MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

U.S. BANK NATIONAL ASSOCIATION, etc. x	INDEX NO. 2646/2010
- against -	MOTION DATE: October 19, 2010
V.M.E.P. CORP., et al., etc.	MOTION SEQ. NO. 1
x	BY: ELLIOT, J.
	DATED: February 24, 2011

Plaintiff commenced this action by filing a copy of the summons and complaint with the County Clerk on February 1, 2010. Plaintiff alleges that defendant V.M.E.P. Corp. executed, acknowledged and delivered a written mortgage to GreenPoint Mortgage Funding, Inc. (GreenPoint) on the real property known as 108-23 Jamaica Avenue, Richmond Hill, New York, to secure repayment of a note, evidencing a loan in the principal amount of $550,000.00.00, payable with interest. Plaintiff also alleges that as collateral security for the mortgage loan, defendant V.M.E.P. Corp. executed an assignment of leases and rents, and defendant Tekchand Chetram executed an unconditional guaranty, whereby Chetram guaranteed the payment obligations of defendant V.M.E.P. Corp. pursuant to the note and mortgage.

Plaintiff further alleges that the original mortgage was never recorded with the New York City Register, and is presumed lost. Plaintiff seeks a judgment impressing an

equitable mortgage on the property and directing the New York City Register to index the copy of the mortgage against the premises. Plaintiff also seeks to declare that it holds the equitable first mortgage and underlying debt as a subsequent assignee of GreenPoint, and that the interests of defendants New York City Department of Finance, New York State Department of Taxation and Finance, and New York City Environmental Control Board are subject and subordinate to the equitable mortgage. Lastly, plaintiff seeks to foreclosure the equitable mortgage, alleging that defendants V.M.E.P. Corp. and Chetram defaulted under the terms of the loan documents by failing to make the payment due on October 1, 2009 and monthly thereafter.

Defendants V.M.E.P. Corp. and Chetram served a joint answer, denying the material allegations of the complaint, and asserting various affirmative defenses. Defendants New York City Department of Finance, and New York State Department of Taxation and Finance each served and filed a notice of appearance and waiver. Plaintiff did not serve defendants "John Doe #7" through "John Doe #10" with process. The remaining defendants have not appeared, moved with respect to the complaint or answered.

Defendants V.M.E.P. Corp. and Chetram move for summary judgment dismissing the complaint asserted against them based upon lack of standing. They contend that they never gave any mortgage to plaintiff and the complaint fails to identify any instrument assigning any interest in the mortgage to plaintiff. They also contend that defendant V.M.E.P. Corp. is the named defendant in another action entitled *Aurora Bank,*

FSB v V.M.E.P. Corp. (Supreme Court, Queens County, Index No. 12414/2010), commenced following the institution of this action. In that action, Aurora Bank, FSB (Aurora) seeks, among other things, to declare that it holds an equitable mortgage upon the property effective as of April 20, 2007 and direct V.M.E.P. Corp. to re-execute the mortgage dated April 20, 2007. The allegations in the complaint in that action (Index No. 12414/2010) relate to the same alleged lost or misplaced original mortgage securing the same loan evidenced by the same promissory note as involved herein.

Plaintiff opposes the motion and cross-moves for summary judgment in its favor against defendants V.M.E.P. Corp. and Chetram, to strike the answer of defendants V.M.E.P. Corp. and Chetram, to substitute Leila Roopnarine, Deodat Roopnarine, Alisha Sugrim, Lachmin Sugrim, Vishaun Sugrim and Maranatha Human Services, Inc., in place and stead of defendants "John Doe #1" through "John Doe #6," for leave to amend the caption to reflect such substitution and to delete reference to defendants "John Doe #7" through "John Doe #10," inclusive, for leave to enter a default judgment as against those defendants other than defendants V.M.E.P. Corp. and Chetram, and leave to appoint a referee to compute the amount due and owing plaintiff and examine and report whether the mortgaged premises can be sold in one parcel. Defendants V.M.E.P. Corp. and Chetram oppose the cross motion.

With respect to the motion by defendants V.M.E.P. Corp. and Chetram for summary judgment dismissing the complaint, and that branch of the cross motion by plaintiff

pursuant to CPLR 3212 for summary judgment against defendants V.M.E.P. Corp. and Chetram, it is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

An equitable mortgage is appropriate where there is unequivocal evidence that the parties intended to create a mortgage against a specific piece of property to secure an obligation but the instrument is not enforceable as a mortgage at law (*see Mailloux v Spuck*, 87 AD2d 736, 737 [1982], *lv denied* 56 NY2d 507 [1982]; *Fremont Inv. & Loan v Delsol*, 65 AD3d 1013 [2009]). An assignee of the lender may seek to impose and foreclose an equitable mortgage (*see e.g. New York TRW Title Ins. Inc. v Wade's Canadian Inn and Cocktail Lounge, Inc.*, 241 AD2d 845 [1997]). Where a plaintiff's standing is put into issue by a defendant, the plaintiff must prove its standing to be entitled to relief (*see e.g. U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2007]).

Plaintiff asserts the mortgage loan proceeds were fully disbursed, and GreenPoint and defendant V.M.E.P. Corp. mutually intended that the mortgage be a first mortgage lien, fully encumbering the subject premises. Plaintiff also asserts that although a photocopy of the original mortgage exists, the original mortgage itself is missing and presumed lost, having never been recorded, or received by GreenPoint's assignee, Aurora

Bank, FSB f/k/a Lehman Brothers Bank, FSB, or by plaintiff. Plaintiff further asserts that it is named as the assignee in a written assignment of the beneficial interest under the original mortgage. Plaintiff claims an equitable mortgage should be impressed to protect its interest in the property, and that the liens of defendants New York City Department of Finance, New York State Department of Taxation and Finance and New York City Environmental Control Board are judgment liens, and as such, the equitable mortgage takes preference over them. Plaintiff also claims that the *Aurora* action has been voluntarily discontinued.

In support of its cross motion and in opposition to the motion by defendants V.M.E.P. Corp. and Chetram, plaintiff offers, among other things, a copy of the pleadings, the note, with a first allonge denominated as "PREPAYMENT FEE ALLONGE" made as of April 20, 2007, endorsed without recourse by Larry R. Kern, assistant vice president of GreenPoint, to the order of "Aurora Bank FSB f/k/a Lehman Brothers Bank, FSB," and a second allonge with an undated endorsement without recourse by Jennifer Henninger, as special assets administrative assistant for Aurora Bank FSB, from Aurora Bank FSB "FORMERLY KNOWN AS LEHMAN BROTHERS BANK, FSB" to "U.S. Bank National Association, as trustee (the 'Trustee') under the Trust Agreement dated as of September 30, 2007, among Structured Asset Securities Corporation, as Depositor, Lehman Brothers Bank, FSB, as Servicer, and the Trustee relating to Lehman Brothers Small Business Commercial Mortgage Pass-Through Certificates, Series 2007-3." Plaintiff also offers a copy of the original mortgage, signed by defendant Chertram on behalf of V.M.E.P.

Corp., a title insurance policy with GreenPoint as the named insured, an affirmation of regularity of its counsel, and the affidavit of Jack Jacob, the vice-president and regional manager of special assets of Aurora Bank FSB, f/k/a Lehman Brothers Bank FSB, attorney in fact for plaintiff. Plaintiff additionally offers a copy of an assignment, dated April 30, 2007, executed by Patrick Nygard, vice-president of GreenPoint of the mortgage from GreenPoint to "Aurora Bank FSB f/k/a Lehman Brothers Bank, FSB," and subsequent assignment dated January 12, 2010, executed by Steven Caroulis, vice-president of Aurora Bank FSB f/k/a Lehman Brothers Bank, FSB, of the mortgage from Aurora Bank FSB f/k/a Lehman Brothers Bank, FSB to plaintiff.

Defendants V.M.E.P. Corp. and Chetram do not contest that GreenPoint and defendant V.M.E.P. Corp. intended to create a first mortgage lien against the subject property. Rather, they assert the assignment of mortgage from GreenPoint to "Aurora Bank FSB f/k/a Lehman Brothers Bank" is a suspect document, not worthy of consideration on the issue of whether plaintiff has an interest in the mortgage, and standing to bring this action.[1] They contend that the reference to "Aurora Bank FSB, f/k/a Lehman Brothers Bank" as the named assignee on the face of the assignment indicates an alteration to the original document, insofar as Lehman Brothers Bank, FSB (Lehman) had yet to collapse, file for

[1] To the extent defendants V.M.E.P. Corp. and Chetram also complain that the assignment of the assignment of leases and rents was altered subsequent to its execution on May 1, 2007, the apparent alteration has no bearing on the issue of whether plaintiff has an equitable interest in the property as an assignee of the beneficial interest of the original lender in the mortgage.

bankruptcy protection or change its corporate title as of the date of the assignment. They also assert the commencement of the *Aurora* action by Aurora raises an issue of fact as to whether Aurora is the holder of any rights under the claimed equitable mortgage.

Plaintiff concedes that Lehman changed its corporate title effective April 27, 2009. Plaintiff, however, has established, by the reply affidavit of Mr. Jacob, that prior to the change in corporate title of Lehman to Aurora, Lehman purchased the note, mortgage and assignment of leases and rents from GreenPoint as evidenced by a purchase and sale agreement dated January 1, 2007, and that pursuant to such agreement, the original note, a copy of the original mortgage and the original assignment of leases and rents were physically delivered to Lehman on or about June 1, 2007. According to Mr. Jacobs, contemporaneous with the delivery of those documents, Lehman received from GreenPoint an original undated allonge, and original assignment of the mortgage acknowledged on April 20, 2007, and an original assignment of leases and rents acknowledged on May 1, 2007. Mr. Jacob states both the assignment of the mortgage and the assignment of leases and records received by Lehman were incomplete in that the documents did not designate any entity as the assignee, or reference any recording information for the original mortgage and assignment of leases and rents. Mr. Jacob also states that subsequent to the change in corporate title of Lehman to Aurora, and in furtherance of its acquisition of the note and rights under the mortgage, Aurora transcribed its name as the assignee on both the original assignment of mortgage and the original assignment of leases and rents previously

received from GreenPoint. He further states that Aurora thereafter transferred ownership of the subject note, mortgage and assignment of leases and rents to plaintiff by a trust agreement dated September 30, 2007 with plaintiff as trustee.

It appears that Aurora no longer claims to be the holder of the equitable mortgage sought to be impressed by plaintiff herein. The counsel representing Aurora in the action under Index No. 12414/2010 filed an affirmation with the County Clerk to cancel the notice of pendency therein, as well as a copy of a "NOTICE OF VOLUNTARY DISMISSAL" executed by such counsel.[2]

Under these circumstances, plaintiff has established that GreenPoint and defendant V.M.E.P. Corp. intended to create a first mortgage lien, their agreement to make such mortgage culminated in an original signed mortgage, and but for the loss or misplacement of such original, the mortgage would have been recorded. Plaintiff, furthermore, has established that the assignment of the rights, title and interest in the mortgage to it was effectuated prior to the time the action was commenced. Plaintiff has an equitable interest in the mortgage and underlying debt (*see Katz v East-Ville Realty Co.*, 249 AD2d 243 [1998] [noting that an assignor must join a party to whom it assigned the mortgage, as that party "possesses a security interest in the property"]).

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[2] This court makes no determination as to whether the *Aurora* action (Index No. 12414/2010) has been properly discontinued without court order pursuant CPLR 3217(a).

Plaintiff, therefore, has standing to bring this action. Thus, the motion by defendants V.M.E.P. Corp. and Chetram for summary judgment dismissing the complaint asserted against them based upon lack of standing is denied, and that branch of the motion by plaintiff to strike the third, fourth and fifth affirmative defenses is granted.

Plaintiff has made a prima facie showing of entitlement to summary judgment against defendants V.M.E.P. Corp. and Chetram on the causes of action to impress an equitable mortgage against the subject premises and for foreclosure of the equitable mortgage. Plaintiff has demonstrated that defendants V.M.E.P. Corp. and Chetram are in default in payment under the equitable mortgage. The burden shifts to defendants V.M.E.P. Corp. and Chetram to raise a triable issue of fact regarding those remaining defenses asserted in their answer (*see Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [2005]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

As a first affirmative defense, defendants V.M.E.P. Corp. and Chetram assert the complaint fails to state a cause of action. They did not cross-move to dismiss the complaint on this ground (*see Butler v Catinella*, 58 AD3d 145, 151 [2008]), and in any event, plaintiff has established its prima facie entitlement to summary judgment. The first affirmative defense is surplusage, and the branch of the cross motion by plaintiff to strike such defense in the amended answer of defendants V.M.E.P. Corp. and Chetram is denied as moot.

The second affirmative defense asserted by defendants V.M.E.P. Corp. and Chetram is based upon lack of jurisdiction over them. To the extent such defense is premised upon a claim of lack of subject matter jurisdiction, such defense is without merit (*see* NY Const, art VI, § 7[a]; *see Security Pacific Nat. Bank v Evans*, 31 AD3d 278 [2006]). To the extent it is based upon lack of personal jurisdiction due to improper service of process, defendants V.M.E.P. Corp. and Chetram have failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of their answer, and do not seek to extend the time upon the ground of hardship (*see* CPLR 3211[e]). As a consequence, the defense based upon lack of proper service is deemed waived (*see* CPLR 3211[e]; *Reyes v Albertson*, 62 AD3d 855 [2009]; *Dimond v Verdon*, 5 AD3d 718 [2004]; *DeSena v HIP Hosp., Inc.*, 258 AD2d 555 [1999]). That branch of the cross motion by plaintiff to strike the second affirmative defense is granted.

To the extent defendants V.M.E.P. Corp. and Chetram assert, as a sixth affirmative defense, that the claims of plaintiff are not ripe for review, such defense is without merit. The failure to record the original mortgage and pay the mortgage tax does not render the note and mortgage unenforceable provided that the mortgage tax (*see* Tax Law § 253) is paid prior to judgment or final order (*see* Tax Law § 258[1]; *see Commonwealth Land Tit. Ins. Co. v Lituchy*, 161 AD2d 517 [1990]). Prior to obtaining a final judgment enforcing its mortgage interest, plaintiff will have to present evidence of payment of the mortgage tax (*see Commonwealth Land Tit. Ins. Co. v Lituchy*, 161 AD2d 517 [1990],

supra). The failure to record the assignments, likewise, does not constitute a bar to enforcement of plaintiff's rights (*see* Tax Law § 258). Plaintiff has elected to accelerate the mortgage debt in its complaint (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]).

To the degree defendants V.M.E.P. Corp. and Chetram claim plaintiff has failed to comply with a condition precedent to the commencement of this suit, they have failed to demonstrate the subject mortgage was a subprime mortgage, or a high-cost home loan or otherwise was subject to the requirements of RPAPL 1302 and 1304 and Real Property Law § 595-a (*see e.g. Irwin Mtge. Corp. v Davis*, 72 AD3d 743 [2010]). In addition, they have failed to show plaintiff was required to provide them with a notice of default under the mortgage or note prior to commencement of this foreclosure action. That branch of the cross motion by plaintiff to dismiss the sixth affirmative defense asserted by defendants V.M.E.P. Corp. and Chetram is granted.

As a seventh affirmative defense, defendants V.M.E.P. Corp. and Chetram claim that the complaint is not "certified." The court is unaware of any statute, regulation or court rule which requires certification of the complaint in this action. The branch of the cross motion by plaintiff to dismiss the seventh affirmative defense asserted by defendants V.M.E.P. Corp. and Chetram is granted.

Defendants V.M.E.P. Corp. and Chetram have failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense.

Plaintiff, therefore, is entitled to summary judgment in its favor against them *(see Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [1997]; *DiNardo v Patcam Serv. Station*, 228 AD2d 543 [1996]). That branch of the cross motion by plaintiff for summary judgment in its favor against defendants V.M.E.P. Corp. and Chetram is granted.

That branch of the cross motion for leave to enter a default judgment as against defendants Leila Roopnarine, Deodat Roopnarine, Alisha Sugrim, Lachmin Sugrim, Vishaun Sugrim and Maranatha Human Services, Inc., (as well as to substitute said defendants in the place and stead of "John Doe # 1" through "John Doe # 6," and striking out "John Doe # 7" through "John Doe # 10"), New York City Department of Finance, New York State Department of Taxation and Finance and New York City Environmental Control Board is granted. The judgment liens of defendants New York City Department of Finance, New York State Department of Taxation and Finance and New York City Environmental Control Board are subject and subordinate to the equitable mortgage (*see Leonardo v Siegal*, 150 AD2d 760 [1989]; *Blum v Krampner*, 28 NYS2d 62 [1940], *affd* 261 App Div 989 [1941]; *Buckley v Chevron, U.S.A., Inc.*, 149 Misc 2d 476 [1991]).

That branch of the motion for leave to appoint a referee is granted.

Settle order.

J.S.C.