| **Countrywide Home Loans, Inc. v Sanvitale** |
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| 2016 NY Slip Op 32549(U) |
| October 28, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 38113-08 |
| Judge: Thomas F. Whelan |
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 38113-08

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 09/30/16
SUBMIT DATE: 09/30/16
Mot. Seq. # 003 - MOTD

CDISP: No

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COUNTRYWIDE HOME LOANS, INC.,

Plaintiff,

-against-

DANIEL R. SANVITALE, DONNA M. SANVITALE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being tenants or occupants of premises, and corporations, other entities or person who claim or may claim, a lien against the premises,

Defendants.

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KOZENY, McCUBBIN & KATZ
Attys. For Plaintiff
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Melville, NY 11747

Upon the following papers numbered 1 to 4 read on this motion by plaintiff for default judgments on its complaint and other relief, Notice of motion and supporting papers 1 - 4; Notice of Cross Motion & Supporting papers _____; Opposing papers; _____; Reply papers _____; Other ___; it is,

***ORDERED*** that this motion by a purported assignee of the plaintiff for default judgments on the complaint filed and served in this action is considered under CPLR 3215, RPAPL Article 13 and RPL Article 3 and is denied; and it is further

***ORDERED*** that those portions of this motion wherein the movant requests that the court compel the Suffolk County Clerk to record a copy of a lost mortgage assignment as though it was an original are denied.

In October of 2008, the plaintiff, as captioned above, commenced this action to foreclose the lien of two previously consolidated mortgage loans originated by Countrywide Home Loans, Inc., in 2002 and 2003. Those two mortgage loans were thereafter consolidated with a new money mortgage given by the Sanvitale defendants on September 27, 2006 to American Home Mortgage. The new monies loaned, namely, $127,304.20, were the subject of mortgage executed by the Sanvitale defendants on that date which allegedly secured a note in said amount, no copy of which is attached to the moving papers. Also executed on that date was Consolidation, Extension and Modification Agreement [CEMA], by which, the two prior and consolidated mortgage liens were combined with the $127,304.20 mortgage lien of September 27, 2006 to form a single lien in the total amount of $417,000.00. The Santivale defendants also executed a consolidated note and mortgage in favor of American Home Mortgage on September 27, 2006 in the amount of $417,000.00 which reflected the combined amount due under the three mortgage liens consolidated under the 2006 CEMA $417,000.00.

On November 1, 2006, Countrywide Home Loans Inc., f/k/a Countrywide Funding Corporation, issued a satisfaction of mortgage, discharging the 2002 and 2003 mortgages and such satisfaction piece was recorded in the office of the Suffolk County Clerk on January 16, 2007. On January 23, 2007, the plaintiff, Countrywide Home Loans Inc., by its nominee MERS, issued an assignment of the 2002 and 2003 mortgages in favor of American Home Mortgage, which assignment was recorded in the office of the Suffolk County Clerk on March 30, 2007.

By assignment dated February 27, 2014, American Home Mortgage, Corp., purportedly assigned the 2002, 2003 and 2006 mortgages and the CEMAs to the plaintiff, but said assignment was not recorded due its purported loss. Then on March 11, 2014, the plaintiff assigned all of said mortgages and loan documents to Citimortgage, Inc. The recording of that assignment is not apparent from the moving papers.

By the instant motion, Citimortgage, Inc., by its loan servicer, Bank of America, N.A., moves (#003) for a default judgment on the complaint which contains two causes action. In the First, the plaintiff, as captioned above, sought foreclosure of the liens of the consolidated mortgages, deficiency judgments against the obligor defendants and a public sale of the premises. In the Second cause of action, the plaintiff sought the cancellation of record of the November 1, 2006 mortgage satisfaction piece ostensibly issued by it which discharged the debts of the 2002 and 2003 mortgages upon allegations that the satisfaction piece was "erroneously recorded" in the office of the Suffolk County Clerk on January 16, 2007. The movant also seeks the deletion of the unknown defendants, the issuance of an order of reference and a judicial mandate directing the Suffolk County Clerk to record a copy of the lost, February 27, 2014 assignment, by which, American Home Mortgage, Corp., by its attorney-in-fact, purportedly assigned the 2002, 2003 and 2006 mortgages and the CEMAs to the named plaintiff. For the reasons stated, the motion is denied.

A party's right to recover upon a defendant's default in answering is governed by CPLR 3215, and, pursuant thereto, the moving party must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer (*see* CPLR 3215[f]; ***U.S. Bank Natl. Ass'n v Alba,*** 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; ***HSBC***

***Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***Oak Hollow Nursing Ctr. v Stumbo***, 117 AD3d 698, 985 NYS2d 269 [2d Dept 2014]; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***Dela Cruz v Keter Residence, LLC***, 115 AD3d 700, 981 NYS2d 607 [2d Dept. 2014]; ***Kolonkowski v Daily News, L.P.***, 94 AD3d 704, 941 NYS2d 663 [2d Dept. 2012]; ***Triangle Prop. #2, LLC, v Narang*** 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). To satisfy the "facts constituting the claim" element of CPLR 3215(f), the plaintiff must advance, in an affidavit or verified pleading, facts by a person with knowledge from which, the court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant (*see* ***DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.***, 128 AD3d 760, 9 NYS3d 335 [2d Dept 2015]; ***Williams v North Shore LIJ Health Sys.***, 119 AD3d 937, 989 NYS2d 887 [2d Dept 2014]; ***CPS Group, Inc. v Gastro Enter. Corp.***, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; ***Resnick v Lebovitz***, 28 AD3d 533, 813 NYS2d 480 [2d Dept 2006]; ***Beaton v Transit Fac. Corp.***, 14 AD3d 637, 789 NYS2d 314 [2d Dept 2005]).

Here, the moving papers failed to establish the movant's entitlement to a default judgment on the complaint served and filed herein. An award of a default judgment on the First cause of action, which sounds in foreclosure and sale of the three liens of the mortgages last consolidated in 2006, is dependent upon the establishment of a viable claim for the cancellation of record of the November 1, 2006 mortgage satisfaction piece which discharged, of record, the debts of the 2002 and 2003 mortgages upon its recording in the office of the Suffolk County Clerk on January 16, 2007. This result is mandated by two well established legal precepts; the first being, that where, as here, the balances of prior mortgage loans are increased by new monies lent on a subsequent mortgage loan and a CEMA is executed to consolidate all of the mortgages into single liens, the prior notes and mortgages still exist and retain an independent nature and thus may be assigned or otherwise transferred to other parties (*see* ***Bechard v Monty's Bay Recreation, Inc.***, 129 AD3d 1187, 11 NYS3d 695 [3d Dept 2015]; ***Benson v Deutsche Bank Natl. Trust, Inc.***, 109 AD3d 495, 970 NYS2d 794 [2d Dept 2013]; *see also* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 109, 923 NYS2d 609 [2d Dept 2011]). The second of such precepts is that, while a CEMA creates a single mortgage lien from two or more loans of differing priorities, "[a] consolidation of outstanding loans is a device intended for the convenience of only the contracting parties" and thus "cannot impair liens in favor of parties that are not the contracting parties, which retain their independent force and effect" (***Federal Deposit Ins. Corp. v Five Star Mgt.***, 258 AD2d 15, 22, 692 NYS2d 69 [1st Dept 1999]).

Here, the first mortgage loan transaction of September 27, 2006 was a new money loan by which the Sanvitale defendants accepted additional funds totaling $127,304.20 from American Home Mortgage. The Sanvitale defendants executed a mortgage in that amount on that date to secure a mortgage note in the same amount, but no copy of said note is attached to the moving papers. The Sanvitale defendants also agreed, upon their execution of Consolidation, Extension and Modification Agreement [CEMA] of that date, to consolidate the lien of this new loan with the liens of the 2002 and 2003 mortgages which were previously consolidated under the 2003 CEMA between the Sanvitales and the plaintiff. The further executed a consolidated note in the combined amount of all outstanding amounts due under all three of the consolidated loans in the amount of $417,000.00 a mortgage in that amount as well.

Nevertheless, it appears that a cancellation of the September 27, 2006 mortgage satisfaction piece, which discharged the debts of both the 2002 and 2003 mortgage notes, is a condition precedent to foreclosure of the lien of the consolidated mortgage issued on September 27, 2006 to secure the consolidated note of that date which reflected the combined amount due under each of three new money loans in the $417,000.00, because the mortgage notes representing those debts viz a viz third parties remain in force and effect and subsist independent of the terms of the 2006 CEMA agreement between the Sanvitale defendants and American Home Mortgage or its successors. Since one may not foreclose the lien of a mortgage if the debt thereunder has been satisfied or otherwise discharged, foreclosure of the 2006 consolidated lien consisting of the combined balances due under each of the three notes is precluded by the currently existing, public record of the discharge of the 2002 and 2003 debts under the terms of the November 1, 2006 satisfaction piece that was recorded on January 16, 2007. The movant's possession of a viable claim for cancellation of the mortgage satisfaction piece, is thus a condition precedent to succeeding on the First cause of action sounding in foreclosure of the consolidated lien of all three mortgages.

A review of the moving papers reveals that Citimortgage, Inc., by its loan servicer, BANA, failed to demonstrate possession of a viable claim for cancellation of the September 27, 2006 mortgage satisfaction issued by MERS, as nominee of the named plaintiff that was recorded on January 16, 2007. Viable claims for a declaration as to the invalidity of a recorded satisfaction piece together with judicial directives expunging or cancelling the purported discharge of the debt contained therein pursuant to RPAPL Article 15 and/or RPL § 329 rest upon claims for reinstatement of a mortgage owned by the claimant that was erroneously or fraudulently discharged of record without a concomitant satisfaction of the debt of the mortgage lien (*see* ***Onewest Bank, FSB v Michel***, ___ AD3d ___ 2016 WL 6089145 [2d Dept 2016]; ***Mortgage Elec. Registration Sys., Inc. v Smith***, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]; ***Deutsche Bank Trust Co., Americas v Stathakis,*** 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; ***Citibank, N.A. v Kenney,*** 17 AD3d 305, 308, 793 NYS2d 84 [2d Dept 2005]; ***Regions Bank v Campbell***, 291 AD2d 437, 737 NYS2d 636 [2d Dept 2002]; ***Matter of Barclays Bank of New York***, 96 AD2d 594, 464 NYS2d 1016 [2d Dept 1983]). The remedy is derived from long standing equity principles which recognize that a lien affecting real property which is satisfied of record in an instrument issued by error, mistake or fraudulent acts, may be restored to its original status and plausibility *provided* that no injury or prejudice is inflicted upon anyone who innocently relied upon the discharge and either purchased the property or made a loan thereon in reliance upon the validity of said satisfaction (*see* ***Beltway Capital, LLC v Soleil***, 104 AD3d 628, 961 NYS2d 225 [2d Dept 2013]; ***DLJ Mtge. Capital, Inc. v Windsor***, 78 AD3d 645, 647, 910 NYS2d 160 [2d Dept 2010]; ***New York Community Bank v Vermonty***, 68 AD3d 1074, 892 NYS2d 137 [2d Dept 2009]; ***Matter of Ditta***, 221 NYS2d 34 [Sup. Ct. Kings County 1961]). Accordingly, the identification and joinder of all those having interests in the premises recorded subsequent to the recording of the satisfaction piece that is the subject of the claim for cancellation is required (*see* RPAPL § 1515).

Upon the court's review of the allegations set forth in the complaint and those advanced in the affidavit of merit, which was executed by an employee of Bank of America, N. A. [BANA], the loan servicer of Citimortgage, said allegations fail to establish the movant's possession of a viable claim

for the cancellation of the November 1, 2006 mortgage satisfaction that was recorded on January 16 2007. Facts constituting the elements of such a claim, including the nature and circumstances of the mistaken and erroneous issuance of the subject satisfaction piece and the absence of any concomitant discharge or satisfaction of the debt purportedly released therein, are not discernible from the complaint or the affidavit of merit attached to the moving papers. Nor are there any allegations regarding the existence or non-existence of persons or entities who lent monies or otherwise relied upon the recorded satisfaction piece. All such persons would be necessary party defendants, absent the effectiveness of a duly indexed notice of pendency as to that claim which binds all such persons as if they were joined as party defendants, because the 2006 CEMA cannot effect the rights of other non-party lienholders who may have relied upon the 2007 recorded discharge of the 2002 and 2003 mortgage debts.

Accordingly, those portions of this motion (#003) by BANA, as loan servicer for Citimortgage, Inc., for default judgments on the complaint filed and served herein, the appointment of a referee to compute, together and the deletion of unknown defendants are denied.

Also denied is the application for relief in the form of a judicial mandate directing the Suffolk County Clerk to record a copy of the February 27, 2014, by which American Home Mortgage, Corp., by its attorney-in-fact, purportedly assigned the 2002, 2003 and 2006 mortgages and the CEMAs to the plaintiff. None of the procedural or substantive requirements imposed upon the granting of this relief have been addressed, let alone established by the movant. While relief under common law principles may be available to the owner of a recordable instrument such as deed, mortgage or assignment of mortgage, which was not recorded due to its loss or destruction, the claim must rest upon allegations and evidence of the due execution of the lost instrument and of its contents via a certified copy or other clear and convincing proof of the contents thereof (*see* ***Argent Mtge. Co., LLC v 35 Plank Rd. Realty Corp.***, 131 AD3d 909, 15 NYS3d 473 [2d Dept 2015]; ***O'Brien v Town of Huntington***, 66 AD3d 160, 166, 884 NYS2d 446 [2d Dept 2009]; ***La Capria v Bonazza***, 153 AD2d 551, 552-553, 544 NYS2d 848 [2d Dept 1989]; ***Edwards v Noyes***, 65 NY 125, 127 [1875]).

Alternatively, statutory claims in the nature of mandamus to compel may lie against a County Clerk in his or her capacity as registrar of conveyances where said Clerk is in breach of a ministerial duty to record an instrument entitled to recording pursuant in Real Property Law §§ 290 [3], 291 or other provisions of the Recording Act. However, such claims must rest upon allegations that a copy of the lost deed, mortgage or other instrument at issue is valid on its face and recordable because it is duly acknowledged and was presented to the Clerk with the proper fee who refused to record it (*see* Real Property Law § 290[3], § 291; County Law § 525[1]; ***JP Morgan Chase Bank, N.A. v Mbanefo***, 123 AD3d 669, 123 AD3d 669 [2d Dept 2014]; ***Matter of Merscorp, Inc. v Romaine***, 24 AD3d 673, 674, 808 NYS2d 307, *aff'd.* 8 NY3d 90, 828 NYS2d 266 [2006]).

Here, there is no pleaded claim for the recording of the purportedly lost assignment, only counsel's brief and casual request for such relief that is advanced in his supporting affirmation and it is without any mention of the elements necessary state a viable claim for this relief. Nor has the County Clerk, in her capacity as the registrar of deeds and other conveyances, been joined as a party

defendant to any such claim, the true nature of which, is not clear. The application is thus procedurally defective and lacking in substantive merit and it is denied on those grounds.

In view of the foregoing, the instant motion (#003) for default judgments on the complaint and the other relief demanded in the moving papers is in all respects denied.

Dated: October 18, 2016

THOMAS F. WHELAN, J.S.C.