To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED and ENTERED
on 1 13 2015
WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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BLB TRADING, LLC,

Plaintiff,

DECISION AND ORDER
Index No. 15407/2011
Motion Sequence 1

-against-

SUSAN LEDGISTER A/K/A SUZANNE LEDGISTER, if living, and if she be dead, grantees, mortgagees, lienors, heirs, devisees, distributees or successors in interest of such of them as may be dead, and their husbands and wives, heirs, devisees, distributees and successors in interest, all of whom and whose names and places of residence are unknown to Plaintiff, WILHELMINA WOODY, THE BOARD OF MANAGERS OF THE CONSULATE ON THE PART CONDOMINIUM, THE UNITED STATES OF AMERICA AND PEOPLE OF THE STATE OF NEW YORK AND JOHN DOE "1" through "12" said persons or parties having or claimed to have a right title or interest in the Mortgaged premises herein their respective names are presently unknown to the Plaintiff,

Defendants.

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The following papers were considered on Plaintiff's motion seeking an order granting summary judgment and other relief requested:

PAPERS	NUMBERED
Notice of Motion/Affirmation/Affidavit/Exhibits A-M	1-16
Affirmation in Opposition	17
Memorandum of Law in Opposition	18
Reply Affirmation	19

Based on the foregoing papers the motion is GRANTED in part and DENIED in part.

Plaintiff alleges that on or about August 29, 2006, defendant Susan Ledgister ("Ledgister") executed a note with Mortgage Lenders Network USA, Inc. ("Mortgage Lenders") in the amount of $160,000.00. As collateral security on the note, the defendant also executed a mortgage on the premises located at 4 Consultant Drive 4-3M, Eastchester, New York 10707 to Mortgage Electronic Registration Systems Inc. ("MERS"), as nominee for Mortgage Lenders dated August 29, 2006, which was recorded with the Westchester County Clerk on March 19, 2009. The mortgage was assigned to Evestmac Funding I, LLC ("Evestmac"), by assignment dated September 25, 2009 and recorded with the Westchester County Clerk on November 19, 2009. The mortgage was next assigned to the plaintiff, BLB Trading, LLC ("BLB") by assignment dated July 19, 2011 and recorded with the Westchester County Clerk on August 2, 2011. Plaintiff alleges that Ledgister defaulted on her obligation by failing to make the payment due on January 1, 2009 and every payment thereafter. As a result of Ledgister's default, the plaintiff elected to accelerate the mortgage debt and declare the entire amount due and payable. Plaintiff avers to sending the 90 day notice as required by RPAPL § 1304.

The plaintiff filed a summons and complaint and notice of pendency on October 7, 2011 and an amended summons and complaint and amended notice of pendency on August 1, 2012 seeking to foreclose the mortgage. Plaintiff then filed a successive notice of pendency on April 23, 2014. Plaintiff was unable to serve the defendant and moved for service by publication, which this Court granted by Order of Publication dated May 31, 2012. Such Order also appointed Bruce Bozeman, Esq. as Guardian ad Litem and Military Attorney. The guardian ad litem/ military attorney then filed an answer, qualifying affirmation and a report of guardian ad litem & military attorney.

Ledgister filed an answer with affirmative defenses and counterclaims on June 4, 2012. All other defendants either defaulted or waived service all papers with specific exceptions. Plaintiff filed a reply to counterclaims and settlement conferences were held on April 17, 2013 and June 13, 2013, pursuant to the RPAPL requirements. No settlement was reached and plaintiff was given permission to proceed with prosecution of the action. Plaintiff now files the instant motion for summary judgment and other relief requested. Ledgister opposes the motion.

Plaintiff's summary judgment motion

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); CPLR 3212[b]). "To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the

defendant's default in payment," *Campaign v. Barba*, 23 AD3d 327 (2d Dept. 2005). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, *Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714, 717 (1986).

Plaintiff contends that there are no genuine issues of material fact and that the motion for summary judgment should be granted. The Plaintiff submitted an affidavit of merit and amount due from James Fratangelo, a manager at BLB. James Fratangelo stated in his affidavit that he had personal knowledge of the records, record making practices, and how such records are kept and maintained. James Fratangelo avers that based upon these records, the defendant has defaulted under the note for $156,677.62 owing to the plaintiff and no payment has been made to the plaintiff from the defendant despite demand, and by having failed to make monthly payment on January 1, 2009 to date. Plaintiff, therefore, elected to declare the entire balance of principal together with interest at a rate of 8.5688% per annum and from January 1, 2009 due and payable immediately.

Plaintiff has met its initial burden of establishing its entitlement to judgment as a matter of law by producing the mortgage, an affidavit averring to an original note, a copy of the note and an affidavit of merit from its foreclosure specialist evidencing the default in the payment obligations of Ledgister. *Baron Assoc., LLC v. Garcia Group Enters., Inc.*, 96 A.D.3d 793, 793, 946 N.Y.S.2d 611; *GRP Loan, LLC v. Taylor*, 95 A.D.3d 1172, 1173, 945 N.Y.S.2d 336; *Citibank, N.A. v. Van Brunt Props.*, LLC, 95 A.D.3d 1158, 1159, 945

N.Y.S.2d 330. The burden now shifts to the defendant to establish triable issues of fact.

Defendant, by her attorney[1], filed a memorandum of law in opposition arguing that there are questions of fact requiring denial of the motion. Defendant contends that there is no explanation for the two year delay in the assignment of the mortgage and the note from MERS to Evestmac; that the lost note affidavit is invalid because it does not provide details of how and when the note was lost and whether the affiant ever reviewed the original note and compared it to the copy; that the March 9, 2011 allonge states that Mortgage Lenders ceased operations on June 9, 2009, but three months after, on September 25, 2009, Mortgage Lenders via MERS assigned the mortgage without the note, to Evestmac; that the Vice President, Keith Douglas who executed the mortgage assignment, is not an officer of Mortgage Lenders, but was an employee of Acqura Loan Services, the mortgage servicing company for the loan; that MERS did not have authority as nominee to assign anything and the purported 2010 assignment alleged in the complaint is void; that the allonge violates UCC 3-202 and UCC 3-104 by not being affixed to the note; that the affidavit of merit omits any proof of possession of the note; that an affidavit by a person with personal knowledge was not submitted; that there was no proof that plaintiff had possession of the note when this action was commenced; that the motion fails to provide evidence in admissible form; that the out of state notaries on the assignments are invalid; that discovery is needed and that dismissal of the affirmative defenses and counterclaims should be denied.

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[1]Defendant's averred that her original attorney, Farrel R. Donald, Esq. stopped responding to her calls and therefore, she had to hire a new attorney, Susan Lask, Esq. However, it would seem that defendant's new attorney never filed a notice of appearance of a consent to change attorney.

Defendant's arguments regarding MERS not having authority to transfer the mortgage, plaintiff not submitting an affidavit by a person with personal knowledge, the evidence not being in admissible form and discovery being required are all without merit, based on either the applicable law or facts of the case. Plaintiff submitted a certificate of conformity with the affidavit of merit, curing this defect.

The Court now addresses the other issues. The mortgage was assigned on September 25, 2009 by MERS as nominee for Mortgage Lenders to Evestmac. However, as per the allonge, submitted to show transfer of the note, Mortgage Lenders ceased operations on June 9, 2009. This particular issue would be moot, since the mortgage passes with the debt as an inseparable incident," *[U.S. Bank, N.A. v. Collymore,* 68 A.D.3d at 754, 890 N.Y.S.2d 578; *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 939 N.Y.S.2d 120], if not for the one and a half year gap in the transfer of the mortgage and the transfer of the note. The allonge states that the note was not transferred to Evestmac until March 9, 2011. This discrepancy creates a question of fact.

Further, Elonna Ashuroua, a managing member of BLB avers in the lost note affidavit that the original note was misplaced during a transfer of the collateral file from Mortgage Lenders to Evestmac. Due to the time lag between the transfer of the mortgage and the transfer of the note, the Court is unclear if this lost of the note occurred in 2009 or in 2011.

UCC § 3-804 states that, "the owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his

production of the instrument and its terms". UCC § 3-804. To meet the requirements of the UCC, the lost note affidavit does not state enough facts pertaining to the loss, such as the approximate time period, especially in light of the gap between the transfer of the mortgage and the transfer of the note.

The Court is also unclear as to the role of Elonna Ashuroua. She signed the lost note affidavit as managing member of BLB, but also signed the allonge to the promissory note transferring the note from Evestmac to BLB. Is this person an employee of both BLB and Evestmac

Another issue that creates a question of fact is the allonges submitted transferring the note. UCC § 3-202 states that "[a]n indorsement must be written by or on behalf of the holder and on the instrument or **on a paper so firmly affixed** thereto as to become a part thereof". Since the original note was lost, and the Court cannot determine exactly when it was lost, the attachment or lack thereof of the allonge to the note, is also a question of fact to be determined.

Dismissal of the defendant's counterclaims

Defendant's first counter claim alleges that the plaintiff failed to provide Ledgister with a proper notice under the Federal Homeowners Counseling Act and that the plaintiff did not comply with the servicing responsibilities under a pooling and servicing agreement. There is no valid cause of action here, since the defendant has not established that the note was part of a pooling and servicing agreement and the premises are not the principal residence of the defendant. Therefore, the defendant's first counterclaim is dismissed.

Defendant's second counterclaim alleges unjust enrichment. Unjust enrichment is a quasi contract claim which is advanced in the absence of an actual contract. A [c]laim alleging unjust enrichment may not be maintained where there is a valid and express agreement between the parties which explicitly covers the same specific subject matter for which the implied agreement is sought." *MT Property, Inc. v Ira Weinstein and Larry Weinstein, LLC*, 50 A.D.3d 751, 752, 855 N.Y.S.2d 627, 628 (2d Dept. 2008). The defendant claims that because the plaintiff does not have the original note and allegedly does not have standing that there is no contract. However, even though the plaintiff lost the original note, the plaintiff provided a copy of the note, a lost note affidavit averring to the existence of a note executed by the defendant, an affidavit of merit based upon personal knowledge, and a mortgage signed by the defendant. For the defendant to claim that there is no agreement or contract, is disingenuous and therefore, the second counterclaim is dismissed.

Defendant's third counterclaim is for slander of title. The "[e]lements of [a] cause of action for slander of title are (1) communication falsely casting doubt on validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages." *39 College Point Corp. v. Transpac Capital Corp.* 27 A.D.3d 454, 455, 810 N.Y.S.2d 520, 521 (2d Dept. 2006). Here, as with the prior counterclaim, the defendant's claim that there is no contract (mortgage or note) is disingenuous. Defendant has not provided any affidavit stating that she never executed a note and/or mortgage and therefore, the mortgage was wrongfully recorded. It is one thing to claim that the plaintiff has no standing to bring the action, it is quite another to claim that the plaintiff has

wrongfully recorded a mortgage against the defendant. Additionally, the plaintiff provided documentary proof of the mortgage executed by the defendant. Therefore, the defendant's third counterclaim is dismissed.

Defendant's fourth counterclaim is for fraud. To establish a cause of action for fraud, the claimant must show that (1) the opponent misrepresented or concealed a material fact, (2) the opponent knew that the representation was false, (3) that it was made for the purpose of inducing the other person to rely on it, (4) that the person justifiably relied on the misrepresentation, (5) and was injured as a result of the reliance. *Levin v. Kitsis*, 82 A.D.3d 1051, 920 N.Y.S.2d 131 (2d Dept. 2011). Defendant has not shown that she justifiably relied on a material representation made by the plaintiff and was injured as a result. As stated previously, the plaintiff has provided a copy of the mortgage and note executed by the defendant and the defendant has failed to provide any affidavit averring to the falsity of those documents.

Plaintiff also seeks to have the fictitious names JOHN DOE "1" though "12" and unknowns of Susan Ledgister A/K/A removed from the caption. The Court will grant this relief.

Accordingly, the plaintiff's motion is GRANTED in part and DENIED in part. The parties are directed to appear in the Settlement Conference Part on February 17, 2015 at 9:15 am in Courtroom 1600..

To the extent any relief requested in Motion Sequence 1 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
January 9, 2015

HON SAM D. WALKER, J.S.C.