

<b>VC RTL Holdings, LLC v 244 Albany LLC</b>
2022 NY Slip Op 30390(U)
February 2, 2022
Supreme Court, Kings County
Docket Number: Index No. 514696/21
Judge: Lawrence S. Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2<sup>nd</sup> day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

VC RTL HOLDINGS, LLC,

Plaintiff,

- against -

Index No. 514696/21

244 ALBANY LLC; SCHNEUR ZALMAN COHEN; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) \_\_\_\_\_

13-18

Opposing Affidavits (Affirmations) \_\_\_\_\_

22-31

Reply Affidavits (Affirmations) \_\_\_\_\_

32

Upon the foregoing papers in this action to foreclose a commercial mortgage on the real property at 244 Albany Avenue in Brooklyn (Block 1244, Lot 86) (Property), defendants 244 Albany LLC (244 Albany or borrower) and Schneur Zalman Cohen (Cohen

or guarantor) (collectively, defendants) move (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 (a) (3), dismissing the complaint for lack of standing.

### ***Background***

On June 17, 2021, plaintiff VC RTL Holdings, LLC (VC RTL) commenced this action to foreclose a mortgage encumbering the Property by filing a summons, a complaint verified by counsel and a notice of pendency against the Property. The complaint alleges that on December 9, 2019, 244 Albany, the obligor, executed and delivered a note in the principal amount of \$639,710.00 to Loanst LLC (Loanst), the original lender, which was secured by a mortgage encumbering the Property (complaint at ¶¶ 7-8). Allegedly, the loan was further secured by a guarantee executed by Cohen (*id.* at ¶ 10).

The complaint further alleges that “the plaintiff, directly or through an agent, has possession of the Note, which note is secured by the Mortgage, and the Note is made payable to the plaintiff as evidenced by allonges to the Note” and collectively annexes copies of the note and mortgage as Exhibit B (*id.* at ¶ 14). The note states that the maturity date of the loan is January 1, 2021 and reflects that it is executed by defendant Cohen as “President and Owner” of 244 Albany (*see* NYSCEF Doc No. 3). Notably, although there is sufficient space at the bottom of page 7 of the note (which was numbered 1 through 7), it has a separate “Allonge” executed on December 9, 2019, by Chesny Engel, the “Authorized Signatory” of Loanst, on the next page (numbered as page “1”) that states that:

“[t]his Allonge is affixed to, and is hereby made a part of, that certain Note, dated December 9, 2019, in the original principal amount of \$639,710.00 (Note), made by 244 ALBANY, LLC, a New York limited liability company, for the

benefit of LOANST LLC, a New York limited liability company (Assignor), and evidences the endorsement of the Note by Assignor as provided in that certain Master Loan Sale Agreement, dated June 17, 2019, by and between Assignor and the endorsee hereon (Agreement), to wit:

“The Note is hereby made PAYABLE TO THE ORDER OF PS FUNDING, INC [PS Funding] without recourse subject to the Agreement.”

A second “Allonge,” dated December 23, 2019, with similar language is on an unnumbered separate page endorsed and assigned by Daniel Graham, Vice President of PS Funding, as “Assignor” to the order of VC RTL (*id.*).

The complaint alleges that both the note and mortgage were assigned: (1) by “Lender to PS Funding” by a December 9, 2019 “Assignment of Mortgage,” and (2) by PS Funding to VC RTL by a December 23, 2019 “Assignment of Mortgage” (*id.* at ¶¶ 11-12), both of which are collectively annexed to the complaint as Exhibit E (*see* NYSCEF Doc No. 6). The December 9, 2019 “Assignment of Mortgage” states that “the Assignor hereby sells, grants, assigns and transfers to Assignee any and all of its right, title and interest in and to that certain Mortgage . . . TOGETHER with the note or notes therein described or referred to . . .” (*id.*). The December 23, 2019 “Assignment of Mortgage (and Other Loan Documents)” states that “Assignor hereby sells, grants, assigns, and transfers to Assignee any and all of its right, title and interest in and to that certain Mortgage . . .” and “any and all of its right, title and interest in and to any and all loan documents related to the Security Instrument, including, without limitation, any notes, allonges, loan agreements, guarantees, and title policies” (*id.*).

Regarding defendants' payment default, the complaint alleges that:

“Obligor and Guarantor have failed to comply with the terms and conditions of the Note, Mortgage and Guaranty by failing and omitting to pay the payments as they became due under the Note and Mortgage, and any applicable grace period has expired. Plaintiff elects to declare the entire principal sum secured by the Note and Mortgage to become immediately due and payable, and such principal balance as of the date of default and as of the time of this Complaint is \$639,710.00” (complaint at ¶ 15).

The complaint asserts four causes of action: (1) to foreclose the Property; (2) against the borrower and guarantor to recover under the note, mortgage and guaranty; (3) for reasonable attorney's fees, pursuant to the terms of the mortgage; and (4) for the appointment of a receiver for rents.

#### *Defendants' Pre-Answer Dismissal Motion*

On September 2, 2021, defendants filed the instant pre-answer motion for an order, pursuant to CPLR 3211 (a) (3), to dismiss the complaint for lack of standing. Defense counsel argues that “[p]laintiff lacks standing because Plaintiff is not a holder in due course of the Note.” Defense counsel notes that the “first assignment” occurred on December 9, 2019, the same day of the note's execution, “but this allonge was on a separate page (from the Note)” and “the first allonge was clearly represented as being a separate and distinct document because it was numbered as page ‘1’ (i.e., what MS Word will do when you start a new document) while the note itself ended at ‘Page 7 of 7.’” Defense counsel argues that “the first allonge has no physical attributes or indications showing that it was firmly (or at all) affixed to the Note[.]” and thus, it did not constitute a valid transfer of the underlying

note to VC RTL. Defense counsel also asserts that the second allonge “suffers from the same defects raised as to the first allonge.” Defense counsel argues that the mere fact that the allonges specifically state that “[t]his Allonge is affixed to, and is hereby made part of, that certain Note . . .” is “unavailing” because “the language in the allonge cannot replace the physical act to firmly fix the indorsement/allonge to the Note.”

Defense counsel also contends, without any case law authority, that the December 9, 2019 Assignment of Mortgage stating that the mortgage is assigned “TOGETHER with the note or notes therein” “does not effectuate a transfer of the Note” because it does not satisfy Uniform Commercial Code (UCC) § 3-202’s explicit requirement for the allonge to be “firmly affixed to the note.”

#### *VC RTL’s Opposition*

VC RTL, in opposition, submits an affidavit from Lam Tiffany Wetzel (Wetzel), who attests that she is “a/an Authorized Signatory of PS Funding, Inc. [PS Funding] the servicing agent for VC RTL[,]” “I am responsible for managing the loan[,]” “I have access to the business records of Plaintiff, including the business records for, and relating to the loan” and “I make this affidavit based on my review of those records relating to the loan, and from my own personal knowledge of how they were made, kept and maintained.” Wetzel attests that “[p]laintiff had an ownership interest in the Note and Mortgage . . . at the time of the filing of the summons and complaint and notice of pendency[,]” and “I am a/an Authorized Signatory of Plaintiff, therefore I am authorized to make this assertion.” Notably, Wetzel’s affidavit does not annex a power of attorney or any other documentation

establishing that Wetzel's employer, PS Funding, has authority to act or speak on behalf of plaintiff VC RTL, nor does it annex any of VC RTL's business records upon which Wetzel's affidavit and personal knowledge is purportedly based.

Wetzel alleges that "[o]n December 9, 2019, the Note and Mortgage were assigned by virtue of an assignment of mortgage to PS Funding, Inc." and "[t]he assignment of the Note by Loanst LLC to PS Funding, Inc. was memorialized by the allonge dated December 9, 2019" which "was attached to the original note *at that time*" (emphasis added). Wetzel also asserts that "[t]he Note and Mortgage were further assigned by virtue of an assignment of mortgage by PS Funding, Inc to Plaintiff dated December 23, 2019 and recorded on July 22, 2020 . . ." and "[t]he assignment of the Note by PS Funding, Inc. to Plaintiff was memorialized by . . . allonge dated December 23, 2019" which "was attached to the original note *at that time*" (emphasis added). Wetzel avers that "[f]urther evidencing the intent to transfer the Note[,] the allonge[s] specifically set[ ] forth the details of the Note."

Notably, Wetzel attests that "[a] copy of the Note is attached as Exhibit 'A'." However, Exhibit A to Wetzel's affidavit is of a copy of the seven-page promissory note followed by *two duplicate copies* of the December 9, 2019 "Allonge" with an indorsement from Loanst to PS Funding, *without a copy* of the December 23, 2019 "Allonge" by which PS Funding allegedly memorialized its assignment of the note to plaintiff VC RTL (*see* NYSCEF Doc No. 24). In contrast, the summons and complaint, which are collectively annexed to plaintiff's opposing papers as Exhibit F, includes all exhibits to the complaint,

including the promissory note and *both* the December 9 and December 23, 2019 “Allonges” (*see* NYSCEF Doc No. 29).

