# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

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

***Justice***

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YAKTE PROPERTIES, LLC,

Plaintiff,

- v -

TODD A. MILNER, CAPITAL ONE, N.A., FIA CARD SERVICES, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NEW YORK COUNTY CLERK, JOHN DOE # 1 THROUGH JOHN DOE # 12

Defendant.

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**INDEX NO.** 850102/2021

**MOTION DATE**

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion and cross-motion are determined as follows:

In this action, Plaintiff seeks to foreclose on a consolidated, extended and modified mortgage on residential real property located at 109 West 131st Street, New York, New York. The mortgage secures a loan with an original principal amount of $443,750.00 which is memorialized by an adjustable-rate note. The mortgage and note, both dated February 23, 2004, were given by Defendant Todd A. Milner ("Milner") to non-party GreenPoint Mortgage Funding, Inc. On August 11, 2006, non-party US National Bank Association, as Trustee of CS7B ABS Trust Series Heat 2002-4, issued a satisfaction of a mortgage dated June 17, 2002, which was consolidated into the subject mortgage.

Plaintiff commenced this action to, *inter alia*, foreclose on the mortgage, correct the legal description of the property in the mortgage and to discharge the August 11, 2006, satisfaction as erroneous. Defendant Milner answered and pled, including lack of standing and failure to serve pre-foreclosure notices pursuant to contract as well as RPAPL §§1303 and 1304. Defendant Milner also pled a counterclaim for recovery of attorney's fees under RPL §282 and a crossclaim to discharge a subsequently issued note and mortgage that is allegedly held by Defendant Capital One, NA. Plaintiff filed a reply to the counterclaim.

Now, Plaintiff moves for, *inter alia*, summary judgment against Defendant Milner, striking his answer, appointing a referee to compute and to amending the caption. Defendant Milner opposes the motion and cross-moves to dismiss pursuant to CPLR §3211[a][1] and [7] as well as for summary judgment dismissing the complaint. Plaintiff opposes the cross-motion.

In moving for summary judgment on its foreclosure cause of action, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendant's default in repayment (*see U.S. Bank, N.A. v James,* 180 AD3d 594 [1st

Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Since Defendant Milner raised lack of standing and failure to provide a contractual pre-foreclosure notice in the answer, Plaintiff was required to demonstrate its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]) as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie,* 186 AD3d 1582, 1584 [2d Dept 2020]). Similarly, Plaintiff was obliged to demonstrate its strict compliance with RPAPL §§1303 and 1304 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]).

Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported by an affidavit from David Ross ("Ross"), a Director of Loss Mitigation of Real Time Resolutions, Inc. ("Real"), the alleged servicer and attorney-in-fact for Plaintiff. Ross acknowledges that his knowledge is based entirely upon his review of records referred to in his affidavit. Ross established a foundation under CPLR §4518 for admission of his employer's documents as business records via his personal knowledge of the record-keeping procedures of Real (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). However, many of the salient documents were created by parties other than Plaintiff and Ross failed to show knowledge of any other entity's record keeping practices (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). For instance, concerning the RPAPL §1304 notice, the records proffered to prove same appear to be from Plaintiff's legal counsel, Leopold & Associates, PLLC, and Ross did not establish familiarity with that entity's record keeping procedures. Ross also failed to attest that any records received from prior makers were incorporated into the records Real kept and were routinely relied on in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780, 782-783 [2d Dept 2019]; *cf. Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]). Rather, Ross attested that records from prior servicers or entities were incorporated into "Shellpoint's" records without further explanation.

As to Defendants' default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). As Ross' knowledge of Defendants' default was based solely upon a review of documents, the records evidencing the default (ie. an account ledger or similar records) were required to be proffered (*see US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]). The default notices annexed to Ross' affidavit, even if admissible, were insufficient to establish the default in payment (*see Bank of N.Y. Mellon v Mannino*, 209 AD3d 707 [2d Dept 2022]).

Accordingly, since none of the evidence proffered to demonstrate the note, mortgage, Defendants' default, issuance of pre-foreclosure notices are admissible, Movant failed to establish any

of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v* Allanah, 200 AD3d 947 [2d Dept 2021]).

On the issue of standing, in a foreclosure action it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status via physical possession of the note prior to commencement of the action which contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, 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]). As to the latter two circumstances, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). Further, "[t]he attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]).

Here, since Plaintiff did not create the note, mortgage, allonges or assignments, no admissible evidence of its standing was submitted. Also, despite the endorsement in blank on the face of the operative note, it was not attached to the complaint when the action was commenced, and Ross' affidavit is silent as to whether Real physically possessed the note when the action was commenced.

Accordingly, Plaintiff failed to establish, *prima facie*, it had standing when this action was commenced.

On the cause of action to expunge the August 11, 2006 satisfaction, a "mortgagee may have an erroneous discharge of mortgage, without concomitant satisfaction of the underlying mortgage debt, set aside, and have the mortgage reinstated where there has not been detrimental reliance on the erroneous recording" (*New York Community Bank v Vermonty*, 68 AD3d 1074, 1076 [2d Dept 2009]; *see also Deutsche Bank Trust Co. v Stathakis*, 90 AD3d 983, 984 [2d Dept 2011]). Only bona fide purchasers and lenders for value are entitled to protection from an erroneous discharge of a mortgage (*see Fischer v Sadov Realty Corp.*, 34 AD3d 630, 631 [2d Dept 2006]; *Karan v Hoskins*, 22 AD3d 638, 638 [2d Dept 2005]; *see also Beltway Capital, LLC v Soleil*, 104 AD3d 628, 631[2d Dept 2013]). Here, absent any admissible evidence, Movant failed to demonstrate that the underlying debt has not been satisfied. Similarly, Ross' affidavit does not address, much less establish, *prima facie*, that Milner has not detrimentally relied on the erroneous discharge.

Concerning the cross-motion, the branch of the motion to dismiss the complaint based upon documentary evidence and failure to state a claim is denied (*see JP Morgan Chase Bank v Holcomb*, ____Misc 3d____ NY Slip Op 30972[U](Sup Ct NY Cty 2014]). Defendant Milner also moves for summary judgment dismissing the complaint as barred by the statute of limitations. On a motion to dismiss a cause of action as barred by the statute of limitations, the movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). An action to discharge an erroneous satisfaction of a mortgage is governed by a six-year statute of limitations (CPLR §214[6]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action

accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). Defendant Milner did not establish when the cause of action accrued as he submitted no proof that US Bank was the holder of the note and mortgage when the discharge was issued. A discharge issued without interest in same is void at its inception and does not trigger the statute of limitations (*see LNV Corp. v Sorrento*, 154 AD3d 840 [2d Dept 2017]).

In any event, as the prior mortgage was incorporated into the consolidated mortgage, "the allegedly erroneous satisfaction of the first mortgage is academic" (*Ridgewood Sav. Bank v Glickman*, 197 AD3d 1189, 1190-1191 [2d Dept 2021]). Moreover, absent detrimental reliance, an inadvertent discharge of a mortgage, without attendant satisfaction of the underlying debt, leaves Plaintiff with an unrecorded, equitable lien, that Plaintiff can enforce by way of foreclosure (*see Citibank, N.A. v Kenney*, 17 AD3d 305 [2d Dept 2005]).

Accordingly, it is

ORDERED that the motion and cross-motion are denied in their entirety, and it is further

ORDERED that this matter is set down for a virtual status conference on **July 19, 2023 @ 11:40 am** via Microsoft Teams.

5/19/2023
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | X | DENIED | X | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | | REFERENCE |