# Foreclosure Cases

*Score:*

Against mortgagee (17 cases): 1, 3, 5, 10, 14, 22, 23, 25, 27, 28, 30, 32, 35, 37, 40, 43, 47

Pro mortgagee (32 cases): 2, 4, 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 24, 26, 29, 31, 33, 34, 35, 36, 38, 39, 40, 41, 42, 44, 45, 46

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*Lessons Learned:*

# I. SUBSTANTIVE LAW

## A. STANDING

1. Standing remains an issue, regardless of MERS. While the 2012 case law shows a definite trend favoring lenders in standing issues, it does not repudiate the leading cases[1] that established standing as a problem for the lending industry and may simply be explained by lenders who know that they do not have physical possession of the note simply not attempting to bring the foreclosure action at all.

    a. *U.S. Bank Nat. Ass'n v. Dellarmo,* 94 A.D.3d 746, 942 N.Y.S.2d 122 (Second Dept. 2012) – 1

    b. *Citibank, N.A. v. Van Brunt Properties, LLC,* 95 A.D.3d 1158, 945 N.Y.S.2d 330 (Second Dept. 2012) –12

    c. *US Bank Nat. Ass'n v. Cange*, 96 A.D.3d 825, 947 N.Y.S.2d 522 (Second Dept. 2012) –42

    d. *Wells Fargo Bank, N.A. v. Hudson,* 98 A.D.3d 576, 949 N.Y.S.2d 703 (Second Dept. 2012) –45

    e. *CSFB 2004–C3 Bronx Apts LLC v. Sinckler, Inc.,* 96 A.D.3d 680, 949 N.Y.S.2d 21 (First Dept. 2012) –13 In *Sinckler*, the record seems to imply that the mortgagor assumed that a "where's the note" defense would be available and was simply disappointed when it turned out that the mortgagee actually had it. Something similar happened in *Deutsche Bank Trust Co. Americas v. Codio,* 94 A.D.3d 1040, 943 N.Y.S.2d 545 (Second Dept. 2012)—16 where the plaintiff was able to

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[1] *Bank Of N.Y. v. Silverberg,* 86 A.D.3d 274, 926 N.Y.S.2d 532 (Second Dept. 2011) –Additional Study Materials 2

produce an allonge showing it to have been the proper assignee of the mortgage.

f. It is a question of fact that must be established. *Deutsche Bank Nat. Trust Co. v. Rivas,* 95 A.D.3d 1061, 945 N.Y.S.2d 328 (Second Dept. 2012)—15, but *Rivas* does not set forth in the decision just what the question of fact is questioning.

g. *HSBC Bank USA v. Hernandez,* 92 A.D.3d 843, 939 N.Y.S.2d 120 (Second Dept. 2012) –22 appears to be a case where the bank tried to bluff its way through, even though it may not have had possession of the note or a clear chain of title to it. While it survived summary judgment, most notably it was not granted summary judgment when its summary judgment papers apparently failed to include the note. Thus, although it survived the appeal, it appears unlikely that it will prevail in the case.

2. If standing was defective at the time of the commencement of the action, it *appears* that the standing cannot be corrected. *U.S. Bank Nat. Ass'n v. Dellarmo,* 94 A.D.3d 746, 942 N.Y.S.2d 122 (Second Dept. 2012) – 1.

a. However, if standing is proper in the plaintiff at the time of commencement of the action, but a proper assignment is effected during the prosecution of the action, the action itself may, in effect, be assigned, and the caption amended to reflect the substitute mortgagee. *Citibank, N.A. v. Van Brunt Properties, LLC,* 95 A.D.3d 1158, 945 N.Y.S.2d 330 (Second Dept. 2012) –12; *GRP Loan, LLC v. Taylor,* 95 A.D.3d 1172, 945 N.Y.S.2d 336 (Second Dept. 2012) –20

b. Substitution in the action (and amendment of the caption) is not mandatory, but rather the original action can proceed after the assignment. *IndyMac Bank F.S.B. v. Thompson,* --- N.Y.S.2d ----, 2012 WL 4513052, 2012 N.Y. Slip Op. 06582 (App.Div. Second Dept. 2012) – 23

3. Acceleration Standing and Statute of Limitation; One who lacks standing to bring a foreclosure action, lacks the capacity to accelerate the entire note and thus cannot start the running of the statute of limitations to bar the later payments due on the installment note. *Wells Fargo Bank, N.A. v. Burke,* 94 A.D.3d 980, 943 N.Y.S.2d 540 (Second Dept. 2012) – 2

4. An assignment of a mortgage will not be given effect absent proof of physical possession of the note. *U.S. Bank Nat. Ass'n v. Dellarmo,* 94 A.D.3d 746, 942 N.Y.S.2d 122 (Second Dept. 2012) – 1

5. A purchaser of failed bank's assets has standing to commence a foreclosure action, even if it is immune from whatever counterclaims the borrower may have asserted against the failed bank. *JP Morgan Chase Bank Nat. Ass'n v. Miodownik,* 91 A.D.3d 546, 937 N.Y.S.2d 192 (First Dept. 2012) –24

6. Where property is owned as tenants by the entirety and only one spouse signs the note and mortgage, the foreclosure proceeding cannot be prosecuted against the nonsignatory spouse. *US Bank Nat. Ass'n v. Lieberman,* 98 A.D.3d 422, 950 N.Y.S.2d 127 (First Dept. 2012) –43

## B. MORTGAGEES IN POSSESSION

1. Appellate Division allows for receiver to reimburse lender two items explicitly state in mortgage and note. For example,

## C. QUALITY OF TITLE

1. Constant unsuccessful efforts by the mortgagor to defeat the foreclosure proceeding are insufficient to make the title unmarketable enough to relieve a successful bidder at the foreclosure sale from going forth with the sale. *Bank of New York v. Segui,* 91 A.D.3d 689, 937 N.Y.S.2d 95 (Second Dept. 2012) –8

2. Where the Defendant claims to hold a superior mortgage herself, the foreclosure proceeding may be defeated. *South Point, Inc. v. Redman,* 94 A.D.3d 1086, 943 N.Y.S.2d 543 (Second Dept. 2012) –37

## D. PREDATORY AND FRAUDULENT PRACTICES

1. A consumer seeking to resist a foreclosure must show either substantively that she was taken advantage of in predatory practices or that the loan was issued after the law went into effect creating presumptions of predation. *Emigrant Mortg. Co., Inc. v. Fitzpatrick,* 95 A.D.3d 1169, 945 N.Y.S.2d 697 (Second Dept. 2012) –17 It should be noted that this decision holds the consumer responsible for the contents of the great mass of information presented at the time of loan applications and closings and does not take into account the well-known phenomenon that people simply do not read these materials.

2. Where the one who is sitting as Plaintiff in the foreclosure proceeding actually maliciously caused the default, while the foreclosure proceeding itself *may* still lie, ancillary relief within the court's discretion is properly denied the Plaintiff. *Norwest Bank Minnesota, NA v. E.M.V. Realty Corp.,* 94 A.D.3d 835, 943 N.Y.S.2d 113 (Second Dept. 2012) –30. *Norwest* is unclear whether if the predatory practice had been committed by the initial plaintiff in the suit whether the foreclosure relief in chief would also have been denied.

3. Where the premises are conveyed out from under a mortgage in order to avoid the mortgage, no matter how many such conveyances there are, they can all be set aside and the foreclosure allowed to proceed. *Pritchard v. Curtis,* 95 A.D.3d 1379, 944 N.Y.S.2d 341 (Third Dept. 2012) –33

### E. MERGER CLAUSE

1. A merger clause in a mortgage will not necessarily bar claims of fraudulent representations, at least not where the clause is "bare bones." Thus, the mortgage itself is vulnerable to attack through oral testimony claiming fraudulent inducement. *LibertyPointe Bank v. 75 East 125th Street, LLC,* 95 A.D.3d 706, 946 N.Y.S.2d 26 (First Dept. 2012) –27. Contrast this with *Emigrant Mortg. Co., Inc. v. Fitzpatrick,* 95 A.D.3d 1169, 945 N.Y.S.2d 697 (Second Dept. 2012) –17 that refuses to allow an attack on the mortgage based on a predatory lending claim where the mortgage transaction included boilerplate disclosures. Philosophically, these two cases are difficult to reconcile.

### F. VALUE OF MORTGAGED PREMISES

1. Where the premises were supposed to be sold on a price per acre basis and there was less acreage than actually contracted for, then the foreclosure can proceed, but the amount foreclosed upon will be reduced downward. *Shufelt v. Bulfamante*, 92 A.D.3d 936, 940 N.Y.S.2d 108 (Second Dept. 2012) –35

### G. PAYMENT

1. Where mortgagor pays the full amount demanded, but pays it late, the mortgagor is still in default of the mortgage and foreclosure is appropriately ordered. *Thompson v. Naish,* 93 A.D.3d 1203, 940 N.Y.S.2d 714 (Fourth Dept. 2012) –39

## II. PROCEDURAL LAW

### A. SOURCES OF PROCEDURAL LAW

1. Impliedly, trial courts have the power to require additional paperwork beyond what would appear on the face of the statute in order to grant foreclosure on default.

    a. *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012) —6; Compare, *Brusco v. Braun*, 84 NY2d 674, 645 NE2d 724, 621 NYS2d 291 (1994)—Additional Study Materials 1

    b. Such additional paperwork can be required by an Administrative Order issued by the State's Chief Administrative Judge. *Flagstar Bank v. Bellafiore,* 94 A.D.3d 1044, 943 N.Y.S.2d 551 (Second Dept. 2012) –18; *US Bank, N.A. v. Boyce*, 93 A.D.3d 782, 940 N.Y.S.2d 656 (Second Dept. 2012) –44; *Wells Fargo Bank, N.A. v. Hudson,* 98 A.D.3d 576, 949 N.Y.S.2d 703 (Second Dept. 2012) –45

## B. BENCH AND BAR

1. There appears to be evidence of hostility to the Plaintiff's bar among at least some trial judges. *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012)—6; *IndyMac Bank F.S.B. v. Thompson,* --- N.Y.S.2d ----, 2012 WL 4513052, 2012 N.Y. Slip Op. 06582 (App.Div. Second Dept. 2012)—23; *South Point, Inc. v. Redman,* 94 A.D.3d 1086, 943 N.Y.S.2d 543 (Second Dept. 2012) –37; *U.S. Bank Nat. Ass'n v. Gonzalez,* --- N.Y.S.2d ----, 2012 WL 4513150, 2012 N.Y. Slip Op. 06596 (Second Dept. 2012) –40 (In the *Gonzalez* case, the hostility appears well justified.)

2. It is error for a trial court *sua sponte* to dismiss a foreclosure action for failure to timely file requested affirmation, absent extraordinary circumstances. *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012)—6

3. Trial court hostility to default foreclosure judgments remains very much in play. *Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012) —6

## C. PERSONAL JURISDICTION

1. The general hostility to personal jurisdiction defenses throughout New York practice holds true in foreclosure actions as well.

   a. *Bank of New York v. Espejo,* 92 A.D.3d 707, 939 N.Y.S.2d 105 (Second Dept. 2012)—7

   b. *Cantor v. Flores,* 94 A.D.3d 936, 943 N.Y.S.2d 138 (Second Dept. 2012) –9

   c. *Christiana Bank & Trust Co. v. Eichler,* 94 A.D.3d 1170, 942 N.Y.S.2d 241 (Third Dept. 2012)—11.

   d. *U.S. Bank Nat. Ass'n v. Hossain,* 94 A.D.3d 979, 943 N.Y.S.2d 140, 2012 N.Y. Slip Op. 02864 (Second Dept. 2012) –41

   e. *HSBC Bank USA N.A. v. Thomas,* 92 A.D.3d 531, 939 N.Y.S.2d 346 (First Dept. 2012) –21

   f. *Reich v. Redley,* 96 A.D.3d 1038, 947 N.Y.S.2d 564 (Second Dept. 2012) –34

   g. *Wells Fargo Bank, NA v. Edwards*, 95 A.D.3d 692, 945 N.Y.S.2d 44 (First Dept. 2012) –46

   h. However, where there are specific denials of the propriety of service of process, a mortgagor can effect the vacatur of the foreclosure judgment. *Deutsche Bank Nat. Trust Co. v. DaCosta,* 97 A.D.3d 630, 949 N.Y.S.2d 393 (Second Dept. 2012)—14. However, *DaCosta,* while

stating that the facts of its case showed a sufficiently specific denial, it sets no explicit standards for that explicitness.

## D. DEFENSES

1. Where a mortgagor has a defense to the foreclosure proceeding, such as the failure to serve a pre-litigation contractual notice, it is waived unless raised in an answer or motion under CPLR 3211(a). *Signature Bank v. Epstein,* 95 A.D.3d 1199, 945 N.Y.S.2d 347 (Second Dept. 2012) –36

2. Affirmative defenses will be permitted to survive a motion to dismiss so long as there are issues of fact as to whether it really exists or not. *South Point, Inc. v. Redman,* 94 A.D.3d 1086, 943 N.Y.S.2d 543 (Second Dept. 2012)—37

3. There are no defenses available to a junior lien holder in a reforeclosure action. *Targee Street Internal Medicine Group, P.C. v. Deutsche Bank Nat. Trust Co.,* 92 A.D.3d 768, 939 N.Y.S.2d 82 (Second Dept. 2012) –38

4. Regardless of misbehavior by the plaintiff's attorney, late answers or motions to dismiss are inexcusable. *U.S. Bank Nat. Ass'n v. Gonzalez,* --- N.Y.S.2d ---- , 2012 WL 4513150, 2012 N.Y. Slip Op. 06596 (Second Dept. 2012) –40

## E. COUNTERCLAIMS

1. A waiver in a mortgage of defenses or counterclaims does not preclude a counterclaim based on fraud, if properly asserted. *Archer Capital Fund, L.P. v. GEL, LLC,* 95 A.D.3d 800, 944 N.Y.S.2d 179 (Second Dept. 2012) –4

## F. CONSOLIDATION

1. Where there is a question about the validity of the mortgage, an action trying out that question should be consolidated with a foreclosure action. On the practical level, this means that while foreclosure actions typically move quickly through predictable stages, the foreclosure action will be slowed down to a crawl through the discovery process in the validity suit. *American Home Mortg. Servicing, Inc. v. Sharrocks,* 92 A.D.3d 620, 938 N.Y.S.2d 202 (Second Dept. 2012) –3

## G. INTERVENTION

1. Unrecorded contract vendees are entitled to intervene in foreclosure proceedings so as to exercise whatever lien they may have against the sale proceeds, but not so as to interfere with the foreclosure itself. *Global Team Vernon, LLC v. Vernon Realty Holding, LLC,* 93 A.D.3d 819, 941 N.Y.S.2d 631 (Second Dept. 2012) –19

2. Where it appears that there may have been fraud in the conveyance underlying the grant of the mortgage, one contesting the bona fides of the conveyance should be granted intervention, notwithstanding possible statute

of limitations issues. *JP Morgan Chase Bank, Nat. Ass'n v. Kalpakis*, 91 A.D.3d 722, 937 N.Y.S.2d 105 (Second Dept. 2012) –25

## H. STAYS

1. Foreclosure proceedings are appropriately stayed pending related bankruptcy proceedings. *Capital One, N.A. v. Waterfront Realty II, LLC,* 94 A.D.3d 683, 942 N.Y.S.2d 131 (Second Dept. 2012) –10

2. A stay is not effective if not served in strict compliance with the methodology dictated in the order granting the stay. *Lenders Capital LLC v. Ranu Realty Corp.,* --- N.Y.S.2d ----, 2012 WL 4868325, 2012 N.Y. Slip Op. 06890 (First Dept. 2012) –26

## I. SUMMARY JUDGMENT

1. The mortgagor seeking to resist summary judgment in a foreclosure proceeding, must set forth more than mere suppositions of the bases for the various defenses available to a foreclosure defendant. Hoping to find something in discovery is not enough. *New York Community Bank v. Parade Place, LLC,* 96 A.D.3d 542, 947 N.Y.S.2d 426 (First Dept. 2012) –29

## J. DEFICIENCY JUDGMENT

1. There is a 90 day period after the Referee's conveyance of title, during which the Plaintiff may move for a deficiency judgment. Refusal of the deed did not stop the running of that limitations period. Thus, the Petitioner, by wasting time seeking to manipulate the deed, lost the ability to get the deficiency judgment. *M & T Real Estate Trust ex rel. M & T Real Estate, Inc. v. Doyle,* 93 A.D.3d 1331, 941 N.Y.S.2d 422 (Fourth Dept. 2012) –28

2. Where the purchaser at a foreclosure sale would have a claim against the mortgagor, but fails to move for a deficiency judgment within the 90 day period, that claim is wholly extinguished, both as to the main debt and ancillary charges. *Option One Mortg. Corp. v. J.P. Morgan Chase & Co.,* 93 A.D.3d 480, 940 N.Y.S.2d 225 (First Dept. 2012) –32

## K. CORRECTION OF IMPROPERLY JOINED PARTIES

1. Where the proceeding is brought against a dead person, there is no fixing it. *Wendover Financial Services v. Ridgeway,* 93 A.D.3d 1156, 940 N.Y.S.2d 391 (Fourth Dept. 2012) –47

## L. TECHNICAL FLAWS

1. Minor technical flaws in every stage of the foreclosure proceeding are subject to the same kinds of forgiveness as in any other action under CPLR 2001[2].

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[2] CPLR 2001:

*NYCTL 2005–A Trust v. Rosenberger Boat Livery, Inc.,* 96 A.D.3d 425, 947 N.Y.S.2d 2 (First Dept. 2012) –31

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# Case 1

*U.S. Bank Nat. Ass'n v. Dellarmo,* 94 A.D.3d 746, 942 N.Y.S.2d 122 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.
**U.S. BANK NATIONAL ASSOCIATION, etc., respondent,**
**v.**
**Joseph DELLARMO, also known as Joseph Dell'Armo, appellant, et al., defendants.**

April 3, 2012.

PETER B. SKELOS, J.P., L. PRISCILLA HALL, LEONARD B. AUSTIN, and ROBERT J. MILLER, JJ.

***747** In an action to foreclose a mortgage, the defendant Joseph Dellarmo, also known as, Joseph Dell'Armo, appeals from an order of the Supreme Court, Rockland County (Weiner, J.), entered October 5, 2010, which denied his motion pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against him for lack of standing.

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendant Joseph Dellarmo, also known as Joseph Dell'Armo, to dismiss the complaint insofar as asserted against him is granted.

In commencing this action on April 25, 2006, to foreclose a mortgage entered into by the defendant Joseph Dellarmo, also known as Joseph Dell'Armo (hereinafter Dellarmo), the plaintiff asserted in its complaint that it had been assigned the subject mortgage by assignment dated April 11, 2006, which was duly recorded with

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**Mistakes, omissions, defects and irregularities.** At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

the Clerk of Rockland County. Dellarmo failed to answer or appear, but thereafter moved, inter alia, to enjoin the plaintiff from foreclosing on the property on the ground that it lacked standing, and to vacate a default judgment entered against him. On October 30, 2009, while Dellarmo's motion was pending, a "Corrective Assignment of Mortgage" (hereinafter the corrective assignment) dated July 28, 2009, to the plaintiff was recorded with the Clerk of Rockland County, purporting to "correct and replace the April 11, 2006 assignment ... which was sent for recording but was lost prior to being recorded" by the Clerk of Rockland County. The corrective assignment was notarized outside New York State but unaccompanied by a CPLR 2309(c) certification. By order dated January 4, 2010, the Supreme Court determined, based on the April 11, 2006, assignment, which the complaint described as having been recorded, and without referencing the corrective assignment, that the plaintiff had standing to commence this action, and directed a hearing to determine the validity of the service of process. Following the hearing, the Supreme Court vacated the default judgment entered against Dellarmo.

Dellarmo moved pursuant to CPLR 3211(a) to dismiss the complaint insofar as ****124** asserted against him, contending, among other things, that the corrective assignment was a nullity, as it had been notarized out-of-state without the required CPLR 2309(c) certification, and, even if the corrective assignment was valid, the plaintiff nevertheless lacked standing to bring this action, as it was not the holder in due course of both the mortgage and note when it commenced the action. The Supreme Court ***748** denied the motion, finding that the failure to accompany the corrective assignment with a CPLR 2309(c) certification was not a fatal defect and that Dellarmo raised merely speculative doubts about the validity of the corrective assignment. Dellarmo appeals, and we reverse.

The plaintiff's failure to comply with CPLR 2309(c) in submitting various documents, including, among others, the corrective assignment, which were notarized outside the state but not accompanied with a certificate in conformity with CPLR 2309(c), was not a fatal defect, as such certification may be provided nunc pro tunc (*see* CPLR 2001; *Betz v. Daniel Conti, Inc.,* 69 A.D.3d 545, 892 N.Y.S.2d 477; *Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda,* 68 A.D.3d 672, 673, 891 N.Y.S.2d 394; *Smith v. Allstate Ins. Co.,* 38 A.D.3d 522, 832 N.Y.S.2d 587).

"In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 279, 926 N.Y.S.2d 532; *see Countrywide Home Loans, Inc. v. Gress,* 68 A.D.3d 709, 888 N.Y.S.2d 914). Where a defendant raises the issue of standing, the plaintiff must prove its standing to be entitled to relief (*see CitiMortgage, Inc. v. Rosenthal,* 88 A.D.3d 759, 931 N.Y.S.2d 638; *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d 752, 753, 890 N.Y.S.2d 578). Moreover, while assignment of a promissory note also effectuates assignment of the mortgage (*see Bank of N.Y. v. Silverberg,* 86 A.D.3d at 280, 926 N.Y.S.2d 532; *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d at 753–754, 890 N.Y.S.2d 578; *Mortgage Elec. Registration Sys., Inc. v. Coakley,* 41 A.D.3d

674, 838 N.Y.S.2d 622), the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it (*see Deutsche Bank Natl. Trust Co. v. Barnett,* 88 A.D.3d 636, 931 N.Y.S.2d 630; *Bank of N.Y. v. Silverberg,* 86 A.D.3d at 280, 926 N.Y.S.2d 532). The failure to record an assignment prior to the commencement of the action is not necessarily fatal since "an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery" (*Bank of N.Y. v. Silverberg,* 86 A.D.3d at 280, 926 N.Y.S.2d 532; *see Deutsche Bank Natl. Trust Co. v. Barnett,* 88 A.D.3d 636, 931 N.Y.S.2d 630; *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d at 754, 890 N.Y.S.2d 578; *LaSalle Bank Natl. Assn. v. Ahearn,* 59 A.D.3d 911, 912, 875 N.Y.S.2d 595).

Here, as the plaintiff concedes, the complaint incorrectly asserts that the April 11, 2006, assignment of the mortgage to the plaintiff had been duly recorded. Further, there is no allegation that the note or mortgage was physically delivered to the plaintiff prior to commencement of the action (*compare* ***749** *Mortgage Elec. Registration Sys., Inc. v. Coakley,* 41 A.D.3d 674, 838 N.Y.S.2d 622). The record also suggests that in the order dated January 4, 2010, in which the Supreme Court held that the plaintiff had standing pursuant to the April 11, 2006, assignment, the court relied upon the incorrect assertion in the complaint that the April 11, 2006, assignment had ****125** been recorded. The Supreme Court referred only to the April 11, 2006, assignment and made no reference to the corrective assignment's purported replacement of the April 11, 2006, assignment.

The plaintiff now relies on the corrective assignment, which was recorded with the Clerk of Rockland County on October 30, 2009, to demonstrate that it was a holder of the mortgage as of the April 25, 2006, commencement of this action. The corrective assignment recites, in pertinent part, that it "is meant to correct and replace the April 11, 2006 assignment by and between the parties herein which was sent for recording but was lost prior to being recorded" in Rockland County. However, inasmuch as the complaint does not allege that the note was physically delivered to the plaintiff, and nothing in the plaintiff's submission in opposition to Dellarmo's motion could support a finding that such physical delivery occurred, the corrective assignment cannot be given retroactive effect (*see Countrywide Home Loans, Inc. v. Gress,* 68 A.D.3d at 710, 888 N.Y.S.2d 914; *Wells Fargo Bank, N.A. v. Marchione,* 69 A.D.3d 204, 210, 887 N.Y.S.2d 615; *LaSalle Bank Natl. Assn. v. Ahearn,* 59 A.D.3d at 912–913, 875 N.Y.S.2d 595). Moreover, both the unrecorded April 11, 2006, assignment and the recorded corrective assignment indicate only that the mortgage was assigned to the plaintiff. Since an assignment of a mortgage without the underlying debt is a nullity (*see Deutsche Bank Natl. Trust Co. v. Barnett,* 88 A.D.3d 636, 931 N.Y.S.2d 630; *Bank of N.Y. v. Silverberg,* 86 A.D.3d at 280, 926 N.Y.S.2d 532), the plaintiff has failed to demonstrate that it had standing to commence this action (*see Bank of N.Y. v. Silverberg,* 86 A.D.3d at 280, 926 N.Y.S.2d 532; *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d at 754, 890 N.Y.S.2d 578).

Accordingly, the Supreme Court should have granted Dellarmo's motion

pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against him for lack of standing.

In light of the foregoing, we need not reach Dellarmo's remaining contentions.

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# Case 2

*Wells Fargo Bank, N.A. v. Burke,* 94 A.D.3d 980, 943 N.Y.S.2d 540 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**WELLS FARGO BANK, N.A., etc., respondent,**

**v.**

**Windsor BURKE, et al., appellants, et al., defendants.**

April 17, 2012.

****541** PETER B. SKELOS, J.P., THOMAS A. DICKERSON, LEONARD B. AUSTIN, and ROBERT J. MILLER, JJ.

***981** In an action to foreclose a mortgage, the defendant Windsor Burke appeals from so much of an order of the Supreme Court, Kings County (Silber, J.), dated December 16, 2010, as denied his motion pursuant to CPLR 5015 to vacate his default in appearing or answering and to dismiss the complaint insofar as asserted against him as barred by the statute of limitations, and the defendant 105 4th Units, LLC, appeals from so much of the same order as, upon reargument, adhered to its original determination in an order dated February 1, 2010, denying that branch of its motion which was pursuant to CPLR 3211(a)(5) to dismiss so much of the complaint as, in effect, asserted causes of action against it based on payments due on or after October 5, 2003, as barred by the statute of limitations.

ORDERED that the order dated December 16, 2010, is affirmed insofar as appealed from, with costs.

In 1999, the defendant Windsor Burke borrowed $45,000 from nonparty Delta Funding Corporation (hereinafter Delta) which was secured by a 30–year mortgage on property owned by Burke located in Brooklyn. Burke defaulted on March 3, 2002, by failing to make the required monthly payment, and he conceded that he failed to make any of the monthly payments that came due after that date.

In June 2002, a foreclosure action (hereinafter the 2002 action) was commenced against Burke by the nonparty Wells Fargo Bank Minnesota, N.A. (hereinafter the Predecessor). However, the note and mortgage were not assigned to the Predecessor until August 23, 2002. Burke did not appear or interpose an answer in the 2002 action.

A junior lienholder, the nonparty Board of Managers 105 4th Avenue Condominium (hereinafter the Condominium Board), was named as a defendant in

the 2002 action, but was never served with process. Another action was commenced by the Predecessor in 2003 (hereinafter the 2003 action), which named the Condominium Board as the defendant. Burke was not named as a defendant in the 2003 action. The 2003 action was consolidated with the 2002 action on November 2005.

By deed dated June 29, 2006, Burke conveyed his interest in the property to the nonparty NB 105 4th Apts, LLC. That entity, in turn, conveyed the interest to the defendant 105 4th Units, LLC (hereinafter Units LLC), pursuant to a bargain and sale deed dated November 15, 2006.

Sometime in July 2008, counsel for Units LLC advised counsel for the Predecessor that since the Predecessor had not been assigned the note and mortgage prior to commencing the 2002 action, it lacked standing. The Predecessor agreed to voluntarily ***982** discontinue the consolidated action, and an order dated April 14, 2009, discontinued the consolidated action.

In June 2009, the note and mortgage were assigned to the plaintiff. On October 5, 2009, the present foreclosure action was commenced by the plaintiff against, among others, Burke and Units LLC. Burke did not appear or interpose an answer. Units LLC made a pre-answer motion to dismiss the complaint insofar as asserted against it. It argued that the Predecessor had accelerated the loan in 2002 or 2003, and that the 2009 action was therefore barred by the six-year statute of limitations.

The Supreme Court denied that branch of the motion of Units LLC which was to dismiss so much of the complaint as, in effect, asserted causes of action against it based on payments due on or after October****542** 5, 2003. However, the court found that payments which had become due prior to October 5, 2003, were time-barred.

Units LLC moved for leave to reargue. At this point, Burke separately moved to vacate his default and to dismiss the complaint insofar as asserted against him. The Supreme Court granted the motion for reargument, but, upon reargument, adhered to its prior determination denying that branch of the motion of Units LLC which was to dismiss so much of the complaint as, in effect, asserted causes of action against it based on payments due on or after October 5, 2003. The Supreme Court also denied Burke's motion to vacate his default and to dismiss the complaint insofar as asserted against him. Burke and Units LLC appeal.

As a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action (*see* CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment becomes due (*see Wells Fargo Bank, N.A. v. Cohen,* 80 A.D.3d 753, 754, 915 N.Y.S.2d 569; *Loiacono v. Goldberg,* 240 A.D.2d 476, 477, 658 N.Y.S.2d 138; *Pagano v. Smith,* 201 A.D.2d 632, 633, 608 N.Y.S.2d 268). However, "even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*EMC Mtge. Corp. v. Patella,* 279 A.D.2d 604, 605, 720 N.Y.S.2d 161; *see Lavin v. Elmakiss,* 302 A.D.2d 638, 639, 754 N.Y.S.2d 741; *Zinker v. Makler,* 298 A.D.2d 516, 517, 748

N.Y.S.2d 780).

Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the ***983** holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation (*see Esther M. Mertz Trust v. Fox Meadow Partners,* 288 A.D.2d 338, 340, 734 N.Y.S.2d 77; *Ward v. Walkley,* 143 A.D.2d 415, 417, 532 N.Y.S.2d 426; *see also* 1–5 Bergman on New York Mortgage Foreclosures §5.11[2] [2011]). "Sometimes ... whether maturity has arrived through acceleration can be a question of fact" (1–5 Bergman on New York Mortgage Foreclosures §5.11[3] [2011]; *cf. LPP Mtge. Ltd. v. Gold,* 44 A.D.3d 718, 719, 842 N.Y.S.2d 739).

As with other contractual options, the holder of an option may be required to exercise an option to accelerate the maturity of a loan in accordance with the terms of the note and mortgage (*see Serapilio v. Staszak,* 255 A.D.2d 824, 824, 680 N.Y.S.2d 296; *Loiacono v. Goldberg,* 240 A.D.2d at 477, 658 N.Y.S.2d 138; *see generally Island Auto Seat Cover Co., Inc. v. Minunni,* 69 A.D.3d 570, 571, 892 N.Y.S.2d 189). Furthermore, the borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan (*see EMC Mtge. Corp. v. Smith,* 18 A.D.3d 602, 603, 796 N.Y.S.2d 364; *EMC Mtge. Corp. v. Patella,* 279 A.D.2d at 605–606, 720 N.Y.S.2d 161; *Arbisser v. Gelbelman,* 286 A.D.2d 693, 694, 730 N.Y.S.2d 157), and such notice must be "clear and unequivocal" (*Sarva v. Chakravorty,* 34 A.D.3d 438, 439, 826 N.Y.S.2d 74; *see Arbisser v. Gelbelman,* 286 A.D.2d at 694, 730 N.Y.S.2d 157; *Colonie Block & Supply Co. v. Overmyer Co.,* 35 A.D.2d 897, 897, 315 N.Y.S.2d 713). Commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been ****543** exercised (*see EMC Mtge. Corp. v. Smith,* 18 A.D.3d at 603, 796 N.Y.S.2d 364; *Clayton Natl. v. Guldi,* 307 A.D.2d 982, 982, 763 N.Y.S.2d 493; *Arbisser v. Gelbelman,* 286 A.D.2d at 694, 730 N.Y.S.2d 157).

