

Torchlight Debt Fund VI, LP v 445 Fifth Ave. Assoc., LLC
2021 NY Slip Op 32599(U)
November 30, 2021
Supreme Court, New York County
Docket Number: Index No. 850140/2020
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III **PART** **32**

Justice

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INDEX NO. 850140/2020

TORCHLIGHT DEBT FUND VI, LP,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 004

- v -

445 FIFTH AVENUE ASSOCIATES, LLC, WFH 445, LLC, JMS 445, LLC, MLS 445, LLC, PEPPERWOOD 445, LLC, GLEN-GERY CORPORATION, CITY SOUVENIRS ON 5TH, INC., THE DARTMOUTH COMPANY, INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 112, 113, 114, 115, 117

were read on this motion to/for DISMISS

Upon the foregoing documents, the motion is determined as follows:

The within matter is an action to foreclose on a consolidated, amended and restated mortgage encumbering three condominium units in a premises located at 445 Fifth Avenue, New York, New York. Defendants 445 Fifth Avenue Associates, LLC, WFH 445, LLC, JMS 445, LLC, MLS 445, LLC, and Pepperwood 445, LLC (collectively "Mortgagors") are the owners and mortgagors of the units which are encumbered by the mortgage. The mortgage secured an indebtedness of \$40,000,000.00 evidenced by a consolidated, amended and restated promissory note dated December 23, 2015.

This action was initially commenced by CIBC, Inc. ("CIBC"), the former Plaintiff and originator of the loan, on September 28, 2020, based upon Mortgagor Defendants' alleged default in interest payments and failure to maintain a debt service reserve. Thereafter, CIBC apparently executed a Loan Sale Agreement on March 12, 2021¹, whereby CIBC transferred its "Loan Rights" to non-party DOF VI Reit Holdings, LLC ("DOF VI"). Under that agreement, the Loan Rights included the "Loan Documents" which was defined in the agreement to encompass, *inter alia*, the December 23, 2015 note. Transfer of the Loan Rights would occur only if all the conditions precedent were met on or prior to the "Closing Date", March 23, 2021. On March 22,

¹ An amendment to the loan sale agreement was executed on March 17, 2021 which did not add any terms relevant here.

2021, DOF VI assigned its interest under the Loan Sale Agreement to Plaintiff by written agreement. By document dated March 23, 2021, CIBC transferred the Loan Documents, including the December 23, 2015 note, to Plaintiff.

By document dated March 18, 2021, CIBC purported to assign the mortgage at issue to Plaintiff. The copy of the assignment annexed to the amended complaint has the signature of the authorizing representative, Todd H. Roth as Managing Director, on one page, but the supposed acknowledgement thereof on a duplicate signature page which lacks Roth's signature. Also annexed to the amended complaint is an undated ostensible "Allonge" which transfers the December 23, 2015 note from CIBC to Plaintiff.

Plaintiff moved and was granted leave to substitute Torchlight Debt Fund VI, LP as Plaintiff by order of the Court dated June 11, 2021. Thereafter, Plaintiff was granted leave to amend the complaint which was filed on August 27, 2021. Plaintiff's amended complaint seeks, *inter alia*, to foreclose on the consolidated, amended and restated mortgage based upon failure of repayment and other defaults. An *ex parte* motion to appoint a receiver of these units was granted by order of the Court dated January 25, 2021.

Now, Mortgagor Defendants move, pre-answer, to dismiss Plaintiff's complaint pursuant to CPLR §3211[a][1] and [3] claiming that Plaintiff lacks standing to prosecute this action. Plaintiff opposed the motion.

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see Higgitt, CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 [2011]).

