SUPREME COURT OF THE STATE OF NEW YORK **Index No.:130398/09**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 002**

CITIMORTGAGE, INC.,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

ANGELA FINOCCHIARIO,
NATIONAL CITY BANK,
BEDELL AVENUE HOMEOWNERS ASSOCIATION, and
"JOHN DOE",
"MARY DOE", and
"JANE DOE" the names of the last three defendants being fictitious their true names being unknown to plaintiff, persons intended being persons in possession of portions of the premises described in the complaint in this action.,

Defendants

The following items were considered in the review of the following order to show cause to vacate the default judgment of foreclosure and to dismiss the complaint for lack of standing.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affirmation	3
Supplemental Affidavit	4
Supplemental Affidavit	5
Sur-Reply Affirmation in Opposition	6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Order to Show Cause is as follows:

The defendant, Angela Finocchiario, moves by order to show cause for an order vacating an order of reference entered on default; and upon the vacating of that default judgment, the granting of a motion to dismiss for the plaintiff's lack of standing to commence this action. The order to show cause is granted.

Facts

This is an action to foreclose real property located at 73 Ottavio Promenade, Staten Island, New York. On March 25, 2009 the plaintiff commenced this foreclosure action by filing a summons and complaint with the Richmond County Clerk. Subsequently, the defendant was served with the summons and complaint on May 11, 2009 pursuant to CPLR § 308(4). The defendant failed to answer the plaintiff's complaint. On August 11, 2009 the plaintiff served the defendant with an additional copy of the summons pursuant to CPLR § 3215(g)(3) in connection with a motion for a default. By order dated October 13, 2009 this court signed the plaintiff's order of reference.

According to the defendant the plaintiff entered into a mortgage modification agreement as of January 2010 and paid $4030.00 per month until September 2010. In addition the defendant annexed a printout from the plaintiff dated October 5, 2010 showing the mortgage modification. The defendant states further that she was directed to make 10 payments and the foreclosure action would be discontinued. In addition, it was the defendant's understanding that the plaintiff would not prosecute its foreclosure action during the pendency of the modification period. But, unknown to the defendant, plaintiff's judgment of foreclosure and sale was signed on March 23, 2010 and entered on March 26, 2010.

On October 14, 2010 the defendant filed a Chapter 7 Bankruptcy application in the U.S. Bankruptcy Court for the Eastern District of New York. On June 1, 2011 the defendant was discharged of her personal liability, but she specifically reaffirmed the debt owed to the plaintiff. This is documented in exhibit C to the defendant supplemental affidavit in a document entitled "Chapter 7 Individual Debtor's Statement of Intention." This order to show cause was presented to this court on June 4, 2012. And on July 6, 2012 the defendant received a notice rejecting a mortgage modification.

The defendant argues that the plaintiff does not possess the necessary assignments to

commence this foreclosure action against her. On December 9, 2005, the defendant executed a mortgage and note in favor of Great American Mortgage Corp ("Great American"). The note was in the amount of $1,232,000. The mortgage encumbered property located at 73 Ottavio Promenade, Staten Island, New York 10307. The original mortgage contained the following language:

> I mortgagee, grant and convey the Property to MERS (solely as nominee for Lender and Lender's successors in interest) and its successors in interest subject to the terms of this Security Instrument . . . I understand and agree that MERS holds legal title to the rights granted by me in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right:
> (A) to exercise any and all of those rights, including but not limited to, the rights to foreclose and sell the Property; and
> (B) to take any action required by Lender including, but not limited to, releasing and cancelling this Security Instrument.

The defendant asserts that MERS as nominee for Great American, assigned the mortgage to Worldwide Financial Resources, Inc. ("Worldwide") on August 31, 2007. Then it is alleged that MERS as nominee for Worldwide assigned the mortgage to LaSalle Bank National Association ("LaSalle") on August 31, 2007. Then Wells Fargo, N.A. as successor by merger with LaSalle assigned the mortgage to Citizens Community Bank ("Citizens") on August 27, 2007 which was recorded on October 5, 2007. Defendant then took a second mortgage in the amount of $118,183.25 in favor of Citizens which contained the same nomination language concerning MERS on August 30, 2007. On August 30, 2007 a CEMA was executed consolidating the original Great American mortgage with the Citizens mortgage into a single lien of $1,350,000.00. And finally, MERS as nominee for Citizens assigned the CEMA to plaintiff on February 4, 2009.

The plaintiff does not dispute the chain of title as set forth by the defendant.

Discussion

It is within the discretion of the of the trial court to vacate a default judgment pursuant to CPLR § 317 where a defendant has not been personally served without the proffering of a reasonable excuse for the default.[1] The defendant was not served personally in this action. Instead, the defendant was served by substituted services under CPLR § 308(4) by affixing the summons and complaint to the door of the subject property, with follow up by mail. Here, it is unclear when the plaintiff first received notice of the default taken against her. Noticeably missing is a copy of the judgment of foreclosure with notice of entry.

On these facts the defendant must assert a meritorious defense in order to reap the benefit of CPLR § 317. Here, the defendant asserts that there is a gap in the chain of title which would prevent the foreclosure of this mortgage and note as the plaintiff lacks standing to commence this action. The plaintiff argues that no meritorious defense can exist because the defense of standing has been waived as a matter of law This court finds that this defense is meritorious and consequently vacates the default judgment taken against the defendant pursuant to CPLR § 317; and upon vacating the default judgment dismisses the plaintiff's complaint.

The defendant, argues that the judgment of foreclosure and sale entered on default must be vacated and the action dismissed because the plaintiff lacked standing to commence the action. Here, the plain language contained in the mortgage dated December 9, 2005 held by Great American grants MERS legal rights in the mortgage only. The mortgage is silent as to the MERS' interest in the corresponding note. The Court of Appeals spoke to this topic over one hundred years ago in the *Matter of Pirie,*[2] where it stated that, "[t]he collateral lien of the mortgage could have no legal existence when separated from the note and transferred to others than the holder of the note, but so long as the two remain together, owned and possessed by the

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[1] *Rios v. Starret City, Inc.*, 31 AD3d 418 [2d Dep't. 2006].

[2] 198 NY 209 [1910].

same person, they operate together and are obligations for the payment of the same indebtedness."[3] The Appellate Division, Second Department in the 1988 case of *Kluge v. Fugazy*, held that a foreclosure action, ". . . may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity."[4] Essentially, the *Kluge* decision found that because the plaintiff did not have title to the mortgage and note, it lacked standing to bring the action in foreclosure.

The Appellate Division, Second Department speaking spoke specifically with respect to transfers of mortgages by MERS in *Bank of New York v. Silverberg*. In that case, the court held that the language which granted MERS and interest in the mortgage failed to grant MERS any interest in the corresponding note. Consequently, MERS lacked the authority to assign the power to foreclose.[5] Therefore, the string of transfers facilitated by MERS did not grant the plaintiff the power to foreclose on the mortgage and subsequent CEMA.

The plaintiff argues that a defense of standing is waived if not raised in a pre-answer motion to dismiss, or stated as a separate defense in the answer. It is the plaintiff's contention since there was a default on the part of the defendant the defense of standing is waived forever. To support this position the plaintiff relies on *Wells Fargo Bank Minn., N.A. v. Mastropaolo*,[6] where the Appellate Division, Second Department held that the failure of a defendant to either: 1) assert the affirmative defense of lack of standing in an answer; or 2) move to make a pre-answer motion to dismiss arguing lack of standing, would result in that defense being waived. In arriving at this holding the Appellate Division, Second Department reasoned from a string of cases that ". . . for purposes of the waiver rule set forth in CPLR 3211(e), standing and capacity

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[3] *Id., citing, Bergen v. Urbahn*, 83 NY 49, [1880].

[4] 145 AD2d 537, [2d Dept 1988].

[5] *Bank of N.Y. v. Silverberg*, 86 AD3d 274 [2d Dep't. 2011].

[6] 42 AD3d 239, [2d Dept 2007].

to sue are sufficiently related that they should be afforded identical treatment."[7] Those cases hinged on the Court of Appeals decision in *Matter of Prudco Realty Corp. v. Palermo*.[8] *Matter of Prudco Realty* involved an appeal from a decision of the Appellate Division, Second Department of an Article 78 proceeding, where Prudco Realty Corp. challenged the determination of the Zoning Board of Appeals of the Town of Brookhaven, that granted the application of the intervenor S.F. Shopping Center, Inc. for a certificate of existing use for the operation of a gasoline station.[9] In reversing the Special Term's holding that Purdco Realty Corp. lacked standing, the Appellate Division, Second Department held, "[a]s an owner of property located within 200 feet of the subject premises, petitioner was, as a matter of law, an 'aggrieved' person on whom subdivision 7 of section 267 of the Town Law conferred the right to seek judicial review of the determination of the respondent Zoning Board of Appeals of the Town of Brookhaven."[10] In affirming the Appellate Division, Second Department's decision in *Matter of Purdco Realty* the Court of Appeals addressed the issue of standing by stating, ". . . without asserting the petitioner's lack of standing to challenge the Board's determination pursuant to CPLR 3211(subd [a], par 3). . . CPLR 3211(subd [e]) provides that such a defense is waived if not raised either by motion or in the responsive pleading . . ."[11] But the Court of Appeals decision in *Matter of Prudco Realty* lacks the thorough consideration of the legal concepts of "capacity" and "standing" that it elaborates on in later decisions.

