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SHORT FORM ORDER

INDEX No. 07-5331

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-05-12 (#009)
MOTION DATE 4-24-13 (#010)
ADJ. DATE 8-28-13
Mot. Seq. # 009 - MD
010 - XMotD

---X

US BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE CSMC TRUST 2006-CF2 CS MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-CF2,

Plaintiffs,

- against -

KAREN CICCARELLI, T&V CONSTRUCTION CORP., "John Doe",

Defendants.

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Upon the following papers numbered 1 to 69 read on this motion for summary judgment and cross motion for summary judgment and other relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 61; Answering Affidavits and supporting papers 62 - 65; Replying Affidavits and supporting papers 66 - 69; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order striking the verified answer of the intervenor David M. Tubens, for an order pursuant to CPLR 3212 granting summary judgment on its complaint, and for an award of the costs of this motion is denied; and it is further

ORDERED that this cross motion by the intervenor David M. Tubens for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint, for an order vacating the order of reference granted on May 18, 2010 and for a preliminary conference to obtain a discovery order, and for leave to file an amended answer to add a fourth affirmative defense is determined herein; and it is further

ORDERED that the intervenor David M. Tubens is directed to serve a copy of this order with notice of entry upon plaintiff and upon the Clerk of the Calendar Department within thirty (30) days of the date of this order and the Clerk is directed to schedule this action for a preliminary conference within sixty days of the date of this order, on notice to all parties.

This is an action to foreclose a mortgage executed by defendant Karen Ciccarelli (Ciccarelli) securing premises at 77 Leo Lane, Deer Park, New York. Said mortgage was executed on September 30, 2005 together with a note for the sum of $335,750.00 in favor of the lender MortgageIt, Inc. which mortgage was recorded on October 21, 2005 in the Suffolk County Clerk's Office. MortgageIt, Inc. commenced this action on February 9, 2007. The Ciccarelli mortgage and note were subsequently assigned by MERS as nominee for MortgageIt, Inc. to US Bank National Association, as Trustee, on behalf of the Holders of the CSMC Trust 2006-CF2 CS Mortgage Pass Through Certificates, Series 2006-CF2 (US Bank), by assignment of mortgage dated February 20, 2007. The order of reference granted on May 18, 2010 in this action (Pastoressa, J.) also granted substitution of US Bank as party plaintiff.

The subject premises as well as two other parcels, 72 Osceola Avenue, Deer Park, New York and 112 Irving Avenue, Deer Park, New York, secured another mortgage of an earlier date given by non-parties Mario Pratti (Pratti) and Catherine Rasmussen (Rasmussen) to defendant T & V Construction Corp. (T & V) in connection with a loan in the amount of $308,000.00. The T & V mortgage was dated November 19, 2003 and recorded on March 14, 2006. T & V commenced a foreclosure action to foreclose its mortgage on all three properties one year prior to the instant action. T & V was granted a Judgment of Foreclosure and Sale on January 17, 2008 (Sgroi, J.) in said action entitled T & V Construction Corp. v Mario J. Pratti, Macedo Developers Corporation, Catherine Rasmussen, Matthew Decristan, Karen Ciccarelli, Betty Mcevoy, Jaclyn Mcevoy, under Index number 21299/2006. David M. Tubens (Tubens) was the successful bidder at a public sale of the subject premises, 77 Leo Lane, on March 26, 2009. Tubens paid $1,000.00 and became record owner of the premises by Referee Deed dated May 11, 2009.

After said sale, Tubens learned that Pratti and Rasmussen had deeded the 77 Leo Lane and 112 112 Irving Avenue properties to Pratti who in turn deeded the 112 Irving Avenue property to Ciccarelli on September 16, 2005 and the 77 Leo Lane property to Ciccarelli on September 30, 2005. On the respective dates that Ciccarelli was deeded the properties, she obtained mortgage loans from MortgageIt, Inc. All this was done approximately six months prior to the recording of the T & V mortgage. Tubens

sought leave to intervene as a party defendant in the instant action. His request was initially denied without prejudice by order dated May 25, 2010 (Pastoressa, J.) for failure to submit a proposed pleading setting forth the claim or defense for which he sought intervention. Then, by order dated March 16, 2011, Tubens was granted leave to intervene and his answer was deemed served within twenty days of service of a copy of the order with notice of entry. Tubens' verified answer dated October 6, 2010 contained the following three affirmative defenses: that plaintiff was not a proper party, that plaintiff lacked standing to sue and that no valid notice of pendency was filed pursuant to RPAPL § 1331.

