

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT.....	1
COUNTER-STATEMENT OF FACTS	9
<u>ARGUMENT</u>	
I. THE LOWER COURT PROPERLY DENIED PLAINTIFF- APPELLANT’S MOTION FOR SUMMARY JUDGMENT	13
A. Plaintiff-Appellant Moved for Summary Judgment on its First and Fifth Causes of Action Only.....	14
B. Plaintiff-Appellant’s Third and Fourth Causes of Action Were Resolved by Stipulation Between the Parties	19
II. THE LOWER COURT PROPERLY GRANTED DEFENDANTS-RESPONDENTS’ CROSS-MOTION FOR SUMMARY JUDGMENT AND DISMISSAL OF THE COMPLAINT.....	20
A. No Genuine Issues of Material Fact Exist Warranting a Trial in this Action	21
B. Discovery Is Not Warranted.....	24
C. Plaintiff-Appellant’s First Cause of Action for Reformation of the Mortgage Fails for Lack of Mutual Mistake.....	27
D. Plaintiff-Appellant’s First Cause of Action for Reformation is Outside the Applicable Statute of Limitations	35
E. Plaintiff-Appellant’s Fifth Cause of Action for a Judgment Declaring that Defendants-Respondents Assumed the Plaintiff-Appellant’s Mortgage Nunc Pro Tunc Fails for Lack of Intent.....	38
F. Plaintiff-Appellant’s Second Cause of Action, Even if Plead Against Defendants-Respondents, Also Fails for Lack of Intent.....	47

III. THE LOWER COURT PROPERLY DENIED PLAINTIFF- APPELLANT’S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT LEIBOVICH.....	48
A. Plaintiff-Appellant Failed to Establish Standing to Commence the Action.....	48
i. Plaintiff-Appellant Failed to Establish Possession of the Note at the Time of Commencement	49
ii. Plaintiff-Appellant Failed to Establish that MERS had Authority to Assign the Mortgage to Plaintiff-Appellant	51
IV. THE LOWER COURT PROPERLY DENIED PLAINTIFF- APPELLANT’S MOTION FOR SUBSTITUTION OF FANNIE MAE AND AMENDMENT OF THE CAPTION	52
V. THE LOWER COURT PROPERLY ADHERED TO ITS DECISION UPON REARGUMENT.....	55
CONCLUSION	64

PRELIMINARY STATEMENT

Plaintiff-Appellant comes before this Court with a disingenuous brief, which is laden with arguments and assertions that were never made before the Lower Court. These arguments and assertions should be ignored and when this Court gets down to the one true issue *sub judice*, i.e. whether Plaintiff-Appellant has sufficiently plead and is entitled to an equitable mortgage, this Court will see that the Lower Court properly held that there is no basis for such a claim on the facts or pleadings herein.

Plaintiff-Appellant's first cause of action for reformation, fifth cause of action for "assumption" of the mortgage and arguably, its second cause of action which seeks a "first priority equitable mortgage", are the only causes of action plead against Pamela Lebhar and Uriel Lebhar (the "Lebhar Defendants"). Plaintiff-Appellant's third and fourth causes of action for equitable subrogation and subordination, respectively, concern the priority of Plaintiff-Appellant's mortgage over a Home Equity Line of Credit (HELOC) in favor of Bank of America, N.A., which issue was clearly resolved by Stipulation of Settlement between those parties (R. 116-17) establishing that Plaintiff-Appellant's Mortgage is enforceable with priority over Bank of America's lien. Accordingly, the Lower Court properly held that Plaintiff-Appellant's third and fourth causes of action were moot (R. 11) and Plaintiff-Appellant's arguments with respect to its third cause of action must fail.

With respect to Plaintiff-Appellant's first cause of action, Plaintiff-Appellant acknowledges that "it would no longer be able to seek reformation based on mutual mistake" because Defendants-Respondents assert that they never had any intention of executing a mortgage in favor of Plaintiff-Appellant. (App. Brief, P. 10). Accordingly, there is no basis for appeal of the dismissal, on summary judgment, of Plaintiff-Appellant's first cause of action. Yet, in an attempt to cloud the issues before this Court, Plaintiff-Appellant lends much of its brief to an argument that it was "intended" that Defendants-Respondents execute said Mortgage. This argument fails immediately by reason that Plaintiff-Appellant acknowledges that no "mutual mistake" was made in this transaction. Tellingly, even in their moving papers before the Lower Court, Plaintiff-Appellant argued only an alleged *unilateral* mistake on the bank's part, not any mistake on the Lebhar Defendants' part, and accordingly its claim for reformation failed on its face. Yet, Plaintiff-Appellant goes on at length about what should have been done by the original lender Flagstar Bank, FSB ("Flagstar Bank"). However, Plaintiff-Appellant fails to support that there was even a *unilateral* mistake by Flagstar Bank.

There was absolutely no evidence placed before the Lower Court establishing that the Lebhar Defendants were aware of Defendant Charli Leibovich's refinance transaction with Flagstar Bank, or that it was the intent of *either* Flagstar Bank, or the

Lebhar Defendants, that the Lebhar Defendants be bound by the subject Mortgage. The Lebhar's Affidavits before the Lower Court stated directly to the contrary. (R. 199-201, 2003-04). Nor was there any evidence placed before the Lower Court that the subject mortgage was "intended to encumber 100%" of the Subject Property, as Plaintiff-Appellant so claims, without merit. The Subject Mortgage executed by Defendant Charli Leibovich ("Leibovich") provides only that Leibovich agreed to be fully responsible therefor. Thus, contrary to Plaintiff-Appellant's statement of facts, the only thing "clear and unequivocal" about the Subject Mortgage is that it called for the signature of Leibovich only and that Flagstar Bank had full knowledge via public record that Leibovich was only a 25% owner of the real property to be encumbered.

Plaintiff-Appellant's attempt to continue to couch Leibovich's signature as a "defect" is also unavailing. Not only does Plaintiff-Appellant openly concede that Defendants-Respondents never intended to execute the Mortgage, but then Plaintiff-Appellant states that "the cause of the [purported] defect has not yet to be [sic] determined". (App. Brief, P. 9)(emphasis added). This is because there is no "defect". The Mortgage and all the closing documents were prepared by Flagstar Bank for Leibovich's signature only. As was detailed in the affidavits of Uriel Lebhar and Pamela Lebhar before the Lower Court, neither Defendant was aware of the subject mortgage transaction and neither was requested to execute the mortgage. (R.

199-201, 2003-04). Thus, neither party had any agreement whatsoever with the Plaintiff-Appellant or the original lender, Flagstar Bank, to enter into any agreement to be bound by a mortgage.

Tellingly, all documents in connection with the subject mortgage (i.e. the Mortgage (R. 68-82), Note (R. 264-65) HUD statement (R. 85), and Mortgage Payoff Affidavit (R. 86)) contain Leibovich's name only. Thus, this is not a case of the mortgage stating on its face that Pamela Lebhar and Uriel Lebhar are "Borrowers" and that they inadvertently failed to sign. There was no "mistake" here. This Mortgage never even contemplated the signatures of Pamela Lebhar and Uriel Lebhar and the Plaintiff-Appellant's attempt to argue that Flagstar Bank would have never agreed to such a mortgage is completely unsupported by any facts and is totally unavailing. The only affidavit submitted by Plaintiff-Appellant on the motions before the Lower Court were by a Lisa Lubbess (R. 158-166, 227-231), as "attorney in fact" for Fannie Mae (which is the purported current mortgage holder twice removed and was never even made a party to this action by reason of lack of standing) and accordingly, as the Lower Court properly determined, Ms. Lubbess had no personal knowledge of the loan transaction that took place with Flagstar Bank (Fannie Mae's purported assignor twice removed) twelve (12) years prior to her affidavit. Accordingly, it was properly determined by the Lower Court that "the evidence is

clear that the original mortgagee, Flagstar, *did* agree to disburse the loan funds, with the full knowledge that five (5) months prior thereto the property was deeded to additional owners." (R. 16).