When standing is raised as a defense to a mortgage foreclosure action, it is ordinarily Plaintiff's obligation to prove same to be entitled to foreclose (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). However, Mortgagor Defendants have raised the defense in a pre-answer motion to dismiss, so it is Movant's obligation to demonstrate *prima facie* Plaintiff lacked standing as a matter of law (*see Wilmington Sav. Fund Socy., FSB v Matamoro*, ___ AD3d ___, 2021 NY Slip Op 05741 [2d Dept 2021]; *DLJ Mtge. Capital v Mahadeo*, 166 AD3d 512 [1st Dept 2018]). Standing in a foreclosure action is established in three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note with an allonge or indorsement in blank before the action is filed, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). "Thus, the defendants here, in moving to dismiss the complaint under CPLR 3211(a)(1) and (3), needed to affirmatively prove that the plaintiff was not in direct privity with them, was not in physical possession of the note indorsed to it or in blank at the time of the commencement

of the action, and that the assignment of the note . . . to the plaintiff was invalid.” (*Wilmington Sav. Fund Socy., FSB v Matamoro*, supra).

Mortgagor Defendants’ motion is founded solely on Plaintiff’s amended complaint and the documents annexed thereto as exhibits. Although it is unquestionable that Plaintiff did not originate the loan and is not in direct privity with the Mortgagor Defendants, CIBC did and was the Plaintiff when this action was originally commenced. As the assignment purportedly occurred during the pendency of this action, Plaintiff could have continued the action in the name of the original mortgagee, even absent a formal substitution (*see Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 1001 [2 Dept 2015]). However, Plaintiff eschewed that option and determined to prosecute this action in its name and via an amended complaint.

Movants seized on this decision with their motion and argue that since CIBC executed the assignment of the mortgage to Plaintiff four days before the DOC VI assigned its rights under the Loan Sale Agreement to Plaintiff, the entire transfer was a nullity which destroys Plaintiff’s standing. Defendant Mortgagors also posit that the assignment of the mortgage was ineffective as it was not properly acknowledged pursuant to RPL §291.

Both arguments misconstrue the issue to be attended. Movants are correct that to have standing a foreclosure plaintiff must be holder of the note and mortgage. Nevertheless, the salient issue is when and to whom possession of the note passes, not the mortgage (*see eg Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]). “[W]hile assignment of a promissory note also effectuates assignment of the mortgage, the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it” (*see U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012][internal citations omitted]).

Assuming the mortgage assignment dated March 18, 2021 is properly authenticated, the document is a nullity as it purports to assign the mortgage only. Conversely, if the authentication is invalid, then the assignment of the mortgage is also ineffective. In either case, the documentary evidence establishes the mortgage at issue passed with transfer of the debt to Plaintiff on March 23, 2021 as an “inseparable incident” thereof (*see eg Wells Fargo Bank, N.A. v Tricario*, supra), months before Plaintiff was substituted or the complaint was amended.

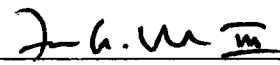
Even if the sequence of assignments was flawed, Movants have not demonstrated, as a matter of law, that Plaintiff was not in physical possession of the note and allonge before Plaintiff was substituted or filed its amended complaint². To succeed on this argument, the Court would have to assume the allonge was executed after these dates. However, as the allonge is undated, it is possible that it was executed before Torchlight Debt Fund VI LP became Plaintiff. In this procedural context, all the facts as alleged by Plaintiff must be assumed true and “whatever may be implied from its statements by reasonable intention” is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]). Therefore, the documentary evidence does not establish irrefutably

² If Plaintiff establishes it had “physical possession” of the note when the action was commenced, Defendant Tantleff’s arguments regarding the validity and timing of the mortgage assignments would be unavailing (*see JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]).

Plaintiff was not the holder of the note when the action was commenced. "Such are the pitfalls of moving to dismiss a complaint in lieu of an answer without the benefit of discovery that might support a later and stronger motion for summary judgment" (*Wilmington Sav. Fund Socy., FSB v Matamoro*, supra).

Accordingly, Defendant Mortgagors' motion to dismiss Plaintiff's complaint is denied.

This matter is set down for a virtual status conference on **February 10, 2022 @ 10:40 am** via Microsoft Teams. Part Clerk Tamika Wright (tswright@nycourts.gov) will forward the appearing parties an invitation to the conference via email.

<u>11/30/2021</u> DATE		 FRANCIS A. KAHN, III, A.J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> HON. FRANCIS A. KAHN III
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER J.S.C.
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE