

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1096

CA 14-00879

PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

FIRST FRANKLIN FINANCIAL CORPORATION,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

WILLIAM NORTON, ALSO KNOWN AS WILLIAM A. NORTON,
DEFENDANT-RESPONDENT,
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,
ET AL., DEFENDANTS.

FEIN, SUCH & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, ESQS.,
SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONI OF
COUNSEL), AND ARTHUR N. BAILEY & ASSOCIATES, JAMESTOWN, FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered June 6, 2012. The order, inter alia, granted the motion of defendant William Norton, also known as William A. Norton, to dismiss the complaint against him for lack of standing and directed the Chautauqua County Clerk to mark as cancelled a certain mortgage-like instrument.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order that, inter alia, granted the motion of William Norton, also known as William A. Norton (defendant) to dismiss the complaint against him and sua sponte cancelled the mortgage. Contrary to plaintiff's contention, Supreme Court properly granted the motion to dismiss the complaint on the ground that plaintiff lacked standing. "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that 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" (*Kondaur Capital Corp. v McCary*, 115 AD3d 649, 650; see *Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59; *US Bank N.A. v Guy*, 125 AD3d 845, 846). Here, defendant met his burden on his motion to dismiss by establishing that plaintiff lacked standing because it did not have "[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action" (*US Bank N.A. v Madero*, 80

AD3d 751, 753; see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362; cf. *Deutsche Bank Trust Co. Ams.*, 131 AD3d at 59-60), and plaintiff failed to raise a question of fact (cf. *US Bank N.A. v Faruque*, 120 AD3d 575, 578; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 683).

Contrary to plaintiff's further contention, the court properly reconsidered defendant's CPLR 3211 motion to dismiss, having expressly denied the earlier motion with leave to renew after the completion of discovery. Indeed, in the order on appeal and in its written decision underlying the order, the court specified that it had "reserved decision" on the earlier motion.

We agree with plaintiff, however, that the court erred in sua sponte cancelling the mortgage. Defendant "was not entitled to the judicial determination cancelling and discharging the subject mortgage and adjudging the subject property free therefrom" (*Ruiz v Mortgage Elec. Registration Sys., Inc.*, 130 AD3d 1000, 1002; see generally *IndyMac Bank, F.S.B. v Yano-Horoski*, 78 AD3d 895, 896). We therefore modify the order accordingly.

Entered: October 9, 2015

Frances E. Cafarell
Clerk of the Court