Even more telling, Leibovich is listed on the subject mortgage as "CHARLI LEIBOVICH, MARRIED" (R. 69) and thus Flagstar Bank, the original mortgagee, was clearly aware of his marital status with Defendant-Respondent Pamela Lebhar who was clearly an owner of the property as evidenced by the deed recorded five (5) months earlier. (R. 65). Accordingly, not only does Plaintiff-Appellant concede that the Defendants-Respondents never "intended" to execute, or be bound by, the Flagstar Bank Mortgage, but there similarly is no basis for the Plaintiff-Appellant to argue that Flagstar Bank even "intended" that the Lebhar Defendants be bound thereby.

Thus, the evidence before the Lower Court established that there was only person who it was ever contemplated would execute the Mortgage, and the Note (tellingly no copy of Note was annexed to the Plaintiff-Appellant's moving papers before the Lower Court), and that was Defendant Leibovich, who apparently did so without the authorization of or knowledge of Pamela Lebhar and Uriel Lebhar. (R. 199-201, 2003-04). Accordingly, this Mortgage should never have even been executed by Leibovich or permitted to encumber the land owned by the Lebhar

Defendants and the Plaintiff-Appellant's attempt to hold the Lebhar Defendants accountable for same is without merit.

The aforementioned lack of intent on the part of both the Lebhar Defendants and Flagstar Bank is what similarly causes Plaintiff-Appellant's Second and Fifth Causes of Action to fail. The Lower Court did not err in dismissing on this ground, or in adhering to its' original Decision upon reargument. Contrary to the Plaintiff-Appellant's unsupported contention otherwise, intent *is* a required element to establish an equitable mortgage. It is simply not enough that the refinance loan proceeds from Flagstar Bank may have been used to satisfy the original purchase money mortgage of First Financial Equities, Inc. Both loans were executed *only* by Leibovich. Accordingly, even *if* Plaintiff-Appellant could "stand in the shoes" of the original mortgagee, First Financial Equities, the *only* party who agreed to be bound by *both* mortgages on the subject property was Leibovich.

Finally, Plaintiff-Appellant's plea for discovery has no merit. At no point in Plaintiff-Appellant's motion for summary judgment, or in opposition to Defendants-Respondents cross-motion, or even on Plaintiff-Appellant's motion to reargue, did the Plaintiff-Appellant argue that there were any genuine issues of material fact warranting a trial or that Plaintiff-Appellant was otherwise entitled to discovery in this action. Accordingly, Plaintiff-Appellant's plea should be ignored.

Notwithstanding the foregoing, it was the Plaintiff-Appellant who *chose* to move for summary judgment against the Lebhar Defendants in this action and only then did the Lebhar Defendants cross-move for similar relief. Had the Plaintiff-Appellant wanted or needed to engage in discovery in this action it certainly had the opportunity to do so in the eleven (11) months between the filing of the Lebhar Defendants' Answer (R. 118) and the filing of Plaintiff-Appellant's motion for summary judgment (R.39). Plaintiff-Appellant did not serve a single demand during this period. Moreover, no Note of Issue had ever been filed in the action and accordingly, Plaintiff-Appellant was not under any time constraint to so move. Thus, Plaintiff-Appellant cannot claim in hindsight that it should have engaged in discovery when it was Plaintiff-Appellant who chose this path. Plaintiff-Appellant cannot now claim it was deprived when it had all the opportunity to engage in discovery. It is only now that Plaintiff-Appellant has lost on the Lebhar Defendants' cross-motion that it complains it should have taken more time.

The examples offered by Plaintiff-Appellant in a last ditch attempt at discovery to revive its equitable mortgage claim, i.e. equitable subrogation based upon "unjust enrichment" or by payments allegedly made toward the mortgage, are claims which are not plead in Plaintiff-Appellant's Complaint and were not raised before the Lower Court. Again, Plaintiff-Appellant's Monday night quarterbacking is not availing. The

only allegation in the Complaint and the only argument set forth before the Lower Court was that the Lebhar Defendants should be liable for the subject mortgage simply because they reside(d) at the subject premises and that the subject mortgage paid off the original purchase money mortgage (also executed only by Leibovich).

Accordingly, by granting the Defendants-Respondents cross-motion, the Lower Court did not wrongly deprive Plaintiff-Appellant the full and fair opportunity to litigate its claims - Plaintiff-Appellant never even argued it had not been given a full and fair opportunity and further, Plaintiff-Appellant simply failed to establish any facts to sustain their alleged claims. Accordingly, dismissal of the Complaint was proper.

COUNTER-STATEMENT OF FACTS

This matter arises out of a certain Mortgage dated May 2, 2003, given by Flagstar Bank, FSB to Defendant Charli Leibovich (“Leibovich”) and executed by Leibovich only¹. (R. 69). Leibovich is the former spouse of Defendant-Respondent, Pamela Lebhar. Uriel Lebhar is the father of Pamela Lebhar. Defendant Leibovich, who after execution of the subject mortgage left the United States and moved to Israel, is in default in this action. (R. 144, 201, 204).

Prior to the subject mortgage being taken, and on or about June 12, 2002, Leibovich transferred the subject property from himself to himself and Pamela Lebhar (50%) and Uriel Lebhar (50%) on. This deed was recorded on January 14, 2003 and had been of record for five (5) months at the time that Flagstar Bank gave the subject mortgage. (R. 65).

Plaintiff-Appellant’s action seeks two (2) causes of action against the Lebhar Defendants: (1) reformation of the subject mortgage to include the Lebhar Defendants’ signatures, and (2) an equitable lien upon the subject premises.

Flagstar Bank, FSB, never requested that either Pamela Lebhar or Uriel Lebhar be a signatory to the subject Mortgage, or the Note for that matter. (R. 199, 204). The

¹ Prior to the subject mortgage being given, there was a mortgage on the subject premises also taken solely by Charli Leibovich with First Financial Equities on or about June 12, 2002. (R. 144).

Lebhar Defendants were further never advised by Leibovich or by Flagstar Bank that the original mortgage on the property with First Financial Equities (also held only by Leibovich) was purportedly being refinanced. (R. 199, 204). No loan application nor a commitment letter naming the Lebhar Defendants was offered.

It was never the Lebhar Defendants' intention to execute the subject mortgage or to be bound thereby. (R. 199, 203). Neither party had any agreement whatsoever (or even contact) with Flagstar Bank to enter into any agreement to have the subject property encumbered by the subject mortgage.

All documents in connection with the subject mortgage (i.e. the Mortgage (R. 68-82), Note (R. 264-65) HUD statement (R. 85), and Mortgage Payoff Affidavit (R. 86)) contain Leibovich's name only. This is not a case of the mortgage stating on its face that Pamela Lebhar and Uriel Lebhar are "Borrowers" and that they inadvertently failed to sign. There was no "mistake" here. Even more telling, Leibovich is listed on the subject mortgage as "CHARLI LEIBOVICH, MARRIED" (R. 69) and thus Flagstar Bank was clearly aware of his marital status with Defendant-Respondent Pamela Lebhar who was clearly an owner of the property as evidenced by the deed recorded five (5) months earlier. (R. 65).

The only affidavit submitted by Plaintiff-Appellant on the motions before the Lower Court were by a Lisa Lubbess (R. 158-166, 227-231), as "attorney in fact" for

Fannie Mae (which is the purported current mortgage holder twice removed and was never even made a party to this action by reason of lack of standing). Ms. Lubbers had no personal knowledge of the loan transaction that took place with Flagstar Bank (Fannie Mae's purported assignor twice removed) twelve (12) years prior to her affidavit.

Subsequent to execution of the subject mortgage, said mortgage was purportedly assigned via two (2) assignments, ultimately to the Plaintiff-Appellant herein. The first assignment, from Flagstar Bank to MERS, is alleged to have taken place on or about June 8, 2004. (R. 87). The second assignment, from MERS to the Plaintiff-Appellant herein, is alleged to have taken place on or about March 1, 2012.² (R. 90).

The subject assignment from MERS to the Plaintiff-Appellant is not supported by any proof that the Note was also assigned and transferred along with the subject mortgage. Accordingly, there is no evidence that the Plaintiff-Appellant, JP Morgan Chase, held the Note at the relevant time, i.e. prior to the commencement of the foreclosure action on November 26, 2012 . (R. 36).

² The Mortgage was purportedly assigned a third time from the Plaintiff-Appellant herein to Fannie Mae on or about September 23, 2014. (R. 183).

Furthermore, no evidence has been offered by Plaintiff-Appellant that MERS, as "agent" under the subject mortgage, even had the authority to effectuate the purported assignment to the Plaintiff-Appellant herein.

On November 24, 2015, the Lower Court determined upon the Plaintiff's motion for summary judgment that the Plaintiff failed to establish a *prima facie* cause on its claims against the Lebhar Defendants and further failed to establish standing sufficient to award a default judgment against Defendant Leibovich. The Lower Court further determined, on Defendants-Respondents' cross-motion for summary judgment, that Defendants-Respondents had established a *prima facie* right to summary judgment in their favor dismissing the Complaint and that Plaintiff-Appellant failed to offer any genuine issues of material fact warranting a trial.

On March 28, 2016, on Plaintiff's motion to reargue only its own motion for summary judgment, the Lower Court adhered to its November 24, 2015 Decision.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT

The Lower Court's reasoning in denying Plaintiff-Appellant's Motion for Summary Judgment was not that genuine issues of material fact existed (neither party ever argued that such issues of fact existed) but rather that Plaintiff-Appellant failed to make a *prima facie* showing of entitlement to judgment as a matter of law. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985).

Plaintiff-Appellant was unable to meet the standard required for judgment in its favor, irrespective of the sufficiency of Defendants-Respondents' opposition to Plaintiff-Appellant's motion. See id. Specifically, Plaintiff-Appellant was unable to establish a mutual mistake warranting reformation, or the requisite intent required to establish an equitable mortgage (as more fully discussed in Points II(E) and II(F), *infra*). By reason that Plaintiff-Appellant failed to establish its *prima facie* case, the burden never shifted to Defendants-Respondents to present evidentiary proof establishing the existence of a material fact requiring a trial and summary judgment was properly denied. See id.

The Lower Court further determined that, "inasmuch as plaintiff was relying upon the affidavits of Lisa Lubbers ("Lubbers") – the attorney in fact for Fannie Mae,

the new assignee and the proposed plaintiff (not the attorney in fact for MERS or the plaintiff) – such reliance was misplaced and could not form the basis for either summary judgment or a default judgment. Specifically, th[e] [Lower] Court noted that Lubess averred that she is the attorney in fact for Fannie Mae; *i.e.*, by her own admissions, she is the attorney in fact for the third assignee of the Subject Mortgage – having purportedly taken assignment in September 2014, post commencement of this action. As a result, it is evident that she did not, and could not, have any had any personal knowledge of the assignment of either the mortgage or the note from MERS to plaintiff.” (R. 37).

A. Plaintiff-Appellant Moved for Summary Judgment on its First and Fifth Causes of Action Only

Plaintiff-Appellant moved for summary judgment before the Lower Court against the Lebhar Defendants based upon two arguments only: (1) Plaintiff is entitled to summary judgment on its first cause of action seeking reformation of the Plaintiff's Mortgage (R. 148-49, 212); and (2) Plaintiff is entitled to summary judgment on its fifth cause of action seeking an equitable mortgage (R. 150-52, 213-16). The Lower Court therefore understood that "[i]n bringing this suit, plaintiff assert[ed] five (5) causes of action - only two (2) of which (the first and the fifth) [we]re asserted as against the individual defendants Pamela Lebhar and Uriel Lebhar,