

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH

PART

IAS MOTION 32

Justice

X

INDEX NO. 103643/2008

MOTION DATE _____

MOTION SEQ. NO. 006 & 007

THE BANK OF NEW YORK, AS TRUSTEE FOR THE BENEFIT
OF CERTIFICATEHOLDERS, CWALT, INC., ALTERNATIVE
LOAN TRUST 2007-HY4 MORTGAGE PASSTHROUGH
CERTIFICATES, SERIES 2007-HY4,

Plaintiff,

- v -

TERRAPIN INDUSTRIES, LLC, COLIN D. RATH, PAMELA
HARVEY-RATH, NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NATIONAL CITY BANK, BOARD OF MANAGERS OF
VALHALLA II CONDOMINIUM, TERRAPIN DESIGN GROUP, LLC,
KBS SHEAPSHED BAY, LLC and JOHN DOE #1 through JOHN
DOE #10 inclusive the last ten names being fictitious and unknown
to plaintiff, the persons or parties intended being the persons,
tenants, occupants, or corporations, if any, having or claiming an
interest in or lien upon the mortgaged premises described in the
complaint,

Defendants.

DECISION AND ORDER

X

The following papers, numbered 4, were read on this application to/for Summ. Judg. (006)

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	<u>1</u>
Answering Affidavits - Exhibits	No(s)	<u>2,3</u>
Replying	No(s)	<u>4</u>

The following papers, numbered 3, were read on this application to/for Summ. Judg (007)

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	<u>1</u>
Answering Affidavits - Exhibits	No(s)	<u>2</u>
Replying	No(s)	<u>3</u>

Motion Sequence Numbers 006 and 007 are consolidated for disposition. The motion by defendant KBS Sheepshead Bay, LLC ("KBS") for summary judgment dismissing the complaint as against KBS (MS006) is granted. The motion by plaintiff ("BNY") for summary judgment appointing a referee (MS007) is granted in part and denied in part.

Background

This decade-old foreclosure case centers on a priority of mortgage dispute between KBS and BNY. BNY's mortgage is from 2007 and KBS' mortgage is from 2015. Facially, that would mean that BNY's mortgage has priority and is superior to KBS' mortgage. But, for the reasons stated in this Court's decision under Index No. 850121/16 (Mot Seq 004), the Court finds that KBS' mortgage has priority over BNY's mortgage under the doctrine of laches.

The history of this case demonstrates that BNY had no interest in pursuing this action. Although BNY's first motion for summary judgment was denied in February 2009 due to the bankruptcy of defendant Terrapin Industries, LLC ("Terrapin Industries"), the fact is that the bankruptcy had already been dismissed as of January 2009. And BNY did not make another motion for summary judgment or do anything else for *four years*. During that time period, the case was inadvertently marked disposed in March 2012—yet BNY did not make a motion to restore until June 2013. Of course, that motion was denied in October 2013 because BNY failed to meet its prima facie burden to restore the action. Then BNY waited until October 2014 to make a new motion to restore—a motion that BNY later withdrew in February 2015.

And, in 2014, the borrower (Terrapin Industries) successfully brought a case to discharge the mortgage BNY seeks to foreclose because BNY failed to answer. In fact, it took BNY ten months to bring a motion to vacate its default in Terrapin Industries' action. During this time period, KBS entered into a mortgage with defendant Terrapin Design Group LLC ("Terrapin Design") after its due diligence revealed that this case was disposed, the mortgage was discharged and there was no active notice of pendency on the property.

BNY insists it should retain priority over KBS despite the fact that it took over four years to restore this action (from the March 2012 dismissal to the July 2016 order restoring this case to

the active calendar). The doctrine of laches compels this Court to find that KBS' mortgage has priority and to grant KBS' motion for summary judgment dismissing the claims against it. Accordingly, the Court also denies the branch of BNY's motion for summary judgment against KBS.

Standing

"A plaintiff may establish standing in a foreclosure action either by showing assignment of the mortgage note or physical delivery of the note prior to the commencement of the foreclosure action. However, a plaintiff may not do so by means of conclusory boiler plate statements. Nevertheless, if the note is affixed to the summons and complaint at the time the action is commenced, it is unnecessary to give factual details of the delivery to establish that possession was obtained prior to a particular date" (*Bank of New York Mellon v Knowles*, 151 AD3d 596, 596-97, 57 NYS3d 473 [1st Dept 2017] [internal quotations and citations omitted]). "[I]t is the note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose" (*Wells Fargo Bank, N.A. v Lawson Ho-Shing*, 168 AD3d 126, 131, 92 NYS3d 194 [1st Dept 2019]).

Contrary to the arguments raised by defendants Terrapin Design Group, Terrapin Industries and the Raths, the fact is that BNY attached the note to its complaint filed in March 2008 and, therefore, it has standing to prosecute this case although its mortgage is junior to KBS's mortgage.

Accordingly, it is hereby

ORDERED that the motion by KBS Sheepshead Bay, LLC (MS006) for summary judgment is granted and all claims against this defendant are severed and dismissed; and it is further

ORDERED that the motion by plaintiff BNY for ~~summary judgment~~ (MS007) for summary judgment is denied to the extent it seeks that relief against defendant KBS and granted to the extent it seeks summary judgment against the answering defendants and a default judgment against the non-answering defendants; and it is further

ORDERED that the affirmative defenses of defendants Terrapin Industries, LLC, Colin D. Rath and Pamela Harvey-Rath are severed and dismissed; and it is further

ORDERED that Mark McKew, Esq. 1725 York Ave #29A
NY NY 10128 (212) 876-6783 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the

computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that the caption be amended to removing all John Does as defendants and to remove defendant KBS Sheepshead Bay LLC; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE BANK OF NEW YORK, AS TRUSTEE FOR THE
BENEFIT OF CERTIFICATEHOLDERS, CWALT, INC.,
ALTERNATIVE LOAN TRUST 2007-HY4 MORTGAGE
PASSTHROUGH CERTIFICATES, SERIES 2007-HY4,

Plaintiff,

v.

TERRAPIN INDUSTRIES, LLC, COLIN D. RATH,
PAMELA HARVEY-RATH, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NATIONAL
CITY BANK, BOARD OF MANAGERS OF VALHALLA II
CONDOMINIUM, TERRAPIN DESIGN GROUP, LLC,

Defendant(s).
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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: July ¹⁶ 2019 @ 2:15 p.m.

5/13/19
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☐ DENIED

☒
☐
☐
☐

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☒ OTHER

☐ REFERENCE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH