

**Federal Natl. Mtge. Assoc. v Higgins**

2016 NY Slip Op 31090(U)

June 13, 2016

Supreme Court, Kings County

Docket Number: 511643/14

Judge: Noach Dear

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7<sup>th</sup> day of June 2016.

P R E S E N T:

HON. NOACH DEAR,

J.S.C.

Index No.:511643/14

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FEDERAL NATIONAL MORTGAGE ASSOC,

Plaintiff,

**DECISION AND ORDER**

-against-

RICHARD HIGGINS et al,

Defendant,

\_\_\_\_\_ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

<b>Papers</b>	<b>Numbered</b>
Moving Papers and Affidavits Annexed	<u>1</u>
Cross	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff moves for summary judgment and an order of reference. Defendant opposes and cross-moves for dismissal arguing that Plaintiff lacks standing.

"Where standing is put into issue by the defendant, a plaintiff must prove its standing if it is to be entitled to relief" (*Bank of Am., N.A. v Paulsen*, 125 A.D.3d 909 [2d Dept 2015]). "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that 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" (*Id.*). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v.*

*Collymore*, 68 AD3d 752, 754 [2d Dept 2009] [citations omitted]). In other words, if Plaintiff demonstrates that the note was either assigned to it prior to the commencement of the litigation or in its physical possession at that time, then Plaintiff has standing.

Plaintiff proffers the affidavit of Jennette Hill, a Foreclosure Specialist of Seterus, Inc. (the servicer of the loan in suit), in support of its motion. Ms Hill attests that the note and mortgage were transferred to Plaintiff via a series of recorded Assignments of Mortgage (Hill Aff., at 3). Those assignments do not demonstrate that Plaintiff is the assignee of the note. Per Plaintiff's own affidavit, the mortgage (but seemingly not the note) was assigned to MERS. Further and more troublingly, JP Morgan assigned its interest in the mortgage and note (if it had any) to Chase Home Finance in 2009 and then assigned that same interest to Plaintiff in 2014. Thus, it would appear that Plaintiff is unable to demonstrate that the note was properly assigned to it prior to the commencement of this action. Indeed, in its reply, Plaintiff appears to rely solely on "physical possession." Ms. Hill, however, never claims that Plaintiff was in physical possession of the note at the time of commencement of the action (or at any other time for that matter).

Plaintiff, in reply, argues that the attachment of photocopies of the note, mortgage, and assignment of the mortgage (by an assignor that no longer had an interest in the mortgage) to its complaint is sufficient to show that it was in physical possession of the original note at that time. In support it quotes *Nationstar Mortgage v Catizone*, 127 AD3d 1151 [2d Dept 2015] for the proposition that such a showing is sufficient. This Court disagrees.

There is no one correct way to demonstrate physical possession of the note. Among other methods that this Court has recently seen, affidavits from the document custodian of the vault where the original note is stored with attached vault records have been proffered, Plaintiff's counsel has offered a certified copy made from the original by one of its attorneys shortly before commencing the action, and Plaintiff has shown via its business records exactly when, how, and from whom the note was transferred to its custodian. The Court of Appeals has also accepted lesser proof – an affidavit stating when Plaintiff acquired the note without further details (*Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355, 362 [2015]; see similarly, *Wells Fargo v Joseph*, 137 A.D.3d 896 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Arias*, 121 A.D.3d 973, 974 [2d Dept 2014]).

*Catizone* states in relevant part, "the plaintiff established its standing as the holder of the note and mortgage by demonstrating that the note was in its possession and the mortgage had been

assigned to it prior to the commencement of the action, as evidenced by its attachment of the indorsed note, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced” (127 A.D.3d at 1152). This holding was reiterated in *Deutsche Bank Nat. Trust Co. v. Leigh*, 137 A.D.3d 841 [2d Dept 2016]). It, thus, appears that attaching copies of a note, mortgage, and valid assignment of mortgage suffice. Herein, even were this accurate (and, as discussed below, this Court does not believe that it is), Plaintiff has not demonstrated that it has standing as the assignment of mortgage was called into question by Plaintiff’s own evidence..

The *Catizone* decision cannot actually mean that attachment of copies of the note, mortgage, and assignment of mortgage to the complaint is alone sufficient to show possession of the note. Subsequent appellate decisions have reiterated production of such an assignment in addition to the note and mortgage are insufficient to demonstrate standing (see, for example, *Deutsche Bank Nat. Trust Co. v. Idarecis*, 133 A.D.3d 702 [2d Dept 2015]; *Deutsche Bank Nat. Trust Co. v. Weiss*, 133 A.D.3d 704 [2d Dept 2015]).

It is well established that the mortgage passes incident to the note but not vice versa and, thus, it is the transfer and ownership of the note, rather than the mortgage that is relevant (*Bank of New York v. Silverberg*, 86 A.D.3d 274, 280 [2d Dept 2011]). Logic dictates, then, that the assignment of the mortgage is not evidence of ownership of the note. Possession of a copy of the mortgage is also not dispositive as recorded mortgages are publicly available. As a result, Plaintiff in its motion papers draws the conclusion that attaching a copy of the note to the complaint is itself evidence of standing.

While copies of notes are not publicly available, they do not alone demonstrate possession of the original. Photocopies are clearly made at different times. The parties to the loan, their lawyers, etc. generally leave the closing with a wet ink or duplicate. This Court regularly sees multiple versions of the note attached to plaintiffs’ papers, complete with differences in endorsements (reflecting copies made at different points in time) and, occasionally, different signatures despite the same date on the document (reflecting copies of different originals). It would also be unsurprising if notes were scanned into the document control systems of the banks and/or servicers. Further, it is common for a photocopy of a “lost” note to accompany an affidavit of lost note. In sum, it does not seem prudent to view possession of a copy of a note as evidence of possession of the original.

In light of the foregoing, Plaintiff has not demonstrated that it was in physical possession of the note at the time of commencement of this litigation and, thus, has not proven that it has standing

and Plaintiff's motion is denied. Defendant's cross-motion to dismiss is also denied as issues of fact remain as to whether Plaintiff had possession of the note.

ENTER



Hon. Noach Dear, J.S.C.

HON. NOACH DEAR J.S.C.

MG  
MD ✓  
MS# 1 & 2.