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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

CITIMORTGAGE, INC.,
.
Plaintiff,

-against-

HOWARD SIROTA, ROCHELLE SIROTA, a/k/a RACHELL SIROTA, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., (MERS), as Nominee for METROPOLITAN NATIONAL MORTGAGE COMPANY, LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, and

"JOHN DOE" and/or "JANE DOE" #1-10, inclusive, the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporation, if any, having or claiming an interest, in or lien upon the premises described in the complaint,

Defendants,

Index Number 12243/2011

Motion Date May 28, 2013

Motion Seq. No. 5

The following numbered papers read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment in its favor against defendants Howard Sirota and Rachell Sirota s/h/a Rochelle Sirota a/k/a Rachell Sirota, to strike the answer of defendant Howard Sirota, including the affirmative defenses, for leave to appoint a referee to compute the amount due and owing plaintiff and to substitute Newbury Place REO II, LLC (Newbury) in the place and stead of plaintiff Citimortgage, Inc. and for leave to amend the caption to reflect such substitution and to delete reference to defendants "John Doe" and "Jane Doe" #1-10, inclusive; this cross motion by defendant Rachell Sirota pursuant to CPLR 3212 for summary

judgment dismissing the complaint with prejudice and to direct the release of the insurance proceeds to defendants Rachell Sirota and Howard Sirota, or a portion thereof sufficient to reimburse them for their out-of-pocket expenses incurred for repair and restoration of the subject property; and this cross motion by defendant Howard Sirota to dismiss the complaint asserted against him pursuant to CPLR 3211(a)(10) and 3211(c).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-5
Notices of Cross Motion - Affidavits - Exhibits	6-14
Answering Affidavits	15-19

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action by filing a copy of the summons and complaint on May 19, 2011. Plaintiff seeks to foreclose on a mortgage on the subject real property known as 125 Beach 128th Street, Rockaway Park, New York to secure repayment of a note, evidencing a loan in the original principal amount of $1,980,000.00, plus interest, by Metropolitan National Bank Mortgage Company, LLC (Metropolitan) to defendants Howard Sirota and Rachelle Sirota. In its complaint, plaintiff alleged it was the holder of the mortgage and underlying note, and that defendants Sirota defaulted under the terms of the mortgage and note by failing to make the monthly mortgage installment payment due on June 1, 2010, and as a consequence, it elected to accelerate the entire mortgage debt.

Defendants Howard Sirota and Rachell Sirota served a joint answer, with various affirmative defenses, but are now represented by separate counsel. Plaintiff did not cause the "John Doe" and "Jane Doe" defendants to be served with process insofar as it determined that they are not necessary party defendants. The remaining defendants are in default in the action.

By order dated December 2, 2011, the Court Attorney Referee noted that a residential foreclosure conference was held that date, but the case had not been settled, and directed plaintiff to proceed by means of motion or order of reference. The Court Attorney Referee also noted that defendant borrowers intended to proceed with short sale activity, and there was no loan modification application pending.

Defendants Rachell Sirota and Howard Sirota oppose the motion by plaintiff. Defendant Rachell Sirota cross moves for summary judgment dismissing the complaint asserted against her and directing that certain insurance proceeds be released from escrow and paid jointly to defendants Sirota. Defendant Howard Sirota cross moves pursuant to CPLR 3211(a)(10) and CPLR 3211(c) to dismiss the complaint asserted against him based upon lack of standing to sue.

In a 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 (*see Bank of New York v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]). However, where, as here, the answer includes a challenge to the plaintiff's standing to bring the action, the latter must also be established in order to succeed on a motion for summary judgment (*see Deutsche Bank Natl. Trust Co v Haller*, 100 AD3d 680, 682 [2d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1173 [2d Dept 2012]; *Bank of New York v Silverberg*, 86 AD3d at 279; *US Bank N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]).

Here, plaintiff asserts it was the holder of the mortgage and note, and therefore had standing to bring this action. Although plaintiff offers a copy of a written assignment by MERS to plaintiff, its counsel explicitly acknowledges plaintiff does not rely upon such assignment to demonstrate standing.[1] Rather, plaintiff contends the assignment constitutes evidence of when the note and mortgage were acquired by it. It claims it was the holder of the note made payable to Metropolitan and endorsed over to it without recourse, and that the mortgage passed with the debt as an inseparable incident to the promissory note (*see U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 674 [2d Dept 2007]).

The copy of the note submitted by plaintiff in support of its motion was made payable to Metropolitan, and includes an endorsement on the note by Metropolitan to plaintiff, and

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[1] Plaintiff presumably does not do so because the subject mortgage does not specifically give Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Metropolitan, the authority to assign the note and plaintiff lacks any evidence that MERS was actually in possession of the note at the time of that assignment (*see Bank of New York v Silverberg*, 86 AD3d 274, 281-283 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 109 [2d Dept 2011]). Under such circumstances, the assignment, at the most, effected an assignment of the mortgage without the underlying note. An assignment of a mortgage without the underlying debt is a nullity (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept 2009]; *Bank of New York v Silverberg*, 86 AD3d at 280), and thus, plaintiff's standing may not be established by virtue of the MERS assignment alone.

two separate allonges. The endorsement on the note and the allonges are undated. To the extent plaintiff offers the affidavit of Justin Wenk, a vice president of BSI Financial Services, Inc. (BSI), the servicing agent for Newbury, the affidavit is conclusory and insufficient to establish that plaintiff had standing to bring this action. Mr. Wenk states that "based upon [his] review of BSI's [s]ervicing [r]ecords, [plaintiff] was the owner of the note and mortgage at the time of commencement of this action." He, however, does not indicate that BSI was the servicing agent for plaintiff. He merely states that BSI is responsible for servicing the mortgage account as "attorney-in-fact for the owner and holder of the subject mortgage and is authorized to make this affidavit as the servicer of the loan," without identifying the owner and holder. Mr. Wenk also fails to indicate whether his knowledge regarding the ownership of the note and mortgage on the date of commencement is based upon business records maintained by plaintiff, or that he has personal knowledge of the business practices or procedures of plaintiff, including with respect to plaintiff's keeping of business records (*see Unifund CCR Partners v Youngman*, 89 AD3d 1377 [4th Dept 2011]). In addition, Mr. Wenk's affidavit lacks any factual details as to the physical delivery of the note to plaintiff, and whether the endorsement of the note was effectuated prior to the commencement of the action (*see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]), or when the execution of the allonge evidencing the transfer of the note from plaintiff into MCM Homeowners Advantage Trust X took place. Plaintiff does not submit a copy of any power of attorney, indicating BSI is the attorney in fact for it.

Under such circumstances, plaintiff has failed to establish, prima facie, that it had standing to commence the action, and that branch of the motion by plaintiff for summary judgment against defendants Howard Sirota and Rachell Sirota is denied (*HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *see also Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061 [2d Dept 2012]).

With respect to that branch of the cross motion by defendant Rachell Sirota for summary judgment dismissing the complaint asserted against her based upon lack of standing and the cross motion by defendant Howard Sirota to dismiss the complaint asserted against him based upon lack of standing, the submissions by the parties do not establish as a matter of law that plaintiff lacked standing to commence the action (*see HSBC Bank USA*, 92 AD3d 843; *Deutsche Bank Natl. Trust Co.*, 95 AD3d 1061). The note bears an endorsement into plaintiff and the assignment dated May 3, 2011 indicates assignment of the mortgage and note to plaintiff, thereby raising questions of fact as to when the endorsement was made and when the note was delivered to plaintiff.

With respect to that branch of the motion by plaintiff to strike the affirmative defenses raised by defendant Howard Sirota in his answer, plaintiff bears the burden of demonstrating

that the defenses are without merit as a matter of law (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]*; Vita v New York Waste Servs.*, LLC, 34 AD3d 559, 559 [2d Dept 2006]).

That branch of the motion by plaintiff to dismiss the first affirmative defense asserted by defendant Howard Sirota in his answer based upon failure to state a cause of action is denied (*see Butler*, 58 AD3d 145).

That branch of the motion by plaintiff to strike the second affirmative defense asserted by defendant Howard Sirota in his answer based upon lack of standing is denied. With respect to the branch of the motion by plaintiff to strike the affirmative defense asserted by defendant Howard Sirota in his answer based upon lack of standing, plaintiff has failed to establish such defense is without merit as a matter of law (*see Vita v New York Waste Servs.*, LLC, 34 AD3d 559, 559 [2d Dept 2006]) (*see supra* at plaintiff 2-4).

That branch of the motion by plaintiff to dismiss the third and fourth affirmative defenses asserted by defendant Howard Sirota in his answer based upon lack of subject matter jurisdiction and "lack of jurisdiction" is granted. The Supreme Court is a court of original, unlimited and unqualified jurisdiction (*see Kagen v Kagen*, 21 NY2d 532, 537 [1968]; NY Const., art VI, § 7) and is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]). The court has the competence to adjudicate the claim asserted by plaintiff for the foreclosure of the mortgage. To the extent defendant Howard Sirota asserts lack of personal jurisdiction, he failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of his answer, and has made no application to extend the period of time upon the ground of undue hardship (CPLR 3211[e]). As a consequence, such defense is deemed waived (CPLR 3211[e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]).

That branch of the motion by plaintiff to dismiss the fifth and sixth affirmative defenses asserted by defendant Howard Sirota in his answer is denied. Although the language contained in the letter dated August 2, 2010 (*see* plaintiff's Exhibit "F") allegedly sent to defendants Sirota satisfied the requirements expressed in the mortgage agreement at paragraph 22, and the filing of the summons and complaint constituted a proper acceleration of the mortgage (*see Franklin Socy. Fed. Sav. & Loan Assn. v Far-Pap Corp.*, 57 AD2d 607 [2d Dept 1977]), plaintiff's submissions, including an attorney's affirmation containing conclusory assertions that notice was given, are insufficient to establish that plaintiff served on defendants Sirota, in accordance with paragraph 15 of the mortgage, the requisite notice to cure their default as expressly required in the mortgage agreement at paragraph 22 (*see Norwest Bank Minn. v Sabloff*, 297 AD2d 722 [2d Dept 2002]).

That branch of the motion by plaintiff to dismiss the seventh affirmative defense asserted by defendant Sirota in his answer is granted. Contrary to the claim by defendant Howard Sirota, the failure by plaintiff to attach a copy of the alleged note to the complaint is not an affirmative defense to foreclosure. There is no statutory requirement that a note be annexed to a complaint for foreclosure and he has not cited any mortgage provision requiring such annexation.

That branch of the motion by plaintiff to dismiss the eighth affirmative defense asserted by defendant Howard Sirota in his answer based upon the doctrines of waiver, estoppel, laches and unclean hands is granted. Defendant Howard Sirota has failed to allege any facts supporting these conclusions of law (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]).

That branch of the motion by plaintiff to dismiss the ninth affirmative defense asserted by defendant Howard Sirota in his answer based upon failure to join necessary parties is granted. Defendant Howard Sirota has failed to identify which party has not been joined, and the manner in which it is necessary.

That branch of the motion by plaintiff to substitute Newbury for the named plaintiff is denied. The determination to substitute a party pursuant to CPLR 1018 lies within the discretion of the court (*see NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563, 564 [2d Dept 2005]). In this instance, it is unclear whether plaintiff had standing to commence this action. Furthermore, plaintiff admits the first allonge identifies the acquiring entity as "MCM Homeowners Advantage Trust X," and not "MCM *Capital* Homeowner Advantage Trust X." Steven Trowern, a member and employee of MCM Capital Homeowner Advantage Trust X, merely states in his affidavit dated April 15, 2013, that "upon information and belief" the allonge was delivered in blank, and then was erroneously completed by an employee of MCM Capital Homeowner Advantage Trust X, who excluded the word "Capital" when filling in the specific endorsement. Under these circumstances, substitution is unwarranted.

That branch of the motion by plaintiff for leave to amend the caption deleting reference to defendants "John Doe" and "Jane Doe" #1-10 is granted. It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY
----------X
CITIMORTGAGE, INC.

Plaintiff

Index No. 12243/2011

-against-

HOWARD SIROTA, ROCHELLE SIROTA A/K/A RACHELL SIROTA, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), AS NOMINEE FOR METROPOLITAN NATIONAL MORTGAGE COMPANY, LLC,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

Defendants
----------X.

That branch of the motion by plaintiff for leave to appoint a referee is denied.

That branch of the cross motion by defendant Rachell Sirota to direct the release of insurance proceeds from escrow as proposed is denied. Defendant Rachell Sirota did not assert any counterclaim in the answer, and therefore, cannot seek affirmative relief on an unpleaded claim for which issue has not been joined (CPLR 3212[a]).

Dated: July 22, 2013

J.S.C.