

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

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Wells Fargo Bank, NA

Index
Number: 17640/10

Plaintiff,

- against -

Motion
Date: 10/23/14

Keith C. Allen, Zola Allen,
et.al.,

Motion
Cal. Number: 168

Defendants.

Motion Seq. No.: 2
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The following papers numbered 1 to 10 read on this motion by defendant, Keith C. Allen, to vacate the order and to dismiss.

	<u>Papers Numbered</u>
Notice of Motion-Affidavit-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibits.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendant Allen for an order, pursuant to CPLR 5015(a), upon the ground of newly-discovered evidence, vacating the memorandum of this Court issued on March 6, 2013 which granted plaintiff's motion for summary judgment, amendment of the caption, a default judgment, an order of reference and dismissal of Allen's counterclaim interposed in his answer, and for an order dismissing the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) is granted to the following extent:

This Court recalls and vacates its memorandum issued on March 6, 2013 and recalls and vacates its order issued pursuant thereto on June 4, 2013, and plaintiff's motion for summary judgment, amendment of the caption, for a default judgment; for an order of reference and for dismissal of Allen's counterclaims is denied without prejudice.

This matter is set down for a hearing in Part 10, Courtroom 63

of this courthouse on December 9, 2014 at 9:30 a.m. for plaintiff to be examined concerning the veracity of the affidavits submitted by it in support of its prior motion relative to plaintiff's representation that it is, and was prior to the commencement of this action, the owner and holder of the note and mortgage. The balance of Allen's motion to dismiss the complaint shall be held in abeyance pending the hearing.

This Court granted plaintiff's prior motion based upon, inter alia, the affidavit of one Amanda Weatherly, vice president of loan documentation for plaintiff, sworn to on November 8, 2012, in which she averred that the original note was indorsed in blank by SunTrust Mortgage, Inc. (the loan originator) and was physically delivered to plaintiff which has been in possession of it since prior to the commencement of this action, and plaintiff has been the holder of the original note and mortgage since prior to commencement of this action. Annexed as an exhibit to the affidavit is a photocopy of the note bearing a stamped blank endorsement from SunTrust Mortgage, Inc. - there is no endorsee and it is undated.

On October 28, 2013, Allen received correspondence from plaintiff, by one Raziye Haxhiu Mavriqi, Executive Mortgage Specialist of Wells Fargo Bank, responding to his inquiry filed with the Consumer Financial Protection Bureau and the New York State Department of Financial Services regarding the ownership of the subject loan. This correspondence is annexed to Allen's moving papers as Exhibit "I". Mavriqi informs, inter alia, "WFHM [Wells Fargo Home Mortgage] is in receipt of correspondence requesting information regarding the investor of this mortgage loan. The investor for this loan is Fannie Mae".

It is common knowledge, of which this Court takes judicial notice, that the Federal National Mortgage Association (FNMA), colloquially known as "Fannie Mae", is a U.S. Government sponsored enterprise that provides liquidity to mortgage loan originators by purchasing mortgage loans conforming to certain criteria, which it then typically packages into mortgage-backed securities for the investment market. Therefore, plaintiff's reply to Allen's inquiry concerning the mortgage by informing that Fannie Mae was the "investor" of the loan indicates that Fannie Mae purchased the mortgage loan from the originator. It appears that plaintiff, in response to Allen's inquiry as to the ownership of the loan, used the term "investor" euphemistically to avoid the use of the term "owner". However, it seems clear to this Court that this correspondence acknowledges that Fannie Mae purchased, and is therefore the owner of, the loan, thus contradicting Weatherly's affidavit as well as the complaint which alleges that plaintiff is the "owner and holder of a note and mortgage being foreclosed."

This Court also notes, after a thorough examination of the Court record, that plaintiff failed to file an attorney affirmation required pursuant to the Administrative Order of the Chief Administrative Judge of the Courts, AO 431/11, (formerly AO 548-10) certifying the accuracy of the papers filed in support of the action. This Court overlooked the absence of the requisite affirmation when it granted plaintiff's motion. Said Administrative Order was issued as a measure to alleviate the problem that had become endemic in residential foreclosure actions where false and "robo-signed" affidavits were submitted by plaintiffs in support of motions and was directly inspired by such practices allegedly committed by the law firm of Steven J. Baum, PC, which firm is now dissolved. Said attorney, who represented many plaintiffs in mortgage foreclosures, is known to this Court to have been investigated by the office of the New York State Attorney General for practices involving the robo-signature of false affidavits in support of foreclosure actions, and numerous foreclosure cases before this Court wherein Mr. Baum was original counsel for plaintiffs have resulted in the vacatur of orders of reference and judgments of foreclosure upon the applications of succeeding counsel for plaintiffs that they could not confirm the veracity of the affidavits of merit and notarizations previously submitted to the Court.

This Court notes that Steven J. Baum was original counsel for plaintiff who commenced this action. Neither plaintiff's counsel substituted on November 30, 2011 nor plaintiff's current counsel substituted on July 31, 2013 has submitted an affidavit certifying the veracity of the original documents submitted by Steven Baum's office and the new affidavits, executions and notarizations made subsequent their substitution. Therefore, this Court, sua sponte, vacates its memorandum issued on March 6, 2013 and its order issued on June 4, 2013, and denies, without prejudice, plaintiff's motion. Accordingly, the referee who was appointed to ascertain and compute the sums owing to plaintiff, Crag D. Zim, Esq., is hereby relieved and discharged as referee.

The balance of Allen's motion to dismiss the complaint shall be held in abeyance pending the hearing. Although plaintiff's counsel is correct in his general statement of the law that the defense of lack of standing is waived if not raised in the answer or a timely pre-answer motion to dismiss, the issue of standing is inextricably intertwined with the issue presented on this record of whether summary judgment, a default judgment and an order of reference were procured from this Court based upon the submission of false affidavits.


Therefore, it is hereby ORDERED, that plaintiff produce Amanda Weatherly, Vice President of Loan Documentation for Wells Fargo Bank, and that she appear, for the aforementioned hearing to give testimony regarding her affidavit; and it is further,

ORDERED, that plaintiff produce Razije Haxhiu Mavriqi, and that he appear, for the aforementioned hearing to give testimony regarding his letter dated October 28, 2013 addressed to Allen and regarding the ownership of the subject loan, and it is further,

ORDERED, that plaintiff bring to the hearing for this Court's examination the ORIGINAL note for the subject loan.

Neither the date nor the time of the hearing may be changed without the express consent of this Court.

Dated: October 30, 2014



KEVIN J. KERRIGAN, J.S.C.