Wetzel alleges that “[f]urther memorializing and evidencing the transfer of the Note and Mortgage is the Assignment and Assumption of Loan Documents dated December 9, 2019 whereby the above assignments were set forth in Schedule 1.” The December 9, 2019 “Assignment and Assumption of Loan Documents” (annexed to VC RTL’s opposition as Exhibit D) provides that “[t]his Assignment is being made pursuant to the terms of the Agreement for the purpose of assigning to Assignee all of Assignor’s rights, title and interest in and to those certain loan documents described on Schedule 1 . . .” Schedule 1 specifically identifies “[t]hat certain Note, dated December 9, 2019, in the original principal amount of \$639,710.00, made by 244 ALBANY, LLC . . . for the benefit of LOANST LLC . . .” (*see* NYSCEF Doc No. 27).

VC RTL also submits an attorney affirmation arguing that “the Plaintiff has standing to bring this action as the Assignee of the Mortgage and underlying note . . .” VC RTL’s counsel asserts that “[d]efendants make several arguments whereby they allege that the allonges to the Note are not ‘attached’ to the original note” which is “based on nothing other than their own opinion and inference . . .” since “[d]efendants have not sought discovery nor have they requested to view the original note and allonges.” Counsel asserts that defendants’ argument regarding the allonges is a “red herring” and “an inference unsupported by any evidence . . .”

Counsel argues that “it is undisputed that Plaintiff was the holder of the underlying note and the subject mortgage at the commencement of this action” because “Plaintiff is the Assignee of both the note and mortgage” and “the note was validly assigned to plaintiff by way of the written assignment agreement” which “establishes plaintiff’s standing to continue this action.” Thus, counsel argues that, even if the allonges were not firmly affixed to the note, “the assignment agreement is sufficient, in and of itself, to establish a valid assignment of the note and mortgage to plaintiff.” Finally, plaintiff’s counsel asserts that “[a]t best, Defendants’ motion [based on electronically filed copies of the loan] is premature” because defendants “have not at any time requested to view the original note and attached allonges.”

### *Defendants’ Reply*

Defendants, in reply, submit an attorney affirmation arguing that “Plaintiff has failed to refute the motion’s position that Plaintiff lacks standing and Plaintiff failed to raise a question of fact as to its alleged standing.” Regarding the Wetzel affidavit, defense counsel notes that: (1) Wetzel did not attest “that there was a physical delivery of the Note” from Loanst to PS Funding, or from PS Funding to VC RLT; (2) Wetzel did not attest that the two allonges were firmly affixed to the note, “thus failing to establish a proper assignment of the note from nonparty Loanst LLC to nonparty PS Funding . . .”; and (3) the Assignment and Assumption of Loan Documents “at best, referenced the First Assignment, but is unrelated to the Second Assignment . . .” Defense counsel argues that

defendants' motion is not premature because "the loan documents Plaintiff attached to its pleadings have established that the 'allonges' were not firmly affixed to the Note . . ."

Although defense counsel acknowledges that "plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing either a written assignment of the underlying note or the physical delivery of the note [,]"<sup>1</sup> he argues that "Plaintiff did not demonstrate a physical delivery of the Note . . ." since "Wetzel's affidavit is silent regarding any physical delivery of the Note." Defense counsel contends that Wetzel's affidavit testimony about a first and second assignment is insufficient because her affidavit "does not assert compliance with [UCC § 3-202's requirement that an indorsement be firmly affixed to the note]."

Defense counsel asserts that "the two assignments are invalid per UCC § 3-202" because "Defendants have already demonstrated that the 'allonges' were not firmly affixed to the Note . . ." and plaintiff failed to controvert those assertion. Defense counsel notes that Ms. Wetzel "merely testified that '[t]he allonge was attached to the original note . . .'" which is insufficient because she does not attest that the allonge was "firmly affixed." Defense counsel explicitly notes that "Plaintiff's exhibit itself shows that the allonges were not firmly attached to the Note" because "the second allonge, which purported to indorse the Second Assignment (from nonparty PS Funding, Inc to Plaintiff) was absent in Plaintiff's Exhibit A" (*see* NYSCEF Doc No. 24).

---

<sup>1</sup> Quoting *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 984 [2015].

### *Discussion*

“On a defendant’s motion pursuant to CPLR 3211(a) (3) to dismiss the complaint based upon the plaintiff’s alleged lack of standing, ‘the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing as a matter of law’” (*Bank of New York Mellon v Chamoula*, 170 AD3d 788, 789-790 [2019]; *Deutsche Bank Tr. Co. Americas v Vitellas*, 131 AD3d 52, 59 [2015] [same]; *HSBC Bank USA, Nat. Ass’n v Roumiantseva*, 130 AD3d 983, 984 [2015]; *U.S. Bank N.A. v Guy*, 125 AD3d 845, 847 [2015]). “To defeat a defendant’s motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff’s submissions raise a question of fact as to its standing” (*Bank of New York Mellon v Chamoula*, 170 AD3d at 790 [internal quotation marks omitted]; *Deutsche Bank Tr. Co. Americas v Vitellas*, 131 AD3d at 60 [holding that “the (CPLR 3211 [a] [3]) motion will be defeated if the plaintiff’s submissions raise a question of fact as to its standing”]; *U.S. Bank N.A. v Guy*, 125 AD3d at 847).

“A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that 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 . . .” and may do so “by showing *either* a written assignment of the underlying note *or* the physical delivery of the note” (*U.S. Bank N.A. v Guy*, 125 AD3d at 846-847 [emphasis added]). It is well-established that “*either a written assignment of the underlying note or* physical delivery of the note prior to the commencement of the foreclosure action *is sufficient to transfer*

*the obligation*, and the mortgage passes with the debt as an inseparable incident” (*U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 754 [2009] [emphasis added]; *see also Deutsche Bank Nat’l Tr. Co. v Horowitz*, 163 AD3d 764, 765 [2018] [holding that “(a) plaintiff has standing to commence a foreclosure action where it is the holder or assignee of the underlying note, either by physical delivery *or execution of a written assignment* prior to the commencement of the action with the filing of the complaint”] [emphasis added]). Moreover, “[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it” (*Bank of New York v Silverberg*, 86 AD3d 274, 280-281 [2011]).

Here, defendants have failed to satisfy their burden of establishing VC RTL’s lack of standing because the written, recorded assignments, which are collectively annexed to both the complaint as Exhibit E and defendants’ moving papers as Exhibit D, demonstrate that VC RTL was the assignee of both the mortgage *and the promissory note* from PS Funding on December 23, 2019, prior to the commencement of this action on June 17, 2021 (*see* NYSCEF Doc Nos. 6 and 18). Defendants fail to raise any question regarding PS Funding’s authority to assign the mortgage and note to VC RTL, or the authority of Loanst, the original lender, to assign the mortgage and note to PS Funding (*c.f. HSBC Bank USA, Nat. v Roumiantseva*, 130 AD3d at 984-985 [holding that defendants demonstrated that plaintiff’s basis for standing, an assignment of the mortgage and note from Mortgage Electronic Registration Systems, Inc. (MERS), was not valid because documents showed that MERS “was without authority to assign the note . . .”]; *U.S. Bank, Nat. Ass’n v Sharif*,

89 AD3d 723, 725 [2011] [holding that “*in the absence of any evidence to demonstrate the existence of a written assignment of the note or physical delivery of the note, the Supreme Court should have granted that branch of Sharif’s cross motion which . . . to dismiss the complaint insofar as asserted against him for lack of standing*”] [emphasis added]).

Here, the December 9, 2019 “Assignment of Mortgage,” which was recorded on December 11, 2019, explicitly provides that “Assignor [Loanst] hereby sells, grants, assigns, and transfers to Assignee [PS Funding] any and all of its right, title and interest in and to that certain Mortgage . . . *TOGETHER with the note or notes therein described or referred to . . .*” (*id.* [emphasis added]). Thus, both the note and mortgage were assigned from Loanst, the original lender, to PS Funding by the December 9, 2019 written assignment. The December 23, 2019 “Assignment of Mortgage (and Other Loan Documents),” which was recorded on July 22, 2020, similarly provides that “Assignor [PS Funding] hereby sells, grants, assigns, and transfers to Assignee [VC RTL] any and all of its right, title and interest in and to that certain Mortgage . . .” and “Assignor [PS Funding] hereby grants, assigns, and transfers to Assignee [VC RTL] any and all of its right, title and interest in and to any and all loan documents related to the Security Instrument, *including, without limitation, any notes [and] allonges . . .*” (*id.* [emphasis added]). Thus, both the note and the mortgage were assigned from PS Funding to plaintiff VC RTL by the December 23, 2019 written assignment, which pre-dates the commencement of this action. Because defendants have failed to satisfy their burden of establishing that the December

23, 2019 written assignment of the mortgage and note from PD Funding to VC RTL was insufficient to transfer title of the note to, and confer standing upon, VC RTL, their CPLR 3211 (a) (3) dismissal motion is denied. Accordingly, it is hereby

**ORDERED** that defendants' motion (mot. seq. one) is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE**