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SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X **PART 6**
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., acting solely as Nominee for
JPMorgan Chase Bank, N.A., successor to
Washington Mutual Bank, F.A.,

INDEX NO.: 5148/11
MOTION DATE: 01/04/12
SEQUENCE NO. 001, 002

Plaintiff,
-against-

DANNY OCAMPO, BRETTE L. JONES, and
THE OFFICE OF THE NASSAU COUNTY
CLERK,

Defendants.

-----X

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Upon the foregoing papers, the motion by defendants Danny Ocampo and Brette L. Jones for summary judgment, pursuant to CPLR §3212, is denied. The portion of the cross-motion by plaintiff to amend the caption of this action *nunc pro tunc* to the date of the filing of the summons and complaint, pursuant to CPLR §3025(b), is granted, but the portion of plaintiff's cross-motion which seeks summary judgment, pursuant to CPLR §3212, is denied.

The Court shall not consider defendants' Amended Affirmation in Support of Opposition to Plaintiff's Cross-Motion, received by the Court on January 23, 2012, nineteen days after the submission date of the motion and cross-motion, as permission was not obtained from the Court to submit same, same is untimely, the affirmation is not signed or dated, and no affidavit of service has been submitted indicating service of the Amended Affirmation in Support of

Opposition upon counsel for plaintiff.

In this action, plaintiff seeks a declaration by the Court (i) directing that the County Clerk accept and record the copy of the Gap Mortgage and CEMA with attached exhibits, including the Consolidated Note and Consolidated Mortgage, as well as the 255 Affidavit, as if an original, upon payment of all applicable taxes, fees, charges, and costs, if any; or (ii) compelling defendants Ocampo and Jones to re-execute any forms or documents as may be necessary to record the Gap Mortgage and CEMA, along with the Consolidated Note and Consolidated Mortgage. This is not a foreclosure action, but an action to compel the recording of duplicated originals of valid mortgage documents.

On or about October 1, 2004, Washington Mutual Bank, F.A. (hereinafter referred to as "WaMu") gave a loan in the amount of \$480,000 to defendants Danny Ocampo and Brette L. Jones (hereinafter referred to as "defendants"). Repayment of the loan was secured by a mortgage (hereinafter the "2004 Mortgage") encumbering real property commonly known as 160 Riverside Boulevard, Long Beach, New York. The mortgage was recorded in the Nassau County Clerk's Office in Liber 27887, Page 220 against Section 0059, Block 113-00, and Lot 00108, on November 12, 2004.

On April 16, 2007, WaMu made a second loan to defendants in the amount of \$86,729.02, which was secured by a mortgage on the same premises (hereinafter referred to as the "Gap Mortgage"). On the same date, defendants entered into a Consolidation, Extension, and Modification Agreement with WaMu. The agreement consolidated the terms of the two outstanding mortgages, and the parties signed a mortgage and note. The terms of the agreement, the mortgage and the note, provided that in satisfaction of the 2004 Mortgage and the Gap Mortgage, WaMu would hold a mortgage over the property in the amount of \$580,000 with a negative amortization not to exceed \$638,000. The agreement, the note and the mortgage will be collectively referred to as the "CEMA"). Plaintiff contends that the CEMA and the Gap Mortgage were to be recorded in the Nassau County Clerk's Office, but were never recorded.

Paragraph 12 of the note incorporated within the CEMA, states that "[i]f any of the Loan Documents are lost, stolen, mutilated or destroyed and the Note Holder delivers to me an indemnification in my favor, signed by the Note Holder, then I will sign and deliver to the Note

Holder a Loan Document identical in form and content which will have the effect of the original for all purposes.”