Plaintiff now moves for an order striking Tubens' verified answer, for summary judgment on its complaint to foreclose the Ciccarelli mortgage, and for an award of the costs of this motion.

Tubens cross-moves for summary judgment on the grounds that plaintiff has failed to establish its first lien priority to foreclose against Tubens' interest, that plaintiff lacks standing as it has failed to establish that it is the holder of the Ciccarelli mortgage and that the Ciccarelli note and mortgage were validly assigned to plaintiff, and that currently there is no valid notice of pendency filed in this action against the subject premises such that, pursuant to RPAPL § 1331, no judgment of foreclosure and sale may be granted. Tubens also seeks an order vacating the order of reference granted on May 18, 2010 and a preliminary conference to obtain a discovery order, as well as leave to file an amended answer to add a fourth affirmative defense that "plaintiff has failed to establish that it is a first mortgage with superior rights to foreclose against the interests of the T & V mortgage or its successor by foreclosure sale, Tubens." Plaintiff opposes Tubens' assertion of the affirmative defense of lack of standing on the basis that standing was already waived by the defendants Ciccarelli and T & V prior to the granting of the order of reference.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (Republic Natl. Bank of N.Y. v O'Kane, 308 AD2d 482 [2d Dept 2003]; see Argent Mtge. Co., LLC v Mentesana, 79 AD3d 1079 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see Washington Mut. Bank v Valencia, 92 AD3d 774 [2d Dept 2012]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (see Deutsche Bank Natl. Trust Co. v Haller, 100 AD3d 680 [2d Dept 2011]; US Bank, NA v Collymore, 68 AD3d 752 [2d Dept 2009]; Wells Fargo Bank Minn., NA v Mastropaolo, 42 AD3d 239 [2d Dept 2007]). It is well settled that lack of standing does not constitute a jurisdictional defect (see HSBC Bank USA, NA v Taher, 104 AD3d 815 [2d Dept 2013]; Deutsche Bank Natl. Trust Co. v Hunter, 100 AD3d 810 [2d Dept 2012]; Bank of N.Y. v Alderazi, 99 AD3d 837 [2d Dept 2012]; U.S. Bank v Emmanuel, 83 AD3d 1047 [2d Dept 2011]; Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239). "Whether the action is being pursued by the proper party is an issue separate from the subject matter of the action or proceeding, and does not affect the court's power to entertain the case before it." (Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239). In a mortgage foreclosure action "[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced" (HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept 2012]; US Bank, NA v Collymore, 68 AD3d at 753; Countrywide

Home Loans, Inc. v Gress, 68 AD3d 709 [2d Dept 2009]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (HSBC Bank USA v Hernandez, 92 AD3d 843). 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 [2d Dept 2012]; see Deutsche Bank Natl. Trust Co. v Barnett, 88 AD3d 636 [2d Dept 2011]; see also Homecomings Fin., LLC v Guldi, 108 AD3d 506 [2d Dept 2013]).

Plaintiff's counsel states in paragraph 7 of his affirmation in opposition to the cross motion that "the documentary evidence establishes that this action was commenced on February 9, 2007 at which time the original, Plaintiff, MortgageIt, Inc., held both the mortgage and note" and the motion papers include the summons, complaint and notice of pendency of this action, all of which indicate MortgageIt, Inc. as plaintiff. Jason T. Baker, a Document Control Officer at Select Portfolio Servicing, plaintiff's servicer, avers by affidavit that defendant Ciccarelli defaulted on her November 2006 loan payment and payments thereafter; that a notice of default was tendered to defendant after which the loan was accelerated; and, that plaintiff is the holder and owner of the Ciccarelli note and mortgage. Plaintiff also submitted a copy of the notice of pendency for this action filed on February 9, 2007.

Inasmuch as Tubens sought leave to intervene as a party defendant before a judgment of foreclosure and sale was entered in this action, plaintiff cannot claim prejudice by the intervention and by the service of his answer (see ABM Resources Corp. v Doraben, Inc., 89 AD3d 773 [2d Dept 2011]). In addition, although defendants Ciccarelli and T & V waived the defense of lack of standing when they failed to assert it in an answer or a pre-answer motion to dismiss (see CPLR 3211[e]; see also Citibank v Swiatkowski, 98 AD3d 555 [2d Dept 2012]; US Bank, Natl. Assoc. v Sharif, 89 AD3d 723 [2d Dept 2011]), their waiver of the defense did not affect Tubens' right to assert it, which he timely did in his answer (see generally Fossella v Dinkins, 66 NY2d 162 [1985]). Although plaintiff and T & V entered into a stipulation of settlement dated January 8, 2010 in this action by which T & V agreed, among other things, that its mortgage lien was subordinate to plaintiff's mortgage lien, said stipulation is unenforceable against Tubens who was not a party to the stipulation (see Gregory v Gregory, 109 AD3d 616 [2d Dept 2013]). In any event, T & V no longer had an interest in the subject property at the time that it entered into said stipulation inasmuch as Tubens had purchased the property the previous year, in 2009, at the foreclosure sale of the T & V mortgage and the T & V mortgage lien was thereby extinguished (see Bank of New York v Midland Ave. Development Co., 248 AD2d 342 [2d Dept 1998]).

Here, plaintiff failed to establish the validity of the assignment by submitting evidence showing that the note was either physically delivered to MERS or assigned to MERS by MortgageIt (see Homecomings Fin., LLC v Guldi, 108 AD3d 506). The affidavit of Jason T. Baker, a Document Control Officer at Select Portfolio Servicing, plaintiff's servicer, does not give factual details as to the physical delivery of the note and, thus, is insufficient to establish that plaintiff had physical possession of the note at any time (see Homecomings Fin., LLC v Guldi, 108 AD3d 506; Deutsche Bank Nat. Trust Co. v Haller, 100 AD3d 680 [2 Dept 2012]). Moreover, it is not clear whether the endorsement in blank on the last page of the note by the assistant secretary of MortgageIt, Inc. was effectuated prior to plaintiff's substitution in this action (see Deutsche Bank Nat. Trust Co. v Haller, 100 AD3d 680). Thus, plaintiff

failed to establish, prima facie, that it has standing to prosecute this action to foreclose the Ciccarelli mortgage (see Homecomings Fin., LLC v Guldi, 108 AD3d 506; Bank of New York v Silverberg, 86 AD3d 274 [2d Dept 2011]). Therefore, its request to strike Tubens' affirmative defense of lack of standing is denied. Tubens' submissions in opposition failed to establish as a matter of law that plaintiff lacked standing to commence this action (see HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept 2012]). It so follows that his request for summary judgment dismissing the complaint on said basis is denied.

Tubens submits his affidavit in opposition to the motion and in support of his cross motion attesting that when he purchased the subject premises at auction he understood that the T & V mortgage was a first lien and that he would own the premises free of any other liens or mortgages. His basis of understanding was a "preliminary 'due diligence' of the foreclosure" at the time of the auction that included reviewing the T & V mortgage, notice of sale, terms of sale and judgment of foreclosure and sale, "none of which gave any indication that the mortgage being foreclosed was in a secondary position or that the sale would be subject to any senior liens or mortgages." According to Tubens, "[i]t was only after the auction that [he] was advised by [his] title company that there was another mortgage on the premises held by US Bank National Trust ...and that it was dated after the mortgage being foreclosed (although recorded prior to the mortgage being foreclosed) and that there was pending litigation surrounding the priorities of the two mortgages." He indicates that he is "a real estate investor of foreclosed properties for over 10 years," that it was his practice to rely solely on the language contained in documents presented at the auction sale, and that he relied on the fact that the T & V mortgage and the judgment of foreclosure and sale lacked the boilerplate language indicating that it was subject to a prior lien or mortgage and the T & V mortgage's recitation that it was a "First Mortgage." Tubens claims that Pratti and Rasmussen engaged in several fraudulent transactions prior to the recording of the T & V mortgage, which included transferring said properties to bona fide purchasers or obtaining new mortgage loans without satisfying or disclosing the existence of the T & V mortgage. According to Tubens, Ciccarelli obtained the subject mortgage loan without disclosing to MortgageIt the existence of the T & V mortgage.