Here, the Predecessor had not been assigned the note or the mortgage at the time the 2002 complaint was served upon Burke. Accordingly, service of the 2002 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt since the Predecessor did not have the authority to accelerate the debt or to sue to foreclose at that time (*see EMC Mtge. Corp. v. Suarez,* 49 A.D.3d 592, 593, 852 N.Y.S.2d 791). Furthermore, Units LLC failed to demonstrate that the commencement of the 2003 action was effective to constitute a valid exercise of the acceleration option since it failed to show that the Predecessor served Burke with the complaint in the 2003 action prior to October 5, 2003 (*see Sarva v. Chakravorty,* 34 A.D.3d at 439, 826 N.Y.S.2d 74). Even if the consolidation of the 2002 and 2003 actions could be construed as a valid acceleration, it occurred in 2005, less than six years prior to the commencement of this action (*see* CPLR 213 [4]).

In sum, Units LLC failed to demonstrate that the option to ***984** accelerate the maturity of the loan was validly exercised in accordance with the terms of the note and mortgage, prior to October 5, 2003 (*see EMC Mtge. Corp. v. Suarez,* 49 A.D.3d

at 593, 852 N.Y.S.2d 791; *Sarva v. Chakravorty,* 34 A.D.3d at 439, 826 N.Y.S.2d 74; *see also Esther M. Mertz Trust v. Fox Meadow Partners,* 288 A.D.2d at 339, 734 N.Y.S.2d 77; *Loiacono v. Goldberg,* 240 A.D.2d at 477, 658 N.Y.S.2d 138; *Pagano v. Smith,* 201 A.D.2d at 633, 608 N.Y.S.2d 268; *Ward v. Walkley,* 143 A.D.2d at 417, 532 N.Y.S.2d 426). Accordingly, upon reargument, the Supreme Court properly adhered to its prior determination denying that branch of the motion of Units LLC which was to dismiss so much of the complaint as, in effect, asserted causes of action against it based on payments due on or after October 5, 2003.

Contrary to Burke's contention, the Supreme Court properly denied his motion to vacate his default in appearing or answering and to dismiss the complaint insofar as asserted against him as barred by the statute of limitations (*see Centennial El. Indus., Inc. v. Ninety–Five Madison Corp.,* 90 A.D.3d 689, 690, 934 N.Y.S.2d 483 [2d Dept.2011]; *Brownfield v. Ferris,* 49 A.D.3d 790, 791, 855 N.Y.S.2d 565).

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# Case 3

*American Home Mortg. Servicing, Inc. v. Sharrocks,* 92 A.D.3d 620, 938 N.Y.S.2d 202 (Second Dept. 2012)

**AMERICAN HOME MORTGAGE SERVICING, INC., respondent,**
**v.**
**William SHARROCKS, et al., defendants; Margaret J. Orosz, nonparty-appellant.**
Feb. 7, 2012.
**DANIEL D. ANGIOLILLO, J.P., THOMAS A. DICKERSON, ARIEL E. BELEN, and LEONARD B. AUSTIN, JJ.**

*620 In an action to foreclose a mortgage, nonparty Margaret J. Orosz, appeals, as limited by her brief, from so much of an order of the Supreme Court, Westchester County (O.Bellantoni, J.), entered August 23, 2010, as denied those branches of her motion which were pursuant to CPLR 1012(a) (3) or 1013 for leave to intervene, to consolidate the instant action with an action entitled *Orosz v. Orosz,* pending in the Supreme Court, Westchester County, under Index No. 1127/09, and to stay the foreclosure sale of the mortgaged real property pending the resolution of that action.

ORDERED that the order is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, those branches of the motion of the nonparty-appellant which were for leave to intervene and to consolidate the instant action with the action entitled *Orosz v. Orosz,* pending in the Supreme Court, Westchester County, under Index No. 1127/09, are granted, that branch of the motion of the nonparty-appellant which was to stay the foreclosure sale of the mortgaged real property is denied as unnecessary, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings consistent herewith, including amendment of the caption to reflect the consolidation.

On February 8, 2008, the nonparty-appellant, Margaret J. Orosz (hereinafter the appellant), was awarded judgment against her brother and her brother's wife in the

principal sum of $1,993,003.01 in a breach of contract action. As a result of the judgment, a lien was placed on real property apparently owned by the appellant's brother and located in Armonk. After a series of transfers, the subject property was transferred to William Sharrocks, who, in 2005 and 2006, obtained loans in exchange for three mortgages on the subject property, which were consolidated in October 2006. After Sharrocks defaulted on the consolidated mortgage loans, the plaintiff mortgagee commenced the instant foreclosure action in December 2007. Subsequently, in January 2009, the appellant commenced an action (hereinafter the fraudulent conveyance action) against, *621 among others, her brother, Sharrocks, and the plaintiff in the instant action, alleging that the serial conveyances of and mortgages on the subject property were fraudulent. The appellant also filed a notice of pendency against the subject property. In April 2010 the appellant moved in the instant foreclosure action, inter alia, pursuant to CPLR 1012(a)(3) or 1013 for leave to intervene, to consolidate the instant action and the fraudulent conveyance action, and to stay the foreclosure sale of the subject property pending the resolution of the fraudulent conveyance action.

CPLR 1013 provides that a court has discretion to permit a person to intervene, inter alia, when the person's claim or defense and the main action have a common question of law or fact (*see* CPLR 1013). In exercising its discretion under CPLR 1013, "the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party" (*Wells Fargo Bank, N.A. Assn. v. McLean,* 70 A.D.3d at 677, 894 N.Y.S.2d 487; *see* CPLR 1013).

In her proposed verified answer in the instant action, the appellant interposed affirmative defenses asserting, inter alia, that "Sharrocks took the subject property **205 as a party to a fraudulent conveyance, and lacked right, title, interest and authority to encumber the subject real property," that "[t]he subject mortgages to Defendant Sharrocks were fraudulently made and void ab initio," and that she "has a superior lien on the subject property and is entitled to the proceeds of any sale of the subject property." As such, there are common questions of law and fact pertaining to the validity of Sharrocks's mortgages in the instant foreclosure action and the fraudulent conveyance action. In addition, the appellant demonstrated a real and substantial interest in the outcome of the foreclosure proceedings (*see Wells Fargo Bank, N.A. v. McLean,* 70 A.D.3d 676, 894 N.Y.S.2d 487; *Berkoski v. Board of Trustees of Inc. Vil. of Southampton,* 67 A.D.3d at 843–844, 889 N.Y.S.2d 623; *Matter of Bernstein v. Feiner,* 43 A.D.3d 1161, 1162, 842 N.Y.S.2d 556; *County of Westchester v. Department of Health of State of N.Y.,* 229 A.D.2d 460, 461, 645 N.Y.S.2d 534). Accordingly, the Supreme Court should have granted that branch of the appellant's motion which was for leave to intervene pursuant to CPLR 1013.

Whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings" *622 (*Wells Fargo Bank, N.A. v. McLean,* 70 A.D.3d at 676–677, 894 N.Y.S.2d 487;

*see Berkoski v. Board of Trustees of Inc. Vil. of Southampton,* 67 A.D.3d 840, 843, 889 N.Y.S.2d 623; *Sieger v. Sieger,* 297 A.D.2d 33, 35–36, 747 N.Y.S.2d 102; *Perl v. Aspromonte Realty Corp.,* 143 A.D.2d 824, 533 N.Y.S.2d 147). In light of our determination that intervention was warranted pursuant to CPLR 1013, we need not determine whether intervention should have been permitted as of right under CPLR 1012(a).

A motion to consolidate two or more actions rests within the sound discretion of the trial court (*see* CPLR 602; *Matter of Long Is. Indus. Group v. Board of Assessors,* 72 A.D.3d 1090, 1091, 900 N.Y.S.2d 128; *North Side Sav. Bank v. Nyack Waterfront Assoc.,* 203 A.D.2d 439, 610 N.Y.S.2d 862). Where common questions of law or fact exist, consolidation is warranted unless the opposing party demonstrates prejudice to a substantial right (*see Alizio v. Perpignano,* 78 A.D.3d 1087, 1088, 912 N.Y.S.2d 132; *Pierre–Louis v. DeLonghi Am., Inc.,* 66 A.D.3d 855, 856, 887 N.Y.S.2d 632; *Glussi v. Fortune Brands,* 276 A.D.2d 586, 714 N.Y.S.2d 516).

In the fraudulent conveyance action, the appellant alleged that the conveyances and mortgages that underlie the instant foreclosure action were fraudulent. Consequently, the subject matter of the instant foreclosure action and the fraudulent conveyance action share common questions of law and fact, warranting consolidation of the two actions (*see Lorber v. Morovati,* 83 A.D.3d 799, 922 N.Y.S.2d 109; *Alizio v. Perpignano,* 78 A.D.3d at 1088, 912 N.Y.S.2d 132; *Ryckman v. Schlessinger–Levi–Polatsch–Tydings,* 225 A.D.2d 603, 639 N.Y.S.2d 729). Moreover, the plaintiff has not shown how it would be prejudiced by consolidation of the two actions. The plaintiff is a party to both actions, and the validity of any foreclosure sale it enters into will ultimately be contingent on the outcome of the fraudulent conveyance action. Thus, the Supreme Court should have granted that branch of the appellant's motion which was to consolidate this foreclosure action and the fraudulent conveyance action (*see Matter of Long Is.Indus. Group v. Board of Assessors,* 72 A.D.3d at 1091, 900 N.Y.S.2d 128; **206 *Viafax Corp. v. Citicorp Leasing, Inc.,* 54 A.D.3d 846, 850, 864 N.Y.S.2d 479; *Ryckman v. Schlessinger–Levi–Polatsch–Tydings,* 225 A.D.2d 603, 639 N.Y.S.2d 729; *North Side Sav. Bank v. Nyack Waterfront Assoc.,* 203 A.D.2d 439, 610 N.Y.S.2d 862).

In light of our determination consolidating the mortgage foreclosure action and the fraudulent conveyance action, the Supreme Court is now obligated to determine the allegations of fraudulent conveyance before entering any judgment in the consolidated action, including any judgment of foreclosure and sale, if warranted. Hence, there is no need to stay the foreclosure and sale pending resolution of the fraudulent conveyance action, and that branch of the appellant's motion which was for *623 such a stay must be denied as unnecessary.

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## Case 4

*Archer Capital Fund, L.P. v. GEL, LLC,* 95 A.D.3d 800, 944 N.Y.S.2d 179 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**ARCHER CAPITAL FUND, L.P., respondent,**

**v.**

**GEL, LLC, et al., appellants, et al., defendants.**

May 1, 2012.

**RUTH C. BALKIN, J.P., CHERYL E. CHAMBERS, L. PRISCILLA HALL, and LEONARD B. AUSTIN, JJ.**

*800 In an action, inter alia, to foreclose a mortgage, the defendants GEL, LLC, GRL, LLC, Eagle Realty, LLC, Emmanuel Lambrakis, George Lambrakis, Gregory Lambrakis, and Alexander Lambrakis appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Agate, J.), entered November 5, 2010, as granted those branches of the plaintiff's motion which were for summary judgment on the complaint, for the appointment of a referee to compute the amount due to the plaintiff, and for leave to seek a deficiency judgment.

ORDERED that the order is affirmed insofar as appealed from, with costs.

Archer Capital Fund, L.P. (hereinafter Archer), commenced this action to foreclose**180 a mortgage given to it by the defendants GEL, LLC, GRL, LLC, and Eagle Realty, LLC (hereinafter collectively Eagle), and to enforce a guarantee by the defendants Emmanuel Lambrakis, George Lambrakis, and Gregory Lambrakis (hereinafter collectively the Lambrakis defendants). *801 Archer moved for summary judgment on the complaint. The Supreme Court granted the motion, relying, in part, on a conditional order of preclusion barring the appellants from introducing evidence supporting their defenses and counterclaims.

Archer established its prima facie entitlement to judgment as a matter of law (*see Petra CRE CDO 2007–1, Ltd. v. 160 Jamaica Owners, LLC,* 73 A.D.3d 883, 884, 904 N.Y.S.2d 699). With respect to the foreclosure cause of action, Archer submitted the mortgage and the unpaid note and evidence that Eagle defaulted (*id.; see Wells Fargo Bank v. Das Karla,* 71 A.D.3d 1006, 896 N.Y.S.2d 681; *Capstone Bus. Credit, LLC v. Imperia Family Realty, LLC,* 70 A.D.3d 882, 883, 895 N.Y.S.2d 199; *Neighborhood Hous. Servs. of N.Y. City, Inc. v. Meltzer,* 67 A.D.3d 872, 873, 889 N.Y.S.2d 627; *Quest Commercial, LLC v. Rovner,* 35 A.D.3d 576, 825 N.Y.S.2d 766). With respect to the cause of action for a deficiency judgment based upon the Lambrakis defendants' guarantee, Archer produced the underlying agreements and evidence of Eagle's default (*see North Fork Bank Corp. v. Graphic Forms Assoc., Inc.,* 36 A.D.3d 676, 828 N.Y.S.2d 194; *E.D.S. Sec. Sys. v. Allyn,* 262 A.D.2d 351, 691 N.Y.S.2d 567; *Federal Deposit Ins. Corp. v. 7 A.M. to 11 P.M. Delicatessen,* 251 A.D.2d 620, 675 N.Y.S.2d 872).

In opposition, the appellants failed to raise a triable issue of fact (*see JPMCC 2007–CIBC19 Bronx Apts., LLC v. Fordham Fulton LLC,* 84 A.D.3d 613, 922 N.Y.S.2d 779; *Petra CRE CDO 2007–1, Ltd. v. 160 Jamaica Owners, LLC,* 73 A.D.3d at 884, 904 N.Y.S.2d 699; *North Fork Bank v. Computerized Quality Separation Corp.,* 62 A.D.3d 973, 974, 879 N.Y.S.2d 575; *Quest Commercial, LLC v. Rovner,* 35 A.D.3d 576, 825 N.Y.S.2d 766). The appellants were barred from

submitting evidence sufficient to defeat Archer's prima facie showing because the conditional order of preclusion became absolute upon the appellants' noncompliance with its terms (*see Gibbs v. St. Barnabas Hosp.,* 16 N.Y.3d 74, 79, 917 N.Y.S.2d 68, 942 N.E.2d 277; *Wilson v. Galicia Contr. & Restoration Corp.,* 10 N.Y.3d 827, 830, 860 N.Y.S.2d 417, 890 N.E.2d 179; *Wei Hong Hu v. Sadiqi,* 83 A.D.3d 820, 821, 921 N.Y.S.2d 133; *Alphonse v. UBJ Inc.,* 266 A.D.2d 171, 697 N.Y.S.2d 324). In seeking to be relieved from the consequences of that noncompliance, the appellants failed to demonstrate a reasonable excuse for such noncompliance, and the existence of a potentially meritorious claim or defense (*see Gibbs v. St. Barnabas Hosp.,* 16 N.Y.3d at 79, 917 N.Y.S.2d 68, 942 N.E.2d 277; *see Wei Hong Hu v. Sadiqi,* 83 A.D.3d at 821, 921 N.Y.S.2d 133; *Nurse v. Figeroux & Assoc.,* 47 A.D.3d 778, 849 N.Y.S.2d 644; *Alphonse v. UBJ Inc.,* 266 A.D.2d at 171, 697 N.Y.S.2d 324). Specifically, the appellants failed to adequately explain and document their claim of law office failure (*see Campbell–Jarvis v. Alves,* 68 A.D.3d 701, 702, 889 N.Y.S.2d 257; *cf. Nurse v. Figeroux & Assoc.,* 47 A.D.3d at 779, 849 N.Y.S.2d 644). Under the circumstances, any alleged negligence by the appellants*802 ' former attorney was properly imputed to the appellants because of their failure to ascertain the status of the case (*see Diamond Truck Leasing Corp. v. Cross Country Ins. Brokerage, Inc.,* 62 A.D.3d 745, 877 N.Y.S.2d 901; **181 *Santiago v. Santana,* 54 A.D.3d 929, 930, 864 N.Y.S.2d 122; *Nurse v. Figeroux & Assoc.,* 47 A.D.3d at 779, 849 N.Y.S.2d 644; *Edwards v. Feliz,* 28 A.D.3d 512, 513, 813 N.Y.S.2d 494; *MRI Enters. v. Amanat,* 263 A.D.2d 530, 531, 693 N.Y.S.2d 211; *cf. L & L Auto Distribs. & Suppliers Inc. v. Auto Collection, Inc.,* 85 A.D.3d 734, 735–736, 925 N.Y.S.2d 151). Moreover, in the mortgage and loan documents, Eagle waived its right to assert defenses or counterclaims in response to any action commenced by Archer to enforce Eagle's obligations thereunder and to recover the debt. Although the appellants' counterclaim alleging fraud survives such a waiver (*see North Fork Bank v. Computerized Quality Separation Corp.,* 62 A.D.3d at 974, 879 N.Y.S.2d 575), that counterclaim was supported only by conclusory allegations against Archer (*see Eurycleia Partners, LP v. Seward & Kissel, LLP,* 12 N.Y.3d 553, 559, 883 N.Y.S.2d 147, 910 N.E.2d 976; *Heffez v. L & G Gen. Constr., Inc.,* 56 A.D.3d 526, 527, 867 N.Y.S.2d 198; *Quest Commercial, LLC v. Rovner,* 35 A.D.3d at 577, 825 N.Y.S.2d 766; *Old Republic Natl. Tit. Ins. Co. v. Cardinal Abstract Corp.,* 14 A.D.3d 678, 680, 790 N.Y.S.2d 143; *E.D.S. Sec. Sys. v. Allyn,* 262 A.D.2d 351, 691 N.Y.S.2d 567). The appellants' specific allegations of fraud were not directed at Archer, but at the appellants' own transactional attorney.

Accordingly, the Supreme Court properly granted those branches of Archer's motion which were for summary judgment on the complaint, for the appointment of a referee to compute the amount due to it, and for leave to seek a deficiency judgment.

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# Case 5

*Bank of America, N.A. v. Oneonta, L.P.,* 97 A.D.3d 1023, 949 N.Y.S.2d 794 (Third Dept. 2012)

Supreme Court, Appellate Division, Third Department, New York.

**BANK OF AMERICA, N.A., as Successor by Merger to Lasalle National Bank, as Trustee for the Certificate Holders of the Bear Sterns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass–Through Certificates, Series 1999–C1, Acting by and through Helios AMC, LLC, in its Capacity as Special Servicer, Appellant,**

**v.**

**ONEONTA, L.P., Formerly Known as Pittsford Capital Mobile Home Parks, L.P., Defendant.**

July 19, 2012.

**Before: MERCURE, J.P., KAVANAGH, STEIN, McCARTHY and EGAN JR., JJ.**

**McCARTHY, J.**

Appeals (1) from an order of the Supreme Court (Coccoma, J.), entered April 21, 2011 in Otsego County, which, among other things, partially granted plaintiff's motion to confirm the referee's report of sale, and (2) from an order of said court, entered June 22, 2011 in Otsego County, which, upon reargument, modified its prior order.

In 1998, defendant executed a consolidated note in the amount of $1,300,000 secured by a mortgage on two parcels of real property each containing a mobile home park. The note and mortgage were subsequently assigned to plaintiff. After defendant defaulted on the note, plaintiff commenced this action to foreclose on the mortgage, seeking to recover the principal and interest due on the note, as well as reimbursement for any expenses incurred during the pendency of the action. Plaintiff concurrently sought to have a receiver appointed for the property. Upon defendant's failure to appear in the action, Supreme Court entered a default judgment against defendant, appointed a receiver for the property and appointed a referee to compute.

During the pendency of the action, plaintiff expended $18,265.34 for real property taxes on the properties, $570 for insurance premiums, $34,361 for environmental assessments, $14,200 for appraisal reports, $40,000 for marketing commissions to a real estate marketing company and $604.42 for miscellaneous expenses, for a total of $108,000.76 in what plaintiff denominated as protective advances.[3] Supreme Court appointed the referee to sell the properties. The referee sold the properties and submitted a report listing a surplus of $267,131.35, after

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[3] While the action was pending, plaintiff assigned its rights and interest in the judgment of foreclosure. All references herein to plaintiff include plaintiff's assignee as well.

deducting the protective advances paid by plaintiff, plus interest, totaling $112,185.42. Plaintiff moved to confirm the referee's report, discharge the receiver and distribute the surplus funds. Supreme Court, among other *796 things, confirmed all aspects of the report except the $112,185.42, denying that portion on the basis that "no advances were authorized by plaintiff after the appointment of a receiver." The court ordered plaintiff to remit that amount to the treasurer of Otsego County. Plaintiff appeals from that order.

Plaintiff moved to renew or, alternatively, to reargue the portion of the motion addressing the protective advances. Supreme Court accepted copies of invoices and receipts regarding the advances that were included with the referee's report but were inadvertently omitted from some copies of the original motion papers. The court still held that plaintiff was not authorized to make any advances after appointment of the receiver, but permitted reimbursement to plaintiff for amounts it paid for taxes and insurance, without interest. The court denied reimbursement for the remainder of the expenditures, finding that they were not necessary and were for plaintiff's benefit. Thus, the court ordered plaintiff to remit $93,350.08 to the County treasurer. Plaintiff also appeals from that order.

The mortgage expressly permitted plaintiff to pay numerous expenses under certain circumstances and to recover those payments. The mortgage states that it secured not only the payment of principal and interest, but also "the payment of all sums advanced and costs and expenses incurred by [plaintiff] in connection with the [d]ebt," as well as securing the performance of all of defendant's obligations under the agreement. A provision permits plaintiff to make any payments or perform any actions required under the mortgage if defendant defaults in its obligations thereunder, with such expenses constituting a portion of the debt secured by the mortgage. Separate provisions of the mortgage required defendant to obtain and maintain insurance and pay all taxes on the property (*see* Real Property Law §254[6]). Another provision permitted any entity designated by plaintiff to enter the property to conduct an environmental assessment or audit, with the costs to be borne by plaintiff unless a report or assessment is performed due to defendant's failure to comply with its obligations or following a default on the mortgage, in which case defendant would be responsible for such expenses. Defendant also agreed, in the mortgage, to pay the costs of any reappraisal of the property in certain circumstances, including if plaintiff requires a reappraisal following a default. Hence, in the event of defendant's default under the mortgage, as occurred here, that document authorized plaintiff to pay the taxes, maintain insurance, and obtain appraisals of the property and environmental assessments, with those expenses—advanced to protect plaintiff's security interest—becoming part of the debt owed under the mortgage (*see White v. Wielandt,* 259 A.D. 676, 679–680, 20 N.Y.S.2d 560 [1940], *affd.* 286 N.Y. 609, 36 N.E.2d 452 [1941]).

On the other hand, no provision of the mortgage permitted plaintiff to retain a real estate marketing company or pay commissions for promoting the property prior to a foreclosure sale. While those services may have resulted in higher bidding and purchase prices for the properties, inuring to the benefit of both plaintiff and

defendant, the mortgage did not authorize plaintiff to engage a company to provide those services. Accordingly, Supreme Court correctly disallowed reimbursement to plaintiff for the marketing commissions and miscellaneous expenses.

Supreme Court did not abuse its discretion in declining to reimburse plaintiff for payments other than for taxes and insurance, as they were paid without court approval after a receiver was appointed. *797 A receiver, who "is an officer of the court and not an agent of the mortgagee or the owner," has a duty "to preserve and operate the property, within the confines of the order of appointment and any subsequent authorization granted to him [or her] by the court" (*Kaplan v. 2108–2116 Walton Ave. Realty Co.,* 74 A.D.2d 786, 786, 425 N.Y.S.2d 817 [1980]; *see Matter of Kane [Freedman–Tenenbaum],* 75 N.Y.2d 511, 515, 554 N.Y.S.2d 457, 553 N.E.2d 1005 [1990]; *Jacynicz v. 73 Seaman Assoc.,* 270 A.D.2d 83, 85, 704 N.Y.S.2d 68 [2000], *lv. denied* 95 N.Y.2d 761, 714 N.Y.S.2d 711, 737 N.E.2d 953 [2000]; *Constellation Bank v. Binghamton Plaza,* 236 A.D.2d 698, 698, 653 N.Y.S.2d 208 [1997]). "During the pendency of the receivership, the property is, in essence, in the possession of the court itself" (*Trustco Bank v. Eakin,* 256 A.D.2d 778, 779, 681 N.Y.S.2d 410 [1998] [citation omitted]). The May 2009 order appointing the receiver authorized him to, among other things, collect rents, enforce leases, act as property manager, take reasonable steps to protect the premises, pay outstanding taxes and procure insurance (*see* RPAPL 1325[2]; *see also* CPLR 6401[b]). The receiver was not authorized to make repairs exceeding $1,500 or to appoint agents, including appraisers, without prior court authorization (*see* CPLR 6401[b]; *see also* 22 NYCRR 36.1[a] [10]; 36.2[a], [b]; *Kitt v. D.M.V. Estates,* 7 A.D.2d 291, 292, 182 N.Y.S.2d 667 [1959]; *compare Litho Fund Equities v. Alley Spring Apts. Corp.,* 94 A.D.2d 13, 15, 462 N.Y.S.2d 907 [1983], *appeal dismissed* 60 N.Y.2d 859, —— N.Y.S.2d ——, —— N.E.2d —— [1983]). Once a receiver was appointed, it was his responsibility to pay the taxes and other necessary expenses and to preserve and maintain the premises (*see Fourth Fed. Sav. Bank v. 32–22 Owners Corp.,* 236 A.D.2d 300, 301–302, 653 N.Y.S.2d 588 [1997]). Plaintiff, who requested the appointment of a receiver, no longer had the authority to perform these duties once the court appointed its own agent—a receiver—to do so. As the receiver would not have been authorized to pay for appraisals or the environmental assessments without court approval, plaintiff was not entitled to reimbursement after it paid these expenses without court approval. The prudent course for plaintiff would have been to seek court approval in advance of undertaking any actions that might be deemed ultra vires and obtaining permission to act and add the expenditure to the amount of its judgment, or move to expand the receiver's powers and have the court authorize him to undertake those actions or make those expenditures (*see Trustco Bank v. Eakin,* 256 A.D.2d at 780, 681 N.Y.S.2d 410; Alexander, Practice Commentaries, McKinney's Cons. Law of N.Y., Book 7B, CPLR C6401:3, at 411).

Notwithstanding the absence of prior judicial approval, Supreme Court could, in the exercise of its discretion, approve payment of the unauthorized expenses (*see Constellation Bank v. Binghamton Plaza,* 236 A.D.2d at 698–699, 653 N.Y.S.2d 208). In the amended final judgment of foreclosure and sale, Supreme Court

authorized the referee to pay plaintiff not only the computed principal balance with interest, but also "any advances as provided for in the note and mortgage, which plaintiff has made for taxes, insurance, ... or to maintain the premises pending consummation of this foreclosure sale," with interest. This order did not distinguish whether it permitted reimbursement for the payment of such expenses prior to or subsequent to the appointment of a receiver. Regardless of which interpretation is used, reimbursement should only be approved for expenditures that are necessary to maintain the premises (*see* *798 *Kaplan v. 2108–2116 Walton Ave. Realty Co.,* 74 A.D.2d at 786, 425 N.Y.S.2d 817; *Long Is. City Sav. & Loan Assn. v. Bertsman Bldg. Corp.,* 123 A.D.2d 840, 841, 507 N.Y.S.2d 640 [1986]; *see also Sun Beam Enters. v. Liza Realty Corp.,* 210 A.D.2d 153, 154, 621 N.Y.S.2d 9 [1994]).[4] Expenses for appraisals, environmental assessments and marketing commissions were related to preparing for, and maximizing the bids and profits from, the foreclosure sale. These expenses were not necessary to maintain the property or preserve its condition. Thus, although the higher sale prices of the properties may have inured to the benefit of defendant as well as plaintiff, the court did not abuse its discretion in refusing to permit reimbursement to plaintiff for these expenses incurred after the appointment of a receiver, despite the inclusion of such expenses as part of the debt in the mortgage.

ORDERED that the orders are modified, on the law and the facts, without costs, by reversing so much thereof as denied plaintiff's request for interest on the $18,835.34 it paid for taxes and insurance; matter remitted to the Supreme Court for a calculation of the interest due to plaintiff; and, as so modified, affirmed.

**MERCURE, J.P., KAVANAGH, STEIN and EGAN JR., JJ., concur.**

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# Case 6

*Bank of America, Nat. Ass'n v. Bah,* 95 A.D.3d 1150, 945 N.Y.S.2d 704 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**BANK OF AMERICA, NATIONAL ASSOCIATION, etc., appellant,**

**v.**

**Alseny BAH, et al., defendants.**

May 23, 2012.

**DANIEL D. ANGIOLILLO, J.P., THOMAS A. DICKERSON, L. PRISCILLA HALL, JEFFREY A. COHEN, JJ.**

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[4] Upon reargument, Supreme Court did permit reimbursement to plaintiff of the amount paid for taxes and insurance, but without interest. These expenses were necessary and should have been paid by the receiver, and the final judgment of foreclosure authorized reimbursement of payments for taxes with interest. Under the circumstances, plaintiff should have been paid interest on the $18,835.34.

*1150 In an action to foreclose a mortgage, the plaintiff appeals (1) from an order of the Supreme Court, Kings County (Schack, J.), dated January 7, 2011, which, sua sponte, directed the dismissal of the complaint with prejudice and the cancellation of a certain *1151 notice of pendency filed against the subject real property, and (2), as limited by its brief, from so much of an order of the same court dated June 27, 2011, as, in effect, denied that branch of its unopposed motion which was pursuant to CPLR 5015 to vacate the order dated January 7, 2011.

ORDERED that on the Court's own motion, the notice of appeal from the order dated January 7, 2011, is deemed to be an application for leave to appeal from that order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order dated January 7, 2011, is reversed, on the law, without costs or disbursements; and it is further,

ORDERED that the appeal from the order dated June 27, 2011, is dismissed as academic, without costs or disbursements, in light of our determination on the appeal from the order dated January 7, 2011.

In 2009 the plaintiff commenced the instant foreclosure action against homeowner Alseny Bah and additional defendants, and filed a notice of pendency against the subject real property. No defendant has ever appeared in this action.

The plaintiff eventually moved for, inter alia, an order of reference. In an order dated November 3, 2010, the Supreme **705 Court indicated that it would not consider the motion unless, within 60 days of the issuance of that order, the plaintiff submitted an attorney's affirmation attesting to the accuracy of the plaintiff's documents.

On December 9, 2010, well before the 60–day deadline, the plaintiff moved pursuant to CPLR 2004 for an enlargement of time to file the attorney's affirmation. The Supreme Court never ruled on that motion. Instead, in an order dated January 7, 2011, issued only a few days after the 60–day deadline had passed, the Supreme Court, sua sponte, directed the dismissal of the complaint with prejudice and the cancellation of the notice of pendency. The Supreme Court characterized the failure of the plaintiff's counsel to submit the requested attorney's affirmation as "delinquent conduct," mandating dismissal of the complaint. In its order, the Supreme Court did not mention the plaintiff's pending motion for an enlargement of time to file the attorney's affirmation.

