Craft v Ocwen Loan Servicing, LLC
2024 NY Slip Op 35516(U)
March 20, 2024
Supreme Court, Nassau County
Docket Number: Index No. 608767/2023
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 30
NASSAU COUNTY

WANDA CRAFT,

Plaintiff,

- against -

OCWEN LOAN SERVICING, LLC,
U.S. BANK TRUST NA, AS TRUSTEE FOR THE
LSF9 MASTER PARTICIPATION TRUST and
U.S. BANK TRUST NA, AS TRUSTEE FOR
IGLOO SERIES IV TRUST,

Defendants.

Index No.: 608767/2023
Motion Seq. Nos.: 01, 04
Motion Dates: 09/15/2023
10/03/2023

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01) and Affirmation	**1**
Pro Se Notice of Cross-Motion (Seq. No. 04), Affidavit and Exhibits, Memorandum of Law	**2**
Affirmation in Opposition to Cross-Motion (Seq. No. 04) and in Further Support of Motion (Seq. No. 01) and Exhibits	**3**
Pro Se Reply Affidavit in Further Support of Cross-Motion (Seq. No. 04)	**4**

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants PHH Mortgage Corporation, successor by merger to Ocwen Loan Servicing, LLC ("PHH") and U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust ("Trust") move (Seq. No. 01), pursuant to CPLR § 3211(a)(1), (5), (7) and (8), for an order dismissing *pro se* plaintiff's Complaint.

Pro se plaintiff opposes the motion (Seq. No. 01) and cross-moves (Seq. No. 04), pursuant to CPLR § 306-b, for an order deeming service of the Summons and Complaint upon defendants PHH and Trust sufficient *nunc pro tunc*; or, in the alternative, cross-moves, pursuant to CPLR § 308(5), for an order granting her leave to serve defendants PHH and Trust via alternative means; and cross-moves, pursuant to CPLR § 306-b, for an order extending her time to serve defendants PHH and Trust; and cross-moves, pursuant to CPLR § 312-a, for an order compelling defendants PHH and Trust to accept service; and cross-moves for an order imposing sanctions upon defendants PHH and Trust for refusing to acknowledge service, and on their counsel, Daniel Hughes, Esq., for filing responsive pleadings prior to *pro se* plaintiff filing a cross-motion to defendants PHH and Trust's motion (Seq. No. 01); and cross-moves, pursuant to CPLR § 3025, for an order allowing amendment of the Complaint to include the named party U.S. Bank Trust National Association as Trustee of the Bungalow Series IV Trust. Defendants PHH and Trust oppose the cross-motion (Seq. No. 04).

In support of the motion (Seq. No. 01), counsel for defendants PHH and Trust asserts, in pertinent part, that, "Plaintiff's action is an attempt to collaterally attack and unwind a long-completed foreclosure action and defacto expunge a mortgage she unquestionably owed and defaulted on. Plaintiff's Complaint is comprised of general and conclusory allegations that Defendants did not have 'authority' to assign Plaintiff's mortgage, and therefore, the assignments should be null and void. However, Plaintiff fails to offer any evidence in support of her claims, making the action meritless. Moreover, her claims are clearly refuted by documentary evidence, barred by the doctrine of res judicata, and fail to state a cause of action. This action should be dismissed. At the outset, Plaintiff's action is procedurally defective and should be dismissed outright because Plaintiff failed to establish personal jurisdiction over Defendants. To that point, Plaintiff failed to properly serve Defendants pursuant to the CPLR or Business Corporations Law ('BCL'). Moreover, Plaintiff has not filed an affidavit of service attesting to proper service. Even if the Court finds that proper service was effectuated here, which it was not, Plaintiff's action should be dismissed because all of Plaintiff's causes of action are barred by the doctrine of res judicata, as they have already been litigated on the merits or should've been litigated in the prior state court foreclosure action, which was completed in February 2023. Plaintiff's claims seeking to void the assignment of mortgages, should be dismissed because Plaintiff is not a party to or third-party intended beneficiary of those assignments and does not have standing to raise those claims. Accordingly, the Court should dismiss Plaintiff's Complaint, with prejudice."

Counsel for defendants PHH and Trust further asserts, in pertinent part, that, "[o]n June 8, 2007, Plaintiff executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc. as Nominee for IndyMac Bank, F.S.B. ('MERS Indy') to secure the principal sum of $348,000.00 (the 'Mortgage'). The Mortgage secured the property known as 61 Pierson Avenue, Hempstead, New York 11550 (Section: 36, Block: 27, Lot: 149) (the 'Property'). The Mortgage was recorded in the Nassau County Clerk's Office on June 26, 2007, in Liber M32043 at Page 101.... On June 4, 2008, the Mortgage was assigned by MERS Indy to IndyMac Bank, F.S.B. ('Indy'). The assignment of mortgage was recorded on June 25, 2008 in the Nassau County Clerk's Office as Liber 33084 at Page 228. On August 19, 2008, Plaintiff entered into a consolidation, extension, and modification agreement ('CEMA Agreement') (CEMA Agreement and Mortgage are collectively the 'Loan') with Indy where the Plaintiff agreed to pay the new principal balance of $381,667.27.

The CEMA Agreement was recorded on December 29, 2009 in the Nassau County Clerk's Office as Liber 34469 at Page 434. On November 1, 2009 Plaintiff defaulted on the Loan. On June 18, 2010, the Loan was assigned by Indy to OneWest Bank, FSB ('OneWest'). The assignment of mortgage was recorded July 2, 2010 in the Nassau County Clerk's Office as Liber M34950 at Page 854. On November 8, 2010, OneWest commenced the underlying foreclosure action against Plaintiff, indexed in the Nassau County Supreme Court as 021021/2010 (the 'Foreclosure Action')....
On August 23, 2013, the Loan was assigned by OneWest to PHH. The assignment of mortgage was recorded February 13, 2017 in the Nassau County Clerk's Office as Liber M41911 at Page 554. On October 17, 2017, the Loan was assigned by PHH to Trust. The assignment of mortgage was recorded November 21, 2017 in the Nassau County Clerk's Office as Liber M42513 at Page 294. On November 27, 2018, a Judgment of Foreclosure and Sale was granted in the Foreclosure Action ('JFS Order').... On October 16, 2020, the Loan was assigned by Trust to co-defendant U.S. BANK TRUST NA, AS TRUSTEE FOR IGLOO SERIES IV TRUST. The assignment of mortgage was recorded on July 16, 2021 in the Nassau County Clerk's Office as Liber M45632 at Page 143. In an attempt to vacate the Judgment of Foreclosure and Sale, stop the sale of the Property, and vacate the completed sale of the Property, Plaintiff filed various Orders to Show Cause and motions in the Foreclosure Action. All were denied. Specifically, on June 23, 2023, the Court denied Plaintiff's Order to Show Cause to Vacate the JFS Order ('Denial Order')....
On February 15, 2023, the Property was sold to a third-party bidder for the sale price of $369,000.00. On June 1, 2023, Plaintiff commenced this action seeking the expungement of various assignments of mortgage regarding the Loan, indexed in the Nassau County

Supreme Court as 608767/2023.... Plaintiff never served Defendants in this action.... Plaintiff continues to litigate in the Foreclosure Action, most recently, by filing a notice of appeal, appealing the Court's June 23, 2023 Order denying Plaintiff's Order to Show Cause to vacate the Judgment of Foreclosure and Sale." *See* Defendants PHH and Trust's Affirmation in Support of Motion (Seq. No. 01) Exhibits A-E.

Counsel for defendants PHH and Trust contends, in pertinent part, that, "[h]ere, Plaintiff has failed to establish personal jurisdiction over Defendants because Plaintiff never properly served Defendants pursuant to the CPLR or BCL, nor did Plaintiff file an affidavit of service on the docket for either defendant. Even if service were proper, which it was not, the action is barred by res judicata as the issues before this Court were already decided on the merits in the Foreclosure Action. Finally, even if challenging the validity of assignments of mortgage were a valid cause of action, which it is not, Plaintiff has no standing to raise these claims. Plaintiff's action should be dismissed. Plaintiff's action is procedurally defective and should be dismissed outright as Plaintiff has failed to obtain personal jurisdiction over the Defendants. The action must be dismissed.... Here, Plaintiff cannot establish its (*sic*) prima facie burden that this Court has acquired personal jurisdiction over Defendants in this action because Plaintiff fails to provide an affidavit of service for Defendants, demonstrating proper service. [citation omitted]. Since Plaintiff failed to file an affidavit of service attesting to proper service, the service must be deemed incomplete. [citation omitted]. Therefore, personal jurisdiction cannot be established on Defendants. Moreover, even if the Court overlooks Plaintiff's failure to properly file an affidavit of service, which it should not, Plaintiff's failure to properly serve Defendants pursuant to CPLR 311 or BCL 306 warrants the dismissal of the Complaint. Plaintiff did not serve a registered agent who is authorized to accept summons on behalf of PHH (and Defendants' counsel cannot attest to the service of Defendant Trust as no affidavit was filed). [citation omitted]. Plaintiff attempted to serve PHH by way of certified mail, which is not proper service on its face, moreover, it was also not delivered to a registered agent of PHH. This clearly demonstrates improper and wholly incompetent service, and therefore the court cannot exercise personal jurisdiction over Defendants in this case. [citation omitted]. As a result of Plaintiff's improper service of Defendants pursuant to both the CPLR and BCL, personal jurisdiction is not obtained over Defendants. This action must be dismissed."