The Court of Appeals decision in *Matter of Town of Riverhead v. New York State Bd. Of Real Prop. Servs.* held that "capacity to sue is a threshold question involving the authority of a

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[7] Id. at 243.

[8] 60 NY2d 656, [1983].

[9] *Prudco Realty Corp. v. Palermo,* 93 AD2d 837, [2d Dept 1983].

[10] Id. at 837.

[11] *Matter of Prudco Realty Corp. v. Palermo*, 60 NY2d 656, [1983].

litigant to present a grievance for judicial review."[12] In *New York State Assn. Of Nurse Anesthetists v. Novello*,[13] the Court of Appeals held that standing requires an interest in the claim at issue before the court. "Standing involves a determination of whether 'the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution.'"[14] The Court of Appeals has held that standing cannot exist where the complaining party was not injured,[15] and that, "[w]ithout both capacity and standing a party lacks authority to sue."[16] The Appellate Division, Second Department adopted these holdings in *Caprer v. Nussbaum*.[17]

The Supreme Court of the United States in the case *City of Chicago v. Morales,* held that while standing is not a Constitutional issue requiring adherence by state courts, it is persuasive authority.[18] In *Allen v. Wright*, the high court stated that the concept of standing goes to the very jurisdiction of a court's authority to hear a dispute.[19] In fact, the Appellate Division, First Department cited the decision in *Allen* by Supreme Court of the United States when it found that it was proper for a trial court to *sua sponte* dismiss a derivative action due to lack of standing absent an objection to the plaintiff's standing by the defendants in *Stark v. Goldberg* .[20]

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[12] *Matter of the Town of Riverhead v. New York State Bd. Of Real Property Servs.*, 5 NY3d 36, 41 [2005].

[13] 2 NY3d 207, 211 [2004].

[14] *Matter of Graziano v. County of Albany*, 3 NY3d 475, 479 [2004].

[15] *Matter of Sarah K*, 66 NY2d 223, 240 [1985].

[16] *Matter of Graziano v. County of Albany,* 3 NY3d 47, 479 [2004].

[17] 36 AD3d 176, [2d Dept 2006].

[18] *See, City of Chicago v. Morales*, 527 US 41, [1999].

[19] *See, Allen v. Wright*, 468 US 737, [1984]; *see also, Matter of New York State Inspection, Security & Law Enforcement Employees v. Cuomo*, 64 NY2d 233, 241 n. 3[1984].

[20] 297 AD2d 203, at 281.

The issue before this court is whether the plaintiff had standing to commence this action; and if the plaintiff did not have standing, did the defendant in this foreclosure action waive this defense by failing to interpose an answer raising it as affirmative defense, or by making a pre-answer motion to dismiss. This court concludes that the plaintiff has failed to submit evidence demonstrating that it had title to both the mortgage and note at the time it commenced this foreclosure action.[21] Furthermore, based on the current body of law, failure to have standing at the commencement of an action is a jurisdictional defect which is covered by CPLR § 3211(a)(2) and therefore not subject to the waiver provisions of CPLR § 3211(e).

In the case of *Deutsche Bank National Trust Company v. McRae*, Justice Timothy J. Walker stated:

> Today, with multiple (and often unrecorded) assignments of mortgage obligations and multiple securitizations often related to the same debt, the court should carefully scrutinize the status of the parties who claim the right to enforce these mortgage obligations. For the unrepresented homeowner, the issues of standing and real party in interest status of the foreclosing party are never considered. Without such scrutiny, there is a risk that the courts will give the judicial "seal of approval" to foreclosures against unrepresented homeowners who have little, if any, understanding of these issues, much less the legal significance thereof.[22]

In its *Mastropaolo* decision, the Appellate Division, Second Department relied heavily upon a Court of Appeals' decision in a divorce case entitled *Lacks v. Lacks*.[23] In characterizing the decision in *Lacks*, the court stated, ". . . the Court of Appeals addressed the issue of whether, 'the residence requirements in matrimonial actions, often described as jurisdictional, involve a kind of subject matter jurisdiction without which a court is powerless to render a valid

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[21] *See, Kluge v. Fugazy*, 145 AD2d 408, [2d Dept 1988].

