

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

SUNNY D. ENG, SHIRLEY ENG, HTFC
CORPORATION, JANE ENG,

Defendants.
-----X

INDEX NO.: 39792/2007
MOTION DATE: 9/9/2010
MOTION NO.: 003 WDN
004 MG CASEDISP

PLAINTIFF'S ATTORNEY:

STEVEN J. BAUM, P.C.
220 Northpointe Parkway, Suite G
Amherst, New York 14228

DEFENDANTS' ATTORNEY:

LAW OFFICES OF CRAIG D. ROBINS
180 Froehlich Farm Blvd.
Woodbury, New York 11797

Mortgaged Premises:
43 Spence Avenue
Holtsville, New York 11742

Upon the following papers numbered 1 to 32 read on this motion for judgment of foreclosure and sales and cross-motion for summary judgment with leave to file late answer; Notice of Motion/ Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-25; Answering Affidavits and supporting papers 26-32; Replying Affidavits and supporting papers; Other; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 003) of plaintiff Wells Fargo Bank, N.A. for judgment of foreclosure and sale is withdrawn in accordance with the "notice of withdrawal" of plaintiff's attorney dated October 25, 2010; and it is further

ORDERED that the cross-motion (motion sequence no. 004) of defendant-mortgagors Sunny D. Eng and Shirley Eng for summary judgment dismissing the complaint or, in the alternative, for leave to file a late answer pursuant to CPLR §3012(d) is granted as follows.

The submissions and the Court's records reflect that this action was originally commenced by HTFC Corporation ("HTFC") on June 14, 2007 to foreclose a mortgage executed by Sunny O. Eng and Shirley Eng in favor of HTFC. HTFC's initial motion for an order of reference was denied pursuant to a short-form order (BAISLEY, J.) dated March 16, 2009 for technical defects. Thereafter, a motion for an order of reference was interposed on behalf of Wells Fargo Bank, N.A., which purported to be the assignee of HTFC pursuant to an assignment dated October 30, 2008. The motion, which sought to substitute Wells Fargo Bank, N.A. ("Wells Fargo") as the plaintiff in the action pursuant to CPLR §§1018 and 1021, was granted on December 15, 2009. The Court notes that the same law firm, Steven J. Baum, P.C., represented both HTFC and Wells Fargo as plaintiffs.

The defendant-mortgagors, who defaulted in answering the initial complaint, now move for summary judgment dismissing the complaint or, in the alternative, for leave to file a late answer pursuant to CPLR §3012(d). Although inartfully framed, defendants' cross-motion is deemed to seek leave to interpose a late answer in the first instance and, upon such relief being granted, an award of summary judgment dismissing plaintiff's complaint (*Methal v City of New York*, 50 AD3d 654 [2d Dept 2008]).

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Defendants' motion is predicated on their recent acquisition of evidence that the assignment pursuant to which plaintiff purportedly became the owner and holder of the mortgage and note was invalid and unauthorized and accordingly plaintiff does not have standing to maintain and prosecute this foreclosure action. In support of their motion, defendants have proffered, *inter alia*, the affidavit of Aaron Wider, Chief Executive Officer of HTFC, sworn to March 19, 2010. Mr. Wider avers that the subject mortgage was not assigned to Wells Fargo, that he is the only person who has authority to make such an assignment, and that he did not assign the subject mortgage to Wells Fargo in this case. Moreover, Mr. Wider avers that "Jeffrey Stephan," who purportedly executed the assignment as "Limited Signing Officer" of HTFC Corporation, has never been an employee of HTFC and that such person was never authorized to act as a "Limited Signing Officer" on behalf of HTFC for any purpose.

Defendants have also proffered the affirmation of their attorney, dated April 20, 2010, and the affidavit of defendant Sunny D. Eng, sworn to March 19, 2010, which reflect that at the time of their default in answering the complaint in this action, defendants reasonably believed they did not have a defense to the action and that it was not until March 5, 2010 that they learned that Wells Fargo did not own the subject mortgage at the time the order of reference was granted. The Court finds that, in the circumstances, defendants have established a reasonable excuse for their delay in interposing an answer in this action. Moreover, the submissions establish that defendants have a potentially meritorious defense to the action. Accordingly, that branch of defendants' cross-motion that seeks leave to file and serve a late answer is granted (CPLR §3012(d)). Defendants' answer shall be deemed served with the motion papers.

Defendants' submissions also establish their *prima facie* entitlement to summary judgment dismissing the complaint (*Methal, supra*), as it appears therefrom that Wells Fargo does not have standing to maintain and prosecute this action to foreclose defendants' mortgage. Plaintiffs have failed to come forward with any evidence to substantiate its claims herein or to raise a triable issue of fact. Indeed, the affirmation of plaintiff's attorney, sworn to September 8, 2010, reflects that plaintiff has been unable to locate any documents substantiating plaintiff's "belief" that "its servicer had the authority to execute any and all documents attendant to the transfer of the loan."

In light of the foregoing, the Court grants that branch of the cross-motion of defendants that seeks summary judgment dismissing plaintiff's complaint.

Dated: November 15, 2010

PAUL J. BAISLEY, JR.

J.S.C.

ASSIGNMENT OF MORTGAGE

KNOW, that HTFC Corporation, 400 Garden City Plaza Suite #20, Garden City, NY 11530, Assignor in consideration of One or More Dollars (\$1.00) paid by Wells Fargo Bank, N.A., 1200 West Parkland Avenue, Milwaukee, WI 53224, Assignee, hereby assigns unto the Assignee, a certain mortgage made by SUNNY D. ENG, SHIRLEY ENG, given to HTFC Corporation, to secure the sum of Five hundred and sixty thousand dollars (\$560,000.00) and interest, dated the 5th day of October, 2005, recorded on the 17th day of November, 2005 in the Office of the Clerk of the County of SUFFOLK at Liber 21173 of Mortgages at Page 27 covering premises commonly known as 43 SPENCE AVENUE, HOLTSVILLE, NY 11742 (said premises are more particularly described in said mortgage) together with the bond or obligation described in said mortgage, and the moneys due and to grow thereon with interest.

TO HAVE AND TO HOLD the same unto the assignee, and to his successors, legal representatives and assigns of the assignee forever.

THIS Assignment is not subject to the requirement of Section 275 of the Real Property Law because it is within the secondary mortgage market.

IN WITNESS WHEREOF, the Assignor has caused these presents to be signed by its duly authorized officer this 30th day of October, 2005.

IN PRESENCE OF

HTFC Corporation

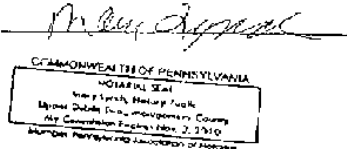
BY _____

Jeffrey Stephan
Limited Signing Officer

State of Pennsylvania
County of Montgomery

On the 30th day of October in the year 2005 before me, the undersigned, a notary public in and for said state personally appeared Jeffrey Stephan, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) or the person upon behalf of which the individual(s) acted, executed the instrument and that such individual(s) made such appearance before me in the State of Pennsylvania, PA. (Insert city or political subdivision and state or other place acknowledgment taken... if acknowledgment is taken outside of New York State)

Notary Public
L. Ann D. 0661336648
SBL # 091.00-01.00-021.004



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