

**U.S. Bank Trust, N.A. v Moomey-Stevens**

2018 NY Slip Op 33665(U)

January 22, 2018

Supreme Court, Saratoga County

Docket Number: 2017-2360

Judge: Ann C. Crowell

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF SARATOGA

U.S. BANK TRUST, N.A. AS TRUSTEE FOR LSF9  
MASTER PARTICIPATION TRUST,

Plaintiff,

-against-

ELIZABETH MOOMEY-STEVENSON A/K/A  
ELIZABETH STEVENSON A/K/A ELIZABETH  
MOOMEY; DAVID STEVENSON A/K/A DAVID M.  
STEVENSON; CURTIS LUMBER CO.; "JOHN DOE",  
said name being fictitious, it being the intention  
of Plaintiff to designate any and all occupants of  
premises being foreclosed herein, and any parties,  
corporations or entities, if any, having or claiming  
an interest or lien upon the mortgaged premises,

Defendants.

**DECISION and ORDER**  
RJI #45-1-2017-1203  
Index # 2017-2360

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APPEARANCES

Shapiro, Dicaro & Barak, LLC  
Attorneys for Plaintiff  
175 Mile Crossing Boulevard  
Rochester, New York 14624

Sandra S. Poland Demars, Esq.  
Attorney for Defendants  
817 Madison Avenue  
Albany, New York 12208

ANN C. CROWELL, J.,

Plaintiff requests an Order pursuant to Civil Practice Law and Rules (CPLR) § 3212, granting summary judgment against defendants Elizabeth Moomey-Stevens and David Stevens ("defendants"). Plaintiff also requests an Order granting a default judgment against the non-answering defendants, amending the caption, correcting the property

description and the appointment of a referee to compute the sums due and owing. Defendants oppose the requested relief.

This is an action to foreclose a mortgage, executed by defendants Elizabeth Moomey Stevens and David M. Stevens on October 12, 2004, to secure indebtedness on real property located at 1247 Saratoga Road, Ballston Spa, New York. The mortgage secured a Note, dated October 12, 2004, in the amount of \$115,000.00 with 5.875 percent interest. Flagstar Bank, FSB was the original lender under the Note. The mortgage was given to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Flagstar Bank, FSB. Through a series of assignments and transfers, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust ("U.S. Bank") is the current holder of the Note and Mortgage.

By Decision and Order dated March 30, 2017, this Court dismissed a prior action regarding the same property under Index Number 2009-1363 as abandoned pursuant to CPLR § 3215(c) without costs or prejudice. By notice dated April 26, 2017, plaintiff again notified defendants their loan was in default. Contrary to defendants' counsel's position, Exhibit B in support of plaintiff's motion demonstrates that the notice was mailed both to the defendants at the property address and to their attorney's address. On April 24, 2017, plaintiff's servicer and attorney-in-fact, Caliber Home Loans, Inc. ("Caliber") caused RPAPL § 1304 notices to be mailed to both defendants by both first class and certified mail. The notice was mailed to both the property address and defendants' counsel's address. On April 25, 2017, plaintiff filed with the New York State Banking Department in accordance with RPAPL § 1306.

On August 16, 2017, this foreclosure action was commenced. On September 29, 2017, defendant filed an Answer with Counterclaim. On October 23, 2017, plaintiff filed a

Reply to Counterclaims.

Plaintiff has submitted the affidavit of Kolette Modlin (“Modlin”) in support of its motion for summary judgment. Modlin is an Officer for Caliber. As the servicing agent and attorney-in-fact for the plaintiff, Caliber maintains detailed business records regarding all aspects of the mortgage and loan documents relevant to this action. Modlin described how Caliber maintains its business records and incorporates the records of any prior servicer. Defendants defaulted by failing to make the required monthly payment due on July 1, 2009, and all subsequent payments. As of November 1, 2017, approximately \$203,786.23 is owed on the loan, inclusive of more than \$40,000 in escrow advances.

Plaintiff has established a *prima facie* case for entitlement to a judgment of foreclosure by producing the note and mortgage, and Modlin’s affidavit attesting to defendants’ default in making the required payments under the note. *Phelps Corp. v Jones*, 108 AD3d 814 [3d Dept. 2013]; *Charter One Bank, FSB v Leone*, 45 AD3d 958 [3d Dept. 2007]; *Overseas Private Investment Corp. v Kim*, 69 AD3d 1185, 1187 [3d Dept. 2010]. Defendants do not dispute the facts that they executed the note and mortgage and were in default.

Where the defendant properly raises the issue of standing, the plaintiff must also establish its standing in order to be entitled to relief. *See, Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept. 2015]. “A plaintiff has standing in a mortgage foreclosure action ‘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.’” *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept. 2012], quoting *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept. 2011]. “Either a written 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 NY Mellon v McClintock*, 138 AD3d 1372, 1374 [3d Dept. 2016], quoting *Chase Home Fin., LLC v Miciotta, supra* at pg. 1307. Modlin’s affidavit in support states that the underlying note and mortgage were transferred to the plaintiff on an unspecified date and that the transfer was memorialized by an Assignment of Mortgage executed on August 17, 2016 and recorded October 4, 2016 (prior to the commencement of this action on August 16, 2017). Plaintiff’s Complaint, paragraph sixth, alleges that the plaintiff is the current owner and holder of the note. A copy of the Note, endorsed in blank without any date, is attached to the Complaint in this action along with the related assignments of mortgage. Plaintiff contends that the attachment of the note to the Complaint at the time of commencement is sufficient to meet its *prima facie* burden on the issue of standing.

The Appellate Division, Second Department has fully embraced the concept that the attachment of a note to the Complaint in an action, endorsed in blank, is sufficient for the plaintiff to meet its *prima facie* burden on the issue of standing. *U.S. Bank, N.A. v Coppola*, \_\_\_ AD3d \_\_\_ [2d Dept. 2017]; *Deutsche Bank Nat. Trust Co. v Carlin*, 152 AD3d 491 [2d Dept. 2017]; *U.S. Bank, N.A. v Saravanan*, 146 AD3d 1010 [2d Dept. 2017]; *Deutsche Bank Nat. Trust Co. v Logan*, 146 AD3d 861 [2d Dept. 2017]; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept. 2016]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151 [2d Dept. 2015]. The Appellate Division, First Department has followed suit. *Bank of New York Mellon v Knowles*, 151 AD3d 596 [1st Dept. 2017]. The Appellate Division, Fourth Department has flatly rejected the proposition. *Bank of New York Mellon v Anderson*, 151 AD3d 1926 [4th Dept. 2017]. The Appellate Division, Third

Department has held that a plaintiff can sustain its *prima facie* burden on standing by averring ownership of the note in the Complaint and attaching a copy of the note to the Complaint. *JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269, 1270-1271 [3d Dept. 2017]. An affidavit alone was found insufficient to establish delivery and possession of the note. *Id.*

Attachment of a certified copy of the note to the Complaint is the better practice (*see, Green Tree Servicing, LLC v Bormann*, \_\_\_ AD3d \_\_\_, 2018 WL 356308 [3d Dept. 2018]). However, plaintiff has sustained its *prima facie* burden on the issue of standing by attaching the note, endorsed in blank, to the Complaint at the time of commencement. *JP Morgan Chase Bank, N.A. v Venture, supra*. “[I]t is unnecessary to give factual details of the delivery [of the note] in order to establish that possession was obtained prior to a particular date.” *JPMorgan Chase Bank, N.A. v Weinberger, supra* at pg 645; *see also, U.S. Bank, N.A. v Coppola, supra*.

Defendants have failed to raise any issues of fact with respect to their default on the note or plaintiff's standing. Defendants' contention that the summary judgment motion is premature is unsupported by any evidentiary showing that the plaintiff has exclusive knowledge and possession of pertinent facts essential to justify opposition to the motion. *See, CPLR § 3212(f); Green Tree Servicing, LLC v Bormann, supra; Ivory Development, LLC v Roe*, 135 AD3d 1216 [3d Dept. 2016]. Defendants' counsel's assertion that the plaintiff may not possess the original note is based upon pure speculation.

Defendants' statute of limitations defense is without merit. This Court's Decision and Order dated March 30, 2017, dismissing the related action under Index Number 2009-1363 stated:

“A dismissal of the action pursuant to CPLR § 3215(c) does not prevent a proper recommencement pursuant to CPLR § 205(a) in what appears to be an undisputably meritorious cause of action. *See, Wells Fargo Bank, N.A. v Eitani*, \_\_\_ AD3d \_\_\_, 47 NYS3d 80 [2d Dept. 2017].”

Since the Court issued the prior decision, the Court of Appeals dismissed the appeal in the case of *Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193 [2d Dept. 2017], app. dis. 29 NY3d 1023 [2017]. Plaintiff timely commenced the instant action within the time frame required by CPLR § 205(a). *Bank of New York Mellon v Slavin*, \_\_\_ AD3d \_\_\_, 2017 WL 6374678 [3d Dept. 2017].

Plaintiff has established a *prima facie* case for entitlement to a judgment of foreclosure as a matter of law on defendants’ remaining affirmative defenses and defendants’ counterclaim. Plaintiff’s motion for summary judgment is granted and defendants’ Answer will be treated as a general notice of appearance.

The plaintiff’s motion to amend the caption of this action by striking therefrom the remaining defendants sued herein as “JOHN DOE” is granted. Pursuant to CPLR § 3215, plaintiff’s motion for a default judgment against the non-answering defendants is granted for the relief demanded in the complaint. Plaintiff’s motion to reform the mortgage and any necessary loan documents by substituting the correct legal description for the property in place of the prior description is granted. The correct legal description is denoted as “Intended Mortgage Premises” and is attached as Schedule A to the Notice of Pendency, Schedule E to the Complaint and Exhibit J to the Affirmation of Ellis M. Oster, Esq.

This foreclosure action is referred to: **Stefanie Bitter, Esq.**, having an office at: Bartlett, Pontiff, Stewart and Rhodes, P.C., 1 Washington Street, P.O. Box 2168, Glens Falls, New York 12801, as referee to ascertain and compute the amount due, except for attorneys

fees, to plaintiff herein for principal, interest and other disbursements advanced as provided for by statute and in the note and mortgage upon which the within action was brought. The referee is also to examine and report as to whether or not the mortgaged premises should be sold in parcels. Upon submission of the referee's report, plaintiff shall pay \$250.00 to the referee as compensation for her services. By accepting this appointment the referee certifies that she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36).

Any relief not specifically granted herein is denied. No costs are awarded to any party. The original decision and order shall be forwarded to the attorney for the plaintiff for filing and entry. The underlying papers will be filed by the Court.

Dated: January 22, 2018  
Ballston Spa, New York

ENTERED  
Craig A. Hayner

*Craig A. Hayner*  
Saratoga County Clerk

*Ann C. Crowell*  
ANN C. CROWELL, J.S.C.

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ENTERED

Papers Received and Considered:

Notice of Motion dated December 6, 2017

Affirmation of Ellis M. Oster, Esq., dated December 6, 2017, with Exhibits A-K

Affidavit of Kolette Modlin, sworn to November 15, 2017

Affirmation of Sandra Poland Demars, Esq., dated December 26, 2017, with attachment

Affirmation of Jason P. Dionisio, Esq., dated December 29, 2017