Counsel for defendants PHH and Trust also contends, in pertinent part, that, "[t]his action should be dismissed under the doctrine of res judicata because Plaintiff's current claims, all arise out of/concern the Loan which was foreclosed in the Foreclosure Action. Specifically, Plaintiff's Complaint alleges that Defendants did not have authority to execute various assignments of mortgage and seeks that the assignments be null and void. Plaintiff's claims are claims arising from the Loan, which have already been adjudicated on the merits, to final judgment and sale and the Property sold. In New York, foreclosure judgments are final judgments on the merits. [citation omitted]. Res judicata prevents situations such as the one here, where a Plaintiff seeks to re-litigation of issues which were/should've been decided on the merits. The action should be dismissed.... Here, Plaintiff is seeking to defacto rescind the foreclosure, and/or tangentially attack plaintiff in the Foreclosure Action by attempting to void the assignment of mortgage by Defendants. The assignments of mortgage that Plaintiff argues should be null and void, arise out of the same transaction as the underlying completed Foreclosure Action. Plaintiff previously raised, or could've raised this same argument in the Foreclosure Action, and is now barred from doing so. To that point, Plaintiff already attempted to vacate the Foreclosure sale by way of an Order to Show Cause, which was denied. In the Denial Order, the Court made a final disposition as to the merit (*sic*), stating that the Plaintiff has not raised sufficient issues that would vacate a Judgment of Foreclosure and Sale or stay the Foreclosure Sale.... Accordingly, Plaintiff is improperly attempting to circumvent this Court's Denial Order, and 2018 JFS Order by asserting the same claims that she raised or could have raised in the Foreclosure Action. [citations omitted].

Plaintiff has already been afforded every opportunity to defend/raise claims against Defendants in the Foreclosure Action. The decisions in the Foreclosure Action bar the instant complaint. The Court should dismiss the Complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7) because Plaintiff fails to state a viable claim against Defendants for the expungement of mortgage assignments, to which Plaintiff is not a party. New York law is clear that only a party to the assignment or a third-party beneficiary has standing to challenge those instruments, of which Plaintiff is neither. This complaint should be dismissed. New York federal and state courts have consistently held that a mortgagor lacks standing to challenge the assignment of mortgage as a claim or defense to foreclosure because the mortgagor is not a party to, or third-party beneficiary of, the assignment of mortgage. [citations omitted].

Plaintiff's Complaint seeks to defacto challenge the validity of the Foreclosure by claiming that the assignment of the mortgages should be null and void.... Plaintiff has no basis to challenge assignments of mortgage, as Plaintiff is neither a party, nor third party beneficiary of the assignment of mortgage. An assignment is only voidable at the election of one of the contracting parties. [citation omitted]. Plaintiff, as a mortgagor, is not a contracting party to any assignment of mortgages regarding the property. As such, Plaintiff is unable to challenge the assignments of mortgage, and therefore, lacks the ability to raise it as a valid cause of action.

[citation omitted] For these reasons, the Court must dismiss Plaintiff's action." *See* Defendants PHH and Trust's Affirmation in Support of Motion (Seq. No. 01) Exhibit E.

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 04), *pro se* plaintiff asserts, in pertinent part, that, "[a]t the time I filed this complaint, I owned the property located at 61 Pierson Avenue, Hempstead, NY 11550 by deed…. I allegedly defaulted on the mortgage in November 2009. The loan was assigned multiple times, ending with the Defendant in 2020. In 2010, OneWest Bank commenced a foreclosure action against me. A judgment of foreclosure and sale was entered in 2018 in favor of One WestBank. My home was allegedly sold after I filed this complaint in 2023. I filed motions challenging the foreclosure, but they were denied. I commenced this action in 2023 seeking to expunge certain mortgage assignments related to my loan as unauthorized as owner of the property. I attempted service of the summons and complaint on Defendants Ocwen Loan Servicing LLC and U.S. Bank Trust N.A. as Trustee for LSF9 Master Participation within the 120-day period under CPLR 306-b through mailings sent on June 25, 2023 pursuant to CPLR 312-a. On June 25, 2023, I served the defendants Ocwen Loan Servicing LLC and U.S. Bank Trust N.A. as Trustee for LSF9 Master Participation with two copies of the statement of service, two copies of the acknowledgment, a self-addressed envelope, and a copy of the summons and complaint by mail as authorized by CPLR 312-A (*sic*)…. The defendants received said documents by first-class mail with certified mail returned receipt confirmation signed by employees at 800 Nicollet Mall, Minneapolis, MN 55402 for US Bank and West Palm Beach Florida for Ocwen…. However, the defendants failed to send back one of the two acknowledgement slips I included with the complaint mailing to acknowledge they accepted service as required by CPLR 312-A (*sic*). This prevented me from drafting an affidavit of service for the court. Although defendants received the mailings, they refused to acknowledge receipt in bad faith just to delay this action and filed a motion to dismiss asking for relief for lack of personal jurisdiction, which seems sanctionable.

Defendants should also be compelled to accept service under CPLR 312-a and sanctioned for their gamesmanship in refusing to acknowledge receipt. Furthermore, the action of Defendant's counsel, Daniel Hughes, in filing a response to a motion clearly meant for the Defendant, U.S. BANK TRUST NA, AS TRUSTEE FOR THE IGLOO IV TRUST, borders on frivolous behavior. This is especially the case since the motion referred to itself as a response to Motion Number 2, filed by counsel Kenneth Britt, who purportedly represents U.S. BANK TRUST NA, AS TRUSTEE FOR THE IGLOO IV TRUST....

Adding insult to injury, I corresponded with Daniel Hughes, Esq. about a prior stipulation we had signed with him regarding submitting a response to his motion under sequence 1. I assured him that my reply to said motion was not required until September 26th, 2023, per the stipulation between us.... The fact that I refused to sign a stipulation with counsel for U.S. Bank N.A as Trustee for the Igloo Series IV Trust provides no grounds for Daniel Hughes, Esq. to file an improper pleading before the filing of my cross motion....

I even requested him via email to withdraw his pleadings and alerted him about the said error, hoping he might withdraw his pleadings, but to no avail. This behavior stands as a prime example of frivolity pursuant to 22 § 130-1.1(c)1-3, warranting sanctions.

CPLR § 320(b) requires an attorney for a non-resident defendant in a real property action to file written authority to appear with the clerk of the court and serve it on the plaintiff within 20 days after appearing or making a motion. Here, Defendant's counsel failed to comply with CPLR § 320(b) before moving to dismiss. Defendant's counsel attempted to respond to and provide evidence of their authority to appear on behalf of and make motions for the Defendants after the (*sic*) by filing a notice pursuant to CPLR § 320(b). However, the documentation supporting defendant's authority under CPLR 322(B) in the form of a notice to appearance pursuant to CPLR 320(b) is deficient for the following reasons: CPLR 322(b) contains specific requirements for an attorney appearance for a non-resident defendant in a real property action. The written authority must be executed and acknowledged in the same form as required for a deed to be recorded, typically meaning it must be notarized. The attorney must also serve a copy of the authority or notice of filing on the plaintiff's attorney within 20 days of appearing. A standard CPLR 320(b) notice of appearance does not meet these requirements, as it is usually just a simple notice, not a notarized authorization. Merely filing a CPLR 320(b) notice of appearance does not satisfy the requirements in CPLR 322(b). If the notice of appearance does not comply with the format and service mandates in CPLR 322(b), it is insufficient to establish the attorney's authority to represent the non-resident defendant in a real property action. Defendants' motions should be denied pending resolution of service issues and their failure to provide adequate proof of authority under CPLR 322, which I served upon defendants' counsel on 9/12/2023 and filed with the court on 9/12/2023. My causes of action seeking to cancel mortgage assignments to defendants have merit, warranting denial of defendants' motions. The assignments failed to attach powers of attorney referenced in the documents, violating RPL § 254.... I also oppose the Defendants' motions on substantive grounds. Defendants argue my claims are barred by res judicata based on the foreclosure judgment against me and that I lack standing to challenge the assignments of mortgage. However, the recent Second Department decision in Lewis v. Bartow, 159 N.Y.S.3d 118 (App. Div. 2021) demonstrates these arguments lack merit.

In Lewis, the court allowed a similar action under Real Property Law § 329 challenging mortgage assignments to proceed despite a prior foreclosure judgment and sale, finding the plaintiff had standing based on ownership at the time of filing suit. Just as in Lewis, I had standing based on my ownership interest when I commenced this action to cancel the unauthorized mortgage assignments. Lewis makes clear that my claims relating back to my ownership are not precluded by the foreclosure judgment against me. Defendants' reliance on res judicata and lack of standing is misplaced in light of Lewis allowing analogous claims to survive foreclosure. The factual details and legal bases within my complaint demonstrate the potential merits of my claims. This shows the merits factor under Leader v. Maroney weighs toward granting me an extension of time to serve in the interest of justice per CPLR 306-b.

The Assignment of Mortgages is Void Because It References an Unrecorded Power of Attorney

The assignment of mortgage dated October 17, 2017, whereby the mortgage was purportedly assigned from OneWest Bank to Defendant Ocwen Loan Servicing LLC is invalid and void under New York law, specifically RPL 254.... The assignment expressly states it was made under authority granted by a power of attorney from OneWest Bank to its attorneys-in-fact, Ocwen Loan Servicing LLC and Caliber Home Loans, Inc. as Attorney-in-Fact. However, this power of attorney was not accompanied by or recorded together with the assignment. The assignment of mortgage dated October 16, 2020, whereby the mortgage was purportedly assigned from Ocwen Loan Servicing LLC to Defendant U.S. Bank Trust National Association, as Trustee for LSF9 Master Participation Trust, is invalid and void under New York law, specifically RPL 254.... The assignment expressly states it was made under authority granted by a power of attorney from U.S. Bank Trust National Association as Trustee for LSF9 Master Participation Trust to its attorneys-in-fact, Caliber Home Loans, Inc.

and Meridian Asset Services. However, this power of attorney was not accompanied by, referenced in, or recorded together with the assignment. Under New York Real Property Law § 254, a power of attorney is required to demonstrate an agent's legal authority to assign a mortgage. As held in Galetta v. Galetta, 3 N.Y.3d 186, 191 (2004), recording the power of attorney provides necessary notice to establish the agent's authority and ensure validity of assignments. Allowing mortgage assignments based on unrecorded powers, as Defendant seeks here, unjustifiably risks improper transfers, undermines chain of title, and violates New York recording requirements, as explained in HSBC Bank USA, N.A. v. Valentin, No. 501864/2012, 2014 N.Y. Slip Op. 30746(U), at 3 (Sup. Ct. Kings Cnty. Mar. 25, 2014). By referencing a power of attorney that was not properly recorded, the subject assignments fail to comply with New York law governing recording of real property conveyances. The lack of recorded powers strips the assignments of any force or effect, rendering them invalid and void as a matter of law under Galetta, 3 N.Y.3d at 191 and HSBC Bank, 2014 N.Y. Slip Op. 30746(U), at 3. Therefore, the October 16, 2020 assignment, under which Defendant claims title to the mortgage, is defective and cannot establish Defendant's standing to foreclose. The assignment should be cancelled and discharged of record. Defendant's attempt to foreclose based on this faulty assignment must be dismissed….
The plaintiff should also be allowed to amend the complaint to plead a cause of action against the party U.S. BANK TRUST NATIONAL ASSOCIATION, AS TRUSTEE OF THE BUNGALOW SERIES IV TRUST, which would be affected by any judgment in this matter as a united-in-interest party who was not originally named due to the unknown assignment of mortgage." *See Pro Se* Plaintiff's Affidavit in Opposition to Motion (Seq. No. 01)

and in Support of Cross-Motion (Seq. No. 04) Exhibits A-E; NYSCEF Document Nos. 3, 5, 23 and 35.

In opposition to the cross-motion (Seq. No. 04), and in further support of the motion (Seq. No. 01), counsel for defendants PHH and Trust asserts, in pertinent part, that, "Plaintiff, continues to attempt to confuse this Court with various 'oppositions,' 'notice of rejections,' 'cross-motions,' and letters, in hopes that it diverts the Court's attention away from the fact that Plaintiff's entire action is barred by the doctrine of res judicata, and is an improper attempt to collaterally attack and unwind a long-completed foreclosure action and defacto expunge a mortgage that the Court has already determined Plaintiff owes and defaulted on.... Regardless of the voluminous number of motions and filings that Plaintiff submits, none can overcome the fact that Plaintiff's action, Cross-Motion, and any other filings are procedurally defective because Plaintiff failed to establish personal jurisdiction over Defendants in the action. Plaintiff's failure to properly serve Defendants pursuant to the CPLR or Business Corporations Law ('BCL'), makes the action and Plaintiff's Cross-Motion fatally deficient. Moreover, Plaintiff's action should be dismissed because Plaintiff's lawsuit is barred by the doctrine of res judicata, as the issues have already been litigated on the merits or should've been litigated in the prior state court foreclosure action, which was completed in February 2023."

Counsel for defendants PHH and Trust further contends, in pertinent part, that, "[i]n response to Defendants' res judicata arguments, Plaintiff cites *Lewis v. Bartow*, stating that 'Lewis makes clear that my claims relating back to my ownership are not precluded by the foreclosure judgment against me.' ... In *Lewis*, the mortgagor brings an action pursuant to RPL 329, seeking to expunge various assignments of mortgage while a companion foreclosure action is pending. However, in our case, Plaintiff brings the instant action, after the completion of the underlying foreclosure action which was indexed as 021021/2010 ('Foreclosure Action'), where there was a final disposition on the merits of the case. In other words, Plaintiff did not bring this action while the Foreclosure Action was pending, but after it was completed. Therefore, *Lewis* was commenced while the companion foreclosure action was pending, and thus res judicata was not applicable, which finds that *Lewis* is inapplicable and irrelevant to the instant fact pattern. To that point, the Court in *Lewis* does not consider res judicata or even remotely reference issue or claim preclusion, which is Defendants' argument. [citation omitted]. Here, in the Foreclosure Action, there was a final decision on the merits, which Plaintiff has failed to rebut. Each allegation raised by Plaintiff in this action, was, or could have been raised as a defense in the Foreclosure Action. This action is barred by the doctrine of res judicata as the issues Plaintiff argues arise out of the same transaction as the Foreclosure Action. [citation omitted]. Moreover, to further demonstrate that 1) this case is barred by res judicata and 2) that Plaintiff is using this action as a mechanism to re-litigate the issues in the Foreclosure Action[.] Plaintiff's Cross-Motion seeks to amend its complaint to join 'U.S. Bank Trust National Association, As Trustee of the Bungalow Series IV Trust' ('Defendant Bungalow')[.] Defendant Bungalow is the current mortgage holder that completed the foreclosure on the property at subject of this litigation, 61 Pierson Avenue, Hempstead, New York 11550 (the 'Property'). This further proves Defendants' argument that Plaintiff is attempting to join all parties that participated in the Foreclosure Action, in the 'new' instant action, to re-litigate issues that were already litigated in the Foreclosure Action. Plaintiff previously raised, or could've raised these same arguments in the Foreclosure Action, and is now barred

from doing so. [citation omitted]. Plaintiff's Cross-Motion must be denied.
Plaintiff lacks standing to challenge assignments of mortgage as New York federal and state courts have consistently held that a mortgagor lacks standing to challenge the assignment of mortgage as a claim or defense to foreclosure because the mortgagor is not a party to, or third-party beneficiary of, the assignment of mortgage. [citations omitted]. Here, Plaintiff relies upon *Lewis v. Bartow*, stating that '[j]ust as in Lewis, I had standing based on my ownership interest when I commenced this action to cancel the fraudulent mortgage assignment.' ... However, again, Plaintiff mis-interprets the law. Defendants concede that in *Lewis v. Bartow*, a mortgagor brought an action pursuant to RPL 329 to discharge the assignments of mortgage on the land records, just as the case here. However, in *Lewis*, the mortgagor brought the RPL 329 action **before** the foreclosure sale was held, thus, leaving the Court to rule that the mortgagor had standing to bring the action 'since he owned the subject property at the time the action was commenced.' [citation omitted].
In the case at hand, Plaintiff brought the instant action pursuant to RPL 329 on June 1, 2023, which was nearly four months after the sale of the Property, which occurred on February 15, 2023.... Therefore, Plaintiff would not be able to claim protection under this case law. Plaintiff's Cross-Motion is yet another attempt to mislead the Court and re-litigate issues that have already been litigated."

Counsel for defendants PHH and Trust also argues, in pertinent part, that, "Plaintiff's Cross-Motion, which vaguely sets forth serving Defendants, cannot overcome that proper service was not effectuated. Since service was never completed on Defendants, Plaintiff failed to establish personal jurisdiction over Defendants, accordingly, Plaintiff's request for a court order seeking 1) service on Defendants sufficient nunc pro tunc pursuant [to]

CPLR 306-b, 2) leave to serve Defendants via alternative means pursuant to CPLR 308(5), 3) to serve defendants pursuant to CPLR 306-b; 4) compelling defendants to accept service pursuant to CPLR 312-a, must be denied. As articulated in Defendants' Motion to Dismiss, A (*sic*) plaintiff cannot cure a defect in service by claiming that the defendant subsequently received actual notice of the commencement of the action (which Plaintiff attempts to do). [citations omitted]. New York courts hold that when an affidavit of service is not filed, 'service was never completed.' [citation omitted]. Here, Plaintiff fails to establish its prima facie burden that this Court has acquired personal jurisdiction over Defendants because Plaintiff fails to provide an affidavit of service **still** despite repeated requests to do so. [citation omitted]. Additionally, Plaintiff's Cross-Motion, does not provide any insight that proper service was conducted pursuant to CPLR or BCL. As a result of Plaintiff's failure to meet its (*sic*) burden of proving personal jurisdiction, Plaintiff's Cross-Motion must be deemed void and null. [citation omitted]. Moreover, Plaintiff cannot now, request to serve all parties with subsequent service, request that [the] parties are served 'nunc pro tunc,' or force Defendants to accept service that purportedly happened to cure her service defect. [citation omitted]. Plaintiff's Cros-Motion must be denied and the action dismissed."

Counsel for defendants PHH and Trust further contends, in pertinent part, that, "Plaintiff's argument concerning CPLR 322(b) raised as a challenge to Defendants (*sic*) Motion to Dismiss does not in any way preclude dismissal of this action. Plaintiff's Cross-Motion states that Defendants' Motion should be dismissed pursuant to 'CPLR 320(b),' but then in the next sentence states, 'I immediately served Defendant's counsel with a CPLR 322(b) notice.' … Plaintiff's argument, under either CPLR provision, lacks merit and is not grounds to maintain this action. Defendants' Motion to Dismiss should be granted.

CPLR 320(b) discusses 'when appearance confers personal jurisdiction, generally.' The statute goes on to say '[s]ubject to the provisions of subdivision (c), an appearance of defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction… is asserted by motion [in 3211].' [citation omitted]…. CPLR 322(b), states, '[t]he attorney for a non-resident defendant in an action affecting real property shall file with the clerk written authority for his appearance….' Here, Defendants have complied with both statutes. For CPLR 320(b), Defendants' Motion to Dismiss objected specifically on the grounds that Plaintiff failed to confer personal jurisdiction. Plaintiff's service over Defendants was defective because it failed to comply with CPLR 311, BCL 306, and Plaintiff failed to file an affidavit of service on Defendants. Therefore, Defendants' appearance has not conferred personal jurisdiction over Defendants', as per the statute. [citation omitted]. Moreover, even if the Court found that personal jurisdiction was conferred over Defendants', which it was not, Plaintiff's Cross-Motion fails to refute that the action is barred by res judicata or that Plaintiff lacks standing to challenge an assignment of mortgage, in which she is not a party to the contract or third-party beneficiary. Therefore, Defendants' Motion to Dismiss should nevertheless be granted. Moreover, regarding CPLR 322(b), Defendants responded to Plaintiff's concerns by filing a formal written letter with a notice of appearance setting forth Houser LLP's authority to represent Defendants…. PHH, Defendants' loan servicer, has retained Houser LLP on 100s, if not 1000s of cases, around the United States. There is no credible challenge to Defendants' choice of representation…. Plaintiff's Cross-Motion seeks to amend its complaint to join Defendant Bungalow and allow the Plaintiff additional time to serve Defendant Bungalow, and complete service on current defendants pursuant to 'CPLR 305, CPLR, 306-b, CPLR 312-a(e)[.]' … Plaintiff's Cross-Motion should be denied outright because the action is clearly deficient for lack of personal jurisdiction over Defendants, and moreover, the action as a whole is barred by res judicata, making Plaintiff's Cross-Motion moot."

See NYSCEF Document No. 28.

"Where a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction, a plaintiff 'need only make a prima facie showing' that such jurisdiction exists." *See Lang v. Wycoff Heights Medical Center*, 55 A.D.3d 793, 866 N.Y.S.2d 313 (2d Dept. 2008); *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986, 845 N.Y.S.2d 797 (2d Dept. 2007); *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905 (1974); *Daniel B. Katz & Assoc. Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 937 N.Y.S.2d 236 (2d Dept. 2011); *Marist College v. Brady*, 84 A.D.3d 1322, 924 N.Y.S.2d 529 (2d Dept. 2011); *Alden Personnel, Inc. v. David*, 38 A.D.3d 697, 833 N.Y.S.2d 136 (2d Dept. 2007). Nevertheless "[a]s the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue." *Cornely v. Dynamic HVAC Supply, LLC, supra* at 987. *See also Urfirer v. SB Builders, LLC*, 95 A.D.3d 1616, 946 N.Y.S.2d 266 (3d Dept. 2012); *Armouth Intern., Inc. v. Haband Co., Inc.*, 277 A.D.2d 189, 715 N.Y.S.2d 438 (2d Dept. 2000).

Personal service upon any domestic or foreign corporation must be made by delivering the summons to an officer, director, managing or general agent, or cashier or assistant cashier, or to any other agent authorized by appointment or by law to receive service. *See* CPLR § 311(a)(1). "Delivery" requires that the summons and complaint be handed to an actual authorized officer, director or other person set forth in the statute. *See id.* Sending a Summons and Complaint via certified mail does not constitute "delivery." A business corporation may also be served under the Business Corporation Law. In the instant matter, *pro se* plaintiff did not effectuate personal service upon defendants PHH and Trust.

An LLC is an entity much like a corporation, and not an individual, and service by substituted service is improper on a corporation. "Service on a corporation may not be made in accordance with the substitute methods of service authorized for the personal service of process on individuals. Service under CPLR § 308 (2) is applicable only to actions against natural persons and is inapplicable to actions against corporations, for which personal service must be made pursuant to CPLR § 311(1)." *Lakeside Concrete Corp. v. Pine Hollow Bldg. Corp.*, 104 A.D.2d 551, 479 N.Y.S.2d 256 (2d Dept. 1984) *aff'd* 65 N.Y.2d 865, 493 N.Y.S.2d 309 (1985). The service envisioned under CPLR § 311(1) upon a corporate officer is in-hand service upon the specified officer. Substitute service under CPLR § 308 (2) and (4) is available only against individual defendants, and not corporations. *See id.*; *DeZego v. Bruhn*, 99 A.D.2d 823, 472 N.Y.S.2d 414 (2d Dept.1984).

CPLR § 3211(a)(5) reads, "[m]otion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:... 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;..."

The doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. *See Carter v. Walt Whitman New York City Housing Authority (NYCHA)*, 98 A.D.3d 1113, 951 N.Y.S.2d 210 (2d Dept. 2012). The fundamental principle underlying the doctrine of *res judicata* is that in the public interest, a party may not be heard a second time on an issue that has once been called upon and contested. *See New York State Labor Relations Board v. Holland Laundry*, 294 N.Y. 480 (1945). The rationale for the doctrine of *res judicata* is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again. *See In re Hunter*, 4 N.Y.3d 260, 794 N.Y.S.2d 286 (2005); *Kalter v. Riversource Life Ins. Co. of New York*, 142 A.D.3d 1141, 38 N.Y.S.3d 71 (2d Dept. 2016); *Lyons v. Lancer Ins. Co.*, 142 A.D.3d 689, 36 N.Y.S.3d 889 (2d Dept. 2016). Allowing re-litigation would undermine public policy concerns intended to ensure finality, prevent vexatious litigation, and promote judicial economy. *See Spencer v. Spencer*, 159 A.D.3d 174, 71 N.Y.S.3d 154 (2d Dept. 2018).

While the doctrine of *res judicata* has been treated as a branch of the law of estoppel, and these terms have been used interchangeably to describe the effect of former proceedings as precluding further litigation of particular facts and issues or of particular causes of action, it is generally accepted that the principle of estoppel is distinguishable from the doctrine of *res judicata*. *Res judicata* and collateral estoppel are related doctrines that are designed to limit or preclude re-litigation of matters that have already been determined; *"res judicata"* generally precludes re-litigation of claims, while "collateral estoppel" precludes re-litigation of issues. Thus, "collateral estoppel," or "issue preclusion," is a component of the broader doctrine of *res judicata* and provides that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent actions. *See Highlands Center, LLC v. Home Depot, U.S.A., Inc.*, 149 A.D.3d 919, 53 N.Y.S.3d 321 (2d Dept. 2017).

With these equitable considerations in mind, and tempered by a "practical inquiry into the realities" of the prior litigation (*see Auqui v. Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246, 980 N.Y.S.2d 345 (2013); *Jeffreys v. Griffin*, 1 N.Y.3d 34, 769 N.Y.S.2d 184 (2003)), the Court concludes that defendants PHH and Trust have established their entitlement to an order dismissing the Complaint on the grounds of *res judicata*.

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence;..." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Lift Ins. Co. of NY.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1*, *supra*, *citing* SIEGEL, PRACTICE COMMENTARIES; MCKINNEY'S CONSLAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) *quoting Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). *See Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiff's factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

The Court finds that the documentary evidence submitted by defendants PHH and Trust resolves all factual issues as a matter of law and conclusively disposes of the claims at issue.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), '"the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995).

In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, *supra* at 88.

On a motion to dismiss a complaint for failure to state a cause of action, the complaint must be afforded a liberal construction. The facts alleged must be presumed to be true and must be accorded every favorable inference. If they fit within any cognizable legal theory, the motion to dismiss must be denied. *See Stein v. Chiera*, 130 A.D.3d 912, 14 N.Y.S.3d 133 (2d Dept. 2015) *citing East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dept. 2009) *affd* 16 N.Y.3d 775, 919 N.Y.S.2d 496 (2011). "If ... the allegations do not fit within any cognizable legal theory even after they are accorded every favorable inference, the motion to dismiss should be granted." *Stein v. Chiera*, *supra* at 914 *citing Fisher v. DiPietro*, 54 A.D.3d 892, 864 N.Y.S.2d 532 (2d Dept. 2008). "A court can consider evidence submitted in opposition to a motion to dismiss 'to remedy defects in the complaint.' This is because '[m]odern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one.'" *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 973 N.Y.S.2d 187 (1st Dept. 2013) *quoting Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314 (1976).

When viewing *pro se* plaintiff's Complaint in light of the criteria set forth above, the Court finds that *pro se* plaintiff has failed to state a cause of action against defendants PHH and Trust that falls within a cognizable legal theory.

Therefore, based upon the above, defendants PHH Trust's motion (Seq. No. 01), pursuant to CPLR § 3211(a)(1), (5), (7) and (8), for an order dismissing *pro se* plaintiff's Complaint, is hereby **GRANTED**.

The branches of *pro se* plaintiff's cross-motion (Seq. No. 04), pursuant to CPLR § 306-b, for an order deeming service of the Summons and Complaint upon defendants PHH and Trust sufficient *nunc pro tunc*; or, in the alternative, pursuant to CPLR § 308(5), for an order granting her leave to serve defendants PHH and Trust via alternative means; and, pursuant to CPLR § 306-b, for an order extending her time to serve defendants PHH and Trust; and, pursuant to CPLR § 312-a, for an order compelling defendants PHH and Trust to accept service; and, pursuant to CPLR § 3025, for an order allowing amendment of the Complaint to include the named party U.S. Bank Trust National Association as Trustee of the Bungalow Series IV Trust, are hereby **DENIED**.

22 NYCRR 130-1.1 deals with Costs and Sanctions. It reads, in pertinent part,

> "(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may

> impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart....
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both....
> (c) For purposes of this Part, conduct is frivolous if:
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place. Including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

"Pursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct." *Keyspan Generation, LLC v. Nassau County*, 118 A.D.3d 949, 991 N.Y.S.2d 46 (2d Dept. 2014). "Conduct during litigation, ... is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false." *Id. quoting Mascia v. Maresco*, 39 A.D.3d 504, 833 N.Y.S.2d 207 (2d Dept. 2007). "The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court's sound discretion." *Matter of Khan-Soleil v. Rashad*, 111 A.D.3d 727, 974

N.Y.S.2d 798 (2d Dept. 2013). The Court has carefully reviewed the record before it and, guided by the foregoing precepts, hereby declines to award costs and sanctions. *See id.*

Accordingly, the branch of *pro se* plaintiff's cross-motion (Seq. No. 04) for an order imposing sanctions upon defendants PHH and Trust for refusing to acknowledge service and on their counsel, Daniel Hughes, Esq., for filing responsive pleadings prior to *pro se* plaintiff filing a cross-motion to defendants PHH and Trust's motion (Seq. No. 01), is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
March 20, 2024

ENTERED
Mar 25 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE