2d Dept 2014]; *U.S. Bank N.A. v Madero*, 80 AD3d 751 [2d Dept 2011]). That branch of the cross motion by defendants Perez for summary judgment dismissing the complaint insofar as asserted against them based upon lack of standing is denied.

In view of the open question of whether plaintiff had standing to bring this action, that branch of the motion by plaintiff to dismiss the remaining affirmative defenses asserted by defendants Perez is denied at this juncture.

To the extent plaintiff moves to dismiss the counterclaims asserted by defendants Perez, this branch of the motion was made beyond the time a responsive pleading to the counterclaims would have been required. Although this branch was not specifically identified as one, it appears to be a motion for summary judgment pursuant to CPLR 3212. Plaintiff, however, has failed to provide a copy of the reply to the counterclaims. Therefore, summary judgment is unwarranted (*see* CPLR 3212[b]; *Deer Park Associates v Robbins Store, Inc.*, 243 AD2d 443 [2d Dept 1997]). That branch of the motion by plaintiff for summary judgment dismissing the counterclaims interposed by defendants Perez is denied.

Those branches of the motion by plaintiff for leave to enter a default judgment and to appoint a referee are denied at this juncture.

To the extent defendants Perez seek discovery, they have failed to demonstrate that they served discovery demands on plaintiff and plaintiff has failed or refused to respond to them. That branch of the cross motion by defendants Perez for leave to conduct discovery is denied without prejudice to those defendants using the discovery devices available pursuant to CPLR article 31.

Accordingly, the branch of the motion by the plaintiff to amend the caption is granted as set forth above.

The branch of the motion by the plaintiff for summary judgment against the Perez defendants, a default judgment against the remaining defendants and the appointment of a Referee to compute is denied.

The branch of the motion by the plaintiff to dismiss the affirmative defenses is granted solely to the extent that the first affirmative defense, alleging lack of subject matter jurisdiction, and the third affirmative defense, alleging lack of personal jurisdiction, based upon improper service, are dismissed.

The branch of the motion by the plaintiff to dismiss the counterclaims set forth in the Answer is denied.

The branch of the cross motion by defendants to dismiss the complaint pursuant to CPLR 3211 is denied.

The branch of the cross motion by defendants for summary judgment is denied.

The branch of the cross motion by defendants leave to conduct discovery is denied without prejudice to those defendants using the discovery devices available pursuant to CPLR article 31.

Dated: March 14, 2016

CARMEN R. VELASQUEZ, J.S.C.