

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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THE BANK OF NEW YORK MELLON TRUST
COMPANY NA, FKA THE BANK OF NEW YORK
TRUST COMPANY, NA AS SUCCESSOR IN
INTEREST TO JP MORGAN CHASE BANK NA AS
TRUSTEE FOR NOMURA ASSET ACCEPTANCE
CORPORATION MORTGAGE PASS THROUGH
CERTIFICATES, SERIES 2004-AR1,

DECISION AND ORDER

Index No. 380904/2009

Plaintiff,

- against -

EDDIE SACHAR, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, NEW
YORK NATIONAL BANK, JOHN DOE ("Said name
being fictitious, it being the intention of Plaintiff to
designate any and all occupants of premises being
foreclosed herein, and any parties, corporations or
entities, if any, having or claiming an interest or lien upon
the mortgaged premise.),

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated October 21, 2010 and the affirmation, affidavit, exhibits, and memorandum of law submitted in support thereof; defendant's affirmation in opposition dated January 6, 2011 and the affidavit annexed thereto; plaintiff's further affidavit in support dated February 10, 2011 and the reply memorandum of law submitted therewith; and due deliberation; the court finds:

In this action to foreclose a mortgage encumbering real property known as 3062 Kingsbridge Terrace, Bronx (Block 3253, Lot 202), plaintiff moves against defendant Eddie Sachar for an order: (i) granting summary judgment against defendant dismissing his answer, affirmative defenses, and counterclaims; (ii) limiting defendant's answer to a notice of appearance; (iii) granting plaintiff an Order

of Reference to compute the amount due; (iv) declaring the remaining defendants in default and amending the caption accordingly; (v) ordering the Clerk of the County of Bronx to correct an error on the index and mortgage as to the physical description of the premises recorded and filed September 17, 2004; and (vi) ordering that plaintiff's lien is a valid first lien on the premises. Defendant had executed a mortgage with Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the lender, Fairmont Funding, Ltd. in April 2004. In or about September 2008, defendant defaulted under the terms of the loan. MERS, who was also the mortgagee of record, subsequently assigned the mortgage to plaintiff in April 2009.

A *prima facie* case of entitlement to summary judgment in a foreclosure action is made upon presentation of proof of ownership of the mortgage documents from the underlying transaction and undisputed evidence of nonpayment. *See Red Tulip, LLC v. Neiva*, 44 A.D.3d 204, 842 N.Y.S.2d 1 (1st Dep't 2007), *leave denied*, 13 N.Y.3d 709, 918 N.E.2d 961, 890 N.Y.S.2d 446 (2009). While defendant does not dispute that he has not made any monthly mortgage payments since September 2008, defendant submits that plaintiff lacks standing to maintain this action as the assignment of the mortgage documents was made not by the original lender, but by MERS to plaintiff. When a defendant in a foreclosure action contests plaintiff's standing to bring suit, it is incumbent upon plaintiff to "prove its standing in order to be entitled to relief." *See US Bank Nat'l Assn. v. Madero*, 2011 NY Slip Op 505 (2d Dep't Jan. 25, 2011), citing *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753, 890 N.Y.S.2d 578, 580 (2d Dep't 2009). Plaintiff must establish that it is the holder or assignee of both the mortgage and the note, as an assignment of the mortgage without an assignment of the underlying debt is a nullity. *Id.* at *2.

Plaintiff has shown that the mortgage contract conferred broad powers upon MERS as nominee to act on the original lender's behalf. *See US Bank, N.A. v. Flynn*, 27 Misc.3d 802, 897 N.Y.S.2d 855

(Sup. Ct. Suffolk County 2010); *cf. Bank of New York v. Alderazi*, 28 Misc.3d 376, 900 N.Y.S.2d 821 (Sup. Ct. Kings County 2010) (stating that MERS, as nominee, lacked capacity to assign mortgage). The mortgage expressly states that “MERS holds only legal title to the rights granted by me in this Security Instrument, but, if necessary to comply with law or custom, MERS . . . has the right . . . to take any action required of Lender including, but not limited to, the right to foreclose and sell the Property” and that MERS could “take any action required of Lender” including but not limited to releasing or canceling the mortgage. Defendant offers no other proof that the mortgage and note were not properly assigned.

Plaintiff has also provided sufficient documentation that it was (and is) the holder of the underlying mortgage documents at the time of the commencement of this action. Plaintiff has shown that the assignment of the mortgage was not made retroactively. *See Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 887 N.Y.S.2d 615 (2d Dep’t 2009) (stating that an assignee of a note and mortgage lacks standing to commence a foreclosure action prior to the execution of the assignment); *see also Lasalle Bank Nat’l Ass’n v. Ahearn*, 59 A.D.3d 911, 875 N.Y.S.2d 595 (3d Dep’t 2009) (retroactive assignment executed after the filing of summons and complaint does not confer standing). Although the assignment refers only to an assignment of the mortgage, physical delivery of the note is sufficient to transfer the obligation, *see U.S. Bank, N.A. v. Collymore, supra*, and plaintiff has established that the note was delivered to it prior to the commencement of this action. Thus, plaintiff may pursue this action. *See Security Pac. Natl. Bank v. Evans*, 31 A.D.3d 278, 279, 820 N.Y.S.2d 2, 3 (1st Dep’t 2006), *appeal dismissed*, 8 N.Y.3d 837, 862 N.E.2d 86, 830 N.Y.S.2d 8 (2007), citing *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

Contrary to defendant’s contention, proof in support of a summary judgment motion may be in

the form of an affidavit by a person with knowledge of the facts. *See* CPLR 3212; *see also* *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 828 N.E.2d 604, 795 N.Y.S.2d 502 (2005). The affiant, Jaime Wells (“Wells”) of Wells Fargo Bank, N.A. as the successor to Wells Fargo Home Mortgage, Inc., doing business as America’s Servicing Company (“ASC”), has established that ASC has serviced defendant’s loan since 2005, and possesses knowledge with respect to this action and to defendant’s default. The mortgage expressly permits a “loan servicer” to collect periodic payments and perform other mortgage loan servicing obligations, and defendant acknowledged that ASC serviced his loan in three separate letters he sent to ASC prior to the default. ASC also mailed at least four separate notices detailing defendant’s default to his home address in Great Neck, New York, thus satisfying the conditions precedent found in the mortgage

Plaintiff has also established defendant’s thirteenth affirmative defense and third counterclaim, asserting a claim for plaintiff’s purported breach of good faith and fair dealing, is without merit as defendant has failed to comply with the terms of the agreement. Plaintiff has also shown that defendant’s remaining defenses are without merit.

Defendant fails to raise an issue of triable fact in opposition, as his affidavit fails to address plaintiff’s claim that he defaulted on payment of the mortgage, despite the general denial contained in his verified answer. *See New York State Mortgage Loan Enforcement & Admin. Corp. v. North Town Phase II Houses, Inc.*, 191 A.D.2d 151, 594 N.Y.S.2d 183 (1st Dep’t 1993). Defendant has also offered no evidentiary proof that plaintiff miscalculated the amount overdue on the mortgage or the fees associated with his default. Nor has defendant identified any conduct to support his affirmative defenses of unconscionability, fraud, or equitable estoppel. *See Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 534 N.E.2d 824, 537 N.Y.S.2d 787 (1988); *Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dep’t 2003); *BWA Corp. v. Alltrans Express U.S.A., Inc.*, 112 A.D.2d 850, 493

N.Y.S.2d 1 (1st Dep't 1985). Similarly, defendant fails to identify how plaintiff violated the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. §§ 1602 and 1639, New York Executive Law § 63(12), New York General Business Law § 349, and Article 12-D of New York Banking Law.

Defendant also executed an "Owners Estoppel Certificate" that states "there are no defenses or offsets to said mortgage or to the bond or note which it secures." Courts will enforce an estoppel certificate, even in light of a valid defense, "[u]nless (1) there is an equitable basis to invalidate the certificate, such as duress, or (2) the assignee took with knowledge of some defect in the manner in which the certificate was obtained." *Quantum Corporate Funding v. L.P.G. Assocs.*, 246 A.D.2d 320, 323, 667 N.Y.S.2d 702, 705 (1st Dep't 1998). Defendant has offered no evidence to invalidate the estoppel certificate.

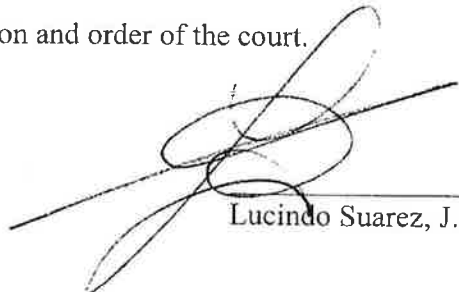
Finally, defendant has not opposed plaintiff's application to correct a recording error and to correct the description of the premises on the mortgage and in the index pertaining to the premises.

Accordingly, it is

ORDERED, that plaintiff's motion for, *inter alia*, summary judgment against defendant Eddie Sachar and for an order of reference is granted in accordance with the annexed Order Granting Summary Judgment and Appointing Referee to Compute amended and signed this date.

This constitutes the decision and order of the court.

Dated: March 3, 2011



Lucindo Suarez, J.S.C.