[22] *Deutsche Bank National Trust Company v. McRae,* 27 Misc3d 247, [Sup Ct, Allegany County, 2010].

[23] 41 NY2d 71, [1976].

judgment.'"[24] However, the Court of Appeals described *Lacks* in the following terms,

> [t]he court has never before considered the unlikely question, until this case, whether the judicial error on an essential element of the cause of action was so fundamental as to permit vacatur of a final judgment, collaterally or after final judgment beyond ordinary appellate review. Had that ever been the problem unlikely until this case, perhaps the need for a less elastic and encompassing term than the word "jurisdiction" would have been apparent.[25]

In *Lacks*, after the final judgment of divorce had been rendered, the former wife challenged the jurisdiction of the court, arguing that her former husband failed to meet the one year residency requirement of Domestic Relations Law § 230. The Court of Appeals held, "[i]n no way do these limitations on the cause of action circumscribe the power of the court in the sense of competence to adjudicate causes in the matrimonial categories. That a court has no 'right' to adjudicate erroneously is no circumscription of its power to decide, rightly or wrongly."[26] In so holding, the Court of Appeals held that a trial court erring on an element of a cause of action was not tantamount to a jurisdictional defect.

In holding that standing is an affirmative defense which can be waived under CPLR § 3211(e), the Appellate Division, Second Department in *Mastropaolo* analogized Wells Fargo's lack of ownership of the mortgage and note at the commencement of the foreclosure to, ". . . a failure to satisfy residenc[y] requirements in a matrimonial action, [which] was not a jurisdictional defect that was 'so fundamental to the power of adjudication of a court.'" In *Lacks* the parties were married and the Supreme Court had the jurisdiction to issue a judgment of divorce. There was no real issue of subject matter jurisdiction. The fact that the husband was not a resident of New York for the requisite one year prior to his filing for divorce did not strip the Supreme Court of its power to issue a divorce absent a timely motion to challenge the lack of compliance with DRL § 230. But such an analogy cannot be applied to a judgment of

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[24] *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 AD3d 239, 243 [2d Dept 2007].

[25] *Lacks v. Lacks*, 41 NY2d 71, 76 [1976].

[26] Id. at 75-76.

foreclosure and sale where true ownership of the note and mortgage is at issue. The ownership of the note and mortgage goes to the very heart of this litigation.

In speaking of issues surrounding standing, Professor Siegel in his renowned treatise, *New York Practice*, 5th ed. § 136 stated in part:

> One not affected by anything a would-be defendant has done or threatens to do ordinarily has no business suing, and a suit of that kind can be dismissed at the threshold for want of jurisdiction without reaching the merits. When one without the requisite grievance does bring suit, and it's dismissed, the plaintiff is described as lacking "standing to sue" and the dismissal as one for lack of subject matter jurisdiction. A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy . . .[27]

Here, the plaintiff has not demonstrated ownership of the mortgage and note prior to the commencement of this action for foreclosure and sale. Absent a demonstration of both ownership of the mortgage and the note, the plaintiff lacks both the capacity and standing to sue the defendants. While the defendant may have waived his defense of lack of capacity, pursuant to CPLR §§ 3211(a)(3) and 3211(e), his defense of lack of standing is preserved under CPLR § 3211(a)(2). And consequently, the motion to dismiss the plaintiff's complaint is granted.

Conclusion

It has become evident that the foreclosure crises has brought to light shortcomings in our civil litigation system. Many individuals when first presented with a summons and complaint in a foreclosure action choose to try to remedy the problem on their own rather than consulting with trained legal professionals. Perhaps this reaction is due in part to the widespread advertisement of federal foreclosure prevention programs such as the Obama Administration's Making Home Affordable program. Or perhaps it is the rampant confusion felt by homeowners who do not

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[27] Siegel, NY Prac § 136, at 240 [5th ed].

understand how the MERS systems operates. However, it has become evident that especially in the realm of foreclosure litigation that it would be a miscarriage of justice to continue to treat standing as a defense that can be waived.

Accordingly, it is hereby:

ORDERED, that Angela Finnocchiario's order to show cause is granted and the default judgment is vacated, and upon the default being vacated the complaint is dismissed for lack of standing; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

ENTER,

DATED: January 4, 2013

Joseph J. Maltese
Justice of the Supreme Court