

**DOF NPL III LLC v Joshua Mgt. LLC**

2022 NY Slip Op 33705(U)

October 28, 2022

Supreme Court, New York County

Docket Number: Index No. 850019/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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DOF NPL III LLC, MAXIM CREDIT GROUP, LLC,
Plaintiffs,

INDEX NO. 850019/2022

MOTION DATE 03/18/2022

MOTION SEQ. NO. 001

- v -

JOSHUA MANAGEMENT LLC, EMMANUEL KU,
MARYANNE KU, DEXTER FINANCIAL SERVICES, INC.,
CASTLE OIL CORPORATION, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, BUREAU OF
HIGHWAY OPERATIONS, JOHN DOE 1-10 AND JANE
DOE 1-10

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ORDERED that so much of defendants Joshua Management LLC, Emmanuel Ku, and Maryanne Ku’s (the “moving defendants”) motion to dismiss the complaint pursuant to CPLR 3211(a)(4) due to a prior pending action is denied. On August 17, 2022 the Court granted plaintiff DOF NPL III LLC (“DOF”) and nonparty Flushing Bank’s motion to dismiss the complaint in Joshua Management LLC v Flushing Bank and DOF NPL III LLC, Index No. 654053/2021, and thus there is no other pending action in favor of which the Court should dismiss this action (id., NYSCEF Doc. No. 47); and it is further

ORDERED that so much of the motion to dismiss the complaint pursuant to CPLR 3211(a)(3) for lack of standing is denied. “In a foreclosure action, a plaintiff has standing if it is the holder, or the assignee, of the underlying note at the time the action is commenced” (Central Mtge. Co. v Davis, 149 AD3d 898, 899 [2d Dept 2017]). Physical delivery of the note prior to

the commencement of the action is sufficient to establish standing (*Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 361 [2015]; *Bank of New York Mellon Tr. Co. NA v Sachar*, 95 AD3d 695, 696 [1st Dept 2012]). Here, plaintiffs argue, and the moving defendants do not dispute, that DOF's counsel is presently in possession of the note and was at the time the action was filed. The moving defendants argue, however, relying on *Reich v 559 St. Johns Pl, LLC* (204 AD3d 850, 852 [2d Dept 2022]), that DOF gave plaintiff Maxim Credit Group, LLC ("Maxim") a security interest in the note and mortgage that are the subject of this action, and by the Collateral Assignment entered into between the plaintiffs DOF gave all right to enforce the note to Maxim alone.

In *Reich*, a somewhat similar situation as the instant case occurred, as the plaintiff Reich gave a security interest in a note and mortgage encumbering property owned by the defendant 559 St. Johns Pl, LLC to nonparty Lenox Pacific, LLC prior to commencing the action (*Reich*, 204 AD3d at 850). Affirming the trial court's grant of summary judgment to the defendant, the Appellate Division, Second Department, held that by "submitting evidence that the plaintiff executed the written assignment of the note and mortgage to Lenox prior to the commencement of the action," the defendant demonstrated that Reich no longer had standing to foreclose the mortgage, and Reich failed to raise an issue of fact in opposition (*id.* at 852). While the Court did not comment on the language of the collateral assignment agreement, the trial court observed that the agreement not only stated that the assignment was given as collateral security, but also contained the language "[t]ogether with the bond or note or obligation in said mortgage ... TO HAVE AND TO HOLD the same ... forever" (*Reich v 559 St. Johns PL LLC*, 2018 NY Slip Op 32734[U], \*4 [Sup Ct, Kings County 2018]). Such language indicates that the assignment was not solely collateral but "a written assignment of the underlying note . . . and the mortgage passes

with the debt as an inseparable incident” (*U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

Here, the parties have submitted a Memorandum of Collateral Assignment of Note, Mortgage and Other Loan Documents, which references a separate Collateral Assignment but does not provide its terms (NYSCEF Doc. No. 34). This gives rise to a factual question regarding standing, as what was actually transferred or assigned between the plaintiffs determines which one of them actually has standing. Plaintiffs seem to suggest that because DOF retained the physical note they retain standing to foreclose on it, but that Maxim has standing due to the collateral assignment. However, “[e]ither 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” (*Collymore*, 68 AD3d at 754). Thus, if the terms of the underlying collateral assignment indicate not merely the granting of a security interest but a transfer of the documents themselves as in *Reich*, then Maxim would be the only plaintiff with standing. Conversely, if only a security interest was granted, which, the Court notes, is certainly possible given that DOF’s counsel retained the physical note itself, then DOF would be the party with standing (*Taylor*, 25 NY3d at 361; *Sachar*, 95 AD3d at 696). Without knowing the terms of the Collateral Assignment it is not possible to resolve the issue. On a motion to dismiss for lack of standing, it is the movant’s burden “to establish prima facie that plaintiffs have no standing to sue” (*Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016]), and based on the above the moving defendants have not satisfied their burden; and it is further

ORDERED that so much of the motion to dismiss the complaint based on documentary evidence or for failure to state a cause of action pursuant to CPLR 3211(a)(1) and (a)(7) is denied. A review of the allegations of the complaint makes clear that this is an action to foreclose

the mortgage, and that plaintiffs seek an order foreclosing the mortgage and decreeing that the mortgaged premises be sold and plaintiff be paid the proceeds; that a receiver be appointed to manage the rents of the mortgaged premises during this process; and that the moving defendants be required to pay any remaining balance due following the sale. Thus, and contrary to defendants' arguments, the complaint is "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR 3013). Other than citations to the general pleading standard, the moving defendants provide no authority that the allegations of the instant complaint are insufficient to state a claim for mortgage foreclosure, and the documentary evidence provided by the moving defendants does not "conclusively resolve[] all factual issues" (e.g. *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]); and it is further

ORDERED that the moving defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 1166, 111 Centre Street on December 7, 2022 at 2:00 PM. The parties are directed to meet and confer regarding discovery prior to the conference, and may submit a proposed preliminary conference order to the Principal Court Attorney of Part 38 at [ssyaggy@nycourts.gov](mailto:ssyaggy@nycourts.gov).

This constitutes the Decision and Order of the Court.



<u>10/28/2022</u> DATE	<u>LOUIS L. NOCK, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	