EMO DECISION & ORDER

INDEX No. 11-14385

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/7/13
ADJ. DATES 6/21/13
Mot. Seq. # 001 - MOTD
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CITIMORTGAGE, INC.,

Plaintiff,

-against-

LEON H. IVEY, DENISE TYSON a/k/a DENISE SANDS, ERIN CAPITAL MANAGEMENT, LLC, UNITED STATE OF AMERICA ACTING THROUGH THE IRS and "JOHN DOE" and "MARY DOE" (said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest or lien upon the premises being foreclosed herein.)

Defendants.

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Upon the following papers numbered 1 to 10 read on this motion by the plaintiff for accelerated judgments, substition and/or deletion of party defendants and the appointment of a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1- 5; 6-7; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 8-9; Reply papers ____; Other 10 (various reports and correspondence submitted on behalf of defendant Ivey; (~~and after hearing counsel in support and opposed to the motion~~)the instant motion, it is,

ORDERED that this motion (#001) by the plaintiff for accelerated judgments on its complaint and an order of reference is considered under CPLR 3212, 3215 and RPAPL § 1321 and is granted to the extent set forth below.

The plaintiff commenced this action in April of 2011 to foreclose a May 24, 2007 mortgage given on real property situated in Suffolk County by defendant, Leon H. Ivey, to secure a mortgage note of the same date executed by such defendant in favor of FBM, LLC. The plaintiff alleges that a default in payment occurred on September 1, 2009 and that such default continues to date.

Issue was joined by service of an answer by the defendant mortgagor in May of 2011 by his then counsel, Andrew M. Doftosky P.C. Therein, defendant Ivey asserts but one affirmative defense, namely, that the plaintiff lacks standing to maintain this action. In September of 2011, the defendant changed attorneys under a consent form, pursuant to which, the Litvin Law Firm of Brooklyn, New York was substituted for the Doftosky firm. On December 27, 2011, the law firm of Davidson & Fink was substituted for the plaintiff's attorney of record. On June 20, 2013, one day prior to the submission of this motion, defendant Ivey appeared herein in a self represented capacity, via a substitution executed by him and the Litvin Law Firm.

By the instant motion, the plaintiff, by its counsel, moves for summary judgment dismissing the answer of defendant Ivey and for summary judgment on its complaint against him. The plaintiff further seeks an order substituting its purported assignee, PennyMac Corp., for itself as plaintiff in this action pursuant to CPLR 1018 and the deletion of the unknown defendants together with the appointment of a referee to compute pursuant to RPAPL 1321.

Defendant Ivey opposes the motion on various grounds including his pleaded defense of a lack of standing on the part of the plaintiff. In letter objections, the plaintiff challenges defendant Ivey's pro se opposition due to his appearance herein by counsel. However, the court rejects these arguments, since the plaintiff improperly served the moving papers upon defendant Ivey's original counsel of record. Morever, the plaintiff's receipt of defendant Ivey's opposing papers, coupled with the filing of the substitution of Mr. Ivey for his attorneys of record prior to the submission of this motion and the court's receipt of reply papers in which no further objections to defendant Ivey's pro se opposition papers were advanced, all warrant rejection of the plaintiff's procedural objections to defendant Ivey's submissions. Upon review of the parties submission and for the reasons stated, the motion is granted to the extent set forth below.

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"Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact" (***Zanfini v Chandler***, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010], *quoting* ***HSBC Bank USA v Merrill***, 37 AD3d 899, 900, 830 NYS2d 598 [2d Dept 2010]; *see* ***Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***US Bank N.A. v Eaddy***, 79 AD3d 1022, 1022, 914 NYS2d 901 [2010]). Where, as here, an answer served includes the defense of standing or lack of capacity to sue, the plaintiff must further establish its standing to succeed on a motion for summary judgment (*see* ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 242, 837 NYS2d 247 [2d Dept 2007]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see* ***US Bank of NY v Silverberg***, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; ***Wells Fargo Bank, N.A. v Marchione***, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]; ***US Bank, N.A. v Collymore***, 68 AD3d 752, *supra*). Because "a mortgage is merely security for a debt or other obligation and cannot

exist independently of the debt or obligation"(***US Bank of NY v Silverberg***, 86 AD3d 274, *supra*), a mortgage passes as an incident of the note upon its written assignment, physical delivery or indorsement and delivery (*see* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, 2013 WL 3198184 [2d Dept 2013]; ***US Bank Natl. Ass'n v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; ***Deutsche Bank Trust Co. Am. v Codio,*** 94 AD3d 1040, 943 NYS2d 545 [2d Dept 2011]). However, "a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it," since a mortgage is merely security for a debt and cannot exist independently of it (***U.S. Bank N.A. v Dellarmo***, 94 AD3d 746, 748, 942 NYS2d 122 [2d Dept 2012]; *see* ***HSBC Bank USA v Hernandez***, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; ***Citimortgage, Inc. v Stosel***, 89 AD3d 887, 888, 934 NYS2d 182 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Barnett***, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2012]; ***Bank of NY v Silverberg***, 86 AD3d 274, *supra*; ***US Bank Natl. Ass'n v Madero***, 80 AD3d 751, 915 NYS2d 612 [2d Dept 2011]).

Holder status is established where the plaintiff possesses the mortgage note which bears, on its face or by allonge, a special indorsement payable to the order of the plaintiff or where it takes possession of a mortgage note that contains an indorsement in blank likewise affixed, to which note, the mortgage follows as incident thereto (*see* UCC §1-201[20]; §3-202; §3-204; §9-203[g]; ***Spielman v Manufacturers Hanover Trust Co.***, 60 NY2d 221, 469 NYS2d 69 [1983]; ***Deutsche Bank Trust Co. Am. v Codio***, 94 AD3d 1040, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept. 2007]; ***First Trust Natl. Ass'n v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *aff'd,* 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]). New York's Uniform Commercial Code (UCC) §1-201(20) defines "holder" as "a person who is in possession of a document of title, an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." A person becomes the holder of an instrument through its negotiation to him or her (*see* UCC §3-202[1]). Where the instrument is payable to order, it is negotiated by delivery and all necessary indorsements and where it is payable to bearer by virtue of an indorsement in blank or otherwise, delivery alone is sufficient (*see id.*). Delivery is defined as the "voluntary transfer of possession" and is thus an act of volition (UCC §1-201[14]). Constructive delivery of an instrument such as a promissory note to an agent has long been recognized as constituting a valid transfer by delivery (*see* ***Deutsche Bank Natl. Trust Co. v Whelan***, 107 AD3d 931, 2013 WL 3198184 [2d Dept 2013] *supra*; ***Depew Dev, Inc. v AT & A Trucking Corp***, 210 AD2d 974, 621 NYS2d 242 [4th Dept 1994]; ***Wolfin v Security Bank***, 170 App.Div. 519, 156 NYS 474, 476 [1915]; *see also* ***Corporacion Venezolana de Fomento v Vintero Sales Corp***., 452 F.Supp. 1108 [SDNY 1978]). The essential element of a constructive delivery is that it be made with the unmistakable intention of transferring title to the instrument (*see id* at 1117).

It appears from the record adduced on this motion that plaintiff Citimortgage, Inc. is no longer prosecuting its pleaded claims in this action and that such prosecution has been taken up by PennyMac, Loan Services, LLC , on behalf PennyMac, Corp., the assignee of the mortgage under the terms of an assignment by Citimortgage, Inc., dated October 23, 2012. It is upon this assignment which PennyMac Corp. relies to support its demands for its substitution for the named plaintiff and caption amendment to reflect same (*see* CPLR 1018). A review of said written assignment reveals, however, that while it contains an assignment of the mortgage, it does not contain an assignment of the underlying note or the

underlying indebtedness secured thereby. This assignment is thus insufficient to transfer ownership of the note and mortgage to PannyMac Corp., as assignee of the named plaintiff, Citimortgage, Inc. (*see* ***Bank of NY v Silverberg***, 86 AD3d 274, *supra*; ***US Bank Natl. Ass'n v Madero***, 80 AD3d 751, *supra*; *cf.*, ***Chase Home Fin., LLC v Miciotta***, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]). Those portions of the instant motion wherein the plaintiff, through its counsel and its purported assignee, seeks to substitute PennyMac Corp. as the plaintiff in this action are thus denied. Such denial is, however, without prejudice to a further application for the same relief upon due proof of the plaintiff's transfer of the note and mortgage to PennyMac Corp, by assignment or otherwise, and due proof of the retention of plaintiff's counsel's by PennyMac Corp., for purposes of pursing this action.

