

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE  
*Justice*

PART 10

ACT PROPERTIES  
- v -  
ULTRA FARRIN

INDEX NO. 115258/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 3  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

AUG 15 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Aug 13, 2012

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----x  
WELLS FARGO BANK, N.A., NOT IN ITS  
INDIVIDUAL CAPACITY, BUT SOLELY AS  
TRUSTEE FOR RMAC REMIC TRUST,  
SERIES 2009-9,

Plaintiff (s),

*-against-*

FARRIN ULLAH a/k/a FARRIN B ULLAH;  
ASSET ACCEPTANCE LLC; INTERNAL  
REVENUE SERVICE; BOARD OF DIRECTORS  
OF THE COLUMBIA CONDOMINIUM; ZAHID  
ULLAH NAZLIE ULLAH; NEIKI ULLAH,

Defendant (s).  
-----x

**DECISION/ ORDER**  
Index No.: 115258/09  
Seq. No.: 003

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**

AUG 15 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

| Papers   | Numbered |
|--|----------|
| Ullah's OSC w/BM affirm, FBU affid, exhs ..... | 1        |
| Pltf's opp w/RAG affirm, exhs .....            | 2        |
| Ullah's reply w/BM affirm .....                | 3        |
| Proof of service .....                         | 4        |

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action to foreclose a mortgage. In connection with prior motion practice by plaintiff ("Wells Fargo"), the court granted Wells Fargo summary judgment against defendant Farrin B. Ullah ("Ullah"), based upon her having defaulted in the terms of her mortgage (Decision/Order, Gische, 1/30/12) ("summary judgment order").

Ullah now moves by order to show cause for: 1) vacature of the court's summary judgment order on the basis that she was improperly served with the prior motion, and 2) the dismissal of the complaint on the basis that Wells Fargo lacks standing to bring this action (CPLR 3211[a][3]). Wells Fargo opposes all the relief Ullah seeks. The court granted Ullah a temporary restraining order staying the sale of the affected apartment and it remains effective pending the court's decision of this motion.

Since the parties are familiar with this action and the underlying summary judgment order, the facts of this case will not be repeated. Furthermore, the court's underlying summary judgment order is incorporated herein by reference.

#### **Arguments**

In the court's underlying summary judgment order, the court granted plaintiff's motion on default. Ullah argues the court's prior order should be vacated because she first learned about plaintiff's motion when she was served with Notice of Entry of the court's decision and order. She contends that had she been properly served, she would have opposed it. Ullah now seeks summary judgment dismissing the complaint on the basis that the plaintiff lacks standing to bring this action. Ullah argues that plaintiff claims standing based upon an assignment of mortgage by MERS, as nominee for Castle Point Mortgage, Inc. dated October 22, 2009. According to Ullah, MERS lacked authority to assign the subject mortgage to plaintiff because MERS was never the lawful holder or assignee of the underlying note. Thus, Ullah contends that MERS, as a nominee, had no authority to foreclose the mortgage and, therefore, the conveyance of the mortgage without the note is a nullity rendering this action a nullity

as well.

An alternative argument raised by Ullah is that the assignment dated and executed June 22, 2011 by ACT to Wells Fargo "as trustee for RMAC REMIC Trust, Series 2009-9, as assignee ("Remic Trust") is also invalid because the Remic Trust closed in 2009, yet the purported assignment of the note and mortgage was not executed until June 22, 2011. Ullah argues that it would be a violation of the trust's prospectus and its Pooling Servicing Agreement to accept a non-performing asset.

In opposition, plaintiff first challenges Ullah's contention that she was improperly served by producing a receipt showing the package was sent to Ullah by certified mail, return receipt requested and that it was signed for at her building by "Raymond Hernandez." Plaintiff points out that Ullah received other mail it sent to her, yet she cannot explain why she did not receive this particular package, though properly served. Thus, plaintiff contends Ullah has not shown excusable default and her motion pursuant to CPLR 5015 should be denied for that reason.

Turning to the merits, plaintiff argues that Ullah's defense, and therefore her present motion for summary judgment, has no merit. Richard A. Gerbino, Esq., in his affirmation in support of plaintiff's motion, states that the bank has standing to pursue this foreclosure action because it took title to the mortgage via a bona fide purchase agreement made in November 2009. According to Attorney Gerbino, the mortgage was transferred and/or assigned to the plaintiff via actual delivery and ACT, the original plaintiff, was in physical possession of the promissory note, endorsed in blank, when it commenced this action. Ullah replies that there is no affidavit by a person with knowledge stating that MERS was ever in physical possession of the promissory note

or had a right to it. According to Ullah, MERS's absence of actual possession or right to to the note is fatal to plaintiff's standing. With respect to the second argument, Attorney Gerbino maintains the transfer of the loan into the Remic Trust is valid because it was made November 13, 2009. A copy of the applicable pooling agreement is provided and it shows the cut off date for acquisitions and transfers of mortgage loans by the Remic Trust was November 16, 2009.

The note at issue is dated November 21, 2006 and identifies the lender as Castle Point Mortgage, Inc. ("Castle"). The mortgage document, also dated November 21, 2006, identifies Castle as the lender. It states, however, that the borrower (Ullah) transfers certain rights to MERS:

**BORROWER'S TRANSFER TO LENDER OF RIGHTS  
IN THE PROPERTY**

I mortgagee, grant and convey the Property to MERS (solely as nominee for Lender and Lender's successors in interest) and its successors in interest subject to the terms of this Security Instrument. This means that, by signing this Security Instrument, I am giving the Lender those rights that are stated in this Security Instrument and also those rights that Applicable Law gives to lenders who hold mortgages on real property. I am giving Lender these rights to protect Lender from possible losses that might result if I fail to [make payments...]

I understand and agree that MERS holds only legal title to the rights granted by me 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, including, but not limited to, the right to foreclose and sell the property; and
- (B) To take any actions required of the Lender including, but not limited to, releasing and cancelling this Security Instrument.

In an undated assignment of mortgage, notarized October 22, 2009, MERS granted, conveyed, assigned and transferred "all beneficial interest in the mortgage dated November 21, 2006 executed by Farrin Ulla, Grantor to [MERS], as nominee for [Castle], in the principal amount of \$880,750 and recorded February 15, 2007..." There is then a subsequent Pooling Agreement among Roosevelt Mortgage Acquisition Co, as depositor, Roosevelt Management Company, LLC as Program Administrator and Wells Fargo, "not in its individual capacity, but solely as Trustee" ("pooling agreement"). The pooling agreement, by which a group of mortgages were bundled together and sold as a security, is dated November 13, 2009. Ullah's mortgage, however, was not transferred until November 20, 2009 via an instrument that purports to include it in the pool "as of November 13, 2009."

#### **Discussion**

To prevail on a motion to vacate an order entered on default, the party seeking that relief must set forth excusable default and a meritorious defense (CPLR § 5015 (a); Gray v. B.R. Trucking Co., 59 N.Y.2d 649 [1983]). Ullah states she did not receive the package containing plaintiff's motion papers. Although plaintiff presents a "green card" indicating the package was received, the person who accepted the package is someone other than Ullah herself. The court will accept Ullah's sworn representative that she did not receive the package and first learned about the motion upon being served with a copy of the court's decision with Notice of Entry. Thus, Ullah has satisfied the first requirement of CPLR § 5015.

The second requirement is that Ullah demonstrate a meritorious defense.

Though this requirement is closely aligned with Ullah's motion for summary judgment, the applicable legal standards of proof are markedly different. As will be made clear later in this decision, the court finds that Ullah has met this requirement as well.

Therefore, Ullah's motion to vacate the court's decision of summary judgment in favor of the plaintiff, on default, is hereby vacated. The court will proceed to consider whether Ullah is entitled to summary judgment dismissing the complaint.

In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages (MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90, 96 [2006]). The members of MERS contractually agreed to appoint MERS as their common agent on all mortgages they register in the MERS system. In a recent decision emanating from the Appellate Division, Second Department (Bank of New York v. Silverberg, 86 A.D.3d 274 [2<sup>nd</sup> Dept 2011]), the court analyzed the tripartite relationship of promissory notes, mortgages and the MERS system.

Observing that the transfer of a mortgage without the note is a nullity, the Appellate Division decided in Bank of New York v. Silverberg that the plaintiff in that case, the Bank of New York, lacked standing to commence a foreclosure action. The court found that MERS, the entity assigning the mortgage to the Bank of New York, had never held title to the promissory note. Pursuant to a consolidation agreement, MERS had only acquired the right to assign the mortgages themselves, but not the notes. This occurred because MERS had executed the consolidation agreement "as a nominee for [Countrywide] and [Countrywide's] successors and assigns" and the document stated that "[for] purposes of recording this agreement, MERS is the mortgagee of record."

(Bank of New York v. Silverberg, 86 A.D.3d at 281). The Appellate Division found that as Countrywide's nominee, "MERS's authority was limited to only those powers which were specifically conferred to it and authorized by the lender..." (Id.). The conveyance of the mortgage alone, without the note, rendered the transfer by MERS to Bank of New York a nullity, because a mortgage is merely security for a debt and it cannot exist independently of the note (Bank of New York v. Silverberg, 86 A.D.3d at 280). In other words, if MERS did not have the power to assign the underlying note which it did not own, the assignee gained only what MERS had which did not include the note.

The assignment of the note and mortgage can, however, be effectuated by physical delivery of the note (Bank of New York Mellon Grust Company, N.A. v. Sacha, 95 AD3d 695 [1<sup>st</sup> Dept 2012]; U.S. Bank Nat. Ass'n v. Dellarmo, 94 A.D.3d 746 [2<sup>nd</sup> Dept 2012]). Here, Attorney Gerbino asserts that ACT had the note when it commenced this action. Attorney Gerbino, however, does not have personal knowledge of these facts nor is there any affidavit by a person with knowledge, detailing when and how the note was physically delivered, since MERS never had physical possession of the note. Like in Bank of New York v. Silverberg, MERS only acted as Castle's nominee when it assigned the mortgage to ACT. ACT later assigned the mortgage to Wells Fargo Bank, not in its individual capacity, but solely as trustee for the Remic Trust. Since MERS never had physical possession of the note, and there is no proof that ACT obtained physical possession of the note prior to its commencement of this action, nor is there any explanation of how that occurred, plaintiff has not established that ACT, its assignor had standing to commence this action when it did so.

Ullah has proved, and plaintiff does not deny, that the assignment of assets from



ACT to the Remic Trust was prepared to memorialize events that had already occurred more than 19 months earlier. If a mortgage assignment is in writing, the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient, unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated (Wells Fargo Bank, N.A. v. Marchione, 69 A.D.3d 204 [2<sup>nd</sup> Dept 2009]). Retroactive assignments of a mortgage are invalid (Deutsche Bank Nat. Trust Co. v. Abbate, 25 Misc.3d 1216(A) [Sup Ct., Richmond Co. 2009]). Therefore, the June 22, 2011 assignment of mortgage, prepared after this action was commenced, is invalid to confer standing upon Wells Fargo as well. Here there is no proof that ACT ever had physical possession of the note, but even if it did, since ACT took title from MERS, MERS, likewise, would have needed physical possession of the note to validly assign the note to ACT.

In addition, this mortgage was transferred on November 20, 2009. There is no indication in the pooling agreement or the unilateral additional notice (signed only by one party) that the parties agreed the transfer occurred "as of" an earlier date. This calls into question whether the Remic trust ever really owned the subject mortgage. Thus, as argued by Ullah, the assignment was not made before the cut-of date in the pooling agreement which was November 16, 2009.

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable

excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]). Ullah has established her defense, that ACT did not have standing to commence this action when it did so. Plaintiff has failed to come forward with triable issues of fact to defeat her motion. The assignment by MERS to ACT of the mortgage only renders this action a nullity as MERS did not have, nor could it convey the note and it is note that conveys title to the mortgage. Absent an assignment or physical possession of the note, ACT did not have the power to foreclose on Ullah's loan. Accordingly, Ullah's motion is granted in its entirety. Not only is her default vacated, her motion for summary judgment dismissing the complaint is granted and the complaint is hereby dismissed.

#### **Conclusion**

In accordance with the foregoing,

*IT IS HEREBY*

ORDERED that defendant Ullah Farrin a/k/a Farrin B. Ullah's motion to vacate the court's decision/order dated January 30, 2012, granting plaintiff summary judgment is granted as defendant has shown an excusable default and a meritorious defense; and it is hereby

ORDERED that the court hereby vacates it prior decision/order dated January 30, 2012 granting plaintiff summary judgment against defendant Ullah Farrin a/k/a Farrin B. Ullah; and it is further

ORDERED that defendant's Ullah Farrin a/k/a Farrin B. Ullah's motion for summary judgment in her favor dismissing the complaint on the basis that plaintiff does not have standing to maintain and prosecute this action is granted in its entirety; and it

is further

ORDERED that the clerk shall enter judgment in favor of defendant Ullah Farrin a/k/a Farrin B. Ullah dismissing the complaint; and it is further

ORDERED that the claims against the other nominally named defendants are dismissed without prejudice; and it is further

ORDERED that any relief requested but any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
August 13, 2012

**FILED**

So Ordered:

AUG 15 2012

Hon. Judith J. Gische, JSC  
NEW YORK  
COUNTY CLERK'S OFFICE