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (*U.S. Bank, N.A. v. Emmanuel,* 83 A.D.3d 1047, 1048, 921 N.Y.S.2d 320). Here, there were no extraordinary circumstances warranting dismissal of the complaint and the concomitant cancellation of the notice of pendency. Contrary to the *1152 Supreme Court's determination, the plaintiff's counsel did not engage in "delinquent conduct." Rather, the plaintiff's counsel timely moved for an enlargement of time to file the required attorney's affirmation, and there is no evidence of a pattern of willful noncompliance with court-ordered deadlines. Consequently, the Supreme Court erred in, sua sponte, directing the dismissal of the complaint with prejudice and the cancellation of the notice of pendency (*see NYCTL 2008–A Trust v. Estate*

*of Locksley Holas,* 93 A.D.3d 650, 939 N.Y.S.2d 715; *Aurora Loan Servs., LLC v. Shahmela Shah Sookoo,* 92 A.D.3d 705, 941 N.Y.S.2d 503; *U.S. Bank, N.A. v. Emmanuel,* 83 A.D.3d at 1048, 921 N.Y.S.2d 320; *HSBC Bank USA, N.A. v. Valentin,* 72 A.D.3d 1027, 1029, 900 N.Y.S.2d 350).

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# Case 7

*Bank of New York v. Espejo,* 92 A.D.3d 707, 939 N.Y.S.2d 105 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.

**BANK OF NEW YORK, etc., respondent,**

**v.**

**Jose Luis ESPEJO, et al., appellants, et al., defendants.**

Feb. 14, 2012.

**MARK C. DILLON, J.P., JOHN M. LEVENTHAL, ARIEL E. BELEN, and PLUMMER E. LOTT, JJ.**

*707 In an action to foreclose a mortgage, the defendants Jose Luis Espejo and Daisy Espejo appeal from an order of the Supreme Court, Queens County (Markey, J.), entered September 24, 2010, which denied their motion, inter alia, to vacate the judgment of foreclosure and sale of the same court entered September 11, 2009, upon their default in appearing or answering the complaint.

ORDERED that the order is affirmed, with costs.

This action was commenced in early April 2007. According to the affidavits of service, the defendants Jose Luis Espejo and Daisy Espejo (hereinafter together the defendants), were served with copies of the summons and complaint at their home, the mortgaged premises (hereinafter the subject property), on April *708 9, 2007, by delivery of a copy of the summons and complaint to Michael Guzman, referred to as a cotenant, and by the subsequent mailing of two additional copies of the summons and complaint to the same address, all pursuant to CPLR 308(2). The defendants neither answered the complaint nor otherwise appeared in the action. On September 11, 2009, a default judgment of foreclosure and sale (hereinafter the judgment) was entered against them. In May 2010 the defendants moved, inter alia, pursuant to CPLR 5015(a)(4) to vacate the judgment entered upon their default. In support, the defendant Jose Luis Espejo submitted an affidavit stating that he was not served with a copy of the summons and complaint because, at the time of service, he resided and worked in Florida. The defendant Daisy Espejo submitted an affidavit stating that she was not served with a copy of the summons and complaint because Michael Guzman, who received service, did not reside at the subject property. The Supreme Court denied the defendants' motion. The defendants appeal, and we affirm.

The Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 5015(a)(4) to vacate the judgment. The affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308(2) (*see U.S. Natl. Bank Assn. v. Melton,* 90 A.D.3d 742, 934 N.Y.S.2d 352; *Wells Fargo Bank, N.A. v. Christie,* 83 A.D.3d 824, 825, 921 N.Y.S.2d 127; *Deutsche Bank*

*Natl. Trust Co. v. Hussain,* 78 A.D.3d 989, 912 N.Y.S.2d 595), and the defendants' unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service at the address where all notices under the mortgage were to be sent. The conclusory affidavit of the defendant Daisy Espejo that Michael Guzman did not reside at the subject property did not rebut the presumption of proper service. Valid service pursuant to CPLR 308(2) may be made by delivery of the summons and complaint to **107 a person of suitable age and discretion who answers the door at a defendant's residence, but is not a resident of the subject property (*see U.S. 1 Brookville Real Estate Corp. v. Spallone,* 21 A.D.3d 480, 481–482, 799 N.Y.S.2d 816; *Chesman v. Lippoth,* 271 A.D.2d 567, 706 N.Y.S.2d 703).

That branch of the defendants' motion which was to vacate the judgment pursuant to CPLR 5015(a)(1) was properly denied, as they failed to demonstrate both a reasonable excuse for their default and a potentially meritorious defense to the action (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.,* 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 492 N.E.2d 116; *Bank of Am. v. Faracco,* 89 A.D.3d 879, 932 N.Y.S.2d 706). For the same reasons, they were not entitled to enlarge their time to appear or to compel acceptance of an untimely answer (*see Midfirst Bank v. Al–Rahman,* 81 A.D.3d 797, 917 N.Y.S.2d 871).

*709 Finally, the defendants were not entitled to vacatur of the judgment pursuant to CPLR 317 since they failed to demonstrate that they did not receive notice of this action in time to defend it (*see Tribeca Lending Corp. v. Crawford,* 79 A.D.3d 1018, 1019–1020, 916 N.Y.S.2d 116).

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# Case 8

*Bank of New York v. Segui,* 91 A.D.3d 689, 937 N.Y.S.2d 95 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.

**BANK OF NEW YORK, plaintiff-respondent,**

**v.**

**Margarita SEGUI, defendant-respondent, et al., defendants;**
**Chaim Streicher, nonparty-appellant.**

Jan. 17, 2012.

**WILLIAM F. MASTRO, A.P.J., L. PRISCILLA HALL, SANDRA L. SGROI, and JEFFREY A. COHEN, JJ.**

*689 In an action to foreclose a mortgage, Chaim Streicher appeals from an order of the Supreme Court, Kings County (Rothenberg, J.), dated September 24, 2010, which denied his cross motion to set aside the foreclosure sale of the subject property and direct the referee to return his deposit.

ORDERED that the order is affirmed, with costs.

" 'A marketable title is a title free from reasonable doubt, but not from every doubt.... [A] purchaser ought not to be compelled to take property, the possession or title of which he [or she] may be obliged to defend by litigation. He [or she] should have a title that will enable him [or her] to hold his [or her] land free from probable claim by another, and one which, if he [or she] wishes to sell, would be reasonably

free from any doubt which would interfere with its market value' " (*Barrera v. Chambers,* 38 A.D.3d 699, 700, 833 N.Y.S.2d 544, quoting *Voorheesville Rod & Gun Club v. Tompkins Co.,* 82 N.Y.2d 564, 571, 606 N.Y.S.2d 132, 626 N.E.2d 917 [internal quotation marks and citations omitted]; *see* *690 *Laba v. Carey,* 29 N.Y.2d 302, 311, 327 N.Y.S.2d 613, 277 N.E.2d 641; *Cerf v. Diener,* 210 N.Y. 156, 161, 104 N.E. 126; *Patten of N.Y. Corp. v. Geoffrion,* 193 A.D.2d 1007, 1009, 598 N.Y.S.2d 355; *DeJong v. Mandelbaum,* 122 A.D.2d 772, 774, 505 N.Y.S.2d 659). Moreover, "[s]omething more than a mere assertion of a right is essential to create an unmarketable or doubtful title" (*Nasha Holding Corp. v. Ridge Bldg. Corp.,* 221 App.Div. 238, 243, 223 N.Y.S. 223; *see Argent Mtge. Co., LLC v. Leveau,* 46 A.D.3d 727, 848 N.Y.S.2d 691).

Here, even accepting the appellant's unsubstantiated assertions regarding the subject property's decreased market value since an August 2005 foreclosure sale, at which he was the successful bidder, contrary to his contention, a property's decreased market value does not render title unmarketable (*cf. Laba v. Carey,* 29 N.Y.2d at 311, 327 N.Y.S.2d 613, 277 N.E.2d 641; *Barrera v. Chambers,* 38 A.D.3d at 700, 833 N.Y.S.2d 544; *Patten of N.Y. Corp. v. Geoffrion,* 193 A.D.2d at 1009, 598 N.Y.S.2d 355; *DeJong v. Mandelbaum,* 122 A.D.2d at 774, 505 N.Y.S.2d 659). Moreover, under the circumstances, the mortgagor's numerous unsuccessful motions to vacate the judgment of foreclosure and sale pursuant to which the foreclosure sale was conducted do not constitute reasonable doubt sufficient to affect the marketability of title (*see Argent Mtge. Co., LLC v. Leveau,* 46 A.D.3d 727, 848 N.Y.S.2d 691).

A court may exercise its inherent equitable power to ensure that a foreclosure sale conducted pursuant to a judgment of foreclosure "is not made the instrument of injustice" (*Guardian Loan Co. v. Early,* 47 N.Y.2d 515, 520, 419 N.Y.S.2d 56, 392 N.E.2d 1240; *see Golden Age Mtge. Corp. v. Argonne Enters., LLC,* 68 A.D.3d 925, 892 N.Y.S.2d 436; *Alkaifi v. Celestial Church of Christ Calvary Parish,* 24 A.D.3d 476, 477, 808 N.Y.S.2d 230) and, therefore, may set aside a foreclosure sale where " 'fraud, collusion, mistake, or misconduct casts suspicion on the fairness of the sale' " **98 (*Alkaifi v. Celestial Church of Christ Calvary Parish,* 24 A.D.3d at 477, 808 N.Y.S.2d 230, quoting *Fleet Fin. v. Gillerson,* 277 A.D.2d 279, 280, 716 N.Y.S.2d 66).

Contrary to the appellant's contention, the delay in closing title after his successful bid for the subject property at the August 2005 foreclosure sale does not provide an equitable basis to set aside the subject sale and direct the referee to return his deposit (*see Manufacturers & Traders Trust Co. v. Foy,* 79 A.D.3d 825, 914 N.Y.S.2d 185). Further, the appellant's conduct demonstrates that he acquiesced in the delayed closing. While the appellant may not have anticipated the length of the delay, he does not dispute that he was aware when he bid on the subject property of the mortgagor's pending motion to vacate the judgment of foreclosure and sale, and he intervened in this action in 2007 (*id.* at 826, 914 N.Y.S.2d 185). Moreover, the record does not indicate that the appellant attempted to close title after this Court affirmed the denial of the mortgagor's motion to vacate

the judgment of foreclosure *691 and sale (*see Bank of N.Y. v. Segui,* 42 A.D.3d 555, 840 N.Y.S.2d 408), or after this Court affirmed the denial of the mortgagor's motion to renew her motion to vacate the judgment of foreclosure and sale (*Bank of N.Y. v. Segui,* 68 A.D.3d 908, 890 N.Y.S.2d 830; *see Manufacturers & Traders Trust Co. v. Foy,* 79 A.D.3d at 826, 914 N.Y.S.2d 185).

The appellant makes no allegation that the sale itself was tainted by fraud, collusion, mistake, or other misconduct (*see Alkaifi v. Celestial Church of Christ Calvary Parish,* 24 A.D.3d at 477, 808 N.Y.S.2d 230; *Fleet Fin. v. Gillerson,* 277 A.D.2d at 280, 716 N.Y.S.2d 66). Moreover, the fact that the appellant may now be overpaying for the property does not provide an equitable basis to void the sale (*see Guardian Loan Co. v. Early,* 47 N.Y.2d 515, 521, 419 N.Y.S.2d 56, 392 N.E.2d 1240; *Manufacturers & Traders Trust Co. v. Foy,* 79 A.D.3d 825, 914 N.Y.S.2d 185).

Accordingly, the Supreme Court properly denied the appellant's cross motion to set aside the foreclosure sale of the subject property and direct the referee to return his deposit.

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# Case 9

*Cantor v. Flores,* 94 A.D.3d 936, 943 N.Y.S.2d 138 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.

**David A. CANTOR, respondent,**

**v.**

**Frantzie FLORES, appellant, et al., defendants.**

April 17, 2012.

**MARK C. DILLON, J.P., THOMAS A. DICKERSON, L. PRISCILLA HALL, and LEONARD B. AUSTIN, JJ.**

*936 In an action to foreclose a mortgage, the defendant Frantzie Flores appeals from an order of the Supreme Court, Nassau County (Adams, J.), entered January 5, 2011, which denied her motion to vacate a judgment of foreclosure and sale of the same court entered August 11, 2008, upon her default in answering the complaint.

ORDERED that the order is affirmed, with costs.

The Supreme Court providently exercised its discretion in denying the motion of the defendant Frantzie Flores (hereinafter the appellant) to vacate a judgment of foreclosure and sale entered upon her default in answering the complaint. While the appellant explicitly stated that her motion was based upon CPLR 5015(a)(4), she failed to allege that the Supreme Court did not obtain personal jurisdiction over her. The affidavit of the plaintiff's process server, which constituted prima facie evidence of proper service (*see Argent Mtge. Co., LLC v. Vlahos,* 66 A.D.3d 721, 887 N.Y.S.2d 225), indicated that the appellant was served on August 7, 2006, pursuant to CPLR 308(1). The appellant failed to challenge, let alone rebut, the plaintiff's prima facie showing of proper service. To the extent the appellant based her motion to vacate the default judgment of foreclosure and sale on CPLR 5015(a)(1), the motion was properly denied, as she failed to demonstrate a reasonable excuse for her default. While the *937 Supreme Court has the discretion to accept law office

failure as a reasonable excuse (*see* CPLR 2005; *Swensen v. MV Transp., Inc.,* 89 A.D.3d 924, 925, 933 N.Y.S.2d 96), the excuse must be supported by detailed allegations of fact explaining the law office failure (*see Matter of Esposito,* 57 A.D.3d 894, 895, 870 N.Y.S.2d 109; *Gazetten Contr., Inc. v. HCO, Inc.,* 45 A.D.3d 530, 844 N.Y.S.2d 721). Here, the appellant's allegation of law office failure was vague, conclusory, and unsubstantiated (*see Wells Fargo Bank, N.A. v. Cervini,* 84 A.D.3d 789, 789–790, 921 N.Y.S.2d 643; *Star Indus., Inc. v. Innovative Beverages, Inc.,* 55 A.D.3d 903, 904–905, 866 N.Y.S.2d 357). Since the appellant failed to demonstrate a reasonable excuse for her default, it is unnecessary to determine whether she demonstrated the existence of a potentially meritorious defense (*see Tribeca Lending Corp. v. Correa,* 92 A.D.3d 770, 938 N.Y.S.2d 599; *Wells Fargo Bank, N.A. v. Cervini,* 84 A.D.3d at 790, 921 N.Y.S.2d 643).

The appellant's remaining contentions either are without merit or have been rendered academic by our determination.

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# Case 10

*Capital One, N.A. v. Waterfront Realty II, LLC,* 94 A.D.3d 683, 942 N.Y.S.2d 131 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**CAPITAL ONE, N.A., etc., respondent,**

**v.**

**WATERFRONT REALTY II, LLC, et al., appellants, et al., defendants.**

April 3, 2012.

**PETER B. SKELOS, J.P., JOHN M. LEVENTHAL, PLUMMER E. LOTT, and ROBERT J. MILLER, JJ.**

*683 In an action, inter alia, to foreclose a mortgage, the defendants Waterfront Realty II, LLC, Waterfront Realty Co., Isack Rosenberg, and Abraham Rosenberg appeal from an order of the Supreme Court, Kings County (Demarest, J.), dated March 11, 2011, which denied, without prejudice to renewal following the "submission" of certain issues to the United States Bankruptcy Court for the Eastern District of New York in a matter entitled *In re Isack Rosenberg,* Case No. 09–46326, the plaintiff's renewed motion, among other things, for summary judgment on the complaint and to appoint a referee to compute the amount due to it, and their cross motion for leave to serve and file an amended answer.

ORDERED that the appeal from so much of the order as denied the plaintiff's renewed motion, among other things, for summary judgment on the complaint and to appoint a referee to compute the amount due to it is dismissed, as the appellants are not aggrieved by that portion of the order (*see* CPLR 5511); and it is further,

*684 ORDERED that the order is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in declining to determine the merits of the appellants' cross motion and, in effect, determining that prosecution of this matter should be stayed

pending further proceedings in the United States Bankruptcy Court for the Eastern District of New York (*see Honkala v. Lee E. Gibson Constr. Co., Inc.,* 41 A.D.3d 655, 656, 838 N.Y.S.2d 626; *see* **132 *also Certain Underwriters at Lloyd's London v. Pneumo Abex Corp.,* 36 A.D.3d 441, 441, 829 N.Y.S.2d 29; *cf. Rosenbaum v. Dane & Murphy,* 189 A.D.2d 760, 761, 592 N.Y.S.2d 391). Accordingly, the Supreme Court properly denied the appellants' cross motion without prejudice to renewal following the "submission" of certain issues to the bankruptcy court.

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# Case 11

*Christiana Bank & Trust Co. v. Eichler,* 94 A.D.3d 1170, 942 N.Y.S.2d 241 (Third Dept. 2012)

Supreme Court, Appellate Division, Third Department, New York.

**CHRISTIANA BANK & TRUST COMPANY, as Owner Trustee for Security National Asset Securitization Series Trust II, Respondent,**

**v.**

**Daniel W. EICHLER et al., Appellants, et al., Defendants.**

April 5, 2012.

**Before: PETERS, J.P., ROSE, LAHTINEN, STEIN and GARRY, JJ.**

**ROSE, J.**

*1170 Appeal from an order of the Supreme Court (Dowd, J.), entered December 15, 2010 in Chenango County, which denied a motion by defendants Daniel W. Eichler and Carol N. Eichler to, among other things, vacate a default judgment of foreclosure.

Plaintiff commenced this foreclosure action in 2005, alleging that defendants Daniel W. Eichler and Carol N. Eichler (hereinafter collectively referred to as defendants) had failed to make any payments since March 2003 on a mortgage that they executed in 2000. After defendants failed to answer, a default judgment of foreclosure was entered against them in August 2005. Eleven days later, defendants filed for bankruptcy and their case was not closed until April 2010. The referee then deeded the property to plaintiff **242 in August 2010 and, five days later, defendants moved to vacate the default judgment and for leave to file a late answer. Supreme Court denied the motion and defendants appeal.

Defendants contend that issues of fact exist regarding whether they were properly served with the pleadings. While we certainly agree that relief from a judgment may be granted where the court lacked jurisdiction to render it (*see* CPLR 5015[a][4]), defendants failed to adequately rebut the presumption of proper service created by the affidavits of service (*see* *1171 *Owens v. Freeman,* 65 A.D.3d 731, 733, 884 N.Y.S.2d 791 [2009], *lv. dismissed* 13 N.Y.3d 855, 891 N.Y.S.2d 688, 920 N.E.2d 93 [2009]; *Mortgage Elec. Registration Sys., Inc. v. Schuh,* 48 A.D.3d 838, 841, 852 N.Y.S.2d 403 [2008], *appeal dismissed* 10 N.Y.3d 951, 862 N.Y.S.2d 464, 892 N.E.2d 857 [2008]). Those affidavits reflect that two copies of the summons and complaint were left with defendants' 22–year–old daughter at their residence and mailed two days later to the same address (*see* CPLR 308[2]). Defendants do not

deny that their daughter was served or that the proper address is listed in the affidavits. Their bare claim that they did not receive the pleadings is not a "'detailed and specific contradiction of the allegations in the process server's affidavit' sufficient to create a question of fact warranting a hearing" (*U.S. Bank Natl. Assn. v. Vanvliet,* 24 A.D.3d 906, 908, 805 N.Y.S.2d 459 [2005], quoting *Bankers Trust Co. of Cal. v. Tsoukas,* 303 A.D.2d 343, 344, 756 N.Y.S.2d 92 [2003]; *see Scarano v. Scarano,* 63 A.D.3d 716, 716–717, 880 N.Y.S.2d 682 [2009]).

Further, although defendants allege in a very general way that they were unaware that the judgment had been entered against them, they have not denied receipt of the notice of entry of the judgment of foreclosure which immediately preceded their bankruptcy filing, and they admit that they were aware of the Bankruptcy Court's 2006 order permitting plaintiff to remove its claim and continue its foreclosure action. Under these circumstances, Supreme Court properly exercised its discretion by rejecting defendants' claim that they were unaware of the foreclosure action until August 2010 and finding that they failed to offer a reasonable excuse for the four-year delay in moving to vacate the default judgment (*see* CPLR 317, 5015[a][1]; *Washington Mut. Bank v. Fisette,* 66 A.D.3d 1287, 1288, 887 N.Y.S.2d 728 [2009]; *F & K Supply, Inc. v. Shean,* 56 A.D.3d 1076, 1077–1078, 869 N.Y.S.2d 257 [2008]; *Personnel Sys. Intl. v. Clifford R. Gray, Inc.,* 146 A.D.2d 831, 833, 536 N.Y.S.2d 237 [1989]). The absence of a reasonable excuse also supports the exercise of the court's discretion in denying defendants permission to file a late answer pursuant to CPLR 3012(d) (*see Wells Fargo Bank, N.A. v. Wine,* 90 A.D.3d 1216, 1218, 935 N.Y.S.2d 664 [2011]). We have considered defendants' remaining contentions, including their conclusory and unsupported claims that the accounting was in error and that they were not in default, and find them to be without merit.

ORDERED that the order is affirmed, with costs.

**PETERS, J.P., LAHTINEN, STEIN and GARRY, JJ., concur.**

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# Case 12

*Citibank, N.A. v. Van Brunt Properties, LLC,* 95 A.D.3d 1158, 945 N.Y.S.2d 330 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**CITIBANK, N.A., appellant,**

**v.**

**VAN BRUNT PROPERTIES, LLC, respondent, et al., defendants.**

May 23, 2012.

**PETER B. SKELOS, J.P., THOMAS A. DICKERSON, RANDALL T. ENG, and JOHN M. LEVENTHAL, JJ.**

**331 *1158 In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Lewis, J.), dated March 4, 2011, which

denied that branch of its motion which was for summary judgment on the complaint, its application for the appointment of a receiver, and its separate motion to substitute Wells Fargo Bank, N.A., as the plaintiff, and to amend the caption accordingly, and granted the cross motion of the defendant Van Brunt Properties, LLC, for a judgment declaring that the plaintiff is not entitled to any interest, penalties, or fees on the subject note to the extent of declaring that the plaintiff is not entitled to any interest, penalties, or fees on the subject note from the date of the alleged default through March 31, 2011.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as denied the plaintiff's application for the appointment of a receiver is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is reversed, on the law, with costs, that branch of the plaintiff's motion which was for summary judgment on the complaint, the plaintiff's application for the appointment of a receiver, and the plaintiff's separate motion to substitute Wells Fargo Bank, N.A., as the plaintiff, and to amend *1159 the caption accordingly, are granted, and the cross motion of the defendant Van Brunt Properties, LLC, for a judgment declaring that the plaintiff is not entitled to any interest, penalties, or fees on the subject note is denied.

The Supreme Court erred in denying that branch of the plaintiff's motion which was for summary judgment on the complaint and the plaintiff's application for the appointment of a receiver. A mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of the mortgagor's default (*see Zanfini v. Chandler,* 79 A.D.3d 1031, 1032, 912 N.Y.S.2d 911; *HSBC Bank USA v. Merrill,* 37 A.D.3d 899, 900, 830 N.Y.S.2d 598; *Household Fin. Realty Corp. of N.Y. v. Winn,* 19 A.D.3d 545, 546, 796 N.Y.S.2d 533). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Mahopac Natl. Bank v. Baisley,* 244 A.D.2d 466, 467, 664 N.Y.S.2d 345).

Here, the plaintiff met its prima facie burden by submitting the mortgage, note, and evidence of default (*see Swedbank, AB, N.Y. Branch v. Hale Ave. Borrower, LLC,* 89 A.D.3d 922, 923, 932 N.Y.S.2d 540; *Zanfini v. Chandler,* 79 A.D.3d at 1032, 912 N.Y.S.2d 911). In opposition, the defendant mortgagor failed to raise a triable issue of fact as to any bona fide defense (*see Citibank, N.A. v. Silverman,* 85 A.D.3d 463, 464–466, 925 N.Y.S.2d 442; *Rossrock Fund II, L.P. v. Osborne,* 82 A.D.3d 737, 918 N.Y.S.2d 514; *Manufacturers & Traders Trust Co. v. Schlosser & Assoc.,* 242 A.D.2d 943, 665 N.Y.S.2d 949; *Massachusetts Mut. Life Ins. Co. v. Gramercy Twins Assoc.,* 199 A.D.2d 214, 216–218, 606 N.Y.S.2d 158).

Concomitantly, as the plaintiff contends, based on the language of the mortgage and note, it was entitled to the appointment of a receiver (*see* Real Property Law §254[10]; *Maspeth Fed. Sav. & Loan Assn. v. McGown,* 77 A.D.3d 890, 891, 909

N.Y.S.2d 642; *see also Naar v. Litwak & Co.,* 260 A.D.2d 613, 614, 688 N.Y.S.2d 698).

**332 The Supreme Court also erred in granting the defendant mortgagor's cross motion for a judgment declaring that the plaintiff is not entitled to any interest, penalties, or fees on the subject note to the extent of declaring that the plaintiff is not entitled to any interest, penalties, or fees on the note from the date of default through March 31, 2011. Since the defendant mortgagor failed to demonstrate any basis for preventing the plaintiff from enforcing the terms of its mortgage, the grant of such relief was not proper (*see* *1160 *Indymac Bank, F.S.B. v. Yano–Horoski,* 78 A.D.3d 895, 896, 912 N.Y.S.2d 239; *see also Levine v. Infidelity, Inc.,* 285 A.D.2d 629, 630, 728 N.Y.S.2d 670).

Finally, contrary to the defendant mortgagor's contention, the documents submitted by the plaintiff established that the subject note and mortgage were validly assigned to Wells Fargo Bank, N.A., after the commencement of this action, and that Wells Fargo Bank, N.A., is therefore now the real plaintiff in interest. Under these circumstances, the Supreme Court should have granted the plaintiff's motion to substitute Wells Fargo Bank, N.A., as the plaintiff in this action, and to amend the caption accordingly (*see* CPLR 1018, 3025[b]; *Deutsche Bank Trust Co., Americas v. Stathakis,* 90 A.D.3d 983, 935 N.Y.S.2d 651; *Maspeth Federal Savings and Loan Ass'n v. Simon–Erdan,* 67 A.D.3d 750, 751, 888 N.Y.S.2d 599; *East Coast Props. v. Galang,* 308 A.D.2d 431, 765 N.Y.S.2d 46).

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# Case 13

*CSFB 2004–C3 Bronx Apts LLC v. Sinckler, Inc.,* 96 A.D.3d 680, 949 N.Y.S.2d 21 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**CSFB 2004–C3 BRONX APTS LLC, Plaintiff–Appellant–Respondent,**

**v.**

**SINCKLER, INC., Defendant–Respondent–Appellant,**

**Baron Associates LLC, et al., Defendants.**

June 28, 2012.

**SAXE, J.P., FRIEDMAN, RENWICK, DeGRASSE, RICHTER, JJ.**

*680 Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about February 16, 2012, which, insofar as appealed from, denied plaintiff's motion for summary judgment foreclosing a commercial mortgage and dismissing defendant Sinckler, Inc.'s defenses and affirmative defenses, granted the part of Sinckler's motion that sought to vacate a prior order appointing a receiver and denied the part that sought summary judgment dismissing the complaint on the ground of standing, unanimously modified, on the law, to grant plaintiff's motion, and to deny the part of Sinckler's motion that sought to vacate the order appointing a receiver, and otherwise affirmed, without costs.

The record establishes that plaintiff was validly assigned the note and mortgage that is the subject of this foreclosure action (*see Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 280–281, 926 N.Y.S.2d 532 [2011]). Although Sinckler asserted a number of defenses and affirmative defenses, its entire argument is premised upon the contention that plaintiff lacks **22 standing to bring this action because the assignment was invalid. Thus, since this argument lacks merit, plaintiff should have been granted summary judgment on its foreclosure claim. We note that Sinckler admits in its papers on appeal that if plaintiff has standing, then there are no triable issues of fact.

The mortgage agreement provides for the appointment of a receiver, in an action to foreclose the mortgage, "as a matter of strict right and without notice to Mortgagor and without regard to the adequacy of the Property for the repayment of the *681 indebtedness secured hereby." Thus, plaintiff was entitled, "without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage" (Real Property Law §254[10]; *see Naar v. Litwak & Co.,* 260 A.D.2d 613, 688 N.Y.S.2d 698 [1999]). Under the circumstances, vacatur of the order appointing the receiver was not warranted (*see Naar,* 260 A.D.2d at 614–615, 688 N.Y.S.2d 698).

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# Case 14

*Deutsche Bank Nat. Trust Co. v. DaCosta,* 97 A.D.3d 630, 949 N.Y.S.2d 393 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**DEUTSCHE BANK NATIONAL TRUST COMPANY, etc., appellant,**

**v.**

**Rosemarie T. DACOSTA, et al., respondents, et al., defendants.**

July 11, 2012.

**WILLIAM F. MASTRO, A.P.J., DANIEL D. ANGIOLILLO, LEONARD B. AUSTIN, and SANDRA L. SGROI, JJ.**

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Blydenburgh, J.), dated August 4, 2010, as granted those branches of the motion of the defendants Rosemarie T. DaCosta and Ryan DaCosta which were pursuant to CPLR 317 and 5015(a)(4) to vacate a judgment of foreclosure and sale of the same court dated January 7, 2009, entered upon their default, and, in effect, pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against them.

ORDERED that the order is reversed insofar as appealed from, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Suffolk County, for a hearing on the issue of whether the defendants Rosemarie T. DaCosta and Ryan DaCosta were properly served with process pursuant to CPLR 308(2), and a new determination thereafter of those branches of their motion which were pursuant to CPLR 317 and CPLR 5015(a)(4) to vacate the judgment of

foreclosure and sale, and, in effect, pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against those defendants.

In May 2005 the defendants Rosemarie T. DaCosta and Ryan DaCosta (hereinafter together the DaCostas) executed an adjustable rate note to borrow the sum of $328,000 from Indymac Bank, FSB. The note was secured by a mortgage on the Dacostas' property located in Central Islip. The DaCostas allegedly defaulted in making the monthly installment payment due on March 1, 2007, and each monthly installment due thereafter. Pursuant to an *395 assignment, Mortgage Electronic Registration Systems, Inc., as nominee for Indymac Bank, FSB, assigned the note and mortgage to the plaintiff. The plaintiff commenced this action against, among others, the DaCostas, to foreclose the mortgage.

The DaCostas did not answer, appear, or timely move to dismiss the complaint. In an order dated January 7, 2009, the Supreme Court granted the plaintiff's motion for the entry of a judgment of foreclosure and sale upon the DaCostas' default.

The DaCostas moved, inter alia, pursuant to CPLR 317, 5015(a)(3), and 5015(a)(4) to vacate the judgment of foreclosure and sale, and, in effect, pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against them. The Supreme Court granted those branches of the motion which were pursuant to CPLR 317, 5015(a)(4), and, in effect, 3211(a)(3). The plaintiff appeals.

To vacate a default pursuant to CPLR 317, a defendant who has not been served pursuant to CPLR 308(1) does not have to establish a reasonable excuse for his or her default, but must show that he or she did not actually receive notice of the action in time to defend it, and must further show that he or she has a potentially meritorious defense (*see Wassertheil v. Elburg, LLC,* 94 A.D.3d 753, 753, 941 N.Y.S.2d 679; *Matter of Rockland Bakery, Inc. v. B.M. Baking Co., Inc.,* 83 A.D.3d 1080, 1081, 923 N.Y.S.2d 572). The mere denial of the receipt of the summons and complaint is insufficient to rebut the presumption of service established by a process server's affidavit (*see Wassertheil v. Elburg, LLC,* 94 A.D.3d at 753, 941 N.Y.S.2d 679; *Rockland Bakery, Inc. v. B.M. Baking Co., Inc.,* 83 A.D.3d at 1081–1082, 923 N.Y.S.2d 572; *Irwin Mtge. Corp. v. Devis,* 72 A.D.3d 743, 898 N.Y.S.2d 854; *Beneficial Homeowner Serv. Corp. v. Girault,* 60 A.D.3d 984, 984, 875 N.Y.S.2d 815; *Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v. Ellner,* 57 A.D.3d 732, 732, 869 N.Y.S.2d 591; *Mortgage Elec. Registration Sys., Inc. v. Schotter,* 50 A.D.3d 983, 857 N.Y.S.2d 592). However, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit, and necessitates an evidentiary hearing (*see Wells Fargo Bank, N.A. v. Christie,* 83 A.D.3d 824, 825, 921 N.Y.S.2d 127). Here, in light of the factual recitation in the DaCostas' sworn denial of service, the Supreme Court should have conducted a hearing to determine whether service of process was properly effected.

Accordingly, we reverse the order insofar as appealed from, and remit the matter to the Supreme Court, Suffolk County, to conduct a hearing to determine whether service of process was properly effected upon the DaCostas, and for a new determination thereafter of those branches of the DaCostas' motion which were

pursuant to CPLR 317 and 5015(a)(4) to vacate the judgment of foreclosure and, in effect, pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against them.

The plaintiff's remaining contentions either are without merit or need not be reached in light of our determination.

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# Case 15

*Deutsche Bank Nat. Trust Co. v. Rivas,* 95 A.D.3d 1061, 945 N.Y.S.2d 328 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**DEUTSCHE BANK NATIONAL TRUST COMPANY, etc., appellant,**

**v.**

**Luis RIVAS, respondent, et al., defendants.**

May 15, 2012.

**MARK C. DILLON, J.P., RUTH C. BALKIN, RANDALL T. ENG, and CHERYL E. CHAMBERS, JJ.**

*1061 In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Rockland County (Alfieri, J.), dated March 2, 2011, which granted that branch of the motion of the defendant Luis Rivas which was to dismiss the complaint insofar as asserted against him for lack of standing pursuant to CPLR 3211(a)(3).

ORDERED that the order is reversed, on the law, with costs, and that branch of the motion of the defendant Luis Rivas which was to dismiss the complaint insofar as asserted against him for lack of standing pursuant to CPLR 3211(a)(3) is denied.

In this action to foreclose a mortgage, the defendant Luis Rivas moved to dismiss the complaint insofar as asserted against him on the ground, among others, that the plaintiff lacked standing to commence the action (*see* CPLR 3211[a][3]). The Supreme Court granted that branch of the motion. The plaintiff appeals, and we reverse.

When a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, it is incumbent upon the plaintiff to establish its standing to be entitled to relief (*see Citimortgage, Inc. v. Stosel,* 89 A.D.3d 887, 888, 934 N.Y.S.2d 182; *US Bank N.A. v. Madero,* 80 A.D.3d 751, 752, 915 N.Y.S.2d 612; *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d 752, 753, 890 N.Y.S.2d 578). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating *1062 that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (*Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d 95, 108, 923 N.Y.S.2d 609). Here, the issue of standing cannot be determined as a matter of law on this record (*see HSBC Mtge. Corp.* [ *USA*] *v. MacPherson,* 89 A.D.3d 1061, 1062, 934 N.Y.S.2d 428), because there is a question of fact as to whether the plaintiff was the lawful holder of the note when it commenced the action (*see Mortgage Elec. Registration Sys., Inc. v. Coakley,* 41 A.D.3d 674, 838

N.Y.S.2d 622; *cf. Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 281–282, 926 N.Y.S.2d 532; *TPZ Corp. v. Dabbs,* 25 A.D.3d 787, 789, 808 N.Y.S.2d 746).

The remaining branches of Rivas's motion remain pending and undecided (*see Katz v. Katz,* 68 A.D.2d 536, 542–543, 418 N.Y.S.2d 99).

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# Case 16

*Deutsche Bank Trust Co. Americas v. Codio,* 94 A.D.3d 1040, 943 N.Y.S.2d 545 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**DEUTSCHE BANK TRUST COMPANY AMERICAS, etc., appellant,**

**v.**

**Dominic CODIO, respondent, et al., defendants.**

April 24, 2012.

**ANITA R. FLORIO, J.P., PLUMMER E. LOTT, SANDRA L. SGROI, and ROBERT J. MILLER, JJ.**

*1040 In an action to foreclose a mortgage on real property, the plaintiff appeals from an order of the Supreme Court, Kings County (Saitta, J.), dated June 23, 2011, which granted those *1041 branches of the motion of the defendant Dominic Codio which were pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against him for lack of standing, and pursuant to CPLR 6514 to vacate a notice of pendency filed in connection with the real property.

ORDERED that the order is reversed, on the law, with costs, those branches of the motion of the defendant Dominic Codio which were pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against him, and pursuant to CPLR 6514 to vacate the notice of pendency are denied, and the notice of pendency is reinstated.

By producing a document designated as an "allonge to note," which established that the plaintiff is the transferee of the subject mortgage note, the plaintiff made a showing sufficient to warrant denial of that branch of the motion of the defendant Dominic Codio which was pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against him based on the plaintiff's alleged lack of standing (*see* CPLR 3211[a][3]). " '[A] written assignment of the underlying note ... prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident' " (*Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 281, 926 N.Y.S.2d 532, quoting *U.S. Bank N.A. v. Madero,* 80 A.D.3d 751, 753, 915 N.Y.S.2d 612 [internal quotation marks omitted]; *see U.S. Bank, N.A. v. Collymore,* 68 A.D.3d 752, 754, 890 N.Y.S.2d 578; *Lasalle Bank Natl. Assn. v. Ahearn,* 59 A.D.3d 911, 912, 875 N.Y.S.2d 595; *see also U.S. Bank, N.A. v. Sharif,* 89 A.D.3d 723, 933 N.Y.S.2d 293; *Aurora Loan Servs. LLC v. Weisblum,* 85 A.D.3d 95, 109, 923 N.Y.S.2d 609; *Weaver Hardware Co. v. Solomovitz,* 235 N.Y. 321, 331–332, 139 N.E. 353; *Matter of Falls,* 31 Misc. 658, 660, 66 N.Y.S. 47, *affd.* 66 App.Div. 616, 73 N.Y.S. 1134).

Accordingly, the Supreme Court should have denied those branches of Codio's motion which were pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against him, and pursuant to **547 CPLR 6514 to vacate a notice of pendency filed by the plaintiff in connection with the mortgaged real property.

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# Case 17

*Emigrant Mortg. Co., Inc. v. Fitzpatrick,* 95 A.D.3d 1169, 945 N.Y.S.2d 697 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**EMIGRANT MORTGAGE COMPANY, INC., appellant,**

**v.**

**Linda FITZPATRICK, also known as Linda J. Fitzpatrick, respondent, et al., defendants.**

May 23, 2012.

**DANIEL D. ANGIOLILLO, J.P., PLUMMER E. LOTT, SHERI S. ROMAN, and ROBERT J. MILLER, JJ.**

*1169 In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Spinner, J.), dated August 11, 2010, as denied that branch of its motion which was for summary judgment dismissing the affirmative defenses of the defendant Linda Fitzpatrick, also known as Linda J. Fitzpatrick.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the plaintiff's motion which was for summary judgment dismissing the affirmative defenses of the defendant Linda Fitzpatrick, also known as Linda J. Fitzpatrick, is granted.

**699 The defendant Linda Fitzpatrick, also known as Linda J. Fitzpatrick (hereinafter Fitzpatrick), received an asset-based loan from the plaintiff, based upon the equity in her home. The plaintiff commenced this action after Fitzpatrick defaulted on her monthly repayments for the subject loan. In her verified answer, Fitzpatrick asserted, as a first affirmative defense, that the subject loan was unconscionable and, as a second affirmative defense, that the plaintiff engaged in deceptive business practices in violation of General Business Law §349 when it issued the subject loan. The plaintiff moved, inter alia, for summary judgment dismissing these affirmative defenses, and the Supreme Court denied its motion. The plaintiff appeals, and we reverse the order insofar as appealed from.

"In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforcible because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably*1170 favorable to the other party" (*King v. Fox,* 7 N.Y.3d 181, 191, 818 N.Y.S.2d 833, 851 N.E.2d 1184; *see Gillman v. Chase Manhattan Bank,* 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824; *Simar Holding Corp. v. GSC,* 87 A.D.3d 688, 689, 928 N.Y.S.2d 592; *FGH Contr. Co. v. Weiss,* 185 A.D.2d 969, 970–971, 587 N.Y.S.2d 415). This definition has been broken down into two elements:

procedural and substantive unconscionability (*see Gillman v. Chase Manhattan Bank,* 73 N.Y.2d at 10, 537 N.Y.S.2d 787, 534 N.E.2d 824; *Simar Holding Corp. v. GSC,* 87 A.D.3d at 689, 928 N.Y.S.2d 592; *Gendot Assoc., Inc. v. Kaufold,* 56 A.D.3d 421, 423, 866 N.Y.S.2d 361; *Matter of Friedman,* 64 A.D.2d 70, 84–85, 407 N.Y.S.2d 999).

"Substantive elements of unconscionability appear in the content of the contract per se; procedural elements must be identified by resort to evidence of the contract formation process" and meaningfulness of the choice (*Matter of Friedman,* 64 A.D.2d at 85, 407 N.Y.S.2d 999; *see Gillman v. Chase Manhattan Bank,* 73 N.Y.2d at 10–11, 537 N.Y.S.2d 787, 534 N.E.2d 824; *Simar Holding Corp. v. GSC,* 87 A.D.3d at 689, 928 N.Y.S.2d 592). " 'Examples of unreasonably favorable contractual provisions are virtually limitless but include inflated prices, unfair termination clauses, unfair limitations on consequential damages and improper disclaimers of warranty' " (*Simar Holding Corp. v. GSC,* 87 A.D.3d at 690, 928 N.Y.S.2d 592, quoting *State of New York v. Wolowitz,* 96 A.D.2d 47, 67–68, 468 N.Y.S.2d 131; *see Matter of Friedman,* 64 A.D.2d at 85, 407 N.Y.S.2d 999). With respect to procedural unconscionability, examples include, but are not limited to, " 'high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties' " (*Simar Holding Corp. v. GSC,* 87 A.D.3d at 689–690, 928 N.Y.S.2d 592, quoting *State of New York v. Wolowitz,* 96 A.D.2d at 67, 468 N.Y.S.2d 131; *see Gillman v. Chase Manhattan Bank,* 73 N.Y.2d at 10–11, 537 N.Y.S.2d 787, 534 N.E.2d 824; *Matter of Friedman,* 64 A.D.2d at 85, 407 N.Y.S.2d 999). "[I]n general, it can be said that procedural and substantive unconscionability operate on a 'sliding scale'; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa" (*State of New York v. Wolowitz,* 96 A.D.2d at 68, 468 N.Y.S.2d 131, quoting Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2–719[2],* 65 Cal. L. Rev. 28, 41–42, n. 56; *see Simar Holding Corp. v. GSC,* 87 A.D.3d at 690, 928 N.Y.S.2d 592).

**700 " 'The determination of unconscionability is a matter of law for the court to decide' " (*Simar Holding Corp. v. GSC,* 87 A.D.3d at 690, 928 N.Y.S.2d 592, quoting *Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters.,* 58 A.D.2d 482, 488, 396 N.Y.S.2d 427; *see Laidlaw Transp. v. Helena Chem. Co.,* 255 A.D.2d 869, 870, 680 N.Y.S.2d 365; *State of New York v. Wolowitz,* 96 A.D.2d at 68, 468 N.Y.S.2d 131). "Where the significant facts germane to the unconscionability issue are essentially undisputed, the court may determine the issue without a hearing*1171 " (*Scott v. Palermo,* 233 A.D.2d 869, 870, 649 N.Y.S.2d 289; *see Simar Holding Corp. v. GSC,* 87 A.D.3d at 690, 928 N.Y.S.2d 592).

Here, the plaintiff lender proffered documentary evidence establishing that Fitzpatrick, the defendant borrower, was fully informed as to the terms of the subject asset-based loan, and, in particular, was aware of the fact that the plaintiff would not be independently verifying her income before issuing the subject loan. Specifically, the plaintiff submitted copies of the mortgage and note, as well as a

resource letter and high-equity loan certificate, which informed Fitzpatrick that the subject loan was being issued based primarily upon the equity in her home, her annual income would not be verified by the plaintiff, and the plaintiff was relying upon Fitzpatrick's representations as to her ability to repay the subject loan. Fitzpatrick signed each document. In opposition, Fitzpatrick set forth no evidence regarding her education, financial status, or access to legal or financial counsel, the availability of other types of loans or loans of a lesser amount, or any deception or high pressure tactics utilized by the plaintiff. Moreover, she did not offer evidence relating to the industry standards for residential loans at the time the subject loan was issued. In addition, the plaintiff correctly notes that, contrary to the Supreme Court's determination that the plaintiff's possible violations of the restrictions and limitations placed on subprime and high-cost loans by the Banking Law create a triable issue of fact on the issue of unconscionability, the subject loan, issued on April 9, 2008, does not fall under the purview of Banking Law §6–m(4), which applies only to subprime and high-cost loans issued on or after September 1, 2008 (*see* Banking Law §6–m[4], as added by L. 2008, ch. 472). Accordingly, Fitzpatrick failed to raise a triable issue of fact regarding the unconscionability of the subject loan, and the Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment dismissing the first affirmative defense (*see Gillman v. Chase Manhattan Bank,* 73 N.Y.2d at 10, 537 N.Y.S.2d 787, 534 N.E.2d 824; *Simar Holding Corp. v. GSC,* 87 A.D.3d at 689, 928 N.Y.S.2d 592; *Gendot Assoc., Inc. v. Kaufold,* 56 A.D.3d at 423, 866 N.Y.S.2d 361; *Hayes v. County Bank,* 26 A.D.3d 465, 466–467, 811 N.Y.S.2d 741; *State of New York v. Wolowitz,* 96 A.D.2d at 67–68, 468 N.Y.S.2d 131; *Matter of Friedman,* 64 A.D.2d at 84–85, 407 N.Y.S.2d 999).

Section 349(a) of the General Business Law declares as unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (General Business Law §349[a]). Although the statute is "directed at wrongs against the consuming public" *1172 (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank,* 85 N.Y.2d 20, 24, 623 N.Y.S.2d 529, 647 N.E.2d 741), it allows a private right of action by any person who has been injured by a violation of the section (*see* General Business Law §349[h]). "To assert a viable claim under **701 General Business Law §349(a), a plaintiff must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) [he or she sustained] damages" (*Lum v. New Century Mtge. Corp.,* 19 A.D.3d 558, 559, 800 N.Y.S.2d 408; *see Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.,* 3 N.Y.3d 200, 205–206, 785 N.Y.S.2d 399, 818 N.E.2d 1140; *Stutman v. Chemical Bank,* 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608; *Gaidon v. Guardian Life Ins. Co. of Am.,* 94 N.Y.2d 330, 344, 704 N.Y.S.2d 177, 725 N.E.2d 598).

Here, the plaintiff's evidence established that Fitzpatrick was presented with clearly written documents describing the terms of the subject loan and alerting her to the fact the plaintiff would not independently verify her income. Such evidence established its prima facie entitlement to judgment as a matter of law dismissing

the second affirmative defense. In opposition, Fitzpatrick failed to proffer any evidence sufficient to raise a triable issue of fact as to whether the plaintiff made any materially misleading statements or committed any misconduct with respect to the subject loan (*see Ladino v. Bank of Am.,* 52 A.D.3d 571, 574, 861 N.Y.S.2d 683; *cf. Shovak v. Long Is. Commercial Bank,* 50 A.D.3d 1118, 1120, 858 N.Y.S.2d 660; *Lum v. New Century Mtge. Corp.,* 19 A.D.3d at 559, 800 N.Y.S.2d 408). Accordingly, the Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment dismissing the second affirmative defense.

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# Case 18

*Flagstar Bank v. Bellafiore,* 94 A.D.3d 1044, 943 N.Y.S.2d 551 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**FLAGSTAR BANK, appellant,**

**v.**

**Lauren BELLAFIORE, et al., defendants.**

April 24, 2012.

**MARK C. DILLON, J.P., THOMAS A. DICKERSON, L. PRISCILLA HALL, and LEONARD B. AUSTIN, JJ.**

**552 *1044 In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Cohalan, J.), dated February 1, 2011, which denied its motion for summary judgment on the complaint, to strike the answer of the defendant Lauren Bellafiore, for an order of reference, and for leave to amend the caption to delete the defendants sued herein as "John Does" and "Jane Does."

ORDERED that the order is reversed, on the law, without costs or disbursements, and the plaintiff's motion for summary judgment on the complaint, to strike the answer of the defendant Lauren Bellafiore, for an order of reference, and for leave to amend the caption to delete the defendants sued herein as "John Does" and "Jane Does" is granted.

*1045 The Supreme Court improperly denied the plaintiff's motion for summary judgment on the complaint, to strike the answer of the defendant Lauren Bellafiore, for an order of reference, and for leave to amend the caption to delete the defendants sued herein as "John Does" and "Jane Does" on the ground that the plaintiff had not filed an attorney affirmation in accordance with Administrative Order 548/10, which was issued by the Chief Administrative Judge of the State of New York on October 20, 2010. Administrative Order 548/10 (hereinafter the Administrative Order), which has since been replaced by Administrative Order 431/11, requires the plaintiff's counsel in a residential mortgage foreclosure action to file with the court an affirmation confirming the accuracy of the plaintiff's pleadings. In cases pending on the effective date of the Administrative Order, where no judgment of foreclosure has been entered, the attorney affirmation is required to be filed at the time of filing of either the proposed order of reference or the proposed

judgment of foreclosure (*see* Administrative Order 548/10, replaced by Administrative Order 431/11).

This mortgage foreclosure action was pending at the time of the effective date of the Administrative Order, and the plaintiff filed its motion, which included a proposed order of reference, approximately five months before the Administrative Order was issued. Thus, the plaintiff could not have filed the attorney affirmation pursuant to the Administrative Order when it filed its motion and proposed order of reference. Therefore, based on the plain language of the Administrative Order, the plaintiff is required to file the attorney affirmation at the time it files the proposed judgment of foreclosure (*see U.S. Bank, NA v. Boyce,* 93 A.D.3d 782, 940 N.Y.S.2d 656).

Furthermore, the plaintiff made a prima facie showing of entitlement to judgment as a matter of law by submitting the mortgage, the underlying note, and an affidavit of its Vice President attesting to the default (*see HSBC Bank USA, NA v. Schwartz,* 88 A.D.3d 961, 931 N.Y.S.2d 528; *JP Morgan Chase Bank, N.A. v. Agnello,* 62 A.D.3d 662, 663, 878 N.Y.S.2d 397; *EMC Mtg. Corp. v. Riverdale Assoc.,* 291 A.D.2d 370, 737 N.Y.S.2d 114). Since no opposition was filed, no triable issue of fact was raised in response to the plaintiff's prima facie showing or as to the merits of any of the defendant Lauren Bellafiore's affirmative defenses (*see Wells Fargo Bank Minn., Natl. Assn. v. Perez,* 41 A.D.3d 590, 837 N.Y.S.2d 877). Accordingly, those branches of the plaintiff's motion which were for summary judgment on the complaint, to strike the answer of the defendant Lauren Bellafiore, and for an order of reference should have been granted.

*1046 Additionally, as the plaintiff demonstrated that there were no "John Does" or "Jane Does" occupying the subject premises, that branch of the plaintiff's motion**553 which was to amend the caption to delete the defendants sued herein as "John Does" and "Jane Does" should have been granted (*see Neighborhood Hous. Servs. of N.Y. City, Inc. v. Meltzer,* 67 A.D.3d 872, 873–874, 889 N.Y.S.2d 627).

In light of our determination, we need not reach the plaintiff's remaining contention.

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# Case 19

*Global Team Vernon, LLC v. Vernon Realty Holding, LLC,* 93 A.D.3d 819, 941 N.Y.S.2d 631 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**GLOBAL TEAM VERNON, LLC, plaintiff-respondent,**

**v.**

**VERNON REALTY HOLDING, LLC, etc., et al., defendants,**

**Posillico Environmental, Inc., etc., defendant-respondent;**

**Baruch Singer, et al., intervenors-appellants.**

March 27, 2012.

**DANIEL D. ANGIOLILLO, J.P., JOHN M. LEVENTHAL, LEONARD B. AUSTIN, and SHERI S. ROMAN, JJ.**

*819 In an action to foreclose a mortgage, the intervenors, Baruch Singer and River East City, LLC, appeal, as limited by their notice of appeal and brief, from so much of an order of the Supreme Court, Queens County (Kitzes, J.), dated June 30, 2010, as, upon granting that branch of their motion pursuant to CPLR 1012 and 1013 which was for leave to intervene in the action in their capacity as judgment creditors in a related action, denied that branch of their motion pursuant to CPLR 1012 and 1013 which was for leave to intervene in the action as vendee lienors and, thereupon, precluded them from serving an answer including any affirmative defense, counterclaim, or cross claim based upon their alleged status as contract vendees.

ORDERED that the order is affirmed insofar as appealed from, with costs to the plaintiff-respondent.

In October 2005 Vernon Realty Holding, LLC (hereinafter Vernon Realty), entered into a contract of sale to convey certain real property located in Long Island City (hereinafter the Property) to Baruch Singer and a business entity controlled by him, River East City, LLC (hereinafter together the Singer parties). Thereafter, Vernon Realty and the Singer parties amended the contract of sale several times and extended the closing date. After the Singer parties failed to appear at the final extended closing, Vernon Realty commenced an action entitled *Vernon Realty Holding, LLC v. Singer,* in the Supreme Court, Queens County, under Index No. 20084/06 (hereinafter the Vernon Realty action), seeking, inter alia, a judgment declaring**633 that the Singer parties were in default and that it is entitled to retain, as liquidated damages, all funds paid by the Singer parties under the contract. Upon the parties' respective motions for summary judgment in the Vernon Realty action, the Supreme Court determined that Vernon Realty was unable to tender title on the closing date, as promised in the contract of sale, and had *820 abandoned the contract by terminating it. The Supreme Court further determined that the Singer parties were entitled to the return of money paid to Vernon Realty totaling $54,650,000, pursuant to a contract provision which limited the Singer parties' remedy to money damages equivalent to all amounts paid toward the purchase price. On December 2, 2009, the Supreme Court entered judgment in the Vernon Realty action in favor of the Singer parties and against Vernon Realty in that principal sum.

In July 2009 Mutual Bank, a predecessor-in-interest to the plaintiff Global Team Vernon, LLC, commenced the instant action to foreclose upon a first priority mortgage on the Property, which had been recorded on June 10, 2008, and filed a notice of pendency against the Property.

In February 2010 the Singer parties moved for leave to intervene as party defendants in this action, based on their status as judgment creditors in the Vernon Realty action and their alleged status as vendee lienors against the Property pursuant to the contract of sale. In an order dated June 30, 2010, the Supreme Court granted that branch of their motion which was for leave to intervene as judgment creditors, but denied that branch of their motion which was for leave to intervene as vendee lienors, and, thereupon, precluded them from serving an

answer including any affirmative defense, counterclaim, or cross claim based upon their alleged status as contract vendees.

Upon a timely motion, a person is permitted to intervene in an action as of right when, inter alia, "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment" (CPLR 1012[a] [3]). Additionally, a court, in its discretion, may permit a person to intervene, inter alia, "when the person's claim or defense and the main action have a common question of law or fact" (CPLR 1013). Whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted "where the intervenor has a real and substantial interest in the outcome of the proceedings" (*Wells Fargo Bank, N.A. v. McLean,* 70 A.D.3d 676, 677, 894 N.Y.S.2d 487; *see Berkoski v. Board of Trustees of Inc. Vil. of Southampton,* 67 A.D.3d 840, 843, 889 N.Y.S.2d 623; *Perl v. Aspromonte Realty Corp.,* 143 A.D.2d 824, 825, 533 N.Y.S.2d 147).

Here, the Singer parties have a real and substantial interest in the outcome of the proceedings as judgment creditors. "Judgments docketed prior to the delivery of the referee's deed [in a foreclosure action] are liens on the realty that pass to the *821 surplus moneys, and are payable in order of priority of docketing" (*Warwick Sav. Bank v. Long Is. Chap. K. of C. Social Serv., Inc.,* 253 App.Div. 276, 277, 1 N.Y.S.2d 877; *see Bennardo v. Del Monte Caterers, Inc.,* 27 A.D.3d 503, 811 N.Y.S.2d 434).

However, the Singer parties failed to demonstrate that they had a real and substantial interest in the outcome of this foreclosure action based upon their alleged**634 status as contract vendee lienors. Although a contract vendee whose contract is recorded is a necessary party to a foreclosure action (*see Polish Natl. Alliance of Brooklyn v. White Eagle Hall Co.,* 98 A.D.2d 400, 404–405, 470 N.Y.S.2d 642), the Singer parties concede that their contract was not recorded. Moreover, contrary to their contention that paragraph 10 of the subject contract gave them a vendee's lien, paragraph 5(c) of the fifth amendment to the contract superseded that provision and limited their remedy against Vernon Realty to an action for money damages in the amount of their down payment. The Singer parties exercised their sole remedy under paragraph 5(c) and obtained a money judgment. Thus, under the particular circumstances of this case, the Singer parties may not assert an equitable lien against the property in the amount of their down payment based upon their alleged status as contract vendees (*see Anderman v. 1395 E. 52nd St. Realty Corp.,* 60 Misc.2d 437, 440, 303 N.Y.S.2d 474; *cf. Sloan v. Pinafore Homes,* 38 A.D.2d 718, 329 N.Y.S.2d 420). Accordingly, the Supreme Court providently exercised its discretion in denying that branch of the Singer parties' motion pursuant to CPLR 1012 and 1013 which was for leave to intervene in the action in their capacity as vendee lienors, thus precluding them from serving an answer including any affirmative defense, counterclaim, or cross claim based upon their alleged status as contract vendees (*see generally Matter of General Elec. Capital Bus. Asset Funding Corp. v. Hakakian,* 300 A.D.2d 486, 487, 751 N.Y.S.2d 570).

# Case 20

*GRP Loan, LLC v. Taylor,* 95 A.D.3d 1172, 945 N.Y.S.2d 336 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**GRP LOAN, LLC, et al., respondents,**

**v.**

**Joy TAYLOR, et al., appellants, et al., defendant.**

May 23, 2012.

**REINALDO E. RIVERA, J.P., THOMAS A. DICKERSON, JOHN M. LEVENTHAL, and JEFFREY A. COHEN, JJ.**

*1172 In an action to foreclose a mortgage, the defendants Joy Taylor and Lennox Taylor appeal (1) from an order of the Supreme Court, Nassau County (Adams, J.), entered October 21, 2010, which granted the motion of the plaintiff GRP Loan, LLC, inter alia, for summary judgment and for leave to amend the caption to add DLJ Mortgage Capital, Inc., as a plaintiff, and (2), as limited by their brief, from so much of an order of the same court entered January 20, 2011, as, upon reargument, adhered to the original determination.

ORDERED that the appeal from the order entered October 21, 2010, is dismissed, as that order was superseded by the order entered January 20, 2011, made upon reargument; and it is further,

*1173 ORDERED that the order entered January 20, 2011, is affirmed insofar as appealed from, with costs to the respondent DLJ Mortgage Capital, Inc.

In 2007 the defendant Joy Taylor executed an adjustable rate note to borrow the sum of $420,750 from Alliance Mortgage Banking Corp. (hereinafter Alliance). The note was secured by a mortgage on Taylor's property located in Elmont. Alliance then assigned the note and mortgage to Option One Mortgage Corporation (hereinafter Option One). On March 2, 2007, Option One assigned the note and mortgage to the plaintiff GRP Loan, LLC (hereinafter GRP).

On May 11, 2009, GRP commenced this foreclosure action against, among others, Joy Taylor, by the filing of a summons and complaint, alleging that Taylor had defaulted on her payment obligation as of April 1, 2008. Subsequent to the commencement of this action, GRP assigned **338 the note and mortgage to the plaintiff DLJ Mortgage Capital, Inc. (hereinafter DLJ). The Supreme Court granted the motion of GRP, inter alia, for summary judgment and for leave to amend the caption to add DLJ as a plaintiff and to add Joy Taylor's husband, Lennox Taylor, as a defendant (hereinafter together the appellants). Joy Taylor then moved for leave to reargue her opposition to GRP's motion, and, upon reargument, the Supreme Court adhered to the original determination.

"In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the subject mortgage" (*Countrywide Home Loans, Inc. v. Gress,* 68 A.D.3d 709, 709, 888 N.Y.S.2d 914; *see CitiMortgage, Inc. v. Rosenthal,* 88

A.D.3d 759, 761, 931 N.Y.S.2d 638). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note prior to commencement of the action with the filing of the complaint (*see Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d 95, 108, 923 N.Y.S.2d 609; *Wells Fargo Bank, N.A. v. Marchione,* 69 A.D.3d 204, 207–208, 887 N.Y.S.2d 615). Where the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 279, 926 N.Y.S.2d 532). "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, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v. Collymore,* 68 A.D.3d 752, 754, 890 N.Y.S.2d 578).

Here, GRP met its prima facie burden by producing "the mortgage and unpaid note, along with evidence of default" *1174 (*Capstone Bus. Credit, LLC v. Imperia Family Realty, LLC,* 70 A.D.3d 882, 883, 895 N.Y.S.2d 199; *see Deutsche Bank Natl. Trust Co. v. Posner,* 89 A.D.3d 674, 674–675, 933 N.Y.S.2d 52; *Aurora Loan Servs., LLC v. Thomas,* 53 A.D.3d 561, 862 N.Y.S.2d 89). GRP also submitted documentation, in the form of written assignments, which established that it was the owner and holder of the subject mortgage and note prior to the commencement of this action. These assignments were duly recorded in the Nassau County Clerk's Office.

Furthermore, GRP submitted documentation establishing the assignment of the mortgage and note to DLJ subsequent to the commencement of the action. Pursuant to CPLR 1018, "the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Moreover, "[t]he determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court" (*NationsCredit Home Equity Servs. v. Anderson,* 16 A.D.3d 563, 564, 792 N.Y.S.2d 510; *see CitiMortgage, Inc. v. Rosenthal,* 88 A.D.3d at 761, 931 N.Y.S.2d 638).

The appellants' remaining contentions, including their contention that various loan documents and assignments of the note and mortgage were fraudulently altered, are without merit.

Accordingly, upon reargument, the Supreme Court properly adhered to its original determination granting GRP's motion, inter alia, for summary judgment and for leave to amend the caption to add DLJ as a plaintiff.

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## Case 21

*HSBC Bank USA N.A. v. Thomas,* 92 A.D.3d 531, 939 N.Y.S.2d 346 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**HSBC BANK USA N.A., etc., Plaintiff–Respondent,**

**v.**

**Janet THOMAS, et al., Defendants,**
**Maurice Thomas, et al., Defendants–Appellants.**
Feb. 16, 2012.
**SAXE, J.P., FRIEDMAN, FREEDMAN, ABDUS–SALAAM, JJ.**

*531 Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 8, 2010, which denied defendants Maurice Thomas and Sharon Thomas's motion to vacate a default judgment and a judgment of foreclosure and sale, and to stay the Referee's sale of the subject property, unanimously affirmed, without costs.

The defendants in this foreclosure action include the mortgagor, Janet Thomas, and the property's former owners and current occupants, Maurice Thomas and Sharon Thomas. This appeal concerns the motion by Maurice and Sharon Thomas to vacate the judgment of foreclosure entered against them following their default on plaintiff's summary judgment motion.

While Janet Thomas defaulted by failing to answer the complaint, an answer was served on behalf of Maurice and Sharon Thomas, by attorney Ian Belinfanti. One of the defenses asserted in that answer was a lack of personal jurisdiction; however, inasmuch as no motion was made within 60 days based on improper service of process, that defense must be deemed waived (CPLR 3211 [e]). Nevertheless, Maurice and Sharon Thomas contend that the interposed answer must be disregarded and their claim that they were never served must be addressed, because Ian Belinfanti was never retained or authorized to represent them.

We reject their argument. Their submissions fail to justify *532 such a negation of the answer. In order to explain what occurred, they assert that Belinfanti was representing them in a separate dispute with Janet Thomas, and that when they received mail addressed to Janet Thomas, they forwarded it to Belinfanti for him to handle; they suggest that this mail must have been the summons and complaint, and imply that Belinfanti must have interpreted their forwarding it to him as a retention of his services in this foreclosure action. In the face of their acknowledgment that Belinfanti *was* representing them in the dispute with Janet Thomas, their suggestions and speculation are simply insufficient to permit any possible finding that Belinfanti appeared and filed an answer on their behalf without authorization.

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# Case 22

*HSBC Bank USA v. Hernandez,* 92 A.D.3d 843, 939 N.Y.S.2d 120 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.
**HSBC BANK USA, etc., appellant,**
**v.**
**Ana HERNANDEZ, et al., respondents.**

Feb. 21, 2012.

**MARK C. DILLON, J.P., ANITA R. FLORIO, CHERYL E. CHAMBERS, and PLUMMER E. LOTT, JJ.**

*843 In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Nassau County (Adams, J.), entered October 8, 2010, which denied its motion for summary judgment on the complaint and, upon, in effect, searching the record, awarded summary judgment to the defendants dismissing the complaint without prejudice.

ORDERED that the order is modified, on the law, by deleting the provision thereof, in effect, searching the record and awarding summary judgment to the defendants dismissing the complaint without prejudice; as so modified, the order is affirmed, without costs or disbursements.

In order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage. 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 (*see Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 279, 926 N.Y.S.2d 532; *Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d 95, 108, 923 N.Y.S.2d 609; **122 *Wells Fargo Bank, N.A. v. Marchione,* 69 A.D.3d 204, 207, 887 N.Y.S.2d 615; *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d 752, 753, 890 N.Y.S.2d 578). An assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it (*see Deutsche Bank Natl. Trust Co. v. Barnett,* 88 A.D.3d 636, 637, 931 N.Y.S.2d 630; *844 *Bank of N.Y. v. Silverberg,* 86 A.D.3d at 280, 926 N.Y.S.2d 532). "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" (*U.S. Bank, N.A. v. Collymore,* 68 A.D.3d at 754, 890 N.Y.S.2d 578; *see Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d at 108, 923 N.Y.S.2d 609).

Here, the plaintiff failed to establish, prima facie, that it had standing to commence the action. The plaintiff's evidence did not demonstrate that the note was physically delivered to it prior to the commencement of the action. The affidavit from the plaintiff's servicing agent did not give any factual details of a physical delivery of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action (*see Citimortgage, Inc. v. Stosel,* 89 A.D.3d 887, 888, 934 N.Y.S.2d 182; *Deutsche Bank Natl. Trust Co. v. Barnett,* 88 A.D.3d at 637, 931 N.Y.S.2d 630; *Aurora Loan Servs., LLC v. Weisblum,* 85 A.D.3d at 108, 923 N.Y.S.2d 609; *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d at 754, 890 N.Y.S.2d 578). Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment on the complaint.

However, the Supreme Court should not have, in effect, searched the record and awarded summary judgment to the defendants dismissing the complaint without prejudice, as the parties' submissions failed to establish, as a matter of law, that the plaintiff lacked standing to commence the action.

# Case 23

*IndyMac Bank F.S.B. v. Thompson,* --- N.Y.S.2d ----, 2012 WL 4513052, 2012 N.Y. Slip Op. 06582 (App.Div. Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**INDYMAC BANK F.S.B., appellant,**

**v.**

**Jean THOMPSON, et al., respondents.**

Oct. 3, 2012.

**DANIEL D. ANGIOLILLO, J.P., ANITA R. FLORIO, ARIEL E. BELEN, and SHERI S. ROMAN, JJ.**

*1 In an action to foreclose a mortgage, the plaintiff appeals, by permission, from an order of the Supreme Court, Kings County (Jacobson, J.), May 17, 2011, which, sua sponte, directed dismissal of the complaint and advised counsel for the plaintiff that it would inform counsel within 60 days of any further action it might take against counsel for violating Rule 4.1 of the Rules of Professional Conduct.

ORDERED that the appeal from so much of the order as advised counsel for the plaintiff that the court would inform counsel within 60 days of any further action it might take against counsel for violating Rule 4.1 of the Rules of Professional Conduct is dismissed; and it is further,

ORDERED the order is reversed insofar as reviewed, on the law; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The Supreme Court's advisory statement in the order appealed from, in which it indicated to the plaintiff's counsel that it would inform counsel of any further action it might take against counsel for violating Rule 4.1 of the Rules of Professional Conduct, is not appealable as of right or by permission (*see Weiss v. Industrial Enters.,* 7 A.D.3d 518, 776 N.Y.S.2d 322).

Contrary to the Supreme Court's determination, an original mortgagee can continue an action even though it assigned its interest in the mortgage and note to another entity during the pendency of an action, unless the court directs a substitution of parties pursuant to CPLR 1018 (*see CitiMortgage, Inc. v. Rosenthal,* 88 A.D.3d 759, 931 N.Y.S.2d 638; *NationsCredit Home Equity Servs. v. Anderson,* 16 A.D.3d 563, 792 N.Y.S.2d 510; *Lincoln Sav. Bank, FSB v. Wynn,* 7 A.D.3d 760, 776 N.Y.S.2d 908; *Central Fed. Sav. v. 405 W. 45th St.,* 242 A.D.2d 512, 662 N.Y.S.2d 489). Accordingly, the Supreme Court erred in, sua sponte, directing dismissal of the complaint based on the plaintiff's alleged assignment of the subject mortgage and note to another entity during the pendency of this action.

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# Case 24

*JP Morgan Chase Bank Nat. Ass'n v. Miodownik,* 91 A.D.3d 546, 937 N.Y.S.2d 192 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**JP MORGAN CHASE BANK NATIONAL ASSOCIATION, Plaintiff–Respondent,**
**v.**
**Hela MIODOWNIK, Defendant–Appellant,**
**Washington Mutual Bank, etc., et al., Defendants.**
Jan. 24, 2012.
**TOM, J.P., FRIEDMAN, DeGRASSE, RICHTER, JJ.**

*547 Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 12, 2010, which denied defendant Miodownik's motion to dismiss the complaint as against her, unanimously affirmed, without costs.

In this action to foreclose a consolidated mortgage, defendant argues that plaintiff JP Morgan Chase Bank, N.A. (JPMC) does not own the note it is attempting to foreclose. On September 25, 2008, the Office of Thrift Supervision closed Washington Mutual Bank (WAMU) and appointed the FDIC as Receiver (*see Dipaola v. JPMorgan Chase Bank,* 2011 WL 3501756, *3, 2011 U.S. Dist LEXIS 88753, *7 [N.D.Cal.2011]). On that same date, the bulk of WAMU's assets were transferred to JPMC pursuant to a Purchase and Assumption Agreement (the P & A Agreement) entered into between FDIC as Receiver, the FDIC in its corporate capacity, and JPMC (*see id.*). Courts have found that the P & A Agreement evinced that JPMC purchased all of WAMU's loans and loan commitments, and therefore had the right to foreclose on a defaulting borrower (*see e.g. Haynes v. JPMorgan Chase Bank, N.A.,* 2011 WL 2581956, 2011 U.S. Dist LEXIS 69703 [M.D.Ga.2011]).

Defendant's contention that pursuant to sections 2.5 and 3.5 of the P & A Agreement, a borrower's loan is exempt from the P & A Agreement if the borrower is pressing a counterclaim against WAMU, is unavailing. Consistent with section 2.1 of the P & A Agreement, JPMC, as the assuming bank, agreed to continue to service all loans, and agreed to assume the liabilities associated with its ongoing servicing obligations (*see Allen v. United Fin. Mtge. Corp.,* 2010 WL 1135787, *3–4, 2010 U.S. Dist LEXIS 26503, *9–10 [N.D.Cal.2010]). However, section 2.5 of the P & A Agreement expressly provides that JPMC did not assume the potential liabilities of WAMU associated with claims of defaulting borrowers such as defendant, where the claims directly relate to WAMU's lending practices (*see e.g. Yeomalakis v. Federal Deposit Ins. Co.,* 562 F.3d 56, 60 [1st Cir.2009]; *Hanaway v. JPMorgan Chase Bank,* 2011 WL 672559, *2, 2011 U.S. Dist LEXIS 21374, *8 [C.D.Cal.2011]; *Cassese v. Washington Mut., Inc.,* 2008 WL 7022845, *3, 2008 U.S. Dist LEXIS 111709, *7 [E.D.N.Y.2008]).

Moreover, defendant's reliance on section 3.5 of the P & A Agreement, is misplaced since this provision deals with "assets" of WAMU, and makes clear that the FDIC, as Receiver, was retaining any interest, right, action, claim, or judgment that WAMU had for itself so that the FDIC as Receiver would retain *548 the benefit of those recoveries, rather than JPMC. Section 3.5 expressly excludes loss relating to defaulted loans, such as here, which would obviously be for the benefit of JPMC, since it acquired all of WAMU's loans and loan commitments.

In light of the foregoing, we need not address defendant's individual defenses, which result from WAMU's conduct at loan origination (*see Federici v. Monroy,* 2010 WL 1345276, *3, 2010 U.S. Dist LEXIS 37736, *10–11 [N.D.Cal.2010]). Were we to consider these claims, we would find them unavailing.

Defendant's attempt to thwart JPMC's request for attorney's fees is undermined by paragraph 14 of the Consolidation,**194 Extension and Modification Agreement executed by defendant, which consolidated her first and second mortgages, and specifically provided that the lender could charge defendant for fees for services performed in connection with default, including attorneys' fees. Contrary to defendant's argument, she should not be awarded attorney's fees on the basis that JPMC failed to attach a copy of the mortgage to its foreclosure papers that were signed by defendant.

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# Case 25

*JP Morgan Chase Bank, Nat. Ass'n v. Kalpakis*, 91 A.D.3d 722, 937 N.Y.S.2d 105 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, etc., appellant,**

**v.**

**Bette KALPAKIS, et al., defendants,**

**Lythia A. Rousseas, et al., intervenors-defendants-respondents.**

Jan. 17, 2012.

**PETER B. SKELOS, J.P., L. PRISCILLA HALL, LEONARD B. AUSTIN, and ROBERT J. MILLER, JJ.**

*722 In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Whelan, J.), dated March 8, 2011, as granted that branch of the motion of Lythia A. Rousseas, *723 Barbara M. Kalpakis, and Mark G. Kalpakis which was pursuant to CPLR 1012(a)(3) for leave to intervene in the action.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The subject property was owned by George Kalpakis until his death in 1995. According to the affidavit of Lythia A. Rousseas, George Kalpakis died intestate, and his only heirs were his four children: Lythia A. Rousseas, Barbara Kalpakis, Mark Kalpakis, and James Kalpakis. Pursuant to a deed dated March 12, 2003, the subject property was purportedly transferred from George Kalpakis, who was then deceased, to Bette Kalpakis, James Kalpakis's wife. In 2007 Bette Kalpakis executed a mortgage on the property in favor of the plaintiff's predecessor.

In April 2010 the plaintiff commenced this action to foreclose the mortgage. In December 2010 Lythia A. Rousseas, Barbara Kalpakis, and Mark Kalpakis (hereinafter collectively the movants) moved, inter alia, pursuant to CPLR 1012(a)(3) for leave to intervene in the action. The movants asserted that the deed

dated March 12, 2003, was a forgery, and that they did not discover the fraud until 2009.

The Supreme Court properly granted that branch of the movants' motion which was pursuant to CPLR 1012(a)(3) for leave to intervene in the action, as the movants established that they may have an ownership interest in the property that is the subject of the foreclosure proceeding (*see U.S. Bank N.A. v. Gestetner,* 74 A.D.3d 1538, 1541, 902 N.Y.S.2d 247; *Greenpoint Sav. Bank v. McMann Enters.,* 214 A.D.2d 647, 647–648, 625 N.Y.S.2d 273). Contrary to the plaintiff's contention, it did not establish that the movants' claim to invalidate the deed dated March 12, 2003, was barred by the statute of limitations. The movants' claim was asserted within two years of discovery of the fraud (*see Piedra v. Vanover,* 174 A.D.2d 191, 196, 579 N.Y.S.2d 675), and the plaintiff did not establish, as a matter of law, that the fraud could have been discovered earlier with reasonable diligence (*see* CPLR 213[8]; *Sargiss v. Magarelli,* 12 N.Y.3d 527, 532, 881 N.Y.S.2d 651, 909 N.E.2d 573; *Citicorp Trust Bank, FSB v. Makkas,* 67 A.D.3d 950, 953, 889 N.Y.S.2d 656).

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## Case 26

*Lenders Capital LLC v. Ranu Realty Corp.,* --- N.Y.S.2d ----, 2012 WL 4868325, 2012 N.Y. Slip Op. 06890 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**LENDERS CAPITAL LLC, Plaintiff,**

**v.**

**RANU REALTY CORP., et al., Defendants–Respondents,**

**New York State Department of Taxation & Finance, et al., Defendants,**

**Viktoriya Zavelina, Intervenor–Appellant.**

Oct. 16, 2012.

**TOM, J.P., MAZZARELLI, ANDRIAS, DeGRASSE, ROMÁN, JJ.**

*1 Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 6, 2011, which, in this mortgage foreclosure action, to the extent appealed from, granted the motion of defendants Ranu Realty Corp. and Azizur Rahman to vacate the foreclosure sale, and denied intervenor-appellant's cross motion to direct the referee to complete the sale, unanimously reversed, on the law and facts, defendants' motion denied and intervenor's cross motion granted, without costs.

The motion court erred in finding that a stay was in effect at the time of the foreclosure sale and that the sale was a nullity. Even assuming that, about two hours before the sale took place, the referee's office had been served with the order to show cause staying the sale, the record demonstrates that defendants failed to comply strictly with the methods of service provided for in the order to show cause and failed to present proof of service on the return date of the motion (*see Kue Mee Realty Corp. v. Louie,* 295 A.D.2d 263, 743 N.Y.S.2d 863 [1st Dept 2002]).

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# Case 27

*LibertyPointe Bank v. 75 East 125th Street, LLC,* 95 A.D.3d 706, 946 N.Y.S.2d 26 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**LIBERTYPOINTE BANK, Plaintiff–Respondent,**

**v.**

**75 EAST 125TH STREET, LLC, et al., Defendants–Appellants,**

**The City of New York, etc., et al., Defendants.**

May 24, 2012.

**GONZALEZ, P.J., ANDRIAS, SAXE, DeGRASSE, JJ.**

*706 Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered February 16, 2011, which, insofar as appealed from as limited by the briefs, denied defendants-appellants' (defendants) motion to vacate their default, reinstate their answer, and restore the action to the calendar, unanimously reversed, on the law, without costs, and the motion granted.

As an affirmative defense and counterclaim, defendants contend that they were fraudulently induced into entering into the mortgage transaction by the misrepresentations of plaintiff's former president, including his alleged assertion that plaintiff would not foreclose on the mortgage until the former president had paid a pre-existing debt which he owed to defendants' "silent partner." This alleged oral agreement would directly contradict the terms of the note and mortgage which plaintiff sues upon, and which vest plaintiff with an immediate right to foreclose upon occurrence of any default in payment. Nonetheless, the only merger clause here—that contained in the mortgage—is bare-bones, and certainly makes no reference to the "particular misrepresentations" allegedly made here by the former president (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC,* 19 A.D.3d 273, 275, 798 N.Y.S.2d 14 [2005]). Accordingly, neither the parol evidence rule, nor the agreements' merger clause, bars defendants' claim of fraudulent inducement.

**27 Under these circumstances, we find that defendants' claim of fraudulent inducement is sufficiently substantial and meritorious to support vacatur of their default, and the order appealed from should be reversed (*see* *707 *Crespo v. A.D.A. Mgt.,* 292 A.D.2d 5, 9, 739 N.Y.S.2d 49 [2002]; *38 Holding Corp. v. City of New York,* 179 A.D.2d 486, 487, 578 N.Y.S.2d 174 [1992]).

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# Case 28

*M & T Real Estate Trust ex rel. M & T Real Estate, Inc. v. Doyle,* 93 A.D.3d 1331, 941 N.Y.S.2d 422 (Fourth Dept. 2012)

Supreme Court, Appellate Division, Fourth Department, New York.

**M & T REAL ESTATE TRUST, Successor by Merger to M & T REAL ESTATE, INC., Plaintiff–Respondent,**

**v.**

**James J. DOYLE, II, and Jim Doyle Ford, Inc., Defendants–Appellants. (Appeal No. 2.)**

March 23, 2012.

**PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND MARTOCHE, JJ.**

**MEMORANDUM:**

*1331 Plaintiff commenced this action seeking, inter alia, to foreclose certain commercial mortgages and obtain a judgment of foreclosure and sale. Plaintiff was the successful bidder when the property in question was sold at public auction, and it thereafter assigned its successful bid. According to the report of sale dated May 11, 2010, the Referee appointed to conduct the sale executed a deed prepared by counsel for plaintiff naming plaintiff's assignee as the grantee. The Referee mailed the deed to plaintiff's counsel, who also represented the assignee. After the deed was mailed but before it was received, plaintiff's counsel telephoned the Referee and advised him that the assignee was negotiating with a prospective purchaser and would not accept the deed at that time. Plaintiff's counsel subsequently returned the deed with a cover letter dated May *1332 17, 2010, directing the Referee to hold the deed in his file until further notice. By letter dated July 26, 2010, plaintiff's counsel requested that the Referee send him the deed and other closing documents. After receiving the deed, plaintiff's counsel further requested that the Referee "re-execute the ... deed" so that it would be "dated concurrently with its delivery." The Referee's deed indicates that it was executed August 9, 2010.

On September 3, 2010 plaintiff moved, inter alia, to confirm the Referee's report of sale and for leave to enter a deficiency judgment against defendants pursuant to RPAPL 1371(2). Supreme Court erred in granting that part of the motion seeking leave to enter a deficiency judgment inasmuch as the motion was not "made within [90] days after the date of the consummation of the [foreclosure] sale by the delivery of the proper deed of conveyance to the purchaser" (RPAPL 1371[2]). That 90–day period is a statute of limitations that was timely raised by defendants in opposition to the motion (*see Mortgagee Affiliates Corp. v. Jerder Realty Servs.,* 62 A.D.2d 591, 593, 406 N.Y.S.2d 326, *affd.* 47 N.Y.2d 796, 417 N.Y.S.2d 930, 391 N.E.2d 1011; *Voss v. Multifilm Corp. of Am.,* 112 A.D.2d 216, 217, 491 N.Y.S.2d 434).

We agree with defendants that the foreclosure sale was consummated and the 90–day period commenced in May 2010 upon the delivery of the Referee's deed. Such delivery occurred within the meaning of the statute at that time inasmuch as the Referee, acting as grantor on behalf of the court (*see Lennar Northeast Partners Ltd. Partnership v. Gifaldi,* 258 A.D.2d 240, 243, 695 N.Y.S.2d 448, *lv. denied* 94 N.Y.2d 754, 701 N.Y.S.2d 340, 723 N.E.2d 89), executed and parted with control of the deed prepared by plaintiff's counsel with the intention to pass title (*see National Bank of Sussex County v. Betar,* 207 A.D.2d 610, 611–612, 615 N.Y.S.2d 523). **424 "When the Referee[ ] signed the deed[ ] presented by [plaintiff's] counsel, [he was] left with no title to convey to any other party," and thus the sale was consummated upon the delivery of that deed in May 2010, notwithstanding the refusal of

plaintiff's counsel to accept and retain physical possession of the deed at that time (*Lennar Northeast Partners Ltd. Partnership,* 258 A.D.2d at 243, 695 N.Y.S.2d 448; *see Cicero v. Aspen Hills II, LLC,* 85 A.D.3d 1411, 1412, 926 N.Y.S.2d 680). Thus, plaintiff's motion was untimely.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs and that part of the motion for leave to enter a deficiency judgment is denied.

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# Case 29

*New York Community Bank v. Parade Place, LLC,* 96 A.D.3d 542, 947 N.Y.S.2d 426 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**NEW YORK COMMUNITY BANK, Plaintiff–Respondent,**

**v.**

**PARADE PLACE, LLC, et al., Defendants–Appellants,**

**99 Associates, Inc., et al., Defendants.**

June 14, 2012.

**ANDRIAS, J.P., SWEENY, MANZANET–DANIELS, ROMÁN, JJ.**

*542 Order, Supreme Court, New York County (Paul G. Feinman, J.), entered May 4, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as against defendant Parade Place, LLC, under index no. 117349/08, and orders, same court and Justice, entered on or about May 5, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motions for summary judgment as against Parade Place and defendants Saadia Shapiro and Marla Shapiro under index nos. 117348/08 and 117350/08, unanimously affirmed, with costs.

Pursuant to CPLR 5520(c), we deem Saadia Shapiro's and *543 Marla Shapiro's appeals from the order under index no. 117350/08 appeals from the order under index no. 117348/08 as well.

In opposition to plaintiff's prima facie showing that it was entitled to foreclosure, defendants contended that plaintiff did not give the requisite notice of default under the respective mortgages. However, their argument consists of the assertion that plaintiff failed to *allege* that it gave the notice and the conditional statement that "if" it had not complied with the notice requirement, it could not foreclose. These assertions do not raise an issue of fact whether plaintiff gave the requisite notice. Moreover, defendants never argued before the motion court that they had not received notice or that there was anything**428 whatsoever improper about the notice, and they may not raise these arguments for the first time on appeal.

Defendants also failed to raise issues of fact as to fraud in the inducement and unclean hands. In her affidavit, Saadia Shapiro makes conclusory and unsubstantiated assertions and does not actually state that plaintiff had agreed not to foreclose until the assemblage was complete or that plaintiff knew about, and

acquiesced, to the secondary financing (*see Bank Leumi Trust Co. of N.Y. v. Lightning Park,* 215 A.D.2d 246, 626 N.Y.S.2d 202 [1995]; *Friesch–Groningsche Hypotheekbank Realty Credit Corp. v. Ward Equities,* 188 A.D.2d 397, 591 N.Y.S.2d 379 [1992]). Furthermore, defendants appear to be impermissibly trying to use discovery as a "fishing expedition [because] they cannot set forth a reliable factual basis for their suspicions" (*see Orix Credit Alliance v. Hable Co.,* 256 A.D.2d 114, 116, 682 N.Y.S.2d 160 [1998]).

The complaints' description of the properties subject to foreclosure is sufficient since the respective parcels can be identified and located with reasonable certainty (*see Wilshire Credit Corp. v. Y.R. Bldrs.,* 262 A.D.2d 404, 691 N.Y.S.2d 152 [1999]). The mortgaged properties are identified by their addresses and references to tax maps, and for two of the three properties, a metes and bounds description is given as well. Furthermore, defendants failed to provide any documentation, or citation to a public or other record, or any other evidence in admissible form, to support their assertion that all three properties are now a single tax lot.

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## Case 30

*Norwest Bank Minnesota, NA v. E.M.V. Realty Corp.,* 94 A.D.3d 835, 943 N.Y.S.2d 113 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**NORWEST BANK MINNESOTA, NA, etc., plaintiff,**

**v.**

**E.M.V. REALTY CORP., etc., et al., respondents-appellants, RJR Mechanical, Inc., appellant-respondent, et al., defendants.**

April 10, 2012.

**PETER B. SKELOS, J.P., JOHN M. LEVENTHAL, PLUMMER E. LOTT, and ROBERT J. MILLER, JJ.**

*835 In an action to foreclose a mortgage, the defendant RJR Mechanical, Inc., appeals (1) from a decision of the Supreme Court, Queens County (Joseph G. Golia, J.), dated July 30, 2010, made after a hearing, and (2), as limited by its brief, from so much of an order of the same court dated May 2, 2011, as, upon the decision, granted its motion, in effect, for the distribution from escrow of the proceeds from the sale of the subject premises to the extent of directing that escrowed funds in the total sum of only $424,790.42 be distributed to it, and the defendants E.M.V. Realty Corp. and Harry Baron cross-appeal from (1) the same decision, and (2) so much of the same order as, upon the decision, granted that branch of the motion of the defendant RJR Mechanical, Inc., which was for the distribution of escrowed funds in the sum of $399,933.82, representing an award of interest upon the unpaid principal balance of the subject mortgage.

ORDERED that the appeal and cross appeal from the decision are dismissed, without costs or disbursements, as no appeal lies from a decision (*see Schicchi v. Green Constr. Corp.,* 100 A.D.2d 509, 511, 472 N.Y.S.2d 718); and it is further,

ORDERED that the order is modified, on the facts and in the exercise of discretion, (1) by deleting the provision thereof granting that branch of the motion of the defendant RJR Mechanical, Inc., which was for the distribution of escrowed funds in the *836 sum of $399,933.82, representing an award of interest upon the unpaid principal balance of the subject mortgage and substituting therefor a provision denying that branch of the motion, and (2) by deleting the provision thereof directing that escrowed funds in the total sum of $424,790.42 be distributed to the defendant RJR Mechanical, Inc., and substituting therefor a provision directing that escrowed funds in the total sum of $24,856.60 be distributed to that defendant; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the defendants E.M.V. Realty Corp. and Harry Baron.

During the course of this foreclosure action, the tenant of the subject premises, the defendant RJR Mechanical, Inc. (hereinafter RJR), obtained an assignment **115 of the mortgage from the plaintiff, as well as an assignment of a judgment lien against the premises. A private sale of the premises was eventually completed. The proceeds of the sale were placed into an escrow account pending a hearing to determine RJR's interests in the mortgage and judgment, the circumstances surrounding RJR's acquisitions of the mortgage and judgment, and rental offsets claimed by the owner of the premises, the defendant E.M.V. Realty Corp. (hereinafter E.M.V.).

After the hearing, the Supreme Court, in an order dated May 2, 2011, among other things, granted RJR's motion, in effect, for the distribution from escrow of the proceeds from the sale of the subject premises to the extent of directing that escrowed funds in the total sum of $424,790.42 be distributed to it, limiting RJR's recovery on the mortgage and the judgment based upon principles of equity. The total sum of RJR's distribution included interest upon the unpaid principal balance of the subject mortgage in the sum of $399,933.82. RJR appeals, contending that it is entitled to the entirety of the funds held in escrow in satisfaction of the mortgage and the judgment. E.M.V. and its principal, the defendant Harry Baron, cross-appeal from so much of the same order as granted that branch of RJR's motion which was for the distribution of escrowed funds in the sum of $399,933.82, representing an award of interest upon the unpaid principal balance of the subject mortgage.

A foreclosure action is equitable in nature and triggers the equitable powers of the court (*see Notey v. Darien Constr. Corp.,* 41 N.Y.2d 1055, 396 N.Y.S.2d 169, 364 N.E.2d 833; *Mortgage Elec. Registration Sys., Inc. v. Horkan,* 68 A.D.3d 948, 890 N.Y.S.2d 326). A wrongdoer should not be permitted to profit from his or her own wrong (*see Kirschner v. KPMG LLP,* 15 N.Y.3d 446, 464, 912 N.Y.S.2d 508, 938 N.E.2d 941; *Campbell v. Thomas,* 73 A.D.3d 103, 116–117, 897 N.Y.S.2d 460; *Beaumont v. American Can Co.,* 215 A.D.2d 249, 626 N.Y.S.2d 201).

*837 In determining the distribution of the proceeds from the sale of the subject premises, the Supreme Court properly denied RJR recovery for charges accrued due to the default in the mortgage payments and the resulting foreclosure action in light of the Supreme Court's finding, which is supported by the record, that RJR itself intentionally precipitated the foreclosure action by failing to make mortgage payments in lieu of rent. Likewise, the Supreme Court properly limited RJR's interest in the judgment to its cost of acquisition since the record reveals that RJR repeatedly thwarted E.M.V.'s efforts to compromise the judgment for a fraction of its value prior to obtaining assignment of the judgment itself.

However, under the circumstances of this case, the Supreme Court improvidently exercised its discretion when it granted that branch of RJR's motion which was for the distribution of escrowed funds in the sum of $399,933.82, representing an award of interest upon the unpaid principal balance of the subject mortgage. "In an action of an equitable nature, the recovery of interest is within the court's discretion" (*Dayan v. York,* 51 A.D.3d 964, 965, 859 N.Y.S.2d 673; *see* CPLR 5001[a]; *Deutsche Bank Trust Co., Ams. v. Stathakis,* 90 A.D.3d 983, 984, 935 N.Y.S.2d 651). In light of RJR's deliberate course of conduct which triggered the subject foreclosure, equity requires the cancellation of any interest awarded to RJR on the unpaid principal balance of the mortgage. Thus, the total sum of the escrowed funds to be distributed to RJR must be reduced by the sum of $399,933.82.

**116 The parties' remaining contentions either are without merit or need not be reached in light of our determination.

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# Case 31

*NYCTL 2005–A Trust v. Rosenberger Boat Livery, Inc.,* 96 A.D.3d 425, 947 N.Y.S.2d 2 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**NYCTL 2005–A TRUST, et al., Plaintiffs,**

**v.**

**ROSENBERGER BOAT LIVERY, INC., et al., Defendants–Appellants,**

**Mortgage IRA, LLC, et al., Defendants.**

**Joan Iacono, Esq., Receiver–Appellant,**

**v.**

**Ronald Magro, Third–Party Bidder–Respondent.**

June 5, 2012.

**MAZZARELLI, J.P., SWEENY, DeGRASSE, FREEDMAN, RICHTER, JJ.**

*425 Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 27, 2011, which denied the motion of defendants Rosenberger Boat Livery, Inc. and John E. Burke and nonparty Joan Iacono, as Rosenberger's temporary receiver, to vacate (1) an order, same court (Howard R. Silver, J.), entered November 13, 2008, appointing a referee, (2) a judgment of foreclosure, same court (Silver, J.), entered

June 17, 2010, and (3) an auction sale that took place on October 25, 2010, unanimously affirmed, with costs.

Rosenberger's temporary receiver was not a necessary party because title to the property remained with the corporation (*see Bate v. Brenack Stevedoring Co., Inc.,* 197 App.Div. 194, 195, 188 N.Y.S. 855 [1921]). We note that Rosenberger and Burke (who owns half of Rosenberger's shares) appeared early on in this litigation.

The documents challenged by defendants are labeled affidavits and begin, "[name of witness], *being duly sworn,* deposes and says ..." (emphasis added). Therefore, the referee and the foreclosure court could accept these documents as affidavits (*see Sparaco v. Sparaco,* 309 A.D.2d 1029, 1030, 765 N.Y.S.2d 683 [2003], *lv. denied* 2 N.Y.3d 702, 778 N.Y.S.2d 461, 810 N.E.2d 914 [2004]), even though the notary stated that the witness "acknowledged ... that he executed the same." In any event, defendants do not point to any inaccuracies in the documents.

Even assuming, arguendo, the Bronx Press Review did not *426 qualify as a "newspaper" pursuant to General Construction Law §60(a) because it did not have a paid circulation, notice of the sale was also published in the New York Law Journal, and defendants do not contend that the Law Journal fails to qualify as a newspaper. Real Property Actions and Proceedings Law §231(2)(a) requires publication in **4 only one newspaper when the real property to be sold is located in a county within the city of New York. Thus, publication was proper.

The irregularities in the referee's terms of sale were properly disregarded by the court inasmuch as they did not affect a substantial right of any party (*see* CPLR 2001).