Defendants move for summary judgment, arguing, *inter alia*, that plaintiff Mortgage Electronic Systems, Inc. (hereinafter “MERS”) lacks standing to sue as the plaintiff has not furnished proof that JPMorgan Chase authorized MERS to act on its behalf. Defendants claim that they received a letter in March 2010 from the Texas law firm of Bell & Bowes asking them to sign and return copies of the documents attached to plaintiff’s complaint. Defendants contend that the firm which sent them the documents did not disclose its identity. As such, defendants did not sign the documents sent to them. Defendant Ocampo submits an affidavit in which he states that Bell & Bowes did not disclose its reason for asking “us” to sign documents in March 2010, that he did not know how he could “rightfully sign notarized documents dated April 2007 in March 2010, and that he “reasonably believe[s] that the documents attached to the Complaint (Exhibits “I” - “L”) are either falsified or that the Plaintiff is fraudulently representing copies of photocopies to be copies of originals that the Plaintiff actually does not possess.” The Court notes that defendant Brette L. Jones fails to submit an affidavit in support of defendants’ motion in chief for summary judgment, submitting an affidavit only in opposition to plaintiff’s cross-motion. Ms. Jones’ affidavit, submitted for the first time in her opposition papers, is insufficient to meet defendants’ burden in establishing a prima facie showing of entitlement to summary judgment. (*See, Rengifo v. City of New York*, 7 A.D.3d 773, 776 N.Y.S.2d 865 (2d Dept. 2004); *Adler v. Suffolk County Water Authority*, 306 A.D.2d 229, 760 N.Y.S.2d 523 (2d Dept. 2003); *Doda v. City of New York*, 6 A.D.3d 490, 774 N.Y.S.2d 433 (2d Dept. 2004)).

Defendants contend that summary judgment should be granted in their favor as the plaintiff lacks standing to bring this action and as the plaintiff’s “present action has the appearance of fraud, misrepresentation, misconduct, or mistake....”

Plaintiff cross-moves to amend the caption *nunc pro tunc* by substituting JPMorgan Chase Bank, N.A., successor to Washington Mutual Bank, F.A., as the plaintiff, and for summary judgment.

Plaintiff contends that the complaint was errantly drafted in the name of MERS as nominee of JPMorgan Chase (hereinafter “Chase”). Plaintiff contends that Chase is the proper

plaintiff, that Chase has standing to prosecute this action, and that defendants will not be prejudiced by the substitution and amendment of the caption.

Plaintiff further contends that it is entitled to an order granting it summary judgment and directing the Nassau County Clerk to record a copy of the Gap Mortgage and the CEMA Agreement and all of its corresponding documents, or compelling the defendants to execute duplicate originals. Plaintiff contends that Chase is the holder of the mortgages obtained from defendants Ocampo and Jones. Plaintiff also contends that it has submitted copies of the original mortgages and CEMA executed by said defendants as Exhibits to its Verified Complaint. Defendants Ocampo and Jones' signatures appear on each document and their signatures are notarized on the mortgages on the date signed. Plaintiff also submits the Purchase and Assumption Agreement between WaMu, Chase's predecessor, and Chase, and contends that all interests held by WaMu against the subject premises by virtue of the 2004 Mortgage, the Gap Mortgage, and the CEMA, were acquired by Chase. The Court notes, however, that the Purchase and Assumption Agreement and the copies of the mortgage documents at issue are not certified.

Plaintiff contends that during the course of internal audits by Chase of its acquired assets, it was discovered that the Gap Mortgage and the CEMA were not recorded in the Office of the Nassau County Clerk. Chase thereafter contacted title insurer, Fidelity National Title Insurance Company ("Fidelity"), in order to obtain duplicate originals of the Gap Mortgage and CEMA from the defendants Ocampo and Jones for recordation in Nassau County.

Fidelity retained law firm Bell & Bowes to obtain the duplicate originals. Bell & Bowes sent a letter to defendants, disclosing its clients and its reason for contacting the defendants. On March 11, 2010, plaintiff contends that Bell & Bowes received a call from defendant Ocampo agreeing to execute duplicate original documents. As such, Bell & Bowes sent duplicate originals, with the original signatures removed, for execution by the defendants. Plaintiff submits the affidavit of Jack Tartaro, a Claims Manager with Bell & Bowes, who attests to same. The initial letter from Bell & Bowes invited the defendants to compare the proposed duplicate originals with the original documents in the defendants' possession.

