

**Emigrant Mtge. Co., Inc. v Patton**

2012 NY Slip Op 31760(U)

June 25, 2012

Supreme Court, New York County

Docket Number: 115045/2008

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN  
Justice

PART 57

Emigrant Mortgage Company Inc

INDEX NO. 115045-08

- v -

MOTION DATE \_\_\_\_\_

Jacqueline Patton, et al

MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to amend pleadings

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 1A

2, 2B, 2C

3, 3A

M1, M2

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

JUL 03 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6.25.12

Marcy Friedman  
**MARCYS. FRIEDMAN** J.S.C.

- 1. CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER (CHECK AS APPROPRIATE)
- 3. CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

**FILED**

JUL 03 2012

PRESENT: Hon. Marcy S. Friedman, JSC

NEW YORK  
COUNTY CLERK'S OFFICE

\_\_\_\_\_  
EMIGRANT MORTGAGE COMPANY, INC.,  
*Plaintiff,*

- against -

Index No.: 115045/2008

JACQUELINE L. PATTON, et al.,  
*Defendants.*

DECISION/ORDER

\_\_\_\_\_ x  
In this action to foreclose a \$1,150,000 million mortgage, defendant/mortgagor Jacqueline Patton moves to amend her answer. Plaintiff/mortgagee Emigrant Mortgage Company, Inc. (EMC) cross-moves to confirm a referee's report, and for a judgment of foreclosure and sale, and other relief. By prior order dated October 22, 2010, this court granted plaintiff partial summary judgment as to liability and directed the reference.

Defendant initially moved to amend her answer to add the affirmative defense that plaintiff violated the Truth in Lending Act by failing to disclose the correct finance charges to which defendant would be subject. (Aff. in Support of Motion to Amend, ¶1[a].) Defendant claims, based on a forensic audit prepared at her request on May 23, 2010, that the finance charges were understated by \$18,388.21 of a total of \$1,413,586.87, based on a disclosed annual percentage rate (APR) of 6.583%, as opposed to an APR of 6.682% that was used by the auditor in calculating the finance charges. (Sec Audit at 2 [annexed as Ex. B to Def.'s Motion].)

Defendant offers no explanation for her delay, in moving to assert the proposed defense, of approximately eight months after issuance of the prior order granting plaintiff partial summary judgment. Moreover, she makes no showing of merit of the proposed defense, as there is no explanation for the auditor's use of the 6.682% APR in calculating the finance charges. Absent

such a showing, the motion to amend to add this defense must be denied. (See generally, Non-Linear Trading Co., Inc. v Braddis Assocs., Inc., 243 AD2d 107, 116 [1<sup>st</sup> Dept 1998].)

After service of its motion to confirm the referee’s report, plaintiff submitted the affirmation of its attorney, Robert Holland, dated October 28, 2011, in which he stated that he had conferred with Milagros Rivera-Perez, plaintiff’s Assistant Vice President and Foreclosure Administrator, regarding the accuracy of the allegations of the complaint and the supporting affirmations. He stated that she had confirmed the accuracy, with the exception that the complaint (paragraph 15) and the supporting affidavit of James Raborn both mistakenly stated that plaintiff is the owner of the mortgage being foreclosed in this action. (Holland Aff., ¶¶ 4-5.) He further represented that review of plaintiff’s records and files indicated that prior to commencement of the action, plaintiff had assigned the mortgage and note to its affiliate Emigrant Savings Bank- Manhattan (Emigrant Savings), and that simultaneous with the execution of the assignment, Emigrant Savings endorsed the note in blank back to EMC. (Id., ¶¶ 5-6.) He stated that he was advised that the assignment of the mortgage was never recorded, and that at all times since the note and mortgage were executed, EMC has “always had actual physical control and physical possession” of these documents. (Id., ¶ 7.)

As this affidavit was based solely on hearsay, the court directed plaintiff to submit an affidavit on personal knowledge explaining these transfers, and their effect on plaintiff’s standing to bring the action at the time it was commenced by filing of the summons and complaint on November 7, 2008. The matter was adjourned for further argument. (Dec. 14, 2011 Transcript of Oral Argument at 11.)

In response, plaintiff submitted the affidavit of Filippo Ruggiero, a Vice President of

EMC. Mr. Ruggiero stated that plaintiff's attorney was mistaken when he stated that the allonge was prepared and executed simultaneously with plaintiff's execution of the assignment of mortgage. (Ruggiero Aff., ¶ 7.) He stated that although the mortgage was assigned from EMC to Emigrant Savings in 2008, it was never recorded, and the original assignment "has at all times remained in the loan file for this particular loan, which is in the vault where Plaintiff's loan files are maintained." (Id., ¶ 5.) He further stated that the Emigrant entities were involved in a borrowing agreement with the Federal Home Loan Bank of New York (FHLB), and that as part of this agreement, mortgage loans were pledged but not assigned by the various Emigrant entities to FHLB as security for loans given by FHLB to them. (Id., ¶¶ 8-9.) In a change in policy, FHLB advised that it would require the Emigrant entities to deliver the collateral to FHLB. As a result, between November 2009 and January 2010, the Emigrant entities prepared assignments and allonges for all collateral which they intended to give as security for loans from FHLB. (Id., ¶¶ 10-12.) Based on his review of his computer, Mr. Ruggiero attested that the allonge transferring the note was created on December 10, 2009, that it contains his signature, and that it was fully executed on behalf of Emigrant Savings within a day or days thereafter. (Id., ¶ 13.) He concluded that EMC was the holder of the note until December 10, 2009, and that prior to that time, it had only executed the assignment to Emigrant Savings of the mortgage on March 10, 2008. (Id., ¶ 14.)

Further argument on plaintiff's motion was held on February 2, 2012. At the argument, defendant, represented by counsel, made an oral application to vacate this court's prior order granting partial summary judgment, on the ground that plaintiff had no standing to commence this action.

It is well settled that “[i]n a mortgage foreclosure action, a plaintiff has standing where 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.” (U.S. Bank, N.A. v Collymore, 68 AD3d 752, 753 [2d Dept 2009]; see also Aurora Loan Svcs., LLC v Weisblum, 85 AD3d 95, 108 [2<sup>nd</sup> Dept 2011].) “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.” (Collymore, 68 AD3d at 754.) Thus, “an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery.” (Bank of New York v Silverberg, 86 AD3d 274, 280 [2<sup>nd</sup> Dept 2011].)

Further, a transfer of a mortgage without assignment of the underlying note or bond is a nullity. (Collymore, 68 AD3d at 754; Silverberg, 86 AD3d at 280.) Conversely, “[a]s a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note.” (Id. at 280; Mortgage Electronic Registration Sys., Inc. v Coakley, 41 AD3d 674 [2<sup>nd</sup> Dept 2007].) A party does not have standing to bring a foreclosure action where it is listed as the mortgagee but was never the actual holder or assignee of the underlying note. (Silverberg, 86 AD3d at 275.)

As can be seen from review of the plaintiff’s attorney’s affirmation and the Ruggiero affidavit, plaintiff’s attorney made statements, based on his discussion with Ms. Rivera-Perez, an Assistant Vice President of plaintiff, which conflict with the statements of Mr. Ruggiero, a Vice President, about the date on which the underlying note was transferred from EMC to Emigrant Savings. In addition, Mr. Ruggiero does not explain why, according to his version of the events, EMC assigned the mortgage to Emigrant Savings in March 2008, but did not assign the note until

December 2010. Put another way, he does not explain why the mortgage was assigned to Emigrant Savings without the note. He also does not attach any support for his apparent claim that the mortgage remained in the vault for EMC loans, notwithstanding the assignment to Emigrant Savings. Nor does he attach the back-up documentation from his computer that assertedly supports his contention that the allonge for the note was not executed until December 10, 2009, after the commencement of this action.

Reports of widespread insufficiencies in foreclosure filings, including failure to review documents and files to establish standing, led to this Court's landmark initiative requiring the plaintiff's attorney in a foreclosure action to file an affirmation certifying that he or she has reviewed the plaintiff's documents for factual accuracy and confirmed the factual accuracy of the complaint and any supporting affidavits or affirmations filed with the court. (See Administrative Order [AO] 431/11, dated Mar. 2, 2011.) The October 28, 2011 affirmation of plaintiff's counsel is such an affirmation in the form prescribed by the Administrative Order. (See id., Form A.)

The conflict between this affirmation and the Ruggiero affidavit creates an issue of fact as to whether plaintiff had standing to commence this action. (See Collymore, 68 AD3d at 754.) It also implicates the integrity of this Court in the foreclosure process. The court accordingly holds that a hearing must be held on whether plaintiff had standing to commence this action as of the time of its commencement.

In so holding, the court recognizes that standing is ordinarily waived unless raised as an affirmative defense or by way of a motion to dismiss. (See e.g. Matter of Fossella v Dinkins, 66 NY2d 162, 167-168 [1985]; Security Pacific Nat. Bank v Evans, 31 AD3d 278, 280-281 [1<sup>st</sup> Dept 2006], appeal dismissed 8 NY3d 837 [2007]; Wells Fargo Bank Minnesota, Natl. Assn. v Mastropalo, 42 AD3d 239, 242 [2<sup>nd</sup> Dept 2007].) Here, however, plaintiff's filing of its

attorney's October 28, 2011 AO 431/11 affirmation, acknowledging an error in the pleadings and requesting correction, is tantamount to a request for leave to amend the complaint, in response to which defendant was entitled to an opportunity to assert new defenses. The court accordingly holds that the objection to standing has not been waived.

It is accordingly hereby ORDERED that defendant's motion for leave to amend is denied as to the defense based on the Truth In Lending Act; and it is further

ORDERED that the issue of whether plaintiff had standing to commence this foreclosure action as of the date of its filing is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served by plaintiff forthwith on the Clerk of the Special Referee's Office (Room 119) to arrange a date for the reference to a Special Referee; and is further

ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report; and it further

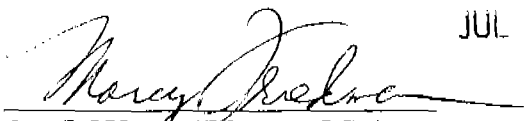
ORDERED that in the event it is determined that plaintiff had standing to commence this foreclosure action as of the date of its filing, plaintiff may re-serve its motion for confirmation of the Referee's report and for a final judgment of foreclosure and sale.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 25, 2012

**FILED**

JUL 03 2012

  
MARCY FRIEDMAN, J.S.C.