Rosenberger could have redeemed its property "at any point before the property [wa]s actually sold at a foreclosure sale" (*NYCTL 1999–1 Trust v. 573 Jackson Ave. Realty Corp.,* 13 N.Y.3d 573, 579, 893 N.Y.S.2d 503, 921 N.E.2d 195 [2009], *cert. denied* —— U.S. ——, 130 S.Ct. 3466, 177 L.Ed.2d 1055 [2010]). However, after the sale, the right to redeem was extinguished, even though no deed had yet been delivered to the purchaser (*see e.g. Chase Manhattan Mtge. Corp. v. Harper,* 54 A.D.3d 987, 988, 865 N.Y.S.2d 127 [2008]).

Defendants have not met their burden of demonstrating a disparity in price *and* "one of the categories integral to the invocation of equity such as fraud, mistake or exploitive overreaching" (*Guardian Loan Co. v. Early,* 47 N.Y.2d 515, 521, 419 N.Y.S.2d 56, 392 N.E.2d 1240 [1979]), to warrant setting aside the sale of the property.

We have considered defendants' remaining arguments and find them unavailing.

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## Case 32

*Option One Mortg. Corp. v. J.P. Morgan Chase & Co.,* 93 A.D.3d 480, 940 N.Y.S.2d 225 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**OPTION ONE MORTGAGE CORP., Plaintiff–Respondent,**

**v.**

**J.P. MORGAN CHASE & CO., et al., Defendants–Appellants,**
**Washington Mutual, Inc., et al., Defendants.**
March 13, 2012.
**SAXE, J.P., SWEENY, FREEDMAN, MANZANET–DANIELS, JJ.**

*480 Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered November 8, 2010, which, to the extent appealed from, denied the motions of defendants J.P. Morgan Chase & Co., JPMorgan Chase Bank, N.A., and TD Bank, N.A. (sued herein as Commerce Bank, N.A.) to dismiss this action for conversion, negligence, and violation of Uniform Commercial Code §3–419(1)(c), unanimously reversed, on the law, with costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

In this action arising from plaintiff's purchase of real estate at a foreclosure sale, the only basis for plaintiff's claim of entitlement to insurance proceeds paid to the previous owners of the home who cashed the insurance checks but failed to use the money to repair fire damage to the property, is pursuant to a paragraph of a mortgage entitled "Borrower's Obligation to Maintain Hazard Insurance or Property Insurance." However, bidding at a foreclosure sale and taking title generally terminates "the mortgagee's insurable interest as a mortgagee" (*Whitestone Sav. & Loan Assn. v. Allstate Ins. Co.,* 28 N.Y.2d 332, 334, 321 N.Y.S.2d 862, 270 N.E.2d 694 [1971]; *see Kessler v. Government Empls. Ins. Co.,* 179 A.D.2d 492, 493, 579 N.Y.S.2d 13 [1992]; *Cohen v. New York Prop. Ins. Underwriting Assn.,* 160 A.D.2d 287, 288, 554 N.Y.S.2d 477 [1990]). Although it is true that *481 where, as here, the mortgagee's bid at a foreclosure sale is less than the amount of the debt secured by the mortgage, there remains "a deficiency for which the mortgagor would be obligated and from which there would survive an insurable interest" (*Whitestone,* 28 N.Y.2d at 335, 321 N.Y.S.2d 862, 270 N.E.2d 694), RPAPL 1371(3) provides that if no motion for a deficiency judgment is made, "the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

It is undisputed that plaintiff made no motion for a deficiency judgment in its action against the mortgagors. "Plaintiff's failure to obtain a deficiency judgment within the prescribed time ... defeats any right of recovery [it] may have had as mortgagee" (*Cohen,* 160 A.D.2d at 288, 554 N.Y.S.2d 477).

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# Case 33

*Pritchard v. Curtis,* 95 A.D.3d 1379, 944 N.Y.S.2d 341 (Third Dept. 2012)
Supreme Court, Appellate Division, Third Department, New York.
**Charles PRITCHARD et al., Respondents,**
**v.**
**Darlene A. CURTIS et al., Defendants,**
**and**
**Donald W. Chichester, Appellant.**

May 3, 2012.

**Before: PETERS, P.J., ROSE, LAHTINEN, MALONE JR. and KAVANAGH, JJ.**

**LAHTINEN, J.**

*1379 Appeal from an order of the Supreme Court (Devine, J.), entered January 13, 2011 in Schoharie County, which granted plaintiffs' motion for partial summary judgment.

This action was commenced in August 2009 to, among other things, foreclose two mortgages that were executed in December 2005 (but not recorded until April **342 2009) and to set aside as fraudulent the conveyances of the two mortgaged parcels. Defendant Donald W. Chichester (hereinafter defendant) owned two parcels in Schoharie County, a 103–acre parcel with a single family house and an unimproved parcel of about 50 acres. In 1999, he formed defendant Pentastar Corporation and conveyed both parcels to the corporation.[5] In July 2005, Pentastar conveyed the parcels to defendant Darlene A. Curtis, who is defendant's companion and was Pentastar's president.

Curtis needed money for her used car business, New York Carriage Corporation, and she contacted DKR & Associates. Between September 2005 and January 2007, DKR wrote a series of checks totaling $105,500 to New York Carriage and $32,000 to Curtis. In December 2005, Curtis executed two "promissory grid" notes, secured by mortgages on both parcels, for $75,000 each, agreeing to pay DKR the principal and interest on or before December 31, 2007. Although executed in December 2005, the mortgages were not recorded by DKR until April 2009.

In March 2008, Curtis conveyed both parcels to defendant Robert P. Toleno, a friend of defendant and Curtis. In December 2008, Toleno transferred the parcels to defendant Anne S. Hartjen, another friend of defendant and Curtis. Defendant and Curtis continued at all times to reside at the residence on the 103–acre parcel without paying rent.

*1380 After recording the mortgages in April 2009, DKR assigned the notes and mortgages in May 2009 to plaintiffs. In August 2009, plaintiffs filed a notice of pendency and commenced this action to, among other things, set aside the March 2008 and December 2008 conveyances as fraudulent and to foreclose on the mortgages. Approximately 10 months later, in June 2010, while the action was pending and discovery was being conducted, Hartjen conveyed the parcels to American Dream Ventures, Inc., a corporation formed by defendant in late May 2010.

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[5] Earlier, in 1994, defendant had mortgaged the 103–acre parcel to Central National Bank and that mortgage was assigned to defendant Alaska Seaboard Partners, L.P. and its nominee, defendant Mortgage Electronic Registration Systems, Inc. Plaintiffs executed a stipulation and order providing, among other things, that proceeds of a foreclosure sale on the 103–acre parcel will be applied first to the amount owed Alaska Seaboard/Mortgage Electronic.

Following discovery, plaintiffs moved for summary judgment on two of their causes of action. They sought summary judgment, first, setting aside the March 2008, December 2008 and June 2010 conveyances as fraudulent and, second, foreclosing the two mortgages. Supreme Court granted plaintiffs' motion and appointed a referee. Defendant appeals.

Initially, we find merit in plaintiffs' contention that defendant lacks standing. Our review of the record reflects that defendant last had an individual ownership interest in the property in 1999, and he is not a signatory to the promissory grid notes or a mortgagor on the mortgages that are the subject of this action (*see Bancplus Mtge. Corp. v. Galloway,* 203 A.D.2d 222, 223, 610 N.Y.S.2d 60 [1994]; *Marine Midland Bank–E. N.A. v. Haufler Assoc.,* 55 A.D.2d 803, 804, 390 N.Y.S.2d 264 [1976]). The fact that American Dream Ventures—a corporation defendant formed—took title to the parcels after the action was commenced does not on this record establish individual standing for defendant since there is no argument or proof to avoid the general rule that a corporation's legal existence is separate from its shareholders (*see e.g. Harris v. Stony Clove Lake Acres,* 202 A.D.2d 745, 747, 608 N.Y.S.2d 584 [1994]).

**343 In any event, we agree with Supreme Court that plaintiffs set forth ample badges of fraud to establish fraudulent intent in support of their claim under Debtor and Creditor Law §276 (*see Dowlings, Inc. v. Homestead Dairies, Inc.,* 88 A.D.3d 1226, 1231, 932 N.Y.S.2d 192 [2011]; *Matter of Shelly v. Doe,* 249 A.D.2d 756, 758, 671 N.Y.S.2d 803 [1998]). The two transfers in 2008 involved friends of Curtis and defendant, and the 2010 transfer was to a corporation formed by defendant less than a month before the transfer. Although there are some discrepancies about the amount—if any—of consideration paid by the transferees, it is clear that all relevant transfers were—at best—for far less than market value and, moreover, Curtis's attorney stated in an affidavit that all conveyances were made without any consideration. Curtis and defendant continued to live on the property throughout the series of transactions without paying rent. Plaintiffs established a prima facie case of fraudulent transfers. Furthermore, plaintiffs also established *1381 entitlement to a judgment of foreclosure by producing the mortgages, the unpaid promissory grid notes and proof of default (*see Charter One Bank, FSB v. Leone,* 45 A.D.3d 958, 958–959, 845 N.Y.S.2d 513 [2007]; *HSBC Bank USA v. Merrill,* 37 A.D.3d 899, 900, 830 N.Y.S.2d 598 [2007], *lv. dismissed* 8 N.Y.3d 967, 836 N.Y.S.2d 540, 868 N.E.2d 221 [2007]). Defendant's submissions were insufficient to raise a triable issue.

ORDERED that the order is affirmed, without costs.

**PETERS, P.J., ROSE, MALONE JR. and KAVANAGH, JJ., concur.**

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# Case 34

*Reich v. Redley,* 96 A.D.3d 1038, 947 N.Y.S.2d 564 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.

**Alexander REICH, respondent,**
**v.**
**Dwight REDLEY, appellant, et al., defendants.**
June 27, 2012.
**WILLIAM F. MASTRO, A.P.J., RUTH C. BALKIN, CHERYL E. CHAMBERS, and PLUMMER E. LOTT, JJ.**

*1038 In an action to foreclose a mortgage, the defendant Dwight Redley appeals (1) from an order of the Supreme Court, Kings County (Steinhardt, J.), dated December 9, 2009, which denied his motion to vacate his default in appearing or answering the complaint, and (2), as limited by his brief, from so much of an order of the same court dated August 20, 2010, as denied that branch of his motion which was for leave to renew his prior motion to vacate.

ORDERED that the order dated December 9, 2009, is affirmed; and it is further,

ORDERED that the order dated August 20, 2010, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The Supreme Court properly denied the motion of the defendant Dwight Redley to vacate his default in appearing or answering the complaint. Insofar as Redley moved to vacate his default pursuant to CPLR 5015(a)(4) for lack of jurisdiction, the affidavit of the plaintiff's process server constituted prima facie evidence of proper service pursuant to CPLR 308(1) **566 (*see Tribeca Lending Corp. v. Crawford,* 79 A.D.3d 1018, 1019, 916 N.Y.S.2d 116; *Matter of Perskin v. Bassaragh,* 73 A.D.3d 1073, 899 N.Y.S.2d 901; *Scarano v. Scarano,* 63 A.D.3d 716, 880 N.Y.S.2d 682). Redley's bare and unsubstantiated denial of service in this case was insufficient to rebut the presumption of proper service created by the plaintiff's duly executed affidavit of service (*see Citimortgage, Inc. v. Phillips,* 82 A.D.3d 1032, 918 N.Y.S.2d 893; *Valiotis v. Psaroudis,* 78 A.D.3d 683, 911 N.Y.S.2d 111; *Prospect Park Mgt., LLC v. Beatty,* 73 A.D.3d 885, 900 N.Y.S.2d 433; *Pezolano v. Incorporated City of Glen Cove,* 71 A.D.3d 970, 971, 896 N.Y.S.2d 685; *1039 *Sturino v. Nino Tripicchio & Son Landscaping,* 65 A.D.3d 1327, 885 N.Y.S.2d 625; *European Am. Bank v. Abramoff,* 201 A.D.2d 611, 608 N.Y.S.2d 233). Moreover, insofar as Redley moved also to vacate his default pursuant to CPLR 5015(a)(1) by demonstrating a reasonable excuse for the default and a potentially meritorious defense (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.,* 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 492 N.E.2d 116), he "failed to establish a reasonable excuse for his default since the only excuse he proffered was that he was not served with process" (*Stephan B. Gleich & Assoc. v. Gritsipis,* 87 A.D.3d 216, 221, 927 N.Y.S.2d 349; *see Pezolano v. Incorporated City of Glen Cove,* 71 A.D.3d at 971, 896 N.Y.S.2d 685). As Redley failed to offer a reasonable excuse, "it is unnecessary to consider whether [he] sufficiently demonstrated the existence of a potentially meritorious defense" (*Lane v. Smith,* 84 A.D.3d 746, 748, 922 N.Y.S.2d 214).

The Supreme Court also properly denied that branch of Redley's motion which was for leave to renew his motion to vacate his default in appearing or answering,

as he failed to offer a reasonable justification for his failure to submit the purported new facts at the time of the prior motion (*see* CPLR 2221[e][3]; *Mount Sinai Hosp. v. Country Wide Ins. Co.,* 85 A.D.3d 1136, 1138, 926 N.Y.S.2d 306; *Jordan v. Yardeny,* 84 A.D.3d 1172, 1173, 923 N.Y.S.2d 358; *Zito v. Jastremski,* 84 A.D.3d 1069, 1071, 925 N.Y.S.2d 91). In any event, the new facts would not have changed the prior determination (*see* CPLR 2221[e][2]; *Davidoff v. East 13th St. Tifereth Place, LLC,* 84 A.D.3d 1302, 1303, 923 N.Y.S.2d 886; *Jordan v. Yardeny,* 84 A.D.3d at 1173, 923 N.Y.S.2d 358; *Zito v. Jastremski,* 84 A.D.3d at 1071, 925 N.Y.S.2d 91).

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# Case 35

*Shufelt v. Bulfamante*, 92 A.D.3d 936, 940 N.Y.S.2d 108 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.

**Thomas SHUFELT, respondent,**

**v.**

**Maria BULFAMANTE, et al., appellants.**

Feb. 28, 2012.

**REINALDO E. RIVERA, J.P., SHERI S. ROMAN, SANDRA L. SGROI, and JEFFREY A. COHEN, JJ.**

*936 In an action to foreclose a mortgage, the defendants appeal from an order of the Supreme Court, Dutchess County (Sproat, J.), dated November 23, 2010, which granted the plaintiff's motion for summary judgment on the complaint and dismissing the affirmative defenses and counterclaims.

ORDERED that the order is modified, on the law, by deleting the *937 provisions thereof granting those branches of the plaintiff's motion which were for summary judgment dismissing so much of the second and fourth affirmative defenses as asserted that the defendant Maria Bulfamante is entitled to an adjustment in the amount due under the mortgage note, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed, without costs or disbursements, upon searching the record, summary judgment is awarded to the defendant Maria Bulfamante on so much of the second and fourth affirmative defenses as asserted that she is entitled to an adjustment in the amount due under the mortgage note to the extent of reducing her obligation pursuant to the face amount of the mortgage note by 6.33%, and the matter is remitted to the Supreme Court, Dutchess County, for the recalculation of the dollar amount of her obligation under the mortgage note in accordance herewith and, inter alia, the entry of an appropriate judgment of foreclosure and deficiency judgment thereafter.

The plaintiff established, prima facie, that the defendant Maria Bulfamante (hereinafter Maria) was in default under the subject mortgage note by demonstrating the existence of the note, the execution thereof by Maria, and Maria's failure to make timely repayments thereunder. In opposition to the plaintiff's showing, the **110 defendants failed to raise a triable issue of fact. Moreover, the existence of a dispute as to the exact amount owed by Maria to the

plaintiff does not preclude the award of summary judgment to the plaintiff on the issue of foreclosure (*see Long Is. Savings Bank of Centereach v. Denkensohn,* 222 A.D.2d 659, 635 N.Y.S.2d 683). Accordingly, the Supreme Court properly granted those branches of the plaintiff's motion which were for summary judgment on the issue of foreclosure, dismissing the first and third affirmative defenses and the counterclaims, all of which challenged the plaintiff's right to foreclosure, and dismissing so much of the second and fourth affirmative defenses as challenged the plaintiff's right to foreclosure.

Nonetheless, as the Court of Appeals explained in *Paine v. Upton*, 87 N.Y. 327, 1882 WL 14593, a purchase-money mortgagor, such as Maria, is entitled to "an abatement from the bond and mortgage given for the purchase-money, proportionate to the deficiency of acreage" actually transferred to him or her by the purchase-money mortgagee, as contrasted with the acreage purportedly transferred (*Paine v. Upton,* 87 N.Y. at 331; *see Mills v. Kampfe,* 202 N.Y. 46, 94 N.E. 1072; *Belknap v. Sealey,* 14 N.Y. 143; *Shay v. Mitchell,* 50 A.D.2d 404, 378 N.Y.S.2d 334, *affd.* 40 N.Y.2d 1040, 391 N.Y.S.2d 856, 360 N.E.2d 356; *Fisher v. Zimmer,* 286 App.Div. 1129, 146 N.Y.S.2d 170 *affd.* *938 1 N.Y.2d 721, 151 N.Y.S.2d 932, 134 N.E.2d 681; *Firenzo v. Baxter,* 267 App.Div. 799, 46 N.Y.S.2d 139; *Rose v. Wood,* 7 Misc.2d 523, 164 N.Y.S.2d 661; 92 CJS, Vendor and Purchaser §71). As reflected in a rider to the contract at issue on the instant appeal, the sale here was expressly made on a "per acre" basis (*see generally* E.H. Schopler, Annotation, *Relief, by Way of Rescission or Adjustment in Purchase Price, for Mutual Mistake as to Quantity of Land, Where Contract of Sale Fixes Compensation at a Specified Rate per Acre or Other Unit,* 153 A.L.R. 4; C.T. Dreschsler, Annotation, *Relief by Way of Rescission or Adjustment in Purchase Price for Mutual Mistake as to Quantity of Land, Where the Sale is in Gross,* 1 A.L.R.2d 9; Annotation, *Measure and Elements of Damages Recoverable from Vendor Where There has been Mistake as to Amount of Land Conveyed,* 94 ALR3d 1091; 91 N.Y. Jur. 2d, Real Property Sales and Exchanges §38). Specifically, pursuant to the terms of the underlying contract of sale, the purchase price paid by Maria was at the per-acre rate of $1,800. Maria paid the total sum of $180,000 to the plaintiff, reflecting the parties' understanding that 100 acres of real property were to be transferred. Maria paid the sum of $50,000 in cash to the plaintiff and, upon the transfer of the acreage, the plaintiff took back a purchase-money mortgage from Maria in the face amount of $130,000. The parcel actually transferred, however, comprised only 93.67 acres, a deficiency of 6.33 acres, representing 6.33% of the total face amount of the purchase-money mortgage.

The plaintiff failed to establish his prima facie entitlement to judgment as a matter of law with respect to the issue of whether Maria was entitled to a reduction in the amount due under the mortgage note. Accordingly, regardless of the sufficiency of the defendants' opposition, the Supreme Court should not have granted those branches of the plaintiff's motion which were for summary judgment dismissing so much of the second and fourth affirmative defenses as alleged that Maria is entitled to an adjustment in the amount due under the disputed mortgage note, but should have denied those branches of the motion. Further, upon searching

the record, we conclude, as a matter of law, that **111 the contract of sale was made on a "per acre" basis, that the parties intended that 100 acres of real property were to be transferred pursuant to the contract of sale, that only 93.67 acres were actually transferred, and that the mortgage note is only applicable to 93.67 acres of real property. Consequently, we award summary judgment to Maria on so much of the second and fourth affirmative defenses as sought an adjustment in her favor to the extent of reducing her obligation pursuant to the face amount of the mortgage note by 6.33%. Accordingly, the matter must be remitted to the Supreme Court, Dutchess *939 County, for the recalculation of the dollar amount of her obligation under the mortgage note after reducing the face amount of the obligation by 6.33% and crediting any overpayments that may have been made and, inter alia, the entry of an appropriate judgment of foreclosure and deficiency judgment thereafter.

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# Case 36

*Signature Bank v. Epstein,* 95 A.D.3d 1199, 945 N.Y.S.2d 347 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.

**SIGNATURE BANK, appellant,**

**v.**

**Arlene L. EPSTEIN, et al., respondents.**

May 23, 2012.

**MARK C. DILLON, J.P., ANITA R. FLORIO, PLUMMER E. LOTT, and SANDRA L. SGROI, JJ.**

*1199 In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Tolbert, J.), entered June 8, 2011, as granted those branches of the defendants' motion which were, in effect, pursuant to **348 CPLR 5015(a)(4) to vacate a judgment of foreclosure and sale of the same court dated July 14, 2009, and to dismiss the complaint.

ORDERED that the order is reversed insofar as appealed from, *1200 on the law, with costs, and those branches of the defendants' motion which were, in effect, pursuant to CPLR 5015(a)(4) to vacate the judgment of foreclosure and sale dated July 14, 2009, and to dismiss the complaint are denied.

In 2004 the defendants executed and delivered to the plaintiff a home equity line agreement providing for a home equity line of credit in an amount up to, but not to exceed, $110,000, along with a disclosure statement and a note. The defendants promised to pay the plaintiff all loan advances that the plaintiff made thereunder, plus interest. The note was secured by a mortgage on the defendants' real property located in New Rochelle. On January 7, 2008, the plaintiff, through its attorneys, notified the defendants in writing that they were in default under the note and that they had 30 days from the date of the letter in which to pay the indebtedness in full before the plaintiff would exercise its legal rights. On July 9, 2008, the plaintiff commenced this foreclosure action, alleging that the defendants failed to pay the

indebtedness due under the note and mortgage. On July 30, 2008, the defendants interposed a verified answer. On March 3, 2009, the Supreme Court granted the plaintiff's motion for summary judgment on the complaint and, on July 14, 2009, issued a judgment of foreclosure and sale. On May 4, 2011, the defendants moved by order to show cause, among other things, in effect, pursuant to CPLR 5015(a)(4) to vacate the judgment of foreclosure and sale on the ground that the plaintiff's failure to provide the defendants with 30 days written notice of the defendants' default under the mortgage constituted a failure to satisfy a condition precedent to the commencement of the action, thus depriving the Supreme Court of jurisdiction to enter a default judgment. The defendants also moved to dismiss the complaint, based on the plaintiff's alleged failure to satisfy the condition precedent. In an order entered June 8, 2011, the Supreme Court, inter alia, granted those branches of the motion on the ground that the plaintiff had failed to comply with the condition precedent as to notice that was set forth in the mortgage. The plaintiff appeals. We reverse the order entered June 8, 2011, insofar as appealed from.

"A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and concludes all matters of defense which were or might have been litigated in the foreclosure action" (*Long Is. Sav. Bank v. Mihalios,* 269 A.D.2d 502, 503, 704 N.Y.S.2d 483). Here, the defendants waived their right to assert a lack of compliance with a condition precedent, as they failed to assert it as an affirmative defense in their answer and failed to raise it in response to the plaintiff's motion*1201 for summary judgment on the complaint (*see First N. Mortgagee Corp. v. Yatrakis,* 154 A.D.2d 433, 546 N.Y.S.2d 9).

The defendants' remaining contentions either are without merit, are raised for the first time on appeal, or have been rendered academic by our determination.

Accordingly, the Supreme Court should have denied those branches of the defendants' motion which were, in effect, to vacate the judgment of foreclosure and sale and, in effect, to dismiss the complaint.

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## Case 37

*South Point, Inc. v. Redman,* 94 A.D.3d 1086, 943 N.Y.S.2d 543 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.

**SOUTH POINT, INC., etc., appellant,**
**v.**
**Thanya REDMAN, et al., defendants,**
**Helen M. Prescod, respondent.**

April 24, 2012.

**RUTH C. BALKIN, J.P., ARIEL E. BELEN, L. PRISCILLA HALL, and ROBERT J. MILLER, JJ.**

*1086 In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Gavrin, J.), dated May 25, 2011, which denied its motion pursuant to CPLR 3211(b) to dismiss the affirmative defense asserted by

the defendant Helen M. Prescod and granted the application of the defendant Helen M. Prescod, in effect, pursuant to 22 NYCRR 130–1.1 for an award of an attorney's fee incurred in defense of the motion in the sum of $1,543.75.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order dated May 25, 2011, as granted the application of the defendant Helen M. Prescod, in effect, pursuant to 22 NYCRR 130–1.1 for an award of an attorney's fee incurred in defense of the plaintiff's motion in the sum of $1,543.75 is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[a]); and it is further,

ORDERED that the order is modified, on the facts and in the exercise of discretion, by deleting the provision thereof granting the application of the defendant Helen M. Prescod, in effect, pursuant to 22 NYCRR 130–1.1 for an award of an attorney's fee incurred in defense of the plaintiff's motion in the sum of $1,543.75, and substituting therefor a provision denying the application; as so modified, the order is affirmed, without costs or disbursements.

The Supreme Court erred in determining that the doctrine of law of the case precluded the granting of the plaintiff's motion pursuant to CPLR 3211(b) to **545 dismiss the affirmative defense *1087 asserted by the defendant Helen M. Prescod. The doctrine of law of the case "applies to determinations which were necessarily resolved on the merits in [a] prior order" (*Hampton Val. Farms, Inc. v. Flower & Medalie,* 40 A.D.3d 699, 701, 835 N.Y.S.2d 678; *see Lehman v. North Greenwich Landscaping, LLC,* 65 A.D.3d 1293, 1294, 887 N.Y.S.2d 133). Here, contrary to the Supreme Court's determination, the prior order at issue did not address the merits of Prescod's affirmative defense (*see Lehman v. North Greenwich Landscaping, LLC,* 65 A.D.3d at 1294, 887 N.Y.S.2d 133).

Nevertheless, we affirm the denial of the plaintiff's motion to dismiss Prescod's affirmative defense, albeit on a different ground from that relied upon by the Supreme Court (*see Montalvo v. Nel Taxi Corp.,* 114 A.D.2d 494, 494, 494 N.Y.S.2d 406; *see also Menorah Nursing Home v. Zukov,* 153 A.D.2d 13, 19, 548 N.Y.S.2d 702). "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211[b]). Upon such a motion, the movant bears the burden of demonstrating that a defense is not stated or is without merit as a matter of law (*see Butler v. Catinella,* 58 A.D.3d 145, 148, 868 N.Y.S.2d 101; *Vita v. New York Waste Servs., LLC,* 34 A.D.3d 559, 559, 824 N.Y.S.2d 177). The nonmoving defendant is "entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v. Metropolis Night Club, Inc.,* 48 A.D.3d 741, 743, 853 N.Y.S.2d 160; *see Butler v. Catinella,* 58 A.D.3d at 148, 868 N.Y.S.2d 101).

Here, the plaintiff failed to satisfy its burden of demonstrating as a matter of law that the defense at issue was without merit. The defense was premised on Prescod's claim that she has a valid mortgage on the subject property with priority over the plaintiff's mortgage. Although the plaintiff raised numerous issues of fact regarding the validity of Prescod's mortgage, the manner in which it was procured, and the

extent to which its existence was disclosed to the plaintiff's predecessor in interest, the plaintiff failed to offer evidence demonstrating as a matter of law that Prescod's defense was without merit (*cf. Vita v. New York Waste Servs., LLC,* 34 A.D.3d at 559, 824 N.Y.S.2d 177). Accordingly, the plaintiff was not entitled to the relief sought.

Although the plaintiff's motion was not ultimately meritorious, the plaintiff's motion cannot be characterized as frivolous, as it was neither "completely without merit in law" or fact nor undertaken primarily to delay or harass (22 NYCRR 130–1.1; *cf. Caplan v. Tofel,* 65 A.D.3d 1180, 1181, 886 N.Y.S.2d 182). Accordingly, the Supreme Court improvidently exercised its discretion in granting Prescod's application, in effect, pursuant to *1088 22 NYCRR 130–1.1 for an award of an attorney's fee incurred in defense of the plaintiff's motion in the sum of $1,543.75.

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# Case 38

*Targee Street Internal Medicine Group, P.C. v. Deutsche Bank Nat. Trust Co.,* 92 A.D.3d 768, 939 N.Y.S.2d 82 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**TARGEE STREET INTERNAL MEDICINE GROUP, P.C., respondent,**

**v.**

**DEUTSCHE BANK NATIONAL TRUST COMPANY, etc., appellant, et al., defendants.**

Feb. 14, 2012.

**PETER B. SKELOS, J.P., RUTH C. BALKIN, RANDALL T. ENG, and SANDRA L. SGROI, JJ.**

*768 In an action for reforeclosure of a mortgage on real property pursuant to RPAPL 1503, the defendant Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2004–2, appeals, as limited by its brief, from so much of an order and judgment (one paper) of the Supreme Court, Queens County (Agate, J.), entered December 1, 2010, as, upon a decision of the same court entered October 5, 2010, granted that branch of the plaintiff's motion which was for leave to enter a default judgment as to it, denied its cross motion, inter alia, to vacate its default in appearing or answering the complaint and to enlarge its time to answer the complaint, and is in favor of the plaintiff and against it directing that it shall have 60 days to redeem the subject real property or be forever barred and forever foreclosed of and from all right, title and interest, claim, lien, and equity of redemption in and to the subject real property.

ORDERED that the order and judgment is affirmed insofar as appealed from, with costs.

In 1991 the plaintiff, Targee Street Internal Medicine Group, P.C. (hereinafter Targee), commenced a mortgage foreclosure action (hereinafter the 1991 action) in connection with a mortgage it held on certain real property (hereinafter the property) on Delevan Street in Queens Village (hereinafter the Targee mortgage).

The Targee mortgage had been recorded in 1990. Because of certain problems, however, including difficulty in locating the mortgagors and in determining whether one of the mortgagors had died, the 1991 action did not proceed to judgment until 2009. Meanwhile, in 2003, the mortgagors purported to convey the property to another person, Frank Emeka. In 2004 Emeka **84 purported to convey the property to Eucharia Iwuchukwu, who obtained a mortgage loan. The mortgage securing repayment of that loan is now held by Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2004–2 (hereinafter Deutsche Bank).

*769 In 2009, after Targee successfully foreclosed on the Targee mortgage, it commenced this reforeclosure action pursuant to RPAPL 1503 to extinguish any junior claims that had not been extinguished by the judgment in the 1991 action. Targee named as defendants, among others, Deutsche Bank. None of the defendants appeared or answered the complaint in the reforeclosure action, and Targee moved for leave to enter a default judgment against them. Deutsche Bank cross-moved, inter alia, to vacate its default and extend its time to answer. Deutsche Bank acknowledged that it had received the summons and complaint and had defaulted. It explained, however, that it had tendered the defense of the action to another bank in accordance with a pooling and service agreement, and sent the summons and complaint to that other bank. The recipient bank then sent the papers to one of its departments, located in California, and then to another department in Florida, where the papers were somehow misplaced and could not be found. Deutsche Bank also asserted, inter alia, that Targee could not reforeclose against Deutsche Bank, inasmuch as the mortgage held by Deutsche Bank had come into existence after Targee commenced its original foreclosure action and after the statute of limitations on the foreclosure of Targee's mortgage had run. The Supreme Court granted Targee's motion and denied Deutsche Bank's cross motion, and it entered an order and judgment accordingly. Deutsche Bank appeals, and we affirm the order and judgment insofar as appealed from.

"A defendant seeking to vacate a default in appearing or answering must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" (*Citimortgage, Inc. v. Brown,* 83 A.D.3d 644, 644, 919 N.Y.S.2d 894; *see Private Capital Group, LLC v. Hosseinipour,* 86 A.D.3d 554, 556, 927 N.Y.S.2d 665). Even if Deutsche Bank's excuse for its default is reasonable, it failed to demonstrate that it has a potentially meritorious defense to this reforeclosure action. Targee's right to reforeclose against Deutsche Bank's admittedly junior lien was "absolute" (*2035 Realty Co. v. Howard Fuel Corp.,* 77 A.D.2d 870, 871, 431 N.Y.S.2d 57; *see 6820 Ridge Realty v. Goldman,* 263 A.D.2d 22, 29, 701 N.Y.S.2d 69). Moreover, contrary to Deutsche Bank's contention, the reforeclosure action under RPAPL 1503 would properly be maintainable against Deutsche Bank even if the applicable statute of limitations barred an action against it to foreclose on the Targee mortgage (*see* RPAPL 1503).

Deutsche Bank's remaining contentions are without merit.

Consequently, the Supreme Court properly granted that branch of Targee's motion which was for leave to enter a default *770 judgment against Deutsche Bank and denied those branches of Deutsche Bank's cross motion which were to vacate its default and enlarge its time to answer the complaint.

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# Case 39

*Thompson v. Naish,* 93 A.D.3d 1203, 940 N.Y.S.2d 714 (Fourth Dept. 2012)
Supreme Court, Appellate Division, Fourth Department, New York.

**Ernest P. THOMPSON and Wendy J. Thompson, Plaintiffs–Respondents,**

**v.**

**Tina M. NAISH, also known as Tina M. Gernatt, Defendant–Appellant, et al., Defendants.**

March 16, 2012.

**PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.**

**MEMORANDUM:**

*1203 As limited by her brief, Tina M. Naish, also known as Tina M. Gernatt (defendant), appeals from an order, entered following a nonjury trial, determining that defendant was in default on a mortgage issued by plaintiffs, and reinstating a previously vacated judgment of foreclosure. Contrary to defendant's contention, Supreme Court did not err in concluding that she had defaulted on the mortgage. Plaintiffs established that defendant did not pay the mortgage for the final six months of its term, nor did she pay it within the month after that term expired. Plaintiffs' attorney then wrote defendant a letter demanding payment within seven days, and defendant failed to respond within that time, or within the month after the expiration of that seven-day grace period.

We agree with defendant that "[o]f particular importance is a fundamental principle that has informed the law of agency and corporations for centuries; namely, the acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals" (*Kirschner v. KPMG LLP,* 15 N.Y.3d 446, 465, 912 N.Y.S.2d 508, 938 N.E.2d 941; *see Henry v. Allen,* 151 N.Y. 1, 9, 45 N.E. 355). Thus, the payment that she belatedly provided to plaintiffs' attorney is deemed received by plaintiffs at that time. Given that a month had passed between the final **716 date set in plaintiffs' demand letter and the time she sent that payment, however, and given that additional accrued interest was added to the mortgage balance pursuant to the terms of the mortgage contract, her payment did not constitute *1204 full payment of the outstanding balance of the loan. Furthermore, we agree with the court that plaintiffs acted in good faith to protect their investment when they paid the outstanding three-year tax bill on the mortgaged property without actual knowledge that defendant had paid part of her balance due on the mortgage. That payment was also added to the mortgage balance pursuant to the terms of the contract. Inasmuch as defendant owed

plaintiffs far more than the minimal interest on the unpaid balance (*cf. Matter of County of Ontario [Middlebrook],* 59 A.D.3d 1065, 872 N.Y.S.2d 805), the court did not abuse its discretion in concluding that she was in default on the mortgage.

Contrary to defendant's further contention, she "failed to show that the equities indisputably favor [her]" position (*Citibank, N.A. v. Grant,* 21 A.D.3d 924, 801 N.Y.S.2d 59). Defendant is correct that, " '[o]nce equity is invoked, the court's power is as broad as equity and justice require' " ( *Mortgage Elec. Regis. Sys. v. Horkan,* 68 A.D.3d 948, 948, 890 N.Y.S.2d 326). Here, however, equity does not require a different result. Although defendant tendered the amount demanded by plaintiffs, she did so more than a month after the date upon which plaintiffs indicated that they would accept payment in lieu of commencing a foreclosure action, and failed to include any payment for the interest that accrued in the interim. In addition, she was still in default on the property's taxes. She failed to contact plaintiffs to notify them that she was sending payment, and in fact the payment was sent to plaintiffs' attorney while he was on vacation. Thus, the court did not abuse its discretion in balancing the equities in favor of plaintiffs, and declining to overlook defendant's default.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

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# Case 40

*U.S. Bank Nat. Ass'n v. Gonzalez,* --- N.Y.S.2d ----, 2012 WL 4513150, 2012 N.Y. Slip Op. 06596 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**U.S. BANK NATIONAL ASSOCIATION, etc., appellant,**

**v.**

**Javier GONZALEZ, respondent, et al., defendants.**

Oct. 3, 2012.

**MARK C. DILLON, J.P., PLUMMER E. LOTT, SHERI S. ROMAN, and JEFFREY A. COHEN, JJ.**

*1 In an action to foreclose a mortgage, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Saitta, J.), dated April 22, 2010, which granted that branch of the motion of the defendant Javier Gonzalez which was pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him, and (2) an order of the same court dated June 8, 2010, which granted that branch of the motion of the defendant Javier Gonzalez which was for the imposition of sanctions upon the plaintiff.

ORDERED that the order dated April 22, 2010, is reversed, on the law, without costs or disbursements, and that branch of the motion of the defendant Javier Gonzalez which was pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him is denied; and it is further,

ORDERED that the order dated June 8, 2010, is affirmed, without costs or disbursements.

The plaintiff commenced this action to foreclose a mortgage on property owned by the defendant Javier Gonzalez. Service upon Gonzalez of copies of the summons and complaint pursuant to CPLR 308(2) was completed on March 6, 2009, and Gonzalez was required to answer the complaint, appear, or move with respect thereto within 30 days of that date (*see* CPLR 320[a], 3211[e]). Gonzalez failed to do so, but by notice of motion dated October 21, 2009, he moved pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him. Gonzalez also moved for the imposition of sanctions upon the plaintiff pursuant to 22 NYCRR 130–1.1.

Gonzalez did not request an extension of time within which to serve and file a motion pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him, and he did not attempt to show good cause for his delay in making the motion, or even address the untimeliness of the motion (*see* CPLR 2004). Moreover, Gonzalez has not sought an extension of time to answer or appear in this action (*see* CPLR 3012[d]). Accordingly, the Supreme Court should have denied, as untimely, that branch of Gonzalez's motion which was pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him (*see Holubar v. Holubar,* 89 A.D.3d 802, 934 N.Y.S.2d 710; *McGee v. Dunn,* 75 A.D.3d 624, 625, 906 N.Y.S.2d 74).

However, in light of the fact that the plaintiff, inter alia, provided various affirmations and affidavits wherein it made a certain representation that proved to be false, and persisted in making that representation after it knew or should have known it to be false, the Supreme Court providently exercised its discretion in granting that branch of Gonzalez's motion which was for the imposition of sanctions upon the plaintiff (*see* 22 NYCRR 130–1.1[c] [3]; *Schwab v. Phillips,* 78 A.D.3d 1036, 1036–1037, 912 N.Y.S.2d 255).

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# Case 41

*U.S. Bank Nat. Ass'n v. Hossain,* 94 A.D.3d 979, 943 N.Y.S.2d 140, 2012 N.Y. Slip Op. 02864 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**U.S. BANK NATIONAL ASSOCIATION, etc., respondent,**

**v.**

**Ruhella HOSSAIN, appellant, et al., defendants.**

April 17, 2012.

**PETER B. SKELOS, J.P., THOMAS A. DICKERSON, RANDALL T. ENG, and JOHN M. LEVENTHAL, JJ.**

*979 In an action to foreclose a mortgage, the defendant Ruhella Hossain appeals from an order of the Supreme Court, Queens County (Cullen, J.), dated June 8, 2011, which denied, without a hearing, her motion pursuant to CPLR 5015(a)(4) to vacate a judgment of foreclosure and sale of the same court dated December 17, 2008, entered upon her default in appearing or answering the complaint and

pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her for lack of proper service.

ORDERED that the order dated June 8, 2011, is affirmed, with costs.

The motion of the defendant Ruhella Hossain (hereinafter the defendant) pursuant to CPLR 5015(a)(4) to vacate the judgment of foreclosure and sale and pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her for lack of proper service was properly denied without a hearing. The affidavit of the process server constituted prima facie *980 evidence of proper service pursuant to CPLR 308(4) (*see Washington Mut. Bank v. Holt,* 71 A.D.3d 670, 897 N.Y.S.2d 148; *Mortgage Elec. Registration Sys., Inc. v. Schotter,* 50 A.D.3d 983, 857 N.Y.S.2d 592). In opposition, the defendant's affidavit was insufficient to rebut the presumption of proper service created by the process server's affidavit (*see Prospect Park Mgt., LLC v. Beatty,* 73 A.D.3d 885, 886, 900 N.Y.S.2d 433; *Beneficial Homeowner Serv. Corp. v. Girault,* 60 A.D.3d 984, 875 N.Y.S.2d 815; *Mortgage Elec. Registration Sys., Inc. v. Schotter,* 50 A.D.3d 983, 857 N.Y.S.2d 592). Thus, the Supreme Court properly denied the defendant's motion (*see* **141 *Household Fin. Realty Corp. of N.Y. v. Brown,* 13 A.D.3d 340, 341, 785 N.Y.S.2d 742).

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# Case 42

*US Bank Nat. Ass'n v. Cange*, 96 A.D.3d 825, 947 N.Y.S.2d 522 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**US BANK NATIONAL ASSOCIATION, respondent,**

**v.**

**Marie CANGE, appellant, et al., defendants.**

June 13, 2012.

**MARK C. DILLON, J.P., THOMAS A. DICKERSON, L. PRISCILLA HALL, and SANDRA L. SGROI, JJ.**

*825 In an action to foreclose a mortgage, the defendant Marie Cange appeals (1) from an order of the Supreme Court, Queens County (Rosengarten, J.), dated September 20, 2011, which, upon her motion pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against her for lack of standing, directed that a hearing be conducted on that issue, and (2) from an order of the same court entered December 22, 2011, which, after a hearing, denied her motion.

ORDERED that the appeal from the order dated September 20, 2011, is dismissed; and it is further,

*826 ORDERED that the order entered December 22, 2011, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

In July 2011, the plaintiff commenced this action to foreclose a mortgage. The defendant Marie Cange (hereinafter the appellant) moved pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against her on the ground that the plaintiff lacked standing to commence the action. The Supreme Court, in

an order dated September 20, 2011, directed that a hearing be conducted on the issue of standing. The hearing was held on December 14, 2011, at which time a Default Resolution Specialist employed by the plaintiff testified, inter alia, that the plaintiff came into possession of the subject original note from the original mortgagee in December 2002. The original note was produced and admitted into evidence without objection. In addition, a computer printout which indicated the loan number, the appellant's name, and the acquisition date of December 11, 2002, was admitted into evidence without objection. In the order entered December 22, 2011, the Supreme Court denied the appellant's motion to dismiss the complaint insofar as asserted against her. She now appeals from both orders.

The appeal from the order dated September 20, 2011, must be dismissed, as it was superseded by the order entered **524 December 22, 2011. In any event, "[a]n order directing a hearing to aid in the determination of a motion does not dispose of the motion and does not affect a substantial right, and therefore is not appealable as of right" (*Kornblum v. Kornblum,* 34 A.D.3d 749, 751, 828 N.Y.S.2d 402; *see* CPLR 5701[a][2][v]; *Iodice v. City of White Plains,* 60 A.D.3d 730, 873 N.Y.S.2d 920) and leave to appeal from the order dated September 20, 2011, was not granted.

In the order entered December 22, 2011, the Supreme Court properly denied the appellant's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against her for lack of standing. "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 279, 926 N.Y.S.2d 532). "As a general matter, once a promissory note is tendered and accepted by an assignee, the mortgage passes as an incident to the note" (*id.* at 280, 926 N.Y.S.2d 532). " '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 A.D.3d 843, 844, 939 N.Y.S.2d 120, quoting*827 *U.S. Bank, N.A. v. Collymore,* 68 A.D.3d 752, 754, 890 N.Y.S.2d 578; *see U.S. Bank Natl. Assn. v. Dellarmo,* 94 A.D.3d 746, 942 N.Y.S.2d 122; *US Bank N.A. v. Madero,* 80 A.D.3d 751, 752, 915 N.Y.S.2d 612).

Here, the uncontroverted evidence at the hearing established that the original note was delivered to the plaintiff in December 2002, and that it was in possession of it at the time the action was commenced in July 2011, as well as on the date of the hearing. As such, the mortgage passed to the plaintiff in December 2002 as an incident to the note. Therefore, the appellant failed to demonstrate that she was entitled to dismissal of the complaint insofar as asserted against her on the ground that the plaintiff lacked standing.

The appellant's remaining contentions either are without merit or have been rendered academic by our determination.

Accordingly, the Supreme Court properly denied the appellant's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against her.

# Case 43

*US Bank Nat. Ass'n v. Lieberman,* 98 A.D.3d 422, 950 N.Y.S.2d 127 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**US BANK NATIONAL ASSOCIATION as Trustee of the Banc of America Funding 2006–A Trust, Plaintiff–Appellant,**

**v.**

**William LIEBERMAN, et al., Defendants,**

**Joanne Omark Lieberman, Defendant–Respondent.**

**[And a Third–Party Action].**

Aug. 7, 2012.

**SWEENY, J.P. CATTERSON, ACOSTA, FREEDMAN, ROMÁN, JJ.**

*422 Order, Supreme Court, New York County (Ellen Gesmer, J.), entered July 8, 2011, which, to the extent appealed from, in a mortgage foreclosure action, granted defendant Johanna Omark Lieberman's (sued herein as Joanne Omark Lieberman) motion for summary judgment dismissing the complaint as against her, denied plaintiff's cross motion for summary judgment, and denied plaintiff's motion to extend the time for discovery and the submission of certain documents, unanimously affirmed, without costs.

Defendants, a husband and wife embroiled in a divorce action*423 , had purchased a residence by personally signing the contract of sale and conducting the remainder of the transaction by power of attorney. The deed vested title in both spouses, but the note and mortgage executed on their behalf named only the husband as borrower. Although the matrimonial court had directed the husband to make payments on the mortgage obligation, he defaulted, and plaintiff sought to foreclose on the property. However, because the property was held by the still married defendants as a tenancy by the entirety, and would only be subject to partition after the divorce decree became final (*see Goldman v. Goldman,* 95 N.Y.2d 120, 122, 711 N.Y.S.2d 128, 733 N.E.2d 200 [2000]; *Freigang v. Freigang,* 256 A.D.2d 539, 682 N.Y.S.2d 466 [1998]), plaintiff sought reformation to correct the inconsistency between the deed and the mortgage to add defendant wife's name as a mortgagor.

The motion court correctly granted defendant's motion for summary judgment insofar as the affidavits and documents**129 she submitted in support of her motion established her prima facie entitlement to such relief. Specifically, defendant established that upon closing (1) she acquired one-half undivided interest in the property at issue, which she holds with her husband as a tenant by the entirety; (2) that she was not a signatory to either the note or mortgage on the property; and (3) that having never applied for a mortgage, she never had any contact, let alone a relationship, with plaintiff or its assignor. Since plaintiff seeks to foreclose on the property pursuant to the mortgage, a contract authorizing foreclosure upon the mortgagor's failure to make the required payments, it must

establish, inter alia, that defendant was a party to the mortgage and that she breached the same (*Harris v. Seward Park Hous. Corp.,* 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 [2010] [the essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages]; *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.,* 69 A.D.3d 802, 803, 893 N.Y.S.2d 237 [2010]). Here, nothing submitted by plaintiff establishes that defendant was a party to the mortgage, let alone that she breached its terms. Accordingly, plaintiff failed to raise an issue of fact so as to preclude summary judgment in defendant's favor.

Plaintiff's cross motion for summary judgment was properly denied inasmuch as plaintiff failed to establish entitlement to reformation of the mortgage or the imposition of an equitable lien upon the property. "Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent *424 of both parties" (*George Backer Mgt. Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062 [1978]). It is thus presumed that a deliberately prepared and executed document manifests the true intentions of the parties such that the proponent of reformation is required to proffer evidence, which in no uncertain terms, evinces fraud or mistake and the intended agreement between the parties (*Chimart Assoc. v. Paul,* 66 N.Y.2d 570, 574, 498 N.Y.S.2d 344, 489 N.E.2d 231 [1986]). Reformation on grounds of mutual mistake requires proof, by clear and convincing evidence, that an agreement does not express the intentions of either party (*Migliore v. Manzo,* 28 A.D.3d 620, 621, 813 N.Y.S.2d 762 [2006]). Reformation based upon a scrivener's error requires proof of a prior agreement between parties, which when subsequently reduced to writing fails to accurately reflect the prior agreement (*Harris v. Uhlendorf,* 24 N.Y.2d 463, 467, 301 N.Y.S.2d 53, 248 N.E.2d 892 [1969]). Here, beyond pointing to documents related to the purchase of the property which defendant either directly executed or which were executed by her attorney-in-fact, plaintiff fails to proffer any evidence establishing any intent that defendant was to be a party to and/or be bound by the mortgage. The absence of such evidence thus precludes the conclusion urged by plaintiff, namely that defendant's failure to execute the mortgage was a mutual mistake or a scrivener's error. In fact, the very evidence proffered by plaintiff militates against such a conclusion, inasmuch as neither the mortgage nor the note, prepared by plaintiff's assignor, had defendant's name preprinted on it, as was her husband's, neither document was executed by defendant's attorney-in-fact on her behalf; he executed them solely on behalf of defendant's husband. Plaintiff's evidence thus supports the conclusion that it was both defendant, her husband and plaintiff's assignor's intent**130 that defendant not be a party to the mortgage.

"[A]n equitable lien is dependent upon some agreement express or implied that there shall be a lien on specific property" (*Teichman v. Community Hosp. of W. Suffolk,* 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 663 N.E.2d 628 [1996] [internal quotation marks omitted]). The proponent of an equitable lien on property must

establish the existence of "a clear intent between the parties that such property be held, given or transferred as security for an obligation" (*Ryan v. Cover,* 75 A.D.3d 502, 502, 904 N.Y.S.2d 750 [2010] [internal quotation marks omitted])As noted above, beyond defendant's execution of other documents related to the purchase of the property, plaintiff failed to tender any evidence establishing that defendant agreed or intended to have plaintiff's assignor place a lien on the property.

We have considered plaintiff's remaining arguments and find them unavailing.

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# Case 44

*US Bank, N.A. v. Boyce*, 93 A.D.3d 782, 940 N.Y.S.2d 656 (Second Dept. 2012)
Supreme Court, Appellate Division, Second Department, New York.

**US BANK, N.A., appellant,**

**v.**

**Amanda BOYCE, et al., respondents, et al., defendants.**

March 20, 2012.

**REINALDO E. RIVERA, J.P., RANDALL T. ENG, L. PRISCILLA HALL, and SANDRA L. SGROI, JJ.**

*782 In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Cohalan, J.), dated November 4, 2010, which denied its motion pursuant to RPAPL 1321 for an order of reference and for leave to amend the caption to delete the defendants sued herein as "John Does" and "Jane Does."

ORDERED that the order is reversed, on the law, with costs, and the plaintiff's motion pursuant to RPAPL 1321 for an order of reference and for leave to amend the caption to delete the defendants sued herein as "John Does" and "Jane Does" is granted.

**657 The Supreme Court improperly denied that branch of the plaintiff's motion which was pursuant to RPAPL 1321 for an order of reference on the ground that the plaintiff had not filed an attorney affirmation in accordance with Administrative Order 548/10, which was issued by the Chief Administrative Judge of the State of New York on October 20, 2010. Administrative Order 548/10 (hereinafter the Administrative Order), which has since been replaced by Administrative Order 431/11, requires the plaintiff's counsel in a residential mortgage foreclosure action to file with the court an affirmation confirming the accuracy of the plaintiff's pleadings. In cases pending on the effective date of the Administrative Order, where no judgment of foreclosure has been entered, the attorney affirmation is required to be filed at the time of filing of either the proposed order of reference or the proposed judgment of foreclosure (*see* Administrative Order 548/10, replaced by Administrative Order 431/11).

This mortgage foreclosure action was pending at the time of the effective date of the Administrative Order, and the plaintiff filed its proposed order of reference on September 29, 2009, approximately 13 months before the Administrative Order was

issued. Thus, the plaintiff could not have filed the attorney affirmation pursuant to the Administrative Order when it filed its proposed order of reference. Based on the plain language of the Administrative Order, the plaintiff is therefore required to file the attorney affirmation at the time it files the proposed judgment of foreclosure.

*783 Furthermore, the defendants failed to answer within the time allowed, and the plaintiff submitted, in support of its motion, the mortgage, the underlying unpaid note, the complaint setting forth the facts establishing the claim, and an affidavit of its employee attesting to the default (*see Emigrant Mortgage Company, Inc. v. Fisher,* 90 A.D.3d 823, 935 N.Y.S.2d 313). Under these circumstances, that branch of the plaintiff's motion which was for an order of reference should have been granted.

Additionally, as the plaintiff demonstrated that there were no "John Does" or "Jane Does" occupying the subject premises, that branch of the plaintiff's motion which was for leave to amend the caption to delete the defendants sued herein as "John Does" and "Jane Does" should have been granted (*see Neighborhood Hous. Servs. of N.Y. City, Inc. v. Meltzer,* 67 A.D.3d 872, 873–874, 889 N.Y.S.2d 627).

In light of our determination, we need not reach the plaintiff's remaining contention.

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# Case 45

*Wells Fargo Bank, N.A. v. Hudson,* 98 A.D.3d 576, 949 N.Y.S.2d 703 (Second Dept. 2012)

Supreme Court, Appellate Division, Second Department, New York.

**WELLS FARGO BANK, N.A., appellant,**

**v.**

**Jascinth HUDSON, etc., et al., defendants,**

**Mahitima Baa, respondent.**

Aug. 8, 2012.

**PETER B. SKELOS, J.P., THOMAS A. DICKERSON, RANDALL T. ENG, and LEONARD B. AUSTIN, JJ.**

*576 In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Demarest, J.), dated December 2, 2010, which granted the oral application of the defendant Mahitima Baa to dismiss the complaint insofar as asserted against him and, in effect, denied its motion for a judgment of foreclosure and sale.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as granted the oral application of the defendant Mahitima Baa to dismiss the complaint insofar as asserted against him is deemed to be an application for leave to appeal from that part of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is modified, on the law, by deleting the *577 provision thereof granting the oral application of the defendant Mahitima Baa to dismiss the

complaint insofar as asserted against him and substituting therefor a provision denying the oral application; as so modified, the order is affirmed, without costs or disbursements.

On May 31, 2006, the defendant Jascinth Hudson executed a note to borrow the sum of $675,000 from the plaintiff Wells Fargo Bank, N.A. The note was secured by a mortgage on Hudson's residential premises in Brooklyn. On October 10, 2006, the plaintiff commenced this foreclosure action alleging that it was the holder of the mortgage and note, and that Hudson was in default of her payment obligations. Hudson failed to appear or answer the complaint, and in June 2007 the Supreme Court granted the plaintiff's motion to appoint a referee to compute the sums due and owing under the mortgage and note. More than two years later, in November 2009, the plaintiff assigned the mortgage and note to the EMC Mortgage Corporation (hereinafter EMC), and EMC thereafter assigned the note and mortgage to another entity.

In August 2010, shortly after the referee's report was filed, the plaintiff moved for a judgment of foreclosure and sale. At oral argument on the motion on October 21, 2010, the defendant Mahitima Baa appeared and informed the Supreme Court that the subject note and mortgage had been transferred out of the plaintiff's possession. At a subsequent appearance on **705 December 2, 2010, Baa made an oral application to dismiss the complaint insofar as asserted against him based upon the plaintiff's alleged lack of standing. By order dated December 2, 2010, the Supreme Court granted Baa's oral application and, in effect, denied the plaintiff's motion for a judgment of foreclosure and sale. The plaintiff appeals and we modify to deny Baa's oral application.

The plaintiff had standing to commence this foreclosure action on October 10, 2006, because, at that time, it was both the holder of the subject mortgage and the underlying note (*see Wells Fargo Bank, N.A. v. Wine,* 90 A.D.3d 1216, 1217, 935 N.Y.S.2d 664; *CitiMortgage, Inc. v. Rosenthal,* 88 A.D.3d 759, 761, 931 N.Y.S.2d 638; *Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 279, 926 N.Y.S.2d 532). Further, the plaintiff did not lose the right to continue this action by subsequently assigning the mortgage and note (*see* CPLR 1018; *Wells Fargo Bank, N.A. v. Wine,* 90 A.D.3d at 1217, 935 N.Y.S.2d 664). Pursuant to CPLR 1018, an action "may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Here no party requested, and the Supreme Court did not direct, *578 that the current holder of the mortgage and note be substituted as the plaintiff. Accordingly, the Supreme Court erred in granting Baa's oral application to dismiss the complaint insofar as asserted against him (*see CitiMortgage, Inc. v. Rosenthal,* 88 A.D.3d at 761, 931 N.Y.S.2d 638; *Buywise Holding, LLC v. Harris,* 31 A.D.3d 681, 683, 821 N.Y.S.2d 213).

Contrary to the plaintiff's contention, however, the Supreme Court properly denied its motion for a judgment of foreclosure and sale. At oral argument on the motion on October 21, 2010, the Supreme Court directed the plaintiff to provide an attorney affirmation in compliance with Administrative Order 548/10, which had just been issued by the Chief Administrative Judge of the State of New York and

gone into effect the previous day. Administrative Order 548/10 (hereinafter the Administrative Order), which has since been replaced by Administrative Order 431/11, requires a plaintiff's counsel in a residential mortgage foreclosure action to file with the court an affirmation confirming the accuracy of the plaintiff's pleadings (*see U.S. Bank, NA v. Boyce,* 93 A.D.3d 782, 940 N.Y.S.2d 656). In cases pending on the effective date of the Administrative Order, where no judgment of foreclosure has been entered, the attorney affirmation must be filed at the time of filing of either the proposed order of reference or the proposed judgment of foreclosure (*id.*).

Here, the plaintiff filed its motion for a judgment of foreclosure and sale, accompanied by a proposed judgment, about two months before the Administrative Order went into effect on October 20, 2010. Although the last stage in the litigation for the filing of an attorney affirmation in a pending case had already passed, the Administrative Order nevertheless expressly applies to actions still pending on its effective date. Under these circumstances, the plaintiff was required to file the mandatory attorney affirmation in compliance with both the Administrative Order and the Supreme Court's directive in order to obtain a judgment of foreclosure and sale (*cf. Flagstar Bank v. Bellafiore,* 94 A.D.3d 1044, 943 N.Y.S.2d 551). The plaintiff's failure to do so warranted the denial of its motion for a judgment of foreclosure and sale.

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## Case 46

*Wells Fargo Bank, NA v. Edwards*, 95 A.D.3d 692, 945 N.Y.S.2d 44 (First Dept. 2012)

Supreme Court, Appellate Division, First Department, New York.

**WELLS FARGO BANK, NA, etc., Plaintiff–Respondent,**

**v.**

**Sheila EDWARDS, Defendant–Appellant,**

**New York City Environmental Control Board, et al., Defendants.**

May 22, 2012.

****45 TOM, J.P., SWEENY, RENWICK, FREEDMAN, ABDUS–SALAAM, JJ.**

*692 Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 26, 2010, which denied defendant Sheila Edwards's cross motion to dismiss the summons and complaint on the ground of lack of personal jurisdiction based upon improper service, and granted plaintiff's motion for a judgment of foreclosure and sale, to confirm the referee's report and for attorneys' fees, unanimously affirmed, without costs.

The court properly found that defendant's allegations were insufficient to rebut plaintiff's prima facie showing of proper service. Defendant's denial of service did not controvert the veracity or content of the affidavit of service so as to require a traverse hearing (*see generally NYCTL 1998–1 Trust & Bank of N.Y. v. Rabinowitz,* 7 A.D.3d 459, 460, 777 N.Y.S.2d 483 [2004]). In addition, her correspondence to her mortgage loan servicer made shortly after the date of service, indicating that she

sought to recommence payment of her mortgage in order to suspend the pending foreclosure action under the instant index number, contradicted her claim that she was not served with the summons and complaint.

Contrary to defendant's contention, the court did not err in determining that she waived the issue of standing by failing to timely appear or answer (*see* CPLR 3211[a][3], [e]). In any event, the action was expressly maintained in plaintiff's capacity as trustee under a pooling and servicing agreement dated October 1, 2006, before the date of the commencement of the *693 action (*see CWCapital Asset Mgt. LLC v. Charney–FPG 114 41st St., LLC,* 84 A.D.3d 506, 923 N.Y.S.2d 453 [2011]).

We have considered defendant's remaining contentions and find them unavailing.

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# Case 47

*Wendover Financial Services v. Ridgeway,* 93 A.D.3d 1156, 940 N.Y.S.2d 391 (Fourth Dept. 2012)

Supreme Court, Appellate Division, Fourth Department, New York.

**WENDOVER FINANCIAL SERVICES, Plaintiff–Appellant,**

**v.**

**Jo–Ann RIDGEWAY, as Heir to the Estate of Amelia Donvito, also known as Amelia C. Donvito, Deceased, Defendant–Respondent, et al., Defendants.**

March 16, 2012.

**PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.**

****392 MEMORANDUM:**

*1156 Plaintiff appeals from an order insofar as it denied, inter alia, those parts of its motion to reissue the judgment of foreclosure and to amend the caption to add defendant Jo–Ann Ridgeway, who was sued as heir to the estate of Amelia Donvito, also known as Amelia C. Donvito (deceased) (hereafter, decedent), as the executrix of decedent's estate. Although Supreme Court did not address those parts of the motion with respect to reissuing the judgment and amending the caption, the failure to rule on those parts of the motion is deemed a *1157 denial thereof (*see Fisher v. Flanigan,* 89 A.D.3d 1398, 1399, 932 N.Y.S.2d 272; *Brown v. U.S. Vanadium Corp.,* 198 A.D.2d 863, 864, 604 N.Y.S.2d 432).

Approximately 6 1/2 years prior to her death, decedent executed a note and mortgage with respect to her home (hereafter, property) that plaintiff alleges it now owns by virtue of a series of assignments. Letters Testamentary were issued to Ridgeway following the death of decedent. Plaintiff subsequently commenced this action to foreclose the mortgage. Notwithstanding decedent's death, plaintiff named her as a defendant in the summons and complaint. We therefore conclude that "the action [against decedent] from its inception was a nullity [inasmuch as] it is well established that the dead cannot be sued" (*Marte v. Graber,* 58 A.D.3d 1, 3, 867 N.Y.S.2d 71; *see Jordan v. City of New York,* 23 A.D.3d 436, 437, 807 N.Y.S.2d 595; *see also Arbelaez v. Chun Kuei Wu,* 18 A.D.3d 583, 795 N.Y.S.2d 327). Further, we conclude that the caption may not be properly amended pursuant to CPLR 305(c).

"That provision is generally used to correct an irregularity, for example where a plaintiff is made aware of a mistake in the defendant's name or the wrong name or wrong form is used" (*Marte,* 58 A.D.3d at 4, 867 N.Y.S.2d 71). In the order appointing a referee, the court amended the caption of this action by "striking the name of the defendant AMELIA DONVITO A/K/A AMELIA C. DONVITO ... and substituting in place thereof JO–ANN RIDGEWAY AS HEIR TO THE ESTATE OF AMELIA DONVITO A/K/A AMELIA C. DONVITO...." Here, however, decedent was never a party to the action, and thus there was no party for whom substitution could be effected pursuant to CPLR 1015(a).

We reject plaintiff's contention that it obtained personal jurisdiction over Ridgeway by serving her in her capacity as an alleged heir of decedent. Although the captions in the summons and complaint included " 'John Does' and 'Jane Does,' " those unknown defendants were described in the complaint as tenants or occupants of the property or those claiming a lien against the property. Ridgeway does not fit within either of those categories in any capacity. In order to name unknown parties pursuant to CPLR 1024, the complaint must adequately describe the intended parties such that, " 'from the description in the complaint,' " they would have known that they were intended defendants (*Lebowitz v. Fieldston Travel Bur.,* 181 A.D.2d 481, 482, 581 N.Y.S.2d 302; *see generally Olmsted v. Pizza Hut of Am., Inc.,* 28 A.D.3d 855, 856, 813 N.Y.S.2d 241). Here, inasmuch as plaintiff named both decedent and the "Doe" defendants in the summons and complaint and the complaint fails to mention *1158 decedent's death, it cannot be said that plaintiff intended to describe the "Doe" defendants to include decedent's heirs, nor did plaintiff adequately do so. We further conclude that, because Ridgeway, as executrix of decedent's estate, was not properly made a party to the action, the complaint fails to assert a viable cause of action against a properly named party. "Perhaps, had [plaintiff] abandoned [its] **393 initial action, and properly filed a summons and complaint by purchasing a new index number and naming [Ridgeway], the personal representative of [decedent], as defendant, the matter before us would not be the nullity it is" (*Marte,* 58 A.D.3d at 5, 867 N.Y.S.2d 71).

We reject plaintiff's further contention that Ridgeway waived the defense of plaintiff's lack of standing by serving a notice of appearance as "Executrix under the Last Will" of decedent and failing to raise that defense in a pleading or pre-answer motion. Pursuant to CPLR 3211(e), "a party" waives such a defense by failing to raise it in a responsive pleading or a pre-answer motion. Inasmuch as Ridgeway was never properly made a party to this action in any capacity, the waiver provisions of CPLR 3211(e) are inapplicable to her.

We therefore modify the order by dismissing the complaint. In light of our determination, we need not address plaintiff's remaining contentions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the complaint and as modified the order is affirmed with costs.

# ADDITIONAL STUDY MATERIALS

## Additional Study Materials 1

### Brusco v. Braun, 84 NY2d 674, 645 NE2d 724, 621 NYS2d 291 (1994)

Petitioner Brusco is the owner of residential property in New York County. He commenced a summary proceeding against his tenant alleging that the tenant had defaulted in paying $3,626.04 rent due from December of 1991 through March of 1992 and seeking a judgment for the arrears, interest and attorney's fees, a judgment awarding possession of the premises to petitioner and the issuance of a warrant to remove the tenant from the premises. Notwithstanding the tenant's default in appearing, respondent Civil Court Judge refused to enter a judgment without an inquest. Petitioner instituted this article 78 proceeding seeking an order of mandamus directing him to sign a judgment in his favor without further proceedings, contending that the provisions of RPAPL 732(3) requires the court to "render judgment" upon default without an inquest. We agree and therefore affirm.

The summary proceeding was brought in the Housing Part of the New York City Civil Court, pursuant to the provisions of article seven of the RPAPL. A notice of petition was issued by the clerk of the Civil Court on March 13, 1992, and the notice and the petition were personally served upon the tenant on March 16. The notice advised the tenant that she must, within five days after service, appear before the clerk of the court or serve an answer upon petitioner. The tenant defaulted in appearing and on March 27, petitioner requested final judgment and a warrant evicting the tenant. She was advised that petitioner's request had been placed on the "Judgment and Warrant Residential Default Applications Calendar" of April 13.

On the adjourned date, petitioner's attorney appeared for the calendar call presided over by respondent. After petitioner's case had been called twice without the tenant's appearance, petitioner's attorney asked the court to render a judgment, noting that the petition had been verified by the petitioner on personal knowledge and that an attorney had personally served it on the tenant. The court denied petitioner's request and, following respondent's general practice, scheduled the matter for an inquest on May 1, 1992. This article 78 proceeding followed.

Supreme Court dismissed the petition, holding that the scheduling of an inquest is within respondent's discretion. On appeal, the Appellate Division, with one justice dissenting, modified the order of Supreme Court, by granting so much of the petition as requested mandamus directing respondent to enter judgment of possession and rent due in favor of petitioner.[1] The Appellate Division certified the following question to the Court of Appeals: "Was the order of this Court, which modified the judgment of the Supreme Court, properly made?"

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[1] The Appellate Division held that the imposition of attorney's fees was the proper subject of a hearing in the underlying summary proceeding and the parties raise no argument with respect to that part of its order.

It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion (see, *Matter of County of Fulton v. State of New York*, 76 NY2d 675, 678; *Matter of Mullen v. Axelrod*, 74 NY2d 580, 583; *Klostermann v. Cuomo*, 61 NY2d 525, 539; *Matter of Legal Aid Soc. of Sullivan County v. Scheinman*, 53 NY2d 12, 16). A party seeking mandamus must show a "clear legal right" to relief (*County of Fulton, supra*, at 678, citing, *Matter of Legal Aid Soc. v. Scheinman, supra*). The availability of the remedy depends "not on the [petitioner's] substantive entitlement to prevail, but on the nature of the duty sought to be commanded-i.e., mandatory, nondiscretionary action" (*Matter of Hamptons Hosp. & Med. Center v. Moore*, 52 NY2d 88, 97). Thus, the dispositive question on this appeal is whether respondent Braun retains any discretion to withhold a judgment pursuant to RPAPL 732(3) when a petition proper in form and substance demonstrates grounds for relief and the supporting papers establish proper service on the tenant. We hold that he does not.

Article 7 of the RPAPL sets forth the jurisdictional and procedural requirements for summary proceedings to recover possession of real property. Section 732 of the article, the section at issue in this appeal, defines "Special Provisions" that are applicable when the proceeding is grounded on the tenant's failure to pay rent, provisions which the regulations make applicable in the New York City Civil Court (see, 22 NYCRR 208.42[d][3]. The statute provides that if the tenant answers the petition, the clerk of the court is required to "fix a date for trial or hearing" (RPAPL 732[2]). However, "[[i]f the [tenant] fails to answer within five days from the date of service, as shown by the affidavit or certificate of service of the notice of petition and petition, the judge shall render judgment in favor of the petitioner ..." (RPAPL 732[3]).

The plain language of the statute establishes two factual predicates to be determined by the court: whether petitioner has submitted an affidavit or certificate of service of the notice of petition and petition, and whether the tenant has failed to respond within five days of the date of service. If both conditions are met, the statute requires that "the judge shall render judgment in favor of petitioner" (RPAPL 732[3] [emphasis supplied]). The statute not only commands an action; it dictates the result. Where, as here, petitioner has proven service of the notice of petition and petition and the tenant has failed to appear, respondent has no discretion; judgment in favor of petitioner must be granted and mandamus lies to compel respondent to do that which the statute requires of him (see, *People ex rel. Allen v. Murray*, 2 Misc 152, *aff'd,* 138 NY 635).

Notwithstanding this unambiguous language, respondent maintains, and the dissent agrees, that the court may hold an inquest to look behind the default. "Rendering" judgment is a judicial act, he maintains, not subject to mandamus. He relies on dicta in *Evarts v. Kiehl* (102 NY 296). In *Evarts* a surety sought a judgment against the estate of a deceased judge because, after hearing all the evidence and taking the case under advisement, the judge failed to render judgment and enter it in the docket book. The determination of disputed facts is a judicial

function and manifestly the court could not be compelled to decide the case, nor could entry of judgment be compelled when the case had not been decided. That, however, is substantially different from the posture of this summary proceeding pursuant to a statute which provides that issues of fact shall be resolved against the tenant upon the tenant's default (compare, *People ex rel. Allen v. Murray, supra*). We agree with the majority at the Appellate Division that as the term is used in section 732(3), there is no substantive difference between "rendering judgment" and "awarding" or "granting" judgment and that mandamus lies to compel judgment "in favor of petitioner" on the facts of this case.

Respondent asserts further that the provisions of CPLR 3215(b), which permit an "assessment" when a plaintiff is required to apply to the court for a default judgment, authorize him to conduct an inquest. However, CPLR 3215 and RPAPL 732(3) address the same subject matter – default judgments – and are inconsistent. The RPAPL does not provide for fact finding in the case of a defaulting tenant in a nonpayment action (compare, RPAPL 731 [requiring hearing in alia summary proceedings except those brought for nonpayment under RPAPL 732]) while the broader CPLR 3215(b), permits fact finding proceedings prior to the rendering of a default judgment. The CPLR provision does not apply because it has been abrogated by the more specific RPAPL 732 (see, CPLR 101 [CPLR "shall govern the procedure in civil judicial proceedings ... except where the procedure is regulated by inconsistent statute"]; McKinney's Cons Laws of NY, Book 1, Statutes §397 ["A special statute which is in conflict with a general act covering the same subject matter controls the case and repeals the general statute insofar as the special act applies"]).

Petitioner has complied with all the procedural requirements of RPAPL article 7: the petition was verified upon personal knowledge of the landlord (RPAPL 721, 741) and the notice of petition and petition were personally served upon the tenant (RPAPL 735). Inasmuch as there was no question regarding the sufficiency of the petition or the service and the tenant failed to answer, respondent was required by RPAPL 732(3) to render judgment in favor of petitioner.

Article 7 represents the Legislature's attempt to balance the rights of landlords and tenants to provide for expeditious and fair procedures for the determination of disputes involving the possession of real property (see, *Cotignola v. Lieber*, 34 AD2d 700, 701). The statute attempts to protect a landlord's right to promptly recover premises occupied by a non-paying tenant but also to ensure that tenants are not unjustly evicted from their homes. Tenants are protected by multiple notice provisions and by the continuing jurisdiction of the Civil Court over the landlord/tenant disputes. Thus, article 7 of the RPAPL and the Rules of Court require the tenant to be notified at least three separate times before the return date: (1) as a predicate to commencement of the proceeding, a demand must be made upon the tenant for payment of rent or possession of the premises (RPAPL 711); (2) personal or "conspicuous place" service of the notice of petition and petition must be made by an attorney, judge, or clerk of the court (RPAPL 731, 735); and (3) upon filing of the notice of petition with proof of service, the clerk promptly mails a

postcard informing the tenant of the summary proceeding and the possibility of eviction (22 NYCRR 208.42[i]). There are also judicial remedies available to tenants. Even after a default, the court may stay the issuance of the warrant of eviction up to ten days (RPAPL 732[3]), after issuance of the warrant, the tenant is entitled to at least 72 hours notice before execution (RPAPL 749[2]), and prior to the execution of the warrant, the court retains jurisdiction to vacate the warrant for good cause shown (RPAPL 74913]). Finally, the Civil Court may, in appropriate circumstances, vacate the warrant of eviction and restore the tenant to possession even after the warrant has been executed (see, *Solack Estates. Inc. v. Goodman*, 78 AD2d 512). ***These safeguards ensure adequate notice and judicial oversight of tenants' rights. The statute does not authorize the judges to fashion additional, individualized protections upsetting the legislative scheme.***[2]

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question not answered on the ground that the order appealed from is final and thus the certified question is unnecessary.

***CIPARICK, J. – Dissenting***

I respectfully dissent.

The dispositive issue on this appeal is the interpretation of the phrase "the judge shall render judgment" as used in RPAPL §732(3). The fact that the instant petition was verified by the landlord and proper service was established does not detract from the judge's exercise of judgment and discretion to "render" a judgment, a distinct judicial process not subject to mandamus and wholly distinguishable from a command to perform a ministerial act, which can be the subject of a mandamus proceeding (see, *Klostermann v. Cuomo*, 61 NY2d 525, 539). The majority, however, eliminates the judicial process from RPAPL §732(3) by construing the judge's function as the performance of a mere ministerial duty-the entry of judgment.

It has long been the law in this State that to render judgment is judicial and to enter it is ministerial (see, *Evarts v. Kiehl*, 102 NY 296 and the discussion in the dissenting opinion below, *Brusco v. Braun*, 199 AD2d 27, 35-36). New York City Civil Court Act section 1401 provides that the civil court "shall have power to render any judgment that the supreme court might render in a like case" within the limits of its jurisdiction, whereas section 1402 states that a "judgment of default may be entered as provided in CPLR §3215" (emphasis provided). These provisions, likewise govern judgments of the Housing Part of the Civil Court.

I disagree with the majority's finding that RPAPL section 732(3) is inconsistent with the provisions of CPLR section 3215 rendering 3215 inapplicable in summary nonpayment proceedings. Rather the provisions of CPLR section 3215 should be read to enhance the provisions of RPAPL section 732(3) and should be harmonized rather than read in conflict, unless CPLR section 3215 provides otherwise (see, e.g., CPLR §3215[g][3][iii] and CPLR §3215[g][4][iii] [exclusions of

[2] The record indicates that the practice of Housing Court Judges is inconsistent. Some hold inquests and others do not. Thus, the process to which a petition is subjected depends, arbitrarily, on the judge calling the Default Judgment Calendar.

summary non-payment proceedings from notice provisions]). Thus, absent an express exclusion by the Legislature, CPLR section 3215(a) and (b) are applicable to summary proceedings in the Housing Part.

No purpose would be served by the judge presiding over the nonpayment proceeding if all that is contemplated by RPAPL section 732(3) is a mechanical act that could be administered by a clerk. Indeed, given what is at risk in a nonpayment proceeding-the tenant's home-it is incongruous to read RPAPL section 732(3) as inconsistent with CPLR section 3215, and in a manner that strips the judge of all discretion.

Even the court below admits that a judge must evaluate the sufficiency of the landlord's pleadings and that, in certain cases, has the discretion to require and consider additional proof before entering judgment. This leads me to conclude that some discretion was intended to be afforded Civil Court judges. Neither RPAPL section 732(3) nor CPLR section 3215 is intended to serve simply as a rubber stamp once it appears that the court has jurisdiction over the matter and failure to appear is shown. It is only in an action for a sum certain where there is no dispute as to the amount due that the entry of a default judgment is a mere ministerial act. A nonpayment proceeding is at its core an equitable proceeding, only secondarily does it concern the recovery of a sum certain. Thus, some measure of proof of liability is required to satisfy the court of the prima facie validity of the cause of action (see, 4 Weinstein-Korn-Miller, NY Civ Prac 113215:03). The measure of such proof is a uniquely judicial function, and in a RPAPL section 732 action is often measured by the judge's first hand confirmation of the facts.

In cases like the instant one, the inquest serves this purpose and is consistent with the inherent power of the court and the discretion vested in the judge. Therefore, respondent Braun's order directing an inquest comports with RPAPL section 732(3), as well as falling within the inherent power of the court (see, NYC Civ. Ct. Act §§201, 212, 1401). The court, in calendaring the inquest need not do violence to the expeditious resolution of the matter. This is certainly preferable to subsequent litigation to stay and/or vacate execution of a warrant of eviction.

Certainly, in this action, mandamus does not lie, as it is an extraordinary remedy requiring a showing of a clear right to the relief sought (*Spring Realty Co. v. New York City Loft Board*, 69 NY2d 657). Petitioner has failed to establish the existence of such a clear right in this case.

Accordingly, I would deny mandamus and reverse the order of the Appellate Division.

# Additional Study Materials 2

## Bank Of N.Y. v. Silverberg,

86 A.D.3d 274, 926 N.Y.S.2d 532 (Second Dept. 2011)

Leventhal, J.

This matter involves the enforcement of the rules that govern real property and whether such rules should be bent to accommodate a system that has taken on a life of its own. The issue presented on this appeal is whether a party has standing to commence a foreclosure action when that party's assignor—in this case, Mortgage Electronic Registration Systems, Inc. (hereinafter MERS)—was listed in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording, but was never the actual holder or assignee of the underlying notes. We answer this question in the negative.

In October 2006 the defendants Stephen Silverberg and Fredrica Silverberg (hereinafter together the defendants) borrowed the sum of $450,000 from Countrywide Home Loans, Inc. (hereinafter Countrywide), to purchase residential real property in Greenlawn, New York (hereinafter the property). The loan was secured by a mortgage on the property (hereinafter the initial mortgage). The initial mortgage refers to MERS as the mortgagee for the purpose of recording, and provides that the underlying promissory note is in favor of Countrywide.[6] Further, the initial mortgage provides that "MERS holds only legal title to the rights granted by the [defendants] . . . but, if necessary to comply with law or custom," MERS purportedly has the right to foreclose and "to take any action required of [Countrywide]." On November 2, 2006, the initial mortgage was recorded in the office of the Suffolk County Clerk.

On April 23, 2007, the defendants executed a second mortgage on the subject property in favor of MERS, as named mortgagee and nominee of Countrywide. The defendants **2 simultaneously *276 executed a note in favor of Countrywide, secured by the second mortgage. The promissory note secured by the second mortgage provided that payment would be made to Countrywide, and that Countrywide "may transfer this Note." The second mortgage was recorded in the office of the Suffolk County Clerk on June 12, 2007.

In sections entitled "Borrower's Transfer to Lender of Rights in the Property" set forth in both the initial mortgage and the second mortgage, those documents provide:

"[The Borrowers] understand and agree that MERS holds only legal title to the rights granted by [the Borrowers] in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right:

"(A) to exercise any or all of those rights, [granted by the Borrowers to Countrywide] including, but not limited to, the right to foreclose and sell the Property; and

"(B) to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Consolidation Agreement

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[6] The promissory note executed in connection with the initial mortgage is not included in the record.

Also in April 2007, the defendants executed a consolidation agreement in connection with the property in the sum of $479,000 in favor of MERS, as mortgagee and nominee of Countrywide. Countrywide was the named lender and note holder. The consolidation agreement purportedly merged the two prior notes and mortgages into one loan obligation. The consolidation agreement was recorded in the office of the Suffolk County Clerk on June 12, 2007. The consolidation agreement, as with the prior mortgages, recites that MERS was "acting solely as a nominee for [Countrywide] and [Countrywide's] successors and assigns . . . For purposes of recording this agreement, MERS is the mortgagee of record." Countrywide, however, was not a party to the consolidation agreement.

In December 2007 the defendants defaulted on the consolidation agreement. Meanwhile, on April 30, 2008, by way of a "corrected assignment of mortgage," MERS, as Countrywide's nominee, assigned the consolidation agreement to the Bank of New York, as Trustee For the Benefit of the Certificate Holders, *277 CWALT, Inc., Alternate Loan Trust 2007-14-T2, Mortgage Pass-Through Certificates Series 2007-14T2 (hereinafter the plaintiff). On May 6, 2008, the plaintiff commenced this mortgage foreclosure action against the defendants, among others.

In June 2008 the defendants moved pursuant to CPLR 3211 (a) (3) to dismiss the complaint insofar as asserted against them for lack of standing. In support of their motion, the defendants submitted, inter alia, the underlying mortgages, the summons and complaint, the second note, and an attorney's affirmation. In the affirmation, the defendants argued, among other things, that the complaint failed to establish a chain of ownership of the notes and mortgages from Countrywide to the plaintiff. In opposition to the defendants' motion, the plaintiff submitted, inter alia, the corrected assignment of mortgage dated April 30, 2008.

The Order Appealed From

In an order dated September 24, 2008, the Supreme Court denied the defendants' motion, concluding that, prior to the commencement of the action, MERS, as Countrywide's nominee, and on Countrywide's behalf, assigned the mortgages described in the consolidation agreement. Hence, the Supreme Court determined that the plaintiff was the owner of the "consolidated Note and Mortgage" and, thus, the proper party to commence the action.

On appeal, the defendants argue that the plaintiff lacks standing to sue because it did not own the notes and mortgages at the time it commenced the foreclosure action. Specifically, the defendants contend that neither MERS nor Countrywide ever transferred or endorsed the notes described in the consolidation agreement to the plaintiff, as required by the Uniform Commercial Code. Moreover, the defendants assert that the mortgages were never properly assigned to the plaintiff because MERS, as nominee for Countrywide, did not have the authority to effectuate an assignment of the mortgages. The defendants further assert that the mortgages and notes were bifurcated, rendering the mortgages unenforceable and foreclosure impossible, and that because of such bifurcation, MERS never had an assignable interest in the notes. The defendants also contend **3 that the Supreme

Court erred in considering the corrected assignment of mortgage because it was not authenticated by someone with personal knowledge of how and when it was created, and was improperly submitted in opposition to the motion.

*278 MERS

"In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages" (*Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90, 96 [2006]). MERS was intended to "streamline the mortgage process by using electronic commerce to eliminate paper."[7] MERS's implementation followed the delays occasioned by local recording offices, which were at times slow in recording instruments because of complex local regulations and database systems that had become voluminous and increasingly difficult to search (*see* Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U Cin L Rev 1359, 1366 [2010]).

"Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system" (*Matter of MERSCORP, Inc. v Romaine*, 8 NY3d at 96 [footnotes omitted]).

The MERS system facilitated the transfer of loans into pools of other loans which were then sold to investors as securities (*see* Peterson at 1361-1362). MERS delivers savings to the participants in the real estate mortgage industry by allowing those entities to avoid the payment of fees which local governments require to record mortgage assignments (*see* Peterson at 1368-1369).

Lenders identify MERS as nominee and mortgagee for its members' successors and assignees. MERS remains the mortgagee of record in local county recording offices regardless of how many times the mortgage is transferred, thus freeing MERS's members from paying the recording fees that would otherwise be furnished to the relevant localities (*id.*; *see Matter of MERSCORP, Inc. v Romaine*, 8 NY3d at 100). This leaves borrowers and the local county or municipal recording offices unaware of the identity of the true owner of the note, and extinguishes a source of revenue to the localities. According to MERS, any loan registered in its system is "inoculated against *279 future assignments because MERS remains the mortgagee no matter how many times servicing is traded."[8] Moreover, MERS does not lend money, does not receive payments on promissory notes, and does not service loans by collecting loan payments.

Analysis

Relevant to our determination is the decision of the Court of Appeals in *Matter of MERSCORP, Inc. v Romaine* (8 NY3d 90 [2006]), which held that the Suffolk County Clerk was compelled to record and index mortgages, assignments of mortgages, and discharges of mortgages that named MERS as the lender's nominee

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[7] MERS, About Us, Overview, http://www.mersinc.org/about/index.aspx (last visited Apr. 26, 2011).

[8] *See* MERS, About Us, Overview, http:// www.mersinc.org/about/index.aspx (last visited Apr. 26, 2011).

or mortgagee of record. In a concurring opinion, Judge Carmen Beauchamp Ciparick specified that the issue of whether MERS has standing to prosecute a foreclosure action remained for another day (*id.* at 100). In a dissent, former Chief Judge Judith S. Kaye posited that the MERS system raised several concerns, including the elimination of the public records which document mortgage loan ownership (*id.* at 100-105).

The principal issue ripe for determination by this Court, and which was left unaddressed by the majority in *Matter of MERSCORP* (*id.*), is whether MERS, as nominee and mortgagee for purposes of recording, can assign the right to foreclose upon a mortgage to a plaintiff in a foreclosure action absent MERS's right to, or possession of, the actual underlying promissory note.

Standing requires an inquiry into whether a litigant has "an interest . . . in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v Nussbaum*, 36 AD3d 176, 182 [2006]; *see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2007]). Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d at 242). In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see U.S. Bank, N.A. v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 709 [2009]; *280 *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207-208 [2009]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 674 [2007]; *Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 546-547 [2003]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414 [1996]).

As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (*see Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2007]; *Smith v Wagner*, 106 Misc 170, 178 [1919] ["assignment of the debt carries with it the security therefor, even though such security be not formally transferred in writing"]; *see also Weaver Hardware Co. v Solomovitz*, 235 NY 321, 331-332 [1923] ["a mortgage given to secure notes is an incident to the latter and stands or falls with them"]; *Matter of Falls*, 31 Misc 658, 660 [1900], *affd* 66 App Div 616 [1901] ["The deed being given as collateral for the payment of the note (,) the transfer of the note carried the security"]).

By contrast, "a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it" (*Merritt v Bartholick*, 36 NY 44, 45 [1867]; *see Carpenter v Longan*, 83 US 271, 274 [1873] [an assignment of the mortgage without the note is a nullity]; *US Bank N.A. v Madero*, 80 AD3d 751, 752 [2011]; *US Bank, N.A. v Collymore*, 68 AD3d at 754; *Kluge v Fugazy*, 145 AD2d 537, 538 [1988] [plaintiff, the assignee of a mortgage without the underlying note, could not bring a foreclosure action]; *Flyer v Sullivan*, 284 App Div 697, 698 [1954] [mortgagee's

assignment of the mortgage lien, without assignment of the debt, is a nullity]; *Beak v Walts*, 266 App Div 900 [1943]). A "mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*FGB Realty Advisors v Parisi*, 265 AD2d 297, 298 [1999]). Consequently, the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt (*id.*; *see* 1 Bergman on New York Mortgage Foreclosures § 12.05 [1] [a] [1991]).

The defendants contend, among other things, that because the plaintiff failed to provide *proof of recording* of the corrected assignment of the mortgage prior to the commencement of the action, it may be inferred that the plaintiff did not own the notes and mortgages prior to that date. However, this particular contention is without merit, as an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery (*see LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912 [2009]). Moreover, " '[n]o special form or language is necessary to effect an assignment as long as the language shows *281 the intention of the owner of a right to transfer it' " (*Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612, 612 [2004], quoting *Tawil v Finkelstein Bruckman Wohl Most & Rothman*, 223 AD2d 52, 55 [1996]).

Here, the consolidation agreement purported to merge the two prior notes and mortgages into one loan obligation. Countrywide, as noted above, was not a party to the consolidation agreement. " '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, and the mortgage passes with the debt as an inseparable incident' " (*US Bank N.A. v Madero*, 80 AD3d at 753, quoting *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *see LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d at 912). The plaintiff relies upon the language in the consolidation agreement, which provides that MERS was ""acting solely as a nominee for [Countrywide] and [Countrywide's] successors and assigns . . . For purposes of recording this agreement, MERS is the mortgagee of record." However, as "nominee," MERS's authority was limited to only those powers which were specifically conferred to it and authorized by the lender (*see* Black's Law Dictionary 1076 [8th ed 2004] [defining a nominee as ""(a) person designated to act in place of another, (usually) in a very limited way"]). Hence, although the consolidation agreement gave MERS the right to assign the mortgages themselves, it did not specifically give MERS the right to assign the underlying notes, and the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]; *HSBC Bank USA v Squitieri*, 29 Misc 3d 1225[A], 2010 NY Slip Op 52000[U] [2010]; *LNV Corp. v Madison Real Estate, LLC*, 2010 NY Slip Op 33376[U] [2010]; **4 *LPP Mtge. Ltd. v Sabine Props., LLC*, 2010 NY Slip Op 32367[U] [2010]; *Bank of N.Y. v Mulligan*, 28 Misc 3d 1226[A], 2010 NY Slip Op 51509[U] [2010]; *OneWest Bank, F.S.B. v Drayton*, 29 Misc 3d 1021 [2010]; *Bank of N.Y. v Alderazi*, 28 Misc 3d 376, 379-380 [2010] [the "party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence"]; *HSBC Bank USA, N.A. v Yeasmin*, 27 Misc 3d 1227[A], 2010 NY Slip Op 50927[U] [2010]; *HSBC Bank USA,*

*N.A. v Vasquez*, 24 Misc 3d 1239[A], 2009 NY Slip Op 51814[U] [2009]; *Bank of N.Y. v Trezza*, 14 Misc 3d 1201[A], 2006 NY Slip Op 52367[U] [2006]; *282 *LaSalle Bank Natl. Assn. v Lamy*, 12 Misc 3d 1191[A], 2006 NY Slip Op 51534[U] [2006]; *In re Agard*, 444 BR 231 [2011]; *but see US Bank N.A. v Flynn*, 27 Misc 3d 802 [2010]).

Therefore, assuming that the consolidation agreement transformed MERS into a mortgagee for the purpose of recording—even though it never loaned any money, never had a right to receive payment of the loan, and never had a right to foreclose on the property upon a default in payment—the consolidation agreement did not give MERS title to the note, nor does the record show that the note was physically delivered to MERS. Indeed, the consolidation agreement defines "Note Holder," rather than the mortgagee, as the "Lender or anyone who succeeds to Lender's right under the Agreement and who is entitled to receive the payments under the Agreement." Hence, the plaintiff, which merely stepped into the shoes of MERS, its assignor, and gained only that to which its assignor was entitled (*see Matter of International Ribbon Mills [Arjan Ribbons]*, 36 NY2d 121, 126 [1975]; *see also* UCC 3-201 [1] ["(t)ransfer of an instrument vests in the transferee such rights as the transferor has therein"]), did not acquire the power to foreclose by way of the corrected assignment.

Notwithstanding the foregoing, the plaintiff contends that case law supports its position that MERS has the power to foreclose, where, as here, MERS is identified in a mortgage as nominee and mortgagee for the purpose of recording. In this regard, the plaintiff relies upon *Mortgage Elec. Registration Sys., Inc. v Coakley* (41 AD3d 674 [2007]), wherein this Court held that MERS had standing to foreclose a mortgage. In that case, unlike in the current case, the lender had transferred and tendered the promissory note to MERS before the commencement of the foreclosure action (*id.* at 674). Therefore, we held that MERS had standing to bring the foreclosure action because it "was the lawful holder of the promissory note, and of the mortgage, which passed as an incident to the promissory note" (*id.* [citations omitted]). Although that determination was a sufficient basis upon which to conclude that MERS had standing, we elaborated, stating,

"further support for MERS's standing to commence the action may be found on the face of the mortgage instrument itself. Pursuant to the clear and unequivocal terms of the mortgage instrument, [the mortgagor] expressly agreed without qualification that MERS had the right to foreclose upon the premises in the event of a default" (*id.* at 675).

*283 According to the plaintiff, *Coakley* indicates that this Court has determined that such broad provisions in mortgages, such as the initial mortgage and second mortgage here, standing alone, grant MERS, as nominee and mortgagee for the purpose of recording, the power to foreclose. On the contrary, the *Coakley* decision does not stand for that proposition. This Court's holding in *Coakley* was dependent upon the fact that MERS held the note before commencing the foreclosure action. In the absence of that crucial fact, the language in the mortgage instrument would not have provided "further support" for the proposition that MERS had the power to

foreclose in that case. Furthermore, the language in the initial mortgage and the second mortgage in this case, purportedly granting MERS the right to foreclose, was superseded by the consolidation agreement. Moreover, as discussed above, the broad language relied upon by the plaintiff cannot overcome the requirement that the foreclosing party be both the holder or assignee of the subject mortgage, and the holder or assignee of the underlying note, at the time the action is commenced.

In sum, because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff. Consequently, the plaintiff failed to show that it had standing to foreclose.

MERS purportedly holds approximately 60 million mortgage loans (*see* Michael Powell and Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, New York Times, March 5, 2011), and is involved in the origination of approximately 60% of all mortgage loans in the United States (*see* Peterson at 1362; Kate Berry, *Foreclosures Turn Up Heat on MERS*, Am **5 Banker, July 10, 2007, at 1). This Court is mindful of the impact that this decision may have on the mortgage industry in New York, and perhaps the nation. Nonetheless, the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property.

Accordingly, the Supreme Court should have granted the defendants' motion pursuant to CPLR 3211 (a) (3) to dismiss the complaint insofar as asserted against them for lack of standing. Thus, the order is reversed, on the law, and the motion of the *284 defendants Stephen Silverberg and Fredrica Silverberg pursuant to CPLR 3211 (a) (3) to dismiss the complaint insofar as asserted against them for lack of standing is granted.

Florio, J.P., Dickerson and Belen, JJ., concur.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendants Stephen Silverberg and Fredrica Silverberg pursuant to CPLR 3211 (a) (3) to dismiss the complaint insofar as asserted against them for lack of standing is granted.