" 'Under New York's Recording Act (Real Property Law § 291), a mortgage loses its priority to a subsequent mortgage where the subsequent mortgagee is a good-faith lender for value, and records its mortgage first without actual or constructive knowledge of the prior mortgage' " (2 Lisa Ct. Corp. v Licalzi, 89 AD3d 721, 722 [2d Dept 2011], quoting Washington Mut. Bank, FA v Peak Health Club, Inc., 48 AD3d 793, 797 [2d Dept 2008]; see Mortgage Electronic Registration Sys., Inc. v Rambaran, 97 AD3d 802, 803-804 [2d Dept 2012]). "[W]here a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser" (Williamson v Brown, 15 NY 354, 362 [1857]; see Lucas v J & W Realty and Constr. Mgt., Inc., 97 AD3d 642, 643 [2d Dept 2012]; Maiorano v Garson, 65 AD3d 1300, 1303 [2d Dept 2009]; Ward v Ward, 52 AD3d 919, 920-921 [3d Dept 2008]). If the purchaser fails to use due diligence in examining the title, he or she is chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed (see People v Luhrs, 195 NY 377 [1909]; Cambridge Valley Bank v Delano, 48 NY 326 [1872]; Astoria Fed. Savings & Loan Assn. v June, 190 AD2d 644 [2d Dept 1993]; see also Fairmont

Funding, Ltd. v Stefansky, 301 AD2d 562 [2d Dept 2003]). Similarly, a mortgagee is under a duty to make an inquiry where it is aware of facts "that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue" (LaSalle Bank Natl. Assn. v Ally, 39 AD3d 597, 600 [2d Dept 2007]; see Lucas v J & W Realty and Constr. Mgt., Inc., 97 AD3d at 643). "A mortgagee who fails to make such an inquiry is not a bona fide encumbrancer for value" (Booth v Ameriquest Mtge. Co., 63 AD3d 769, 769 [2d Dept 2009]; see JP Morgan Chase Bank v Munoz, 85 AD3d 1124, 1126 [2d Dept 2011]; Thomas v LaSalle Bank N.A., 79 AD3d 1015, 1017 [2d Dept 2010]; see also Mortgage Electronic Registration Sys., Inc. v Rambaran, 97 AD3d at 804). Further, "[a]n assignee stands in the shoes of the assignor and takes the assignment subject to any preexisting liabilities" (Arena Constr. Co. v Sackaris Sons, 282 AD2d 489, 489 [2d Dept 2001]; see TPZ Corp. v Dabbs, 25 AD3d 787, 789 [2d Dept 2006]; see also Mortgage Electronic Registration Sys., Inc. v Rambaran, 97 AD3d at 804).

