

Citimortgage. Inc. v Shwarzenberger

2023 NY Slip Op 31128(U)

February 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 516517/2017

Judge: Larry D. Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 FSMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of February 2023.

P R E S E N T:

HON. LARRY D. MARTIN,
J.S.C.

Index No.: 516517/2017 ✓

_____ x

CITIMORTGAGE, INC.,

MS# 1, 2 ✓✓

Plaintiff,

DECISION AND ORDER

-against-

HELENE SHWARZENBERGER, AS TRUSTEE OF THE
IRA SCHWARZENBERGER REVOCABLE TRUST, et al,

Defendant,

_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Motion	<u>1</u>
Opposition/Cross-Motion	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Reply	<u>4</u>

Plaintiff moves for summary judgment pursuant to CPLR §3212, an order of reference, striking defendant Helene Schwarzenberger’s answer and dismissal of her affirmative defenses and counterclaims, fixing defaults of non-appearing defendants and amending the caption. Defendant Helene Schwarzenberger opposes the motion and cross-moves to dismiss the action and to allow for actual and punitive damages as to her Defenses and Counterclaims. Plaintiff opposes the cross-

motion. This foreclosure action was commenced on or about August 24, 2017. Defendant filed an answer with counterclaims on or about December 11, 2017.

It is well established that "[i]n a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default" (*Loancare v. Firshing*, 130 A.D.3d 787 [2d Dept 2015]). Plaintiff has done so. "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" (*Bank of America, N.A. v. Paulsen*, 125 AD3d 909, 910 [2d Dept 2015]). "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, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v. Collymore*, 68 AD3d 752, 754 [2d Dept 2009] [citations omitted]).

Plaintiff proffers an affirmation by Robin Johnson, VP Officer of Legal Support at CitiMortgage. The Johnson Affidavit and the attached business records, states that Citibank, N.A., the parent company of her employer Citimortgage, Inc. ("CMI"), has been the custodian of the original note, since September 12, 2006 before the commencement of this action and remains the custodian to date. This is sufficient to demonstrate Plaintiff's standing. The Court further notes that a copy of the note was attached to the complaint, also demonstrating Plaintiff's standing (*Deutsche Bank v Logan*, 146 A.D.3d 861, 862-863 [2d Dept 2017]; *Nationstar Mtge., LLC v. Catizone*, 127 AD3d 1151, 1152 [2d Dept 2015]).

Defendant claims that she was not served with the required Notices under the RPAPL. However, this defense was a bare and unsubstantiated denial that was neither plead to with specificity in her answer, nor mentioned in her cross-motion. Plaintiff has attached the notices that

were sent to both the property address and the Defendant's home address at 45 North Street, Bay Point, CA 94565. The Johnson Affidavit and appended business records suffice to demonstrate compliance with RPAPL §1304. The appended documentation explains the standard office procedure for mailings. The affiant explains that she has personal knowledge of CMI's mailing practices. Although a third-party vendor, "Transaction Services" mails the notices, CMI oversees the content of all notices and handles quality control and approval before mailings are sent out. The affiant laid the foundation for the documents, set forth the mailing policies in detail and proffered the records upon which she based her conclusion that the policy had been followed herein. As such, the affidavit is sufficient to demonstrate the required mailings (*Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Eisler*, 118 A.D.3d 982, 983 [2d Dept 2014]; *HSBC v Gerber*, 100 AD3d 966, 967 [2d Dept 2012]; see also, *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679, 680, 729 N.Y.S.2d 776 [2d Dept. 2001] ["The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed"]).

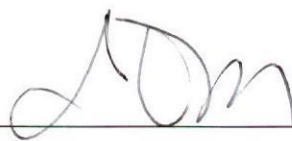
The remaining defenses are either inapplicable and/or meritless as to this foreclosure action. Defendant's cross-motion to dismiss focuses on several grounds: (1) Defendant argues that CMI gave her an unsolicited loan; (2) CMI refused to give her a loan modification; (3) non-parties Citigroup and CitiFinancial caused her stock to plummet; (4) surrogate issues revolving around her father's trust; (4) CMI allegedly transferred the deed from the Irrevocable Trust to her name as an individual; and (5) inability to obtain counsel in New York. Defendant argues that CMI gave her an unsolicited loan but does not refute that she did apply for the loan to make improvements on the property as the Trustee of the Ira Schwarzenberger Revocable Trust. Defendant's allegations as to non-parties Citigroup and Citifinancial have no relevance in this foreclosure

action. All other counterclaims and allegations are either inapplicable and/or unavailing as to raise a triable issue of fact that would prevent summary judgment.

As such, Plaintiff's motion for summary judgment is GRANTED (MS#1) see accompanying order and Defendant's cross-motion is DENIED (MS#2).

The foregoing constitutes the decision and order of the Court.

ENTER:



Hon. Larry D. Martin, J.S.C.

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**