

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. MARKEY IA Part 32
Justice

_____ x Index No. 24388/2008
OPTION ONE MORTGAGE CORPORATION

Motion Date: April 23, 2009

- against -

Motion Cal. No. 35

IVAN LONDONO, et al.

_____ x Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion: Papers Numbered

Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-8
Reply Affidavits.....	9-10

The present motion raises interesting legal and factual issues when papers evidencing a mortgage have been lost by a plaintiff company before they could be recorded by a municipal government agency, and the defendant borrower allegedly refuses to cooperate in the signing and filing of other papers purporting to be a copy of the original. Also at issue is whether a HUD-1 closing statement can be treated as conclusive proof of the mortgage.

Plaintiff Option One Mortgage Corporation (“Option One”) instituted this action under article 15 of New York’s Real Property Actions and Procedure Law (“RPAPL”) seeking a judgment to declare title to a premises and the recording of a mortgage that was allegedly lost or misplaced and therefore not recorded with the City Register of the City of New York.

The present motion by plaintiff Option One has several branches, seeking:

(1) for leave to enter a default judgment against defendants George Hatzigeorgiou (“Hatzigeorgiou”), and Annette M. Hill (“Hill”), as the City Register of the City of New York (Register), declaring that

(a) defendant Ivan Londono (“Londono”) is the owner of the real property known as 118-3 201st Place, St. Albans, in Queens County, New York (“the subject premises” or “the property,” designated on the Tax Map for Queens County as Block 12631, Lot 37),

(b) plaintiff Option One is the holder of a first mortgage against the premises in the principal amount of \$344,000.00,

(c) any interest of defendant Londono is subordinate to plaintiff's mortgage interest,

(d) any interest of defendant Hatzigeorgiou in the premises is subject to and subordinate to plaintiff's mortgage interest, and

(e) a mortgage dated June 10, 2005, in the principal sum of \$60,000.00, and recorded on June 29, 2005, made by defendant Londono to defendant Hatzigeorgiou is discharged and satisfied,

(2) to direct that, upon payment of all requisite fees and presentation of a copy of plaintiff Option One's mortgage, the New York City Department of Finance, Office of the City Register, Queens County, record such copy and assign a control number to it as if it were an original document, and

(3) to strike the answer of defendant Londono pursuant to CPLR 3042 and 3126, and, upon the striking of defendant Londono's answer, for leave to enter a default judgment against him.

Plaintiff Option One, as stated, commenced this action pursuant to Article 15 of the RPAPL for a judgment declaring the rights, interests, and priorities of it, and defendants Londono and Hatzigeorgiou in the subject premises. Plaintiff Option One alleges that defendant Londono acquired title to the subject premises by deed dated July 23, 2004, and that, on July 22, 2005, Londono obtained a mortgage loan from plaintiff in the principal sum of \$344,000.00, plus interest. Option One also alleges that its mortgage was lost or misplaced by its agent, and as a consequence, is not recorded. Option One further alleges that defendant Londono has failed to execute a copy of the mortgage to replace the missing original.

Plaintiff Option One, in addition, alleges that, at the time of the closing of its mortgage loan, a pre-existing mortgage dated June 10, 2005, given by defendant Londono to defendant Hatzigeorgiou (the First Hatzigeorgiou mortgage), was recorded against the property. Plaintiff alleges that the proceeds of its mortgage loan were used to satisfy the Hatzigeorgiou mortgage, but defendant Hatzigeorgiou failed to record a satisfaction or discharge of the Hatzigeorgiou mortgage. Option One also alleges that defendant Londono gave defendant Hatzigeorgiou another mortgage dated January 13, 2006 (the Second Hatzigeorgiou mortgage) in the principal amount of \$30,000.00, plus interest, which was recorded against the property on January 31, 2006. According to Option One, defendant Hatzigeorgiou was aware, at the time of the making of the Second Hatzigeorgiou mortgage loan, of plaintiff's prior unrecorded mortgage.

Defendant Londono served an answer asserting various affirmative defenses. Defendants Hatzigeorgiou and Hill are in default in appearing, answering, or otherwise moving with respect to the complaint.

Plaintiff Option One seeks leave to enter a default judgment as against defendants Hatzigeorgiou and Hill, but makes no motion for summary judgment in relation to defendant Londono. Option One, instead, seeks to strike the answer of defendant Londono for his failure to comply with plaintiff's demand for a bill of particulars regarding defendant Londono's affirmative defenses, and upon the striking of the answer, for leave to enter a default judgment as against defendant Londono, as well. Defendant Londono opposes the motion to the extent that Option One seeks to strike his answer. Neither defendant Hatzigeorgiou nor defendant Hill has appeared in opposition to the motion.

A plaintiff seeking leave to enter a default judgment must establish proof of service of the complaint, a meritorious claim and default in appearing or answering the complaint (CPLR 3215[f]).

Plaintiff has submitted proof of proper service of a copy of the summons and complaint upon defendants Hatzigeorgiou and Hill, and their default in appearing, answering, or otherwise moving in response to the complaint. With respect to the merits of the claims against defendants Hatzigeorgiou and Hill, plaintiff Option One has offered an affidavit of Ms. Cindi Ellis, assistant vice-president of American Home Mortgage Servicing, Inc., as successor in interest to plaintiff, a copy of plaintiff's mortgage and the underlying note, the First and Second Hatzigeorgiou mortgages, and a HUD-1 settlement statement regarding the July 22, 2005 closing of plaintiff's mortgage transaction. In her affidavit, Ms. Ellis asserts that "upon information and belief" the First Hatzigeorgiou mortgage was paid off at the time of the closing of plaintiff's mortgage loan, citing the HUD-1 settlement statement, and that, notwithstanding such payoff, no satisfaction or discharge of mortgage has been filed in relation to the First Hatzigeorgiou mortgage.

Plaintiff offers no copies of cancelled checks or paid receipts as proof of payment. The HUD-1 settlement statement itself does not constitute proof of payment of the First Hatzigeorgiou mortgage by plaintiff.

The certification attached to the HUD-1 settlement statement indicates, in fact, that the closing agent "caused or will cause the funds to be disbursed with the statement" (emphasis supplied). The HUD-1 the settlement statement, in addition, makes no mention of the First Hatzigeorgiou mortgage, but rather indicates "Payoff[s]" to: "Wilshire Credit Corp." in the amount of \$256,409.60; Wilshire Credit Corp for an additional payment. in the amount of \$65,068.61; "Nikos D. Andreadis" in the amount of \$200.04; and Nikos D. Andreadis, "as Attorney," in the amount of \$63,471.48.

Plaintiff Option One, furthermore, offers no evidence that payments to Andreadis or Wilshire Credit Corp. were made at the direction of defendant Hatzigeorgiou or that either Andreadis or Wilshire Credit Corp. were assignees of defendant Hatzigeorgiou with respect to the First Hatzigeorgiou mortgage. Option One makes no claim that it demanded a satisfaction or discharge of the First Hatzigeorgiou mortgage from defendant Hatzigeorgiou, Andreadis or Wilshire Credit Corp., and that the demand was refused.

Plaintiff Option One, therefore, has failed to establish entitlement to a default judgment against defendants Hatzigeorgiou and Hill (*cf. Wells Fargo Bank, N.A. v Perry*, 23 Misc 3d 827 [Sup. Ct. Suffolk County 2009] [declaratory judgment action seeking to record a mortgage]).

To the extent that plaintiff Option One seeks to strike the answer of defendant Londono, pursuant to CPLR 3042(d) and 3126(3), for his failure to serve a bill of particulars, he seeks to remedy the lapse by appending a proposed bill of particulars as an exhibit to his opposition papers. One of the problems with Londono's proposed bill of particulars, wholly apart from its skeletal and anorexic substance, is the fact that it is not verified and therefore not in proper form. CPLR 3044, in pertinent part, states that "[i]f a pleading is verified, a subsequent bill of particulars shall also be verified." Since Londono's answer was verified, even though the complaint itself was not verified, Londono's bill of particulars needs to be verified.

The proposed bill of particulars hardly advances the goals of the CPLR judging by defendant Londono's brief, paltry, conclusory, one sentence answers to each of the questions, ignoring the fact that some of the questions had proper subparts. "The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial." (*Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824, 825 [2nd Dept. 2009] [citing cases]). Defendant Londono's proposed and unverified bill of particulars, as a matter of substantive scope, does not measure up to muster.

Defendant Londono's bill of particulars contains general and nonspecific statements in response to plaintiff Option One's demands numbered 4(b), 5(a), and 6(a). Item 4(b), concerning defendant Londono's fourth affirmative defense, seeks the specifics and particulars of Option One's alleged obligation to serve an "acceleration clause." Item 5(a), concerning defendant Londono's fifth affirmative defense, concerning Option One's alleged failure to comply with a condition precedent, seeks to identify the condition precedent. Item 6(a), concerning defendant Londono's first affirmative defense, stating in conclusory form that Option One failed to comply "with the requirements" of the RPAPL, correctly seeks to identify such "requirements."

That branch of plaintiff Option One's motion seeking to strike the answer of defendant Londono is granted only to the extent of directing defendant Londono to serve

a newly verified further bill of particulars as to the aforementioned affirmative defenses, including complete answers with reasonably ample particularity as to plaintiff Option One's demands numbered 4(b), 5(a), and 6(a). Londono shall serve a new verified bill of particulars, containing the specificity required herein, within 10 days of the service of a copy of this order, bearing the stamped receipt by the Clerk, with notice of entry. If a proper verified bill is not served within such time frame, upon letter request, on notice to all parties, the Court will strike Londono's answer.

The foregoing constitutes the decision, order, and opinion of the Court.

Hon. Charles J. Markey
Justice, Supreme Court, Queens County

Dated: Long Island City, New York

July 21, 2009

Appearances:

For the plaintiff: DelBello Donnellan Weingarten Wise & Wiederkehr, by Daniel G. Walsh, Esq., One North Lexington Avenue, White Plains, New York, N.Y. 10601

For defendant Ivan Londono: Anadale Canale, P.C., by Anadale Canale, Esq., 1111 Route 110 [3rd floor], Farmingdale, New York, 11735