Here, plaintiff's mortgage lien was recorded and indexed at the Suffolk County Clerk's Office under District 0100 Section 023.00 Block 04.00 and Lot 072.000 three years prior to the purchase of the subject property by Tubens, whose deed described the property as District 0100 Section 023.000 Block 04.00 and Lot 072.000. Contrary to Tubens' assertions concerning lack of notice of any prior mortgages, the Judgment of Foreclosure and Sale granted on January 17, 2008 (Sgroi, J.) expressly provided that "Ordered, Adjudged and Decreed that the premises be sold subject to ... (g) Prior mortgages and judgments, if any, now liens of record;" The notice of sale indicated that the premises would be sold subject to the provisions of the filed judgment and terms of sale. A review of the Suffolk County Clerk's Office records prior to purchase would have revealed the existence of plaintiff's interest in the subject property. Unfortunately, Tubens had a title search performed after he purchased the subject property at auction. Thus, Tubens had constructive notice of plaintiff's mortgage lien and was chargeable with the duty to make further inquiry to determine whether the lien had been satisfied or released (see Andy Assoc. v Bankers Trust Co., 49 NY2d 13; see also Real Property Law § 291; Congregation Beth Medrosh of Monsey, Inc. v Rolling Acres Chestnut Ridge, LLC, 101 AD3d 797 [2d Dept 2012]). Under the circumstances, Tubens cannot claim to be a bona fide purchaser for value without notice of plaintiff's prior encumbrance and, therefore, is not entitled to the protection of the recording statutes (see Real Property Law § 291; Fairmont Funding, Ltd. v Stefansky, 301 AD2d 562; see also HSBC Mtge. Services, Inc. v Alphonso, 58 AD3d 598 [2d Dept 2009]).

Leave to amend a pleading "shall be freely given" (CPLR 3025 [b]), provided that the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit (see HSBC Bank v Picarelli, 110 AD3d 1031, 1031 [2d Dept 2013]; Spodek v Neiss, 104 AD3d 758, 759 [2d Dept 2013]; Padin v City of New York, 103 AD3d 614, 615 [2d Dept 2013]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (Edenwald Contr. Co. v New York, 60 NY2d 957, 959 [1983] [internal quotation marks omitted]; see HSBC Bank v Picarelli, 110 AD3d at1031; Aurora Loan Servs., LLC v Dimura, 104 AD3d 796, 796 [2d Dept 2013]; U.S. Bank, Natl. Assn. v Sharif, 89 AD3d 723, 724 [2d Dept 2011]). Here, Tubens has proffered documentary evidence that raises a triable issue of fact as to whether plaintiff is a bona fide encumbrancer for value of the subject property (see Congregation Talmud Torah Ohev Shalom R. Morris Kevelson v Sorscher, 69 AD3d 898 [2d Dept 2010]; see also Thomas v LaSalle Bank N.A., 79 AD3d at 1017-1018). Thus,

Tubens' proposed amendment of his answer to add a fourth affirmative defense that "plaintiff has failed to establish that it is a first mortgage with superior rights to foreclose against the interests of the T & V mortgage or its successor by foreclosure sale, Tubens" is not palpably insufficient or patently devoid of merit (see Aurora Loan Services, LLC v Thomas, 70 AD3d 986 [2d Dept 2010]). In addition, there was no showing of prejudice or surprise resulting directly from the delay in seeking leave (see id.). Therefore, that portion of Tubens' cross motion for leave to amend his answer is granted. His amended answer shall be deemed served within twenty (20) days of service of a copy of this order with notice of entry.

Inasmuch as there are issues of fact concerning whether plaintiff is a bona fide encumbrancer, the Court declines to vacate the order of reference at this juncture (see generally U.S. Bank Natl. Assn. v Allen, 102 AD3d 955 [2d Dept 2013]). Therefore, that portion of Tubens' cross motion seeking to vacate the order of reference is denied. However, his request for a preliminary conference is granted to the extent indicated herein.

Furthermore, plaintiff must file in the clerk's office of each county where the mortgaged property is situated a notice of the pendency of the action at least twenty days before a final judgment directing a sale is rendered (see RPAPL 1331). A new notice of pendency may be filed in a mortgage foreclosure action despite the cancellation or expiration of a previous notice (see Sears Mtge. Corp. v Yaghobi, 19 AD3d 402 [2d Dept 2005]; Bankers Trust Co. of California, N.A. v Lifson, 5 AD3d 710 [2d Dept 2004]). It appears that notices of pendency of this action were filed on February 9, 2007 and January 15, 2010 in the Suffolk County Clerk's Office, and plaintiff's counsel states in his affirmation in opposition to the cross motion that plaintiff has sufficient time before a final judgment is rendered to extend the notice of pendency. Therefore, Tubens' request for dismissal of the complaint based on the affirmative defense of lack of a valid notice of pendency is denied.

Dated: December 2, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION