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STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

RBS CITIZENS, N.A.,

Plaintiff

-against-

DENISE FRUDA a/k/a DENISE R. FRUDA;
RICHARD FRUDA, a/k/a RICHARD J. FRUDA,
et. al

Defendants

**DECISION AND ORDER**
RJI. No. 56-1-2012-0561
Index No. 57269

**APPEARANCES:**

**Shapiro, Dicaro & Barak, LLC (Robert S. Markel, Esq., of counsel)**
**Attorneys for Plaintiff**

**Ronald J. Kim, Esq., Attorney for Defendants Denise and Richard Fruda**

**KROGMANN, J.**

Defendants, Denise and Richard Fruda (hereinafter collectively referred to as "the defendants" executed and delivered a promissory note (hereinafter referred to as "the note") – pursuant to a Fannie Mae/Freddie Mac UNIFORM INSTRUMENT" – to Charter One Bank, NA on August 11, 2001. Simultaneous with the execution of the note, and as security for the same, the defendants executed and delivered a mortgage on property located at 3 Hackensack Avenue Warrensburg, NY 12885 to Charter One Bank NA (hereinafter referred to as "the mortgage"). Under the terms of the note and mortgage the defendants agreed to repay a principal amount of $62,900 plus interest at a rate of 7.2% per annum by making equal monthly payments of $863.83 from August 11, 2001 until July 11, 2009. Beginning January 26, 2008, however, the defendants failed to make all required monthly payments and defaulted on the note.

The plaintiff subsequently provided notices of default and commenced the instant action on or about May 21, 2012 to foreclose upon the note and mortgage. The defendant answered the

plaintiff's complaint, asserting an affirmative defense, among others, that the plaintiff lacked standing to commence the instant action. Now following joinder of issue, the Plaintiff moves by notice of motion for summary judgment, for the appointment of a referee to compute the amount due, for default judgment against all non-answering defendants, for an Order amending the caption of the action, and for whatever other relief that that this Court deems just and proper. In support thereof the Court has considered the affirmation of Robert S. Markel, Esq. dated January 28, 2014, and the affidavit of David P. Salley along with the exhibits annexed thereto. In response, the defendants cross-move to dismiss the instant action pursuant to CPLR § 3211(a)(3) for plaintiff's alleged lack of standing. In support of such cross-motion, the Court has considered the affirmation of Ron L. Kim, Esq. dated February 21, 2014 2013. In opposition to the cross-motion and in further support of the plaintiff's original motion the Court has considered the reply affirmation of Robert S. Markel, Esq. dated February 25, 2014.

Generally, entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default." (Zanfini v Chandler, 79 AD3d 1031, 1031 [2d Dept 2010], quoting HSBC Bank USA v Merrill, 37 AD3d 899 [3d Dept 2007]; Cititbank N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept 2012]; La Salle Bank Nat. Ass'n v Kosarovich, 31 AD3d 904 [3d Dept 2006]; Pritchard v Curtis, 95 AD3d 1379, 1381 [3d Dept 2012]; Charter One Bank, FSB v Leone, 45 AD3d 958 [3d Dept 2007]). If such showing is made "[t]he 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." (Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158, 1159 [2d Dept 2012], quoting Mahopac Nat. Bank v Baisley, 244 AD2d 466 [2d Dept 1997]).

However, where, as here, standing is put into issue by the defendant, the plaintiff must initially prove its standing in order to be entitled to summary judgment. In the context of a mortgage foreclosure action, 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 HSBC Bank USA v Hernandez, 92 AD3d 843, 844 [2d Dept 2012]). With respect to the same, summary judgment should be denied if there are any material issues of fact. Indeed, as always, summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of fact (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1978];Private Capital Group, LLC v Hosseinipour, 86 AD3d 554, 557 [2d Dept 2011]). Issue finding, rather than issue determination, is the Court's function (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). It is well settled that the proponent of a motion for summary judgment is required to make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (see, Jones-Barnes v. Congregation Agudat Achim, 12 AD3d 875 [3d Dept. 2004]; Sheppard-Mobley v King, 10 AD3d 70, 74 [2d Dept. 2004]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

In support of its motion, plaintiff produced copies of both the note and mortgage as well as evidence of non-payment for the same. Defendants, in fact, concede nonpayment. With respect to the issue of standing, plaintiff alleges through its counsel that it is has standing because it is the holder of the note (HSBC Bank USA v Hernandez, 92 AD3d 843, 844 [2d Dept 2012]). In turn, plaintiff, again solely through counsel, alleges it is the holder of the note by virtue of the fact that plaintiff is the successor by merger to the original mortgagee and original note holder, Charter One Bank, F.S.B. Indeed, Banking Law § 602, which governs the effect of

a merger, provides that the receiving corporation, plaintiff in the present case, is considered to be the same entity as both merged corporations; is vested with all of the rights and powers of the merged corporations; and is considered to have been named in any document taking effect before the merger. In addition, no formal assignment is required to effect a transfer of assets of a merged corporation to the receiving corporation(see Barclay's Bank of New York, N.A. v Smitty's Ranch, Inc., 122 AD2d 323, 324 [3d Dept 1986]). Alternatively, plaintiff argues that the "[d]efendants' allegations [regarding standing] are considered moot given that the mortgage was properly assigned to [p]laintiff prior to commencement of the action. The transfer is reflected by the indorsement to [p]laintiff contained on the [n]ote....By Virtue of the transfer of the Note and Mortgage, [p]laintiff became the holder of the Note and Mortgage" (Markel Aff. ¶. 20).

In support of their own motion, the defendants argue that plaintiff lacks standing because it has not sufficiently proven – notwithstanding the merger – that it is the holder or owner of the note and, consequently, the mortgage (see Bank of New York v Silverberg, 86 AD3d 274, 278 [2d Dept 2011]). In regard to such argument, the defendants ask this Court to take judicial notice pursuant to CPLR § 4511 of the information provided by Fannie Mae's online loan look-up tool – entitled "Know your Options – with respect to the note and mortgage at issue.

Judicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability (see Affronti v. Crosson, 95 NY2d 713, 720; Buffalo Retired Teachers 91–94 Alliance v. Board of Educ. for City School Dist. of City of Buffalo, 261 A.D.2d 824). The test for judicial notice is "whether the fact rests upon knowledge *or sources* so widely accepted and unimpeachable that it need not be evidentiarily proven." (see

Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., 61 AD3d 13, 20 [2d Dept 2009](emphasis added)).

The "Know your Options" loan lookup tool is a service provided by Federal National Mortgage Association, otherwise known as "Fannie Mae" that allows one to determine whether Fannie Mae owns a loan. Fannie Mae is a government sponsored entity ("GSE") providing a secondary mortgage market for the purchase of home loans. The "Know Your Options" loan lookup website is the resource for attorneys or individuals, provided directly by Fannie Mae, to determine whether their, or their clients', notes and mortgages have been sold to Fannie Mae or Freddie Mac in the secondary mortgage market. It is commonly used by counsel representing homeowners in CPLR § 3408 settlement conferences. Thus, the Court takes judicial notice of the results produced by the defendants' use of the Know Your Options loan look-up tool relative to the instant motion only. The results are that "it appears that Fannie Mae owns [the defendants'] loan." (see Kim Aff. Ex. 5) Moreover, as noted above, and regardless of judicial notice, the note was executed on a Fannie Mae/ Freddie Mac Uniform Instrument and plaintiff appears to tacitly concede Fannie Mae's ownership of the note stating "[w]ith respect to the involvement of the Federal National Mortgage Association ("Fannie Mae") in this matter… " (Markel Reply Aff. ¶ 3). Fannie Mae ownership, or lack thereof, however, has not been definitively proven in the instant action by an individual with personal knowledge and remains a question of fact.

Assuming, arguendo, Fannie Mae's ownership of the note (based on the evidence provided) then Fannie Mae – according to the Fannie Mae servicing guidelines in effect at the time of commencement of the instant action – *"at all times has possession of and is the holder of the mortgage note"* ( 2011 Fannie Mae Servicing Guidelines Section 202.07.01)(emphasis

added)). Consequently, plaintiff's reliance upon Banking Law § 602 and the effect of merger in order to establish standing would be misplaced. If Fannie Mae is the holder of the note then Charter One Bank FSB –plaintiff's predecessor in interest – is not and the fact that plaintiff is vested with all of the rights and powers of Charter One Bank no longer simply grants plaintiff status as holder of the note (see gen. JP Morgan Chase Bank, Nat. Ass'n v Butler, 40 Misc 3d 1205(A) [Sup Ct 2013]( "CHASE, in the instant action, committed a fraud upon the Court by claiming to be the plaintiff. FANNIE MAE should have been the plaintiff as the owner of the note and mortgage")). The Court acknowledges, however, that the plaintiff continues to hold the mortgage as a result of the merger. There is no evidence of assignment or transfer of the same. However, the note does not simply pass incident to the mortgage (see Bank of New York v Silverberg, 86 AD3d 274, 280 [2d Dept 2011]).

In response to questions of fact concerning Fannie Mae ownership, plaintiff attempts to argue that such ownership is immaterial because "the Fannie Mae Servicing Guide grants servicers, acting in their own names, the authority to represent Fannie Mae's interests in foreclosure proceedings as holder of the mortgage note." (see Merkel Reply Aff. ¶ 3 citing Sharpe v. Wells Farge Home Mortg., 2011 U.S. Dist. LEXIS 132541 (D. Or. Nov. 16, 2011). Plaintiff alludes therefore, to the aforementioned Fannie Mae servicing guidelines which state:

> In order to ensure that a servicer is able to perform the services and duties incident to the servicing of the mortgage loan, Fannie Mae temporarily gives the servicer possession of the mortgage note whenever the servicer, acting in its own name, represents the interests of Fannie Mae in foreclosure actions, bankruptcy cases, probate proceedings, or other legal proceedings.
>
> This temporary transfer of possession occurs automatically and immediately upon the commencement of the servicer's representation, in its name, of Fannie Mae's interests in the foreclosure, bankruptcy, probate, or other legal proceeding.
>
> When Fannie Mae transfers possession, the servicer becomes the holder of the note as follows:

> If a note is held at Fannie Mae's DDC, Fannie Mae has possession of the note on behalf of the servicer so that the servicer has constructive possession of the note and the servicer shall be the holder of the note and is authorized and entitled to enforce the note in the name of the servicer for Fannie Mae's benefit.
>
> If the note is held by a document custodian on Fannie Mae's behalf, the custodian also has possession of the note on behalf of the servicer so that the servicer has constructive possession of the note and the servicer shall be the holder of the note and is authorized and entitled to enforce the note in the name of the servicer for Fannie Mae's benefit (2011 Fannie Mae Servicing Guidelines Section 202.07.02)

Nowhere though does plaintiff state, through someone with personal knowledge, that it is, in fact, a servicer of the note and mortgage for Fannie Mae.

Moreover, the Fannie Mae servicing guidelines, do not supersede New York Law. Under New York law, a "holder" is "a person who is in possession of ... an instrument ... issued or indorsed to him or to his order or to bearer or in blank." (see NYUCC § 1–201[20]). Mere constructive possession, though, at least with respect to mortgage foreclosure actions, is not enough. Multiple cases have stated "A plaintiff… demonstrat[es] 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…" (see Aurora Loan Services, LLC v Taylor, 114 AD3d 627 [2d Dept 2014]; Deutsche Bank Nat. Trust Co. v Whalen, 107 AD3d 931, 932 [2d Dept 2013]("plaintiff established its standing as the holder of the note and mortgage by physical delivery prior to commencement of the action with evidence that its custodian received the original note in October 2005 and received the original mortgage in February 2006 and safeguarded those original documents in a secure location."); U.S. Bank, N.A. v Adrian Collymore, 68 AD3d 752, 754 [2d Dept 2009]). Consistent with New York law, therefore, the

Fannie Mae servicing guide provides instructions on how to obtain physical possession of the note in order to represent Fannie Mae's interests.[1]

Here, plaintiff offers no evidence that Fannie Mae actually transferred physical possession of the note to plaintiff. Although plaintiff states that it "became the holder of the [n]ote and [m]ortgage ....By Virtue of the transfer of the Note and Mortgage," such statement is merely conclusory. The plaintiff's affidavits in support are lacking factual details with respect to the when, who, what, where and how the alleged voluntary transfer of possession occurred. The assertion that the original note was transferred to the plaintiff, and that it became a holder, is made only in an affirmation by plaintiff's counsel and is unsupported by any evidentiary factual support from a person with personal knowledge. Further, the presence of a blank endorsement does not, in and of itself, confer standing upon the plaintiff. An instrument payable to order and indorsed in blank becomes payable to bearer upon negotiation by delivery alone unless and until specially indorsed (see NYUCC § 3–204(2)). Again, there is no evidence of physical delivery of the original note (see Deutsche Bank Nat. Trust Co. v Whalen, 107 AD3d at 932 ("plaintiff established its standing as the holder ... with evidence that its custodian received the *original* note in October 2005 and received the original mortgage in February 2006 and safeguarded those original documents in a secure location."). Indeed, plaintiff fails to make the simple allegation by someone with personal knowledge that it physically possessed the note at the time the action was commenced.

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[1] "If a servicer determines that it needs physical possession of the original mortgage note to represent the interests of Fannie Mae in a foreclosure, bankruptcy, probate, or other legal proceeding, the servicer may obtain physical possession of the original mortgage note by submitting a request directly to the document custodian. If Fannie Mae possesses the original note through a third-party document custodian that has custody of the note, the servicer should submit a Request for Release/Return of Documents(Form 2009) to Fannie Mae's custodian to obtain the note and any other custodial documents that are needed" (2011 Fannie Mae Servicing Guidelines Section 202.07.02).

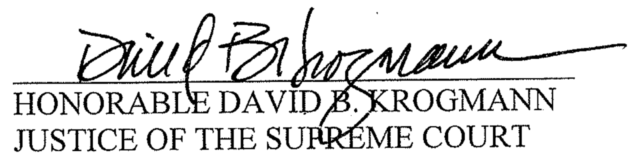
Based on the foregoing, particularly the questions of fact concerning Fannie Mae ownership, plaintiff's motion for summary judgment is denied without prejudice.

Likewise, although the defendants have raised a question of fact sufficient to defeat summary judgment, the defendants have not sufficiently proven that the plaintiff lacks standing and, as such, their cross-motion to dismiss is denied (see Deutsche Bank Nat. Trust Co. v Haller, 100 AD3d 680, 683 [2d Dept 2012]). Also, it should be noted that "lack of capacity to sue" as referenced in CPLR § 3211(a)(3) is a separate and distinct concept from standing (see, Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148, 155 [1994]). "Standing" is an element of the larger question of "justiciability" (see, Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 769 [1991]). The various tests that have been devised to determine standing are designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome so as to "cast[ ] the dispute 'in a form traditionally capable of judicial resolution' " (Id.). "Capacity," in contrast, concerns a litigant's power to appear and bring its grievance before a court such as an infant or minority shareholder (Schaffer, 84 NY2d at 155).

Any relief requested by either party that has not been addressed herein has nonetheless been considered and is expressly denied, without prejudice.

The within constitutes the Decision and Order of this Court.

DATED: MAY 13, 2014



HONORABLE DAVID B. KROGMANN
JUSTICE OF THE SUPREME COURT

The Court is filing the original decision and order together with the original papers in the appropriate County Clerk's Office. Attorney for Plaintiff to comply with CPLR 2220.

Distribution:
Robert S. Markel, Esq.

Ronald J. Kim, Esq.