

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

OS

WELLS FARGO BANK, N.A.,
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff(s)

-against-

LI-RO ENTERPRISES, INC,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR FIRST
RATE CAPITAL CORP., NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, PEOPLE OF THE
STATE OF AMERICA ACTING THROUGH
THE IRS,

JOHN DOE.

Defendant(s)

Index
Number

Motion
Date November 12, 2013

Motion
Cal. Number 186

Motion Seq. No. 2

FILED
APR 30 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 24 read on this motion by plaintiff for an Order: (1) pursuant to CPLR 3212 for summary judgment; (2) pursuant to CPLR 3211(b) dismissing the defenses raised in the answer; (3) deeming all non-answering and non-appearing defendants in default; (4) appointing a referee to compute the amount due, and (5) amending the caption to substitute Angela Brown, Connie Davis, and Tally Brown as defendants in place of "John Doe" and that the plaintiff's name be amended to U.S. Bank National Association, as Trustee, Successor in Interest to Bank of America National Association, as Trustee, Successor by Merger to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2007-7AX; and on the cross motion by the defendant

for an Order: (1) pursuant to CPLR 2004 and 3025(b), granting the defendant leave to amend her answer and deeming the amended answer served; (2) pursuant to CPLR 3211(a)(3,) dismissing the action on the ground that the plaintiff lacked standing to commence and prosecute the action when it was commenced and/or; (3) pursuant to CPLR 3211(a)(1), dismissing the plaintiff's complaint on the grounds that a defense is founded upon documentary evidence and/or (4) pursuant to CPLR 3211(a)(7), dismissing the plaintiff's complaint based on the fact that the plaintiff failed to state a cause of action.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-6
Notice of Cross Motion - Affidavits - Exhibits.....	7-11
Answering Affidavits - Exhibits.....	12-18
Reply Affidavits.....	19-24

Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

Plaintiff commenced this action by filing a copy of the Summons and Complaint with Notice of Pendency on December 18, 2007. Plaintiff seeks to foreclose on the mortgage given by defendant on the premises known as 523 Beach 66th Street, Far Rockaway, New York to secure a note evidencing a loan in the principal amount of \$417,000. Plaintiff alleges that the defendant is in default under the mortgage. The defendant responded by serving and filing a pro se verified answer. On March 13, 2008, the plaintiff filed and served a Notice of Motion for Summary Judgment and Order of Reference. The motion was fully submitted on June 24, 2008. By Order of this Court dated October 10, 2008, the matter was set down for a conference for December 17, 2008. On December 18, 2008, the plaintiff's motion was denied citing the fact that no party appeared at the conference. The matter was then transferred to the Foreclosure Conference Part and scheduled for a first conference which was held on November 8, 2012. The conferences were continued until January 17, 2013. On May 2, 2013, both parties appeared at a status conference and the plaintiff was directed to file an affirmation in compliance with A/O 431/11 and to make an application seeking an Order of Reference. The plaintiff then filed this motion. The defendant has cross moved for leave of court to amend her answer to assert an affirmative defense of lack of standing and upon that defense, to dismiss the complaint based upon lack of standing.

Leave to amend a pleading should be freely given absent prejudice to the other party, provided the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit. (CPLR 3025[b]); *HSBC*

Bank v Picarelli, 110 AD3d 1031 [2d Dept 2013]; *Ruddock v Boland Rentals*, 5 AD3d 368 [2d Dept 2004]; *Holchender v We Transport*, 292 AD2d 568 [2d dept 2002]).

The plaintiff's argument that it is prejudiced from the delay, is without merit. Here, there has been no summary judgment granted to the plaintiff as there has been in the cases relied upon by the plaintiff in opposing the motion. Furthermore, while the plaintiff first moved for summary judgment over five (5) years ago, that motion was denied after the plaintiff failed to appear at a scheduled conference. Additionally, the Court notes that some of the delay in this case is, at least in part, attributable to actions by the plaintiff. In any event, mere lateness is not a barrier to the amendment, unless the lateness is coupled with significant prejudice to the other side, the very elements of the laches doctrine (see *U.S. Bank, N.A. v Sharif*, 89 AD3d 723 [2d Dept 2011]; *Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714 [2d Dept 2006]).

The plaintiff next argues that the proposed affirmative defense of lack of standing is palpably insufficient and devoid of merit because standing was waived by the defendant. Contrary to the argument by the plaintiff, the proposed amendment is not devoid of merit. A defendant waives the defense of lack of standing by failing to timely interpose an answer or move by pre-answer motion asserting the defense of lack of standing (CPLR 3211[e]; see *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989 [2010]; *HSBC Bank, USA v Dammond*, 59 AD3d 679 [2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239 [2007]). However, a defense waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay (*HSBC Bank v Picarelli*, 110 AD3d 1031 [2d Dept 2013]; *U.S. Bank N.A. v Shariff*, 89 AD3d at 724; *Aurora Loan Servs. LLC v Thomas*, 70 AD3d 986 [2d Dept 2010]). As there has been no showing of prejudice and the amendment is not otherwise palpably insufficient the branch of the defendant's motion to amend its answer is granted (see *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]).


Once a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (see *U.S. Bank N.A. v Sharif*, 89 AD3d 723 [2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note (*Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2011]). 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 AD3d 752 [2009]).

Here, the assignment relied upon by the plaintiff is dated one day after the commencement of the action. In fact, the complaint states that the mortgage is to be assigned by an assignment, an acknowledgment that the assignment had not yet occurred at the commencement of the action. A retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment (*Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709 [2009]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204 [2009]). The plaintiff next argues that standing is based on possession of the note. The plaintiff submits an affidavit stating that the original assignment was in error and should have been assigned to U.S. Bank National Association, as Trustee, Successor in Interest to Bank of America National Association, as Trustee, Successor by Merger to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2007-7AX, that the note was specifically endorsed to U.S. Bank National Association, as Trustee, Successor in Interest to Bank of America National Association, as Trustee, Successor by Merger to LaSalle Bank National Association and that the plaintiff is in possession of this note. The plaintiff, however, did not submit any evidence or give any factual details concerning when it received physical possession of the note, and, thus failed to establish that it had physical possession of the note prior to commencing the action (*Citimortgage, Inc. v Stosel*, 89 AD3d 887 [2011]; *U.S. Bank N.A. v Shariff*, 89 AD3d at 725). In fact, the plaintiff did not even state that was in possession of the note at the commencement of the action, just that it is currently in possession of the note. The plaintiff, therefore, submitted no evidence to establish that it had standing to commence the action.

Accordingly, the motion by the plaintiff is denied. The branch of the cross motion for leave of court to amend the answer is granted and the amended answer is deemed served *nunc pro tunc*. The branch of the cross motion to dismiss the complaint pursuant to CPLR 3211(a)(3) is granted and the complaint is dismissed, and it is further

ORDERED, that the Queens County Clerk is directed, upon payment of the proper fees, if any, to cancel and discharge of record, all the Notices of Pendency filed in this action on November 27, 2013, December 3, 2010 and December 18, 2007, against the property know commonly as 523 Beach 66th Street, Far Rockaway, Queens County, Block: 16033 Lot: 60 and said Clerk is hereby directed to enter upon the margin of the record of the same, a Notice of Cancellation referring this Order.

Dated: APR 23 2014



 J.S.C.

FILED
 APR 30 2014
 COUNTY CLERK
 QUEENS COUNTY