Plaintiff contends that the defendants were under an obligation to execute duplicate originals, under the terms of the CEMA, as they both executed same, which specifically states

that “[i]f any of the Loan Documents are lost, stolen, mutilated or destroyed and the Note Holder delivers to me an indemnification in my favor, signed by the Note Holder, then I will sign and deliver to the Note Holder a Loan Document identical in form and content which will have the effect of the original for all purposes.” Plaintiff further contends that the defendants have not met their financial obligations under the CEMA note and have “forced this litigation to occur by virtue of their desire to gain leverage to force the bank to refinance all the CEMA terms to those more favorable to the Defendants.”

The Court notes that nowhere in defendant Ocampo’s affidavit does he deny the existence or terms of the 2004 Mortgage, the Gap Mortgage, or the CEMA. He does not deny that he was loaned money in accordance with the terms of same, nor does defendant Ocampo expressly deny that his notarized signature appears on the photocopied original documents submitted with plaintiff’s complaint. He does not attest that he does not recognize his signature or that he never signed said documents. He also does not expressly attest that he does not recognize the documents as copies of the original documents which he executed.

In addition, defendant’s title “expert,” Senior Closing Officer of Fidelis Abstract Corp., Chuck Noelle, also fails to attest that the CEMA and/or Gap Mortgage are invalid or were procured through fraud, duress or other illegitimate means. He sets forth his own “three rational explanations” regarding the presentation of copies of the documents by plaintiff, none of which are supported by any evidence in the record before this Court. He also fails to consider the fact that the plaintiff may only be in possession of copies of the original documents, thus necessitating the instant action. As such, his affidavit is of little evidentiary value.

To begin, CPLR §3025(b) states that “a party may amend his pleading, or supplement it...at any time by leave of court or stipulation of all parties. Leave shall be freely given upon such terms as may be just....” Leave to amend a pleading is to be freely given where, as here, there is no showing of genuine prejudice or surprise to the nonmoving party, and no showing that the proposed amendment is “palpably insufficient as a matter of law” or “totally devoid of merit.” (*Consolidated Payroll Services, Inc. v. Berk*, 794 N.Y.S.2d 410 (2d Dept. 2005); *Bolanowski v. Trustees of Columbia University in City of New York*, 21 A.D.3d 340, 800 N.Y.S.2d 560 (2d Dept. 2005); *Alatorre v. Hee Ju Chun*, 44 A.D.3d 596, 848 N.Y.S.2d 174 (2d

Dept. 2007); *Maspeth Federal Savings and Loan Ass'n*, 67 A.D.3d 750, 888 N.Y.S.2d 599 (2d Dept. 2009)). The party opposing the amendment must demonstrate that there will be actual prejudice in permitting the service of the amended pleading. (*Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957 (1983)). In the instant action, there has been no showing that the amendment of the complaint to substitute Chase for MERS will result in actual prejudice to the defendants. Further, in this action, MERS is the plaintiff solely as nominee of JPMorgan Chase, N.A. It was never alleged that MERS is the owner of the mortgages at issue.

Accordingly, pursuant to CPLR §3025(b), the portion of plaintiff's motion seeking to amend the complaint in this action to substitute JPMorgan Chase, N.A. in the place and stead of MERS is granted, and the caption of this action is hereby amended, *nunc pro tunc* to the date of the filing of the complaint, by substituting JPMorgan Chase Bank, N.A., as successor to Washington Mutual Bank, F.A., as the plaintiff in the place and stead of MERS. As such, the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
JPMORGAN CHASE BANK, N.A., as successor
to Washington Mutual Bank, F.A.,

INDEX NO.: 5148/11

Plaintiff,

-against-

DANNY OCAMPO, BRETTE L. JONES, and
THE OFFICE OF THE NASSAU COUNTY
CLERK,

Defendants.
-----X

Plaintiff is directed to serve a copy of this Order upon the Clerk of the Nassau County Supreme Court within twenty (20) days, and upon receipt of same, the Clerk is directed to amend the caption as noted above.

Next, defendants Ocampo and Jones have failed to establish a prima facie showing of

entitlement to summary judgment. They have not demonstrated that Chase lacks standing to bring this action or that Chase does not own the mortgages at issue. Defendants only baldly assert, for the first time in its Reply papers, that “upon information and belief,” WaMu securitized the subject mortgage, prior to its closing and acquisition by the FDIC, and, therefore, the mortgage was pooled, barring Chase from claiming ownership and interest in the mortgages. Further, the defendants Ocampo and Jones have failed to demonstrate that they did not sign the original copies of the photocopied notarized mortgage documents at issue, that they did not receive funds from the plaintiff’s predecessor in interest, or that they did not mortgage the property at issue to plaintiff’s predecessor in interest. The signatures of defendants Ocampo and Jones on the photocopied documents at issue are notarized on the same date that the documents were executed. Further, Defendant Ocampo attests only that he believes that the plaintiff’s documents are falsified, but does not deny signing the original documents. Defendant Jones failed to submit an affidavit in support of defendants’ motion for summary judgment, but in opposition states only that “we deny the authenticity of any signatures relied upon by plaintiff.” She does not expressly deny signing the original loan documents or taking a loan and giving a mortgage to WaMu.

The signatures of both defendants are notarized on the copied original mortgage documents at issue herein. Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature.” (*Beitner v. Becker*, 24 A.D.3d 406, 824 N.Y.S.2d 155 (2d Dept. 2006); *see, North Fork Bank Corp. v. Graphic Forms Associates, Inc.*, 36 A.D.3d 676, 828 N.Y.S.2d 194 (2d Dept. 2007); *see also, Banco Popular v. Victory Taxi Management, Inc.*, 1 N.Y.3d 381, 806 N.E.2d 488 (2004)(holding that defendants affidavit alone, without factual assertions supporting a claim of forgery, was inadequate to raise an issue of fact necessitating a trial). Here, the affidavits of the defendants fail to raise factual assertions which support their self-serving attestations regarding the “authenticity” of their signatures.

Accordingly, defendants motion for summary judgment is denied in its entirety.

Further, plaintiff has failed to make a prima showing of entitlement to summary judgment herein. Plaintiff has not submitted certified copies of the relevant mortgage documents and does not submit an affidavit from anyone in plaintiff’s employ setting forth the facts or merits of their

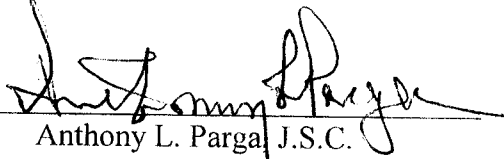
action. There is no evidence submitted which addresses what happened to the original mortgage documents, and plaintiff fails to demonstrate through admissible evidence that it is, in fact, the owner of the mortgages at issue. The Purchase and Assumption Agreement between WaMu and Chase is not certified, and there has been no evidence presented by plaintiff that Chase acquired the mortgages and CEMA at issue herein. As such, plaintiff has failed to submit sufficient admissible evidence to make a prima facie showing of entitlement to summary judgment.

Accordingly, plaintiff's cross-motion for summary judgment is denied.

Plaintiff is directed to serve a copy of this order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court within twenty (20) days of the date of this Order. The parties shall appear for a Preliminary Conference on **April 27, 2012, at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings.

This constitutes the decision and Order of this Court.

Dated: February 29, 2012


Anthony L. Parga, J.S.C.

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ENTERED
MAR 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE