

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
DEUTSCHE BANK TRUST COMPANY AMERICAS
AS TRUSTEE FOR RALI 2002QS6,

Index No: 14695/12
Motion Date: 11/14/12
Motion Cal. No.: 23
Motion Seq. No.: 1

Plaintiff,

-against-

STEFANOS VITELLAS; DOUGLAS MANOR
ASSOCIATION, INC.; FLEET NATIONAL BANK;
JPMORGAN CHASE BANK; NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE,

Maria Vitellas; Winthrop University Hospital;
“JOHN DOES” and “JANE DOES,” said names bring
fictitious, parties intended being possible tenants or
occupants of premises, and corporations, other entities
or persons who claim, or may claim, a lien against the
premises,

Defendants.

-----X

The following papers numbered 1 to 12 read on this motion by defendant for an order dismissing this action with prejudice and for costs and disbursements.

	PAPERS NUMBERED
Notice of Order to Show Cause- Affidavits-Exhibits.....	1 - 4
Cross-Motion- Affidavits-Exhibits.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant moves for an order pursuant CPLR §§3211(a)(3) and (a)(7) to dismiss the within action. Plaintiff cross-moves to amend the complaint to remove any request for a deficiency judgment.

Facts

On April 1, 2002, defendant Stefanos Vitellas (“Vitellas”) executed a promissory note to Lyons Mortgage Services (“Lyons”) for \$560,000 which was concomitantly assigned to MERS as nominee. The note was secured by a mortgage in the name of Vitellas on real property located at 28-02 Marinette St. Douglaston, New York.

On or about May 1, 2004, Vitellas filed for Bankruptcy relief under Chapter 7. On March 1, 2010, Vitellas defaulted on the mortgage. On February 8, 2011, the subject mortgage was assigned to Deutsche Bank Trust (“Deutsche Bank”).

Deutsche Bank contends that they are now the holder of the subject note and mortgage. By virtue of Vitellas default, Deutsche Bank commenced the instant action to foreclose on the subject premises.

Defendants now allege that the plaintiff lacks standing.

For the reasons set forth below, Vitellas’ motion to dismiss pursuant to CPLR 3211(a)(3) is granted and plaintiff’s cross-motion to amend the complaint is denied as moot.

Discussion

“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.” (*US Bank Nat. Ass’n v. Cange*, 96 A.D.3d 825, 826 [2nd Dept 2012]; quoting *Bank of New York v. Silverberg*, 86 A.D.3d 274 [2nd Dept 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.” (*US Bank Nat. Ass'n* at 826-827; quoting *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843 [2nd Dept 2012]; *U.S. Bank, N.A. v. Adrian Collymore*, 68 A.D.3d 752 [2nd Dept 2009].)

“Where standing is raised as a defense by the defendant, the plaintiff is required to prove its standing before it may be determined whether the plaintiff is entitled to relief.” (*U.S. Bank, Nat. Ass'n v. Sharif*, 89 A.D.3d 723, 724 [2nd Dept 2011].) Upon Vitellas’ assertion of the defense of lack of standing, Deutsche Bank was required to demonstrate its standing to prosecute this action. (*Id.* at 725.) However, Deutsche Bank failed to submit a written assignment of the note. Accordingly, in the absence of any evidence to demonstrate the existence of a written assignment of the note or physical delivery of the note Vitellas’ motion for lack of standing is granted. (CPLR 3211(a)(3); *U.S. Bank, Nat. Ass'n v. Sharif*, 89 A.D.3d 723, 724 [2nd Dept 2011]; *Bank of New York v. Silverberg*, 86 A.D.3d 274 [2nd Dept 2011]; *Aurora Loan Services, LLC v. Weisblum*, 85 A.D.3d 95 [2nd Dept 2011].)

Conclusion

For the reasons set forth above, Vitellas’ motion to dismiss pursuant to CPLR §3211(a)(3) is granted and the complaint is hereby dismissed. Accordingly, plaintiff’s cross-motion to amend the complaint is denied as moot.

Dated: January , 2013

Bernice D. Siegal, J. S. C.