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Citimortgage, Inc. v Forbes
2013 NY Slip Op 50577(U)
Decided on April 16, 2013
Supreme Court, Kings County
Rivera, J.
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Decided on April 16, 2013

Supreme Court, Kings County

<p style="text-align:center">Citimortgage, Inc., Plaintiff,</p> <p style="text-align:center">against</p> <p style="text-align:center">Rachel Forbes, YELLOW BOOK CO., INC., NATIONAL STAR FUNDING, LLC, ROCHELLE EVANS, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BOARD, PEOPLE OF THE STATE OF NEW YORK, CRIMINAL COURT OF THE CITY OF NEW YORK, RICARDO FRANCIS, DENISE ORR, CAROL PIPA, JOSEPH PIPA, LUCILLE PIPA, JEFFERY PIPA, MARK WILLIAMS, KERRY WILLIAMS, CHANITA WILLIAMS, EDWARD STANTON, MARGARET STANTON, Defendant(s)</p>

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Francois A. Rivera, J.

By notice of motion filed on October 16, 2012 under motion sequence number one, SRMOF 2009-1 Trust, (hereinafter the movant) has moved to extend the time to comply with an order of this Court (the subject order) which directed the plaintiff, Citimortgage, Inc., (hereinafter Citi) to comply with Administrative Order 548/10.

No one has appeared or submitted opposition to the instant motion.

BACKGROUND

On April 7, 2008, Citi commenced the instant action to foreclose upon real property [*2] located at 860 East 55th Street, Brooklyn, New York, Block 7972, Lot 6 (the subject property) by filing a summons and complaint and notice of pendency. No defendant has appeared or answered the complaint.

On April 26, 2012, Citi moved for an order of reference and other related relief. On August 6, 2012, this Court issued a decision and order directing Citi to comply with Administrative Order 548/10 within 60 days. As of the date of the instant motion, Citi has not complied with the subject order.

MOTION PAPERS

The instant motion papers contain an affirmation of the movant's counsel, an affidavit

of service of the instant motion and four annexed exhibits labeled A through D. Exhibit A is a copy of the subject order directing Citi to comply with Administrative Order 548/10. Exhibit B is described as an email communication sent by the office of the movant's counsel to a document retrieval company requesting a copy of the subject order. Exhibit C is described as a copy of an e-Law document reflecting the filing date of the subject order. Exhibit D is described as a copy of an email communication from the aforementioned document retrieval company.

LAW AND APPLICATION

Administrative Order 548/10, which was issued by the Chief Administrative Judge of the State of New York on October 20, 2010 requires the plaintiff's counsel in a residential mortgage foreclosure action to file with the court an affirmation confirming the accuracy of the plaintiff's pleadings. In cases pending on the effective date of the Administrative Order, where no judgment of foreclosure has been entered, the attorney affirmation is required to be filed at the time of filing either the proposed order of reference or the proposed judgment of foreclosure and sale (*see U.S Bank, NA v Boyce*, 93 AD3D 782 [2nd Dept 2012]).

CPLR 2211 states in pertinent part that a motion is an application for an order. It further states that a motion on notice is made when a notice of the motion or an order to show cause is served. The practice commentaries following CPLR 2211 in McKinney's Cons Laws of NY, Book 7B discusses in section C2211:2 the question of who may move and for what relief. "A general rule can be formulated along these lines: anything that the court has the power to order, an interested party has the right to move for (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2211: 2).

CPLR 1018 provides that upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action.

"CPLR 1018 addresses the situation in which a party transfers her interest in the subject matter of the action to another person while the action is pending, as, for example, by assignment of the claim (*see NY Gen.Oblig.Law § 13-101*) or conveyance of the relevant property. CPLR 1018 authorizes continuation of the action by or against the original party—the assignor/transferor—without the need for substitution of the

assignee/transferee." (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1018).

The instant motion is supported by the affirmation of Ms. Chen, an associate of the the law firm of record of the movant. Ms. Chen has averred that she is familiar with the facts and circumstances surrounding the entire foreclosure proceeding based on her review of the file maintained for the matter and based on the pleadings and documents contained therein.

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Ms. Chen has also averred the following facts among others. Citi was the holder of the note and mortgage on the subject property when the instant action was commenced. Citi transferred and assigned the mortgage to Selene Finance, LP who then transferred and assigned the mortgage to SRMOF 2009-1 TRUST. The court notes that Ms. Chen only spoke of the assignment of the mortgage and not of the underlying note. Where a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity ([see U.S. Bank, N.A. v Sharif, 89 AD3d 723](#) [2nd Dept 2011]).

Ms. Chen did not state that she was the transactional attorney for any of the aforementioned mortgage assignments. Furthermore, her affirmation did not demonstrate any personal knowledge of the assignments or of the underlying facts in the complaint. "The affidavit or affirmation of an attorney, even if he or she has no personal knowledge of the facts, may, of course serve as a vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form," e.g. documents, transcripts" ([Worldwide Asset Purchasing, LLC v Karafotias, 9 Misc 3d 390](#) [N.Y City Civ. Ct., 2005] *citing Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Ms. Chen utilized her affirmation to admit documents showing when the movant first became aware of the subject order.

By not submitting documentary evidence of the assignments linking the plaintiff to the movant and by not providing sworn allegations of fact by a person with personal knowledge demonstrating any interest in the instant foreclosure action, the movant has failed to provide a basis for any relief pursuant to CPLR 2211. In sum, there is no evidence that Citi transferred its interest to SRMOF 2009-1 TRUST.

Accordingly, SRMOF 2009-1 TRUST's motion for an order to extend the time to comply with Administrative Order 548/10 is denied without prejudice.

The foregoing constitutes the decision and order of this court.

Enter:

J.S.C.

Enter Forthwith: _____

J.S.C.

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