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U.S. Natl. Assn. v Said
2013 NY Slip Op 50101(U)
Decided on January 7, 2013
Supreme Court, Queens County
Siegal, J.
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Decided on January 7, 2013

Supreme Court, Queens County

<p>U.S. National Association, as Trustee for CSMC Mortgage-Backed Pass-Through Certificates Series 2006-6 (CSMC 2006-6), Plaintiff,</p> <p>against</p> <p>Amany Said; Ahmed Hassan; New York City Environmental Control Board; John Doe and Jane Doe (Said name being fictitious, it being the intended of Plaintiff to designate any and all occupants of the premises being foreclosed herein., Defendants.</p>
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Bernice Daun Siegal, J.

The following papers numbered 1 to15 read on this motion for an order striking the Anser and dismissing the Counterclaims of Defendant Amany Said, granting plaintiff Summary Judgment, ordering that the caption in this action be modified deleting "John Doe and "Jane

Doe", as Defendants, inserting the names of the current tenants, Kimberlie Torres, Taha Tourky, Amada Quesada, Sara Masoud and Moshera Hamouda, and ordering a referee to compute pursuant to the Real Property Actions and Proceedings Law on the ground that the said defendant has no valid defense to the cause of action and no triable issue of fact exists in this case.

PAPERS

NUMBERED

Notice of Motion - Affidavits-Exhibits.....	1 - 4
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Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are resolved [*2]as follows:

Plaintiff moves for an order pursuant to CPLR §3212 granting summary judgment and striking the answer of defendant Amany Said (hereinafter "Said") on the grounds that Said has no valid defenses and there are no triable issues of fact and upon such order dismissing and severing the counterclaims of Said; amending the caption in this action by replacing "John Doe" and "Jane Doe" as defendants with the names of the current tenants, Kimberlie Torres, Taha Tourky, Amada Quesada, Sara Masoud, and Moshera Hamouda; finding that plaintiff has complied with the October 20, 2010 Administrative Order of the Chief Administrative Judge of the Courts as amended and ordering a referee to compute pursuant to the Real Property Actions Law.

Said cross-moves for an order pursuant to CPLR §3212 granting summary judgment and dismissing plaintiff's complaint; and an order pursuant to CPLR §6514(a) cancelling the Notice of Pendency in this action.

Facts

This is an action for foreclosure on a consolidated mortgage secured by real property located at 35-36 9th Street, Long Island City, New York. On March 18, 2002, a mortgage (hereinafter, "first mortgage") and its accompanying note were executed to defendant Amany Said (hereinafter, "defendant") by Wachovia Mortgage Corporation (hereinafter, "Wachovia") in the sum of \$276,000.00; the first mortgage was recorded on June 24, 2002.

On March 27, 2006, Said secured a second mortgage in the sum of \$214,803.39 with an accompanying note from Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") as nominee for Hemisphere National Bank (hereinafter "MERS as nominee for Hemisphere"); the second mortgage was recorded on May 10, 2006. On March 27, 2006, a Consolidation, Extension, and Modification Agreement (hereinafter "CEMA") was executed to consolidate the two mortgages to form a single lien for the sum of \$480,000.00 ("Consolidated Mortgage"); this agreement and Consolidated Mortgage were recorded on May 10, 2006.

Six assignments occurred in the within action. On March 13, 2003, Wachovia assigned the first mortgage to MERS as nominee for Chase Manhattan Mortgage Corp. (hereinafter "MERS as nominee for Chase"); this assignment of the first mortgage was recorded on July 18, 2003. (Exhibit I Said's cross-motion.)

On March 6, 2006, the first mortgage was then assigned from Wachovia to MERS as nominee for Hemisphere; this assignment of the first mortgage was recorded on May 10, 2006. [\[FN1\]](#)

On May 20, 2010, the Consolidated Mortgage was assigned from MERS as nominee for First United Bank (formerly known as Hemisphere National Bank) (hereinafter, "MERS as nominee for First United") to First United Bank (hereinafter, "First United"); this assignment of the Consolidated Mortgage was recorded on June 1, 2010. [\[*3\]](#)

On August 27, 2010, the first mortgage was assigned from MERS as nominee for Chase to MERS as nominee for Hemisphere; this assignment of the first mortgage was recorded on September 21, 2010.

A Correction Assignment was executed on September 29, 2010, correcting the assignee's name to U.S. Bank National Association, as Trustee for CSMC Mortgage-Backed Pass-Through Certificates, Series 2006-6 (CSMC 2006-6), (hereinafter, "plaintiff"); this correction assignment of the first mortgage was recorded on October 12, 2010. The execution date, as set forth in the recording and copy of CEMA, was September 29, 2010. [\[FN2\]](#) (Exhibit H plaintiff's motion for summary judgment.)

On September 30, 2010, a Correction GAP Assignment was executed from MERS as nominee for Chase to MERS to correct the assignee name to MERS and to include "GAP" in the document heading; this assignment of the first mortgage was recorded on October 14,

2010.

Said is in default for the January 2009 payment of the Consolidated Mortgage. Plaintiff commenced this action by filing a notice of pendency, summons, and complaint on October 5, 2010. The only defendant to either appear or answer the complaint was Said. On November 22, 2010, Said served a verified answer on plaintiff and on December 13, 2010, Said served a verified amended answer asserting affirmative defenses and counterclaims (hereinafter "amended answer") on plaintiff. Plaintiff served a reply to Said's amended answer, dated December 23, 2010.

Contentions

Plaintiff contends that Said's affirmative defenses are without merit. In particular, plaintiff contends that plaintiff has standing since there is no defect in the chain of assignments of the mortgage and that plaintiff, as the holder of the note and mortgage, is a proper party to bring this suit against Said. Furthermore, plaintiff contends that summary judgment should be granted and defendant's affirmative answers should be stricken because defendant failed to raise a material issue of fact in its answer, and alternatively, that the affirmative defenses are without merit and that there are no material issues of fact. In support of its motion and in opposition to the Said's motion to dismiss, plaintiff asserts that plaintiff has stated a cause of action; that plaintiff has standing because there is no defect in the chain of assignments of the mortgage; that plaintiff, as the holder of the note and mortgage, is a proper party; that plaintiff is not barred by estoppel since plaintiff has not acted in any way which would result in an expectation by defendants that they were no longer obligated to pay the note and mortgage; that plaintiff showed a reasonable likelihood of success on the merits because plaintiff's complaint states a cause of action; that defendant cannot claim that damages sustained by plaintiff was caused by plaintiff's culpable and/or negligent conduct in a breach of contract action; that because relief for foreclosure is statutory, an equitable relief is inappropriate; that plaintiff complied with RPAPL §§1303 and 1304; that an entitlement to a settlement conference pursuant to CPLR §3408 is not a valid defense to a mortgage foreclosure; and that plaintiff complied with the terms of the mortgage to provide a thirty day notice as a condition precedent to requiring "immediate payment in full." Plaintiff further contends that plaintiff did not violate the Federal Truth in Lending Act (hereinafter, "TILA"), 15 U.S.C. §1601 *et seq.* because defendant's counterclaim is time barred by the one year statute of limitations, a mortgage to be foreclosed is not a transaction [*4]relegated under 15 U.S.C. §1602(aa), and the total points and fees do not exceed eight percent of the entire loan. Plaintiff contends that defendant's counterclaim that plaintiff violated the Real Estate Settlement Procedure Act (hereinafter, "RESPA"), 12 U.S.C. §2601 *et seq.* fails because defendant's claim fails to state a cause of action upon which the Court may grant, defendant failed to substantiate a single violation of RESPA, defendant is time barred from any action based on a violation of RESPA.

In opposition, Said contends that plaintiff lacks standing and has no legal capacity to sue because the assignment in which plaintiff was assigned the first mortgage was invalid since

there was an improper chain of assignments prior to the assignment involving plaintiff.

For the reasons set forth below, plaintiff's motion for summary judgment pursuant to CPLR §3212 is denied in its entirety; and Said's cross-motion for summary judgment dismissing plaintiff's complaint pursuant to CPLR §3212 is granted in its entirety.

Discussion

To be properly before the court, lack of standing must be raised as a defense in defendant's answer or amended answer or in a timely pre-answer motion to dismiss the complaint pursuant to CPLR §3211(a)(3). (*See* CPLR §3211[e]; *U.S. Bank, N.A. v Denaro*, 98 AD3d 964, 965 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A. v Mastropaolo*, 42 AD3d 239, 244 [2d Dept 2007].) Here, Said asserted plaintiff's alleged lack of standing as its second and third affirmative defenses in its verified amended answer. Thus, defendant has not waived the affirmative defense of plaintiff's lack of standing.

"Where a defendant raises the issue of standing, the plaintiff must prove its standing to be entitled to relief." (*U.S. Bank, N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]; *U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724 [2d Dept 2011]; *Bank of New York v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009].) "In 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 underling note at the time the action is commenced." (*Denaro*, 98 AD3d at 964; *Dellarmo*, 94 AD3d at 748; *Bank of New York*, 86 AD3d at 279; *Countrywide Homes Loans, Inc. v Gress*, 68 AD3d 709, 709—10 [2d Dept 2009]; *Collymore*, 68 AD3d at 753; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207 [2d Dept 2009]; *Fed. Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 546—47 [2d Dept 2003].) In essence, for a plaintiff to commence a foreclosure action, "the plaintiff must have legal or equitable interest in the subject mortgage." (*GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1173 [2d Dept 2012]; *Countrywide Homes Loans, Inc.*, 68 AD3d at 709; *Marchione*, 69 AD3d at 207.) Thus, "foreclosure of a mortgage may not be brought by one who has no title to it." (*Sharif*, 89 AD3d at 724, quoting *Kluge v Fugazy*, 145 AD2d 537, 538 [1988]; *see also Marchione*, 69 AD3d at 207.)

Here, plaintiff has failed to prove that plaintiff has legal or equitable interest in the Consolidated Mortgage. The Corrected Assignment of the Mortgage provides, in relevant part, that

"Mortgage Electronic Registration Systems, Inc., as nominee for 1st United Bank, a Florida Banking Corporation as successor to Republic Federal Bank, N.A. formerly known as the Hemisphere National Bank, N.A. . . . ("Assignor"), all right, title and interest in an to that certain Mortgage executed by Amany Said as Mortgagor on March 18, 2002, and recorded in the Office of the Clerk of the County of QUEENS, State of New York, on June 24, 2002, . . . given to secure the payment of a promissory note in the original amount of Two Hundred, Seventy-Six Thousand, and 00/100 [*5]Dollars (\$276,000.00) and interest. . . . This assignment is to fix the assignee information. The assignee information is to read: *U.S. Bank National Association, as Trustee for CSMC Mortgage-Backed Pass-Through Certificates, Series 2006-6 (CSMC 2006-6)*. . . ."

The Corrected Assignment dated September 29, 2010, by its plain language, only assigned the first mortgage, not the Consolidated Mortgage and significantly, the corrected assignment was made and recorded after the recording of the Consolidated Mortgage. Hence, plaintiff does not have title to the Consolidated Mortgage in order to have standing to maintain an action against Said.

Furthermore, the assignments that were prior to the assignment to plaintiff were invalid. The third assignment assigned the Consolidated Mortgage from MERS as nominee for First United to First United granting ownership interest and the ability to assign the Consolidated Mortgage in only First United. The fourth assignment assigning only the first mortgage from MERS as nominee for Chase to MERS as nominee for Hemisphere was invalid because MERS as nominee for Chase did not have legal title to the mortgage at the time that this assignment was made, instead First United did. In addition, the fifth assignment assigning only the first mortgage from MERS as nominee for Hemisphere to plaintiff was also invalid because MERS as nominee for Hemisphere did not have legal title to the mortgage at the time that this assignment was made, instead First United did. Plaintiff lacks standing because of an improper chain of assignments..

In the instant action, Said raised the issue of standing in its affirmative defenses and its amended answer and plaintiff failed to prove its standing to be entitled to relief. Plaintiff moved for an order for summary judgment on the ground that defendant's answers did not raise triable issues of fact, including that plaintiff had standing to bring this suit; while

defendant cross-moved for an order for summary judgment on the ground that plaintiff lacked standing maintain the within action.

In order to grant summary judgment, there must be no issues of material and triable facts to be resolved at trial. (See *Suffolk County Dept. of Social Serv. on Behalf of Michael V. v James M.*, 83 NY2d 178, 182 [1994]; *Sommer v Fed. Signal Corp.*, 79 NY2d 540, 554—55 [1992]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; [Lopez v Beltre](#), 59 AD3d 683, 683 [2d Dept 2009]; [Baker v D.J. Stapleton, Inc.](#), 43 AD3d 839, 839 [2d Dept 2007].) However, if "there is any doubt as to the existence of such issues . . . or where the issue is arguable," then summary judgment should not be granted. (*Sillman*, 3 NY2d at 404.) Here, as shown above, there are no issues of triable fact as to plaintiff's lack of standing to bring this suit against Said.

Since there is no issue of fact that plaintiff lacks standing, this court need not address the other issues raised in plaintiff's motion for summary judgment and in defendant's cross-motion for summary judgment.

Conclusion

For the reasons set forth above, plaintiff's motion for summary judgment pursuant to CPLR §3212 is denied in its entirety; and defendant's cross-motion for summary judgment dismissing plaintiff's complaint pursuant to CPLR §3212 is granted in its entirety.

This constitutes the decision and order of this court.

Dated: January 7, 2013

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Bernice D. Siegal, J. S. C.

Footnotes

Footnote 1: The Court notes that plaintiff's motion for summary judgment incorrectly labels this assignment. In the motion papers and complaint, plaintiff states that the mortgage was assigned from MERS to MERS as nominee for Hemisphere. The assignment of the mortgage states that assignor was Wachovia, but on top states MERS as assignor. The assignment of mortgage or deed of trust states that the assignee is MERS as nominee for Hemisphere on top

and then further down states MERS as nominee for Chase as assignee (this is found in Exhibits A & H of plaintiff's motion for summary judgment and in Exhibit J in defendant's cross-motion).

Footnote 2: The Court notes that the plaintiff's complaint erroneously states the execution date as September 20, 2012.

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