The remaining portions of the instant motion are granted. According to the affidavit of merit attached to the moving papers, PennyMac's servicer through its default specialist, the plaintiff, Citimortgage, allegedly acquired the note and mortgage by "delivery prior to the commencement of the action as evidenced by an Assignment of Mortgage dated September 28, 2008 that was recorded in the office of the Suffolk County Clerk on October 27, 2008" (*see* ¶ 7 of the affidavit of Spencer Nagy, Default Specialist for PennyMac Loan Servicers, LLC", attached to the moving papers). The assertion is predicated upon Mr. Nagy's personal knowledge of the plaintiff or the plaintiff's servicing agent's records, including, the mortgage account ledgers, in which all payments are received and posted and in which acts, transactions occurrences and events material to the loan are recorded by those duty bound to record such things an maintain in the ordinary course of business (*see* id., ¶¶ 4;5;8). These allegations are not challenged by defendant Ivey and they support counsel's claim that the note was tendered to the plaintiff prior to the commencement of this action in accordance with the allonge attached to the note which bears a special indorsement payable to the order of the plaintiff, Citimortgage, Inc. This uncontroverted proof renders moot any discussion of the effectiveness of the assignment of the mortgage by a nominee of the original lender to the plaintiff some six months prior to the commencement of this action (*see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, *supra*). In any event, such assignment may be considered further evidence of the original lender's tender of the specially endorsed note to the plaintiff, Citimortgage, Inc., prior to commencement of this action (*see* ***Deutsche Bank Trust Co. Am. v Codio***, 94 AD3d 1040, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, *supra*).

The court thus finds that the plaintiff's moving papers established, prima facie, the plaintiff's entitlement to the summary judgment demanded by it against defendant, Leon H. Ivey. It was thus incumbent upon answering defendant Ivey to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of an affirmative defense asserted in his answer or otherwise available to him (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Aames Funding Corp. v Houston,*** 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see* ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369

NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]).

Here, defendant failed to raise any question of fact regarding his pleaded defense as to the purported lack of standing on the part of the plaintiff. His claims that the note and mortgage were securitized and transferred to a trust prior to the commencement of this action are unsupported by any evidence in admissible form. Defendant Ivey's further claims that the plaintiff's prosecution of this action is stayed by a settlement of claims in other jurisdictions or because he is allegedly engaged in loan modification discussions with representatives of PennyMac, Corp. or its loan servicer are rejected as unmeritorious (*see* ***Deutsche Bank Natl. Trust Co. v Gutierrez***, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]; ***Bank of New York Mellon v Izmirigil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***US Bank Natl. Assn. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]).

Defendant Ivey's claim of an entitlement to a mortgage loan modification is equally unavailing. While the parties to a mortgage are required to enter into good faith negotiations aimed at reaching a mutual resolution, including a loan modification, if possible (*see* CPLR 3408), there is no obligation to modify a mortgage loan that is imposed upon a foreclosing plaintiff under the law of this state (*see* ***Graf v Hope Bldg. Corp.***, 254 NY 1, 4–5, 171 NE 884 [1930]; ***Wells Fargo Bank, NA v Meyers***, ___ AD3d__, 966 NYS2d 108 [2d Dept 2013]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***Key Intern. Mfg. Inc. v Stillman***, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984]; ***JP Morgan Chase Bank Natl. Assn. v Ilardo***, 36 Misc.3d 359, 940 NYS2d 829 [Sup.Ct. Suffolk County 2012]). In this regard, the court notes that four settlement conferences were calendared and held before quasi-judicial personnel assigned to the specialized mortgage foreclosure conference part and that the action was released therefrom in January of 2012 without any settlement or loan modification having been reached.

The court has considered the remaining contentions advanced by defendant Ivey in his opposing affidavit, including his attacks on the validity of the affirmation submitted by plaintiff pursuant to Administrative Order 548-10 and find them all to be without merit (*see* ***LaSalle Bank, N.A. v Pace***, 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

Those portions of the plaintiff's motion wherein it seeks an order dropping as party defendants the unknowns defendants listed in the caption are granted, as they were never joined herein by service of process (*see* CPLR 1003). The caption of this action is hereby amended to reflect these changes and all future proceedings shall be captioned accordingly.

The moving papers further established the defaults in answering on the part of the remaining defendants. Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the answering defendant and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***LaSalle Bank, NA v Pace,*** 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd,* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

In view of the foregoing, the instant motion (#001) by the plaintiff for, among other things, the appointment of a referee to compute amounts due under the mortgage for which foreclosure is sought in this action is granted to the extent indicated herein.

The proposed order appointing a referee, as modified by the court to reflect the terms of this order, has been signed simultaneously herewith.

DATED: 8/5/13

THOMAS F. WHELAN, J.S.C.