



## **Plaintiff Did Not Demonstrate Standing—No Proof Underlying Debt Was Transferred to the Plaintiff Along with the Mortgage**

The Second Department determined the plaintiff in a mortgage foreclosure proceeding did not demonstrate standing because there was no proof the underlying debt was transferred to the plaintiff along with the mortgage:

Where, as here, standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief... . In a mortgage foreclosure action, “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” ... . “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” ... . “Where a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity” . Here, the evidence submitted by the plaintiff in support of its motion did not demonstrate that the note was physically delivered to it prior to the commencement of the action, and the plaintiff similarly failed to submit a written assignment of the note. [Bank of NY Mellon v Gales, 2014 NY Slip Op 02402, 2nd Dept 4-9-14](#)

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## **Plaintiff Did Not Establish It Was the Lawful Holder of the Note on the Date the Action Was Commenced**

The Second Department determined plaintiff did not demonstrate entitlement to summary judgment because it did not establish it had standing as the lawful holder or assignee of the underlying note. The court explained the applicable law, noting that the assignment of a mortgage without an assignment of the note is a nullity, but the where a note is transferred, the mortgage securing the debt passes as an incident to the note:

Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing to be entitled to relief ... . In a mortgage foreclosure action, a plaintiff has standing where it is both the holder of the subject mortgage and of the underlying note at the time the action is commenced ... . Where a note is transferred, a mortgage securing the debt passes as an incident to the note ... . By contrast, an assignment of a mortgage without assignment of the underlying note or bond is a nullity ... . “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” ... .

Here, the plaintiff failed to demonstrate its prima facie entitlement to judgment as a matter of law because it did not establish that it had standing as the lawful holder or assignee of the subject note on the date it commenced this action... . [MLCFC 2007-9 Mixed Astoria LLC v 36-02 35th Ave Dev LLC, 2014 NY Slip Op 02416, 2nd Dept 4-9-14](#)

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## **Application to Vacate Default Judgment in Tax Foreclosure Proceeding Governed by Two-Year Statute of Limitations (Under the Facts, the One-Month Statute Did Not Apply)/Deed Purporting to Transfer Property from Religious Organization Invalid for Failure to Comply with the Religious Corporation Law/Notice of Tax Foreclosure Sufficient Even Though Actual Owner Not Notified**

The Third Department determined petitioner’s application to set aside a tax foreclosure judgment was timely, but determined the application was properly denied because the notice of the foreclosure proceeding was adequate, even though petitioner, the actual owner of the property, was not notified. Petitioner, a religious organization, had transferred the property by deed to Forbes, a minister, in 1985. Forbes paid property taxes for several years, but when the payments ceased the county moved to foreclose, naming Forbes as the owner. It turned out that the deed to Forbes was invalid because the transfer did not comply with the Religious Corporation Law. The actual owner, petitioner, was not notified of the foreclosure proceedings. In affirming the judgment of foreclosure, the court discussed the appropriate statute of limitations under the facts, the property-transfer requirements of the Religious Corporation Law, and the tax-foreclosure notice requirements:

Initially, Supreme Court erred in determining that petitioner’s application was untimely. Unlike a motion to vacate a default judgment in a tax foreclosure proceeding, which “may not be brought later than one month after entry of the judgment” (RPTL 1131...), a person or entity challenging the validity of a deed transferred in connection with a tax foreclosure proceeding faces a two-year statute of limitations (see RPTL 1137...). As petitioner was not a party to the foreclosure proceeding and now seeks to set aside the judgment on



the basis that respondent failed to provide notice to the rightful owner, the application was timely (see RPTL 1137). The 1985 deed to Forbes was invalid. A religious corporation shall not sell “any of its real property without applying for and obtaining leave of the court” pursuant to N-PCL 511 (Religious Corporations Law § 12 [1]...). Under N-PCL 511 (b), the Attorney General must be notified before any sale may be finalized. Petitioner did not seek court approval in 1985 or thereafter (see Religious Corporations Law § 12 [1], [9]), nor was the Attorney General notified of the transfer of the property. Where court approval is not obtained for the transfer of real property from a religious corporation, the conveyance is invalid ... . Accordingly, the 1985 deed was invalid and Forbes should not have had any legal right to the property. \* \* \* When determining the reasonableness of the taxing authority’s attempts to provide notice to interested parties, the court may take into account the conduct of such parties ... Here, petitioner indicated that it intended to convey the property to Forbes - its then-minister - in 1985 and was only unsuccessful due to their lack of legal knowledge. Additionally, petitioner did not take any action against Forbes to regain title, despite the deed having been filed for nearly 27 years at the time the foreclosure proceeding was commenced. Under the circumstances, including respondent’s provision of proper statutory notice to the owner of record, respondent complied with due process and satisfied its obligation of searching for interested parties, and petitioner has not demonstrated that any additional steps or more exhaustive search was required here... . [Matter of City of Hudson..., 516690, 3rd Dept 2-27-14](#)

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## **Motion to Vacate Pursuant to CPLR 5015 Should Have Been Granted On “Subject Matter Jurisdiction” and “Fraud Upon the Court” Grounds**

In a full-fledged opinion by Justice Centra, the Fourth Department determined Wells Fargo had either perpetrated a fraud upon the court or failed to reveal all the facts to the court which granted a nunc pro tunc order adding a second parcel to a foreclosure action. The Fourth Department noted that Wells Fargo knew the foreclosure action did not relate to the second parcel and therefore knew the nunc pro tunc order purporting merely to correct a mistake should not have been granted:

First, we agree ... that the court ... should have granted the motion to vacate the nunc pro tunc order because the court ... was without subject matter jurisdiction to issue the nunc pro tunc order (see CPLR 5015 [a] [4]). Wells Fargo moved for the nunc pro tunc order pursuant to CPLR 2001, which provides that a “court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.” The court erred in granting the nunc pro tunc motion because Wells Fargo was not seeking to correct a mere ministerial or clerical mistake... . \* \* \*

...[W]e agree ... that the court ... also should have granted the motion to vacate the nunc pro tunc order based on “fraud, misrepresentation, or other misconduct of an adverse party” (CPLR 5015 [a] [3]...). In its nunc pro tunc motion, Wells Fargo asserted that the “common address” of 124-128 East Main Street contained both Parcel No. 1 and Parcel No. 2. Wells Fargo failed to advise the court ..., however, that the metes and bounds descriptions of the two parcels are different. Wells Fargo does not dispute that, “when there is a discrepancy between the street address and the legal description of a piece of real property, the legal description controls” ... . Wells Fargo also failed to advise the court of the second mortgage that encumbered Parcel No. 2, which, as noted earlier, was executed on the same date as the first mortgage. Further, Wells Fargo failed to advise the court that there was a two-family dwelling on Parcel No. 1 and a separate four-family dwelling on Parcel No. 2. Had Wells Fargo made the court aware of those facts, the court may have realized that there was no clerical error in omitting Parcel No. 2 from schedule A. [Wells Fargo Bank NA ... v Podeswik..., 81, 4th Dept 2-14-14](#)

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## **Foreclosure On Both Junior and Senior Mortgages May Result in Unjust Enrichment If the Two Obligations Amount to More than the Fair Market Value**

The Third Department explained the “unjust enrichment” issues raised when a party holds two mortgages on the same property, forecloses on the junior mortgage, purchases the property at the foreclosure sale, and then sues on the senior mortgage:

Where, as here, a holder of two mortgages forecloses on the junior mortgage and purchases the property, the question of whether the senior obligation is recoverable is a matter of equity dependent upon the facts and circumstances of the case (see Restatement [Third] of Property § 8.5, Comment c [2]...). When the sale price and the outstanding amount owed on the senior obligation together equal the fair market value of the property, the land is considered to satisfy the debt. In that case, equity will prevent the mortgagee from suing on the senior obligation and thus receiving a windfall (see Restatement [Third] of Property § 8.5, Comment c [2]...).

If, however, the fair market value of the property is less than the sum of the two obligations, “the mortgagor would be unjustly



enriched if the mortgagee is prevented from recovering on the senior obligation” (Restatement [Third] of Property § 8.5, Comment c [2]). In such a situation “the mortgagee may recover on the senior obligation only the amount by which the sum of the junior and senior obligations exceed the fair market value of the land” (Restatement [Third] of Property § 8.5, Comment c [2]). Here, neither party submitted proof as to the fair market value of the property, and Supreme Court thus had no basis to determine the amount recoverable on the senior note. We remit for that purpose. [TD Bank NA... v Dunbar Tower LLC, 516770, 3rd Dept 12-12-13](#)

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## **Proof of Value of Property For Purposes of Entering a Deficiency Judgment Not Sufficient**

The Second Department determined that the mortgage lender failed to submit adequate proof of the value of the property for purposes of entering a deficiency judgment:

RPAPL 1371(2) permits a mortgage lender to enter a deficiency judgment for the amount owed “less the market value as determined by the court or the sale price of the property whichever shall be the higher.” “The mortgagee has the initial burden to make a prima facie showing of the fair market value of the property as of the foreclosure sale date” ... . An affidavit by a “licensed real estate appraiser setting forth his [or her] opinion as to the fair market value of the premises on the date of the foreclosure sale, and stating in conclusory fashion that his [or her] opinion was based upon his [or her] personal inspection of the subject premises, examination of the neighborhood, a review of sales and rentals of comparable properties, and general economic trends and expenses data,” without describing the subject premises or appending evidence of comparable sales and market date, is not sufficient ... . In the instant case, the plaintiff relied upon such a conclusory affidavit, two exterior photographs of the front and side of the subject premises, and information purportedly indicating the average sale price of properties in the relevant zip code area, without explaining how those average prices related to the appraiser's conclusion that the fair market value of the subject property on the date of the foreclosure sale was \$550,000. The plaintiff's submission was, thus, insufficient to meet its burden of establishing that it was entitled to a deficiency judgment. [Eastern Sav Bank FSB v Brown, 2013 NY Slip Op 08228, 2nd Dept 12-11-13](#)

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## **Purported Lack of Standing Is Not a Jurisdictional Defect/Sua Sponte Dismissal of Complaint Reversed**

In reversing Supreme Court, the Second Department noted that a court's power to dismiss a complaint sua sponte should rarely be used and further noted that a purported lack of standing is not a jurisdictional defect warranting sua sponte dismissal:

The Supreme Court improvidently exercised its discretion in, sua sponte, directing the dismissal of the complaint. “A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal” ... . Here, there were no extraordinary circumstances warranting sua sponte dismissal of the complaint. Moreover, the defendants, having failed to answer the complaint or make pre-answer motions to dismiss the complaint, waived the defense of lack of standing ... . “Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint by the court”... . [Onewest Bank FSB v Fernandez, 2013 NY Slip Op 08233, 2nd Dept 12-11-13](#)

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## **Tax Lien Foreclosure Upheld Despite Alleged Lack of Notice**

The Third Department determined a motion to vacate a tax lien foreclosure was properly denied in the face of claimed lack of notice, finding the motion untimely and finding the statutory notice requirements had been met and the owner had been afforded due process:

Respondent's motion to vacate was untimely as it was brought more than one month after entry of the judgment of foreclosure (see RPTL 1131...). Notably, “the statute of limitations set forth in RPTL 1131 applies even where, as here, the property owner asserts that he or she was not notified of the foreclosure proceeding”... .

“[N]otice shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States postal service within [45] days after being mailed,” and the foreclosing agent is required to seek an alternative mailing address



for the property owner only when both such notices are returned (RPTL 1125 [1] [b] [i] ...). Accordingly, inasmuch as the notice sent by first class mail to respondent at the 8th Avenue address was not returned, such notice was deemed received ..., and “petitioner was not obligated to take additional steps to notify respondent of the foreclosure proceeding”... .

... “[D]ue process does not require actual notice by the property owner, only reasonable efforts to provide notice under the circumstances” ..., and petitioner discharged its obligations in this regard by fulfilling the requirements of RPTL 1125 ... . Finally, we note that “[o]wnership carries responsibilities” ..., which includes an obligation to apprise the tax enforcing officer of a change in address (see RPTL 1125 [1] [d]...). There is nothing in the record to suggest that respondent fulfilled that obligation here. Simply put, “respondent was responsible for protecting his ownership interests and chargeable with notice that failure to pay his taxes could result in foreclosure” ... . [Matter of Foreclosure of Tax Liens by County of Sullivan..., 516658, 3rd Dept 11-27-13](#)

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## Strict Foreclosure and Reforeclosure Actions Not Available Against Easement Holder

The Second Department determined that neither a strict foreclosure action (RPAPL 1352) nor a reforeclosure action (RPAPL 1503) can be brought to extinguish an easement where the easement holder was not named in the foreclosure action:

A purchaser of foreclosed property may, under certain circumstances, commence a strict foreclosure action pursuant to RPAPL 1352 ... . RPAPL 1352 “authorizes the court to issue a judgment that fixes a time period within which any person having a right of redemption or right to foreclose a subordinate lien must act to redeem or begin a foreclosure action” (id.; see RPAPL 1352). If the person with a right of redemption or subordinate lien fails to redeem the property or commence a foreclosure action within the fixed time period, “all title or interest” this person has in or against “such property shall thereby be extinguished and terminated” (RPAPL 1352...).

A purchaser of a foreclosed property may, under certain circumstances, also commence a reforeclosure action pursuant to RPAPL 1503 ... . “When real property has been sold pursuant to a judgment in an action to foreclose a mortgage,” a purchaser of a foreclosed property may maintain a reforeclosure action “to determine the right of any person to set aside such judgment, sale or conveyance or to enforce an equity of redemption or to recover possession of the property, or the right of any junior mortgagee to foreclose a mortgage” (RPAPL 1503). \* \* \*

An easement holder, unlike a mortgagee ... or a tenant ..., does not fall within the class of persons against whom a strict foreclosure or reforeclosure action may be brought (see RPAPL 1352, 1503). An easement is not a lien or a mortgage... . Moreover, an easement holder that is not named in the foreclosure action does not have a right of redemption. An easement holder, unlike a tenant, does not have a possessory interest in the burdened land (...Property § 450; 1 Rasch, *New York Law and Practice of Real Property* § 18.8 [2d ed]). Thus, such actions cannot be maintained against an easement holder. [Bass v D Ragno Realty Corp, 2013 NY Slip Op 07924, 2nd Dept 11-27-13](#)

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## CPLR 3408, Which Requires a Settlement Conference in a Foreclosure Action Involving a Primary Residence, Does Not Apply Where the Mortgage Collateralizes a Personal Guaranty of a Commercial Loan to a Corporation

In a full-fledged opinion by Justice Cohen, the Second Department determined a statute designed to assist homeowners faced with foreclosure on their primary residence (calling for a settlement conference) did not apply where the mortgage collateralizes a personal guaranty of a commercial loan to a corporation:

CPLR 3408 (requiring a settlement conference) is certainly applicable to many residential foreclosure actions. However, CPLR 3408 does not apply to every residential foreclosure action. Indeed, CPLR 3408 is limited to residential foreclosure actions involving home loans as the term “home loan” is defined by RPAPL 1304. As so defined, home loans are those which are made to a natural person and in which the debt incurred is primarily for personal, family, or household purposes (see RPAPL 1304[5][a][ii], [iii]).

The borrower, as defined under the instant term loan agreement and the note, and the entity that is recognized in the guaranty, was [a corporation]. ... The borrower ... was not a natural person (see RPAPL 1304[5][a][ii]).

Further, the debt incurred was the \$230,000 loan given to [the corporation]. The Supreme Court correctly determined that since the purpose of the loan was to purchase machinery and equipment, and to fund other various start-up, closing, and construction costs associated with fashioning a ... store, it was clearly not primarily incurred for personal, family, or household purposes (see RPAPL



1304[5][a][ii]...). [Independence Bank v Valentine, 2013 NY Slip Op 07937, 2nd Dept 11-27-13](#)