Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA PART 24

x

HSBC BANK USA, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF THE RENAISSANCE HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2004-4,

Index Number 16842/11

Motion Date: October 2, 2012

Plaintiff,

Motion Seq. No. 1

-against-

MARIA CARCHI, ET AL.,

Defendants.

x

The following papers numbered 1 to 10 read on this motion by defendants Maria Carchi and Jose Dutan for an order granting partial summary judgment in favor of the defendants on all of the plaintiff's claims; cancelling the notice of pendency; declaring that plaintiff cannot foreclose on the mortgage and has no legal right to the promissory note and related indebtedness; directing that the mortgage and assignment of mortgage be expunged from the Queens County records; severing defendants' counterclaims while retaining jurisdiction over said counterclaims; and imposing sanctions, costs and attorney's fees.

	PAPERS NUMBERED
Notice of Motion - Affidavits- Exhibits.....	1 - 4
Affirmation in Partial Opposition - Exhibits.....	5 - 8
Replying Affirmation.....	9 - 10

Upon the foregoing papers the motion is determined as follows:

Plaintiff HSBC Bank USA N.A., as Trustee for the Registered Holders of the Renaissance Home Equity Loan Asset-Backed Certificates, Series 2004-4 commenced this mortgage foreclosure action on July 18, 2011, and filed a notice of pendency on the same date. On August 3, 2011, defendants Maria Carchi and Jose Dutan

served an answer and interposed 14 affirmative defenses and 11 counterclaims. Plaintiff has served a reply to the counterclaims. On August 3, 2011, defendants served plaintiff with combined demands and a notice of discovery and inspection, and plaintiff served its responses on October 4, 2011. On December 20, 2011 defendants' counsel served a Notice to Admit on plaintiff on plaintiff's counsel by ordinary mail. Plaintiff's counsel served a response to the notice to admit, by ordinary mail, on January 17, 2012.

A response to a notice to admit must be served within 20 days of service of the notice to admit, in the form of a sworn statement by the party to whom the request is directed "either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters" (CPLR 3123[a]). A notice to admit is to be used only for disposing of uncontroverted questions of fact or those that are easily provable. *(Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6 [2000].) A failure to respond to a notice to admit has been found to constitute admission of the noticed facts (*Hernandez v City of New York*, 95 AD3d 793[2012]; *Watson v City of New York*, 178 AD2d 126 [1991]) and a person acts at his/her peril in failing to respond to clear cut matters of fact. (*Marine Midland Bank v Custer*, 97 AD2d 974 [1983].) A party cannot be compelled to accept an unsworn response to a notice to admit. (*see Rosenfeld v Vorsanger,* 5 AD3d 462, 463 [2004]; *Matter of Johnson v Town of Haverstraw*, 102 Misc 2d 923 [1980].)

CPLR 3123 does not grant an attorney permission to make the statement on behalf of a party. *(see ELRAC, Inc. v McDonald*, 186 Misc. 2d 830, 832-834 [2001]; *Barnes v Shul Private Car Serv.*, 59 Misc 2d 967 [1969].) An attorney may be permitted to answer a notice to admit, but only where the attorney has personal knowledge of the facts or if the answers are based on documentary evidence (*ELRAC, Inc. v McDonald, supra*).

Here, the response to the notice to admit was timely served within 20 days. As the notice to admit was served by regular mail, plaintiff's time to respond was extended by five days, and as the 20th day fell on a Saturday, and the next business day was Martin Luther King Jr. Day, a holiday, service was properly made on January 17, 2012. (CPLR 3123, 2103[b][3]; General Construction Law § 24.) However, said response was executed only by plaintiff's counsel, and was not verified. Counsel, in her opposing affirmation, states that the responses were made based upon documentary evidence in her office's possession. However, no explanation is offered as to why she failed to serve a sworn

response.

In addition, plaintiff's counsel's response improperly raised objections to items 15, 16, 19, 23 and 24 of the notice to admit. Unlike requests for written interrogatories where a party is permitted to object in lieu of responding (CPLR 3133[a]), such a procedure is not authorized with a notice to admit. (*see Webb v Tire and Brake Distributor, Inc.*, 13 AD3d 835 [2004]; *see also Prime Psychological Servs. P.C. v Auto One Insurance Co.*, 14 Misc 3d 1122[A] [2008].) If there is a request for an improper admission, the correct procedure is to seek a protective order, pursuant CPLR 3103. (*see Sagiv v Gamache*, 26 AD3d 368 [2006].) Plaintiff, however, did not seek a protective order.

Contrary to plaintiff's counsel's assertions, defendants did not waive their objections to the response to the notice to admit. A notice to admit is a discovery device, and may be used by a party on a motion for summary judgment, or at trial. (*see Kowalski v Knox*, 293 AD2d 892 [2002]; *Beneficial Fin. Co. of New York, Inc. v Youngman*, 57 AD2d 727[1977]; Patrick M. Connors, Practice Commentaries, McKinneys' Cons Laws of NY, Book7B, CPLR C3123:4.) CPLR 3123 does not require a party to reject, object to, or return an improper response to a notice to admit. Furthermore, the fact that the parties engaged in settlement negotiations on two occasions in late January 2012, without discussing the response to the notice to admit, does not constitute a waiver of said response.

In view of the fact that plaintiff's counsel served an unsworn response to the notice to admit, which contained several improper objections, said response is a nullity. Plaintiff, therefore, is deemed to have admitted to the genuineness of the documents covered by requests 1, 2 and 3, the original note, the original mortgage, and the assignment of the mortgage executed on June 3, 2011. Defendants assert that based upon the notice to admit and the documents attached to said notice plaintiff lacks standing to bring this action, because MERS lacked authority to assign the mortgage to plaintiff, and plaintiff cannot establish that it is the holder or assignee of the underlying note. It is noted that lack of standing was asserted as an affirmative defense in the answer.

Plaintiff commenced the within action on July 18, 2011, seeking to foreclose the subject mortgage. In its complaint, plaintiff alleges that it is the owner and holder of the mortgage, subject to the assignment, and that it is in possession of the original note with a proper endorsement and/or allonge.

A plaintiff has standing in a foreclosure action 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. (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2011]; *see Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709.) Furthermore, the Appellate Division, Second Department has warned:

> "while assignment of a promissory note also effectuates assignment of the mortgage (*see Bank of N.Y. v. Silverberg*, 86 AD3d [274, 280] [2011]; *U.S. Bank, N.A. v Collymore*, 68 A.D.3d [752, 753-754] [2009]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 A.D.3d 674 [2007]), the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 A.D.3d 636 [2011]; *Bank of N.Y. v Silverberg*, 86 A.D.3d at 280)" (*U.S. Bank Nat. Assn. v Dellarmo*, 94 A.D.3d 746 [2012]).

The documentary evidence establishes that on October 29, 2004, defendant Maria Carchi executed a note, and in return for a loan she received, promised to pay the lender, Delta Funding Corporation, the sum of $450,000.00, plus interest. The loan was secured by a mortgage on the subject real property known as 111-47 44th Avenue, Corona, New York, dated October 29, 2004. The original note, now deemed to be admitted, is made payable to the lender, Delta Funding Corporation.

The mortgage was executed by Maria Carchi and Jose Dutan, and stated, among other things, that MERS was the nominee for the lender and that for the purposes of recording the mortgage, MERS was the mortgagee of record. The assignment of the mortgage states on its face that the mortgage was assigned by MERS to plaintiff, together with "all of its rights, title and interest in and to a certain mortgage" on December 23, 2004, and that said assignment was executed on July 3, 2011. Said assignment was recorded on July 15, 2011. It is noted that plaintiff, in the notice of pendency filed in this action, states that the subject mortgage was assigned "by an assignment of mortgage which is dated March 24, 2011."

Plaintiff, in opposition to the within motion, has submitted an affidavit from Youa Vang, an account manager employed by Wells Fargo Bank, National Association, who states that Wells Fargo is the document custodian for the plaintiff and that Wells Fargo's

records show that it was in physical possession of the original note and original mortgage relative to the subject property on July 18, 2011.

Plaintiff's counsel states in her opposing affirmation that "the original note and mortgage may be produced on the hearing date of the Defendants' subject motion for inspection by the Court". However, she offers no explanation as to why she cannot produce a copy of the original note at this time, and has not established that said note was endorsed to plaintiff in blank, without recourse, or that there is an allonge securely affixed thereto. The production of the original note is clearly not a matter for in camera review, as defendants have raised the issue of standing and plaintiff is now required to establish that it has standing to commence this action.

Neither Ms. Vang, nor plaintiff's counsel, states that the note was endorsed over to plaintiff or in blank at the time the plaintiff came into physical possession of the note *(see Mortgage Electronic Registration Systems, Inc. v Coakley*, 41 AD3d 674 [2007], *supra; cf., First Trust Nat. Assn . v Meisels*, 234 AD2d 414 [1996]; *see generally Slutsky v Blooming Grove Inn. Inc.*, 147 AD2d 208[1989]), and plaintiff has failed to present any other evidence that it was a holder of the note at time the action was commenced (see UCC 1- 201[21], 3-203[a], 3-301).

Defendants, therefore, have established their prima facie entitled to partial summary judgment as a matter of law. It is

ORDERED, that the branch of defendants motion which seeks partial summary judgment dismissing the plaintiff's complaint is granted; and it is further,

ORDERED, that the Clerk of Queens County is directed, upon payment of the proper fees, if any, to cancel and discharge a certain notice of pendency filed in this action on November 19, 2008, for the premises located at 111-47 44th Avenue, Corona , NY 11368, Block 2016 and Lot 70, and said Clerk is hereby directed to enter upon the margin of the record of same a notice of cancellation referring to this order; and it is further

ORDERED that defendants' request for summary judgment on its first counterclaim for declaratory judgment is denied as they have not established their right to such relief at this time; that

plaintiff's request to expunge the mortgage and assignment of the mortgage from the Queens County records is denied; and that plaintiff's requests for the imposition of sanctions, attorney's fees and costs, is denied; and it is further

ORDERED that defendants' counterclaims are hereby severed.

Dated: February 4, 2013

AUGUSTUS C. AGATE, J.S.C.