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U.S. Bank Natl. Assn. v Bressler
2011 NY Slip Op 52183(U)
Decided on December 7, 2011
Supreme Court, Kings County
Silber, J.
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Decided on December 7, 2011

Supreme Court, Kings County

**U.S. Bank National Association, AS TRUSTEE FOR SG
MORTGAGE SECURITIES ASSET BACKED CERTIFICATES,
SERIES 2006-FRE2, Plaintiff,**

against

Alan Bressler, CCU LLC, MERS, INC. ET AL, Defendants.

33920/08

Debra Silber, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment and for the appointment of a Referee to compute in this foreclosure action, and defendant's cross-motion to dismiss.

PapersNumbered

Notice of Motion and Exhibits Annexed1-12

Cross-motion and Exhibits Annexed13- 20

Answering Affidavits21-30

Reply Affidavits

Other:

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff's motion for summary judgment and the appointment of a referee to compute in this foreclosure action concerning 1477 East 32nd Street, Brooklyn, NY, 11234, Block 7694, Lot 85, is denied and defendant mortgagor's motion to dismiss the complaint for lack of standing is granted, for the reasons set forth herein.

Defendant Alan Bressler alleges in his Answer to the Complaint that the plaintiff lacks standing to bring this action. In response to the plaintiff's motion for summary judgment, defendant cross moves to dismiss the foreclosure action on the grounds that plaintiff lacks standing to bring this action. The court finds that defendant is correct, and as such, the action must be dismissed.

The mortgage in question was issued by Fremont Investment and Loan on May 4, 2006. The loan states "for purposes of recording, MERS is the mortgagee of record." The tortured history of MERS is described in [Bank of NY v. Silverberg, 2011 NY Slip Op 5002, 86 AD3d 274](#) (2nd Dept), and need not be repeated. On December 18, 2008, an Assignment of Mortgage was executed, and subsequently recorded, which assigns the mortgage and not the note, and assigns it from MERS to plaintiff. First, the assignment of a mortgage without the note is defective as the transfer of the mortgage without the debt is a nullity. In a decision citing *Silverberg*, the court said "an assignment of the mortgage without assignment of the underlying note or bond is a nullity" *Citimortgage, Inc. v Stosel*, 2011 NY Slip Op 8319 (2nd Dept) citing *U.S. Bank, N.A. v [*2] Collymore*, 68 AD3d at 754; see *Bank of NY v Silverberg*, 86 AD3d 274, 280, 926 N.Y.S.2d 532.

Secondly, an assignment from MERS to plaintiff is defective, as MERS had no right or authority to assign the mortgage or the note. *Bank of NY v Silverberg, supra*. "The plaintiff, which merely stepped into the shoes of MERS, its assignor, and gained only that to which its

assignor was entitled . . . did not acquire the power to foreclose by way of the

. . . assignment." *Id.*

It must also be noted that not only did MERS lack the power and authority to execute the assignment on behalf of Fremont Investment and Loan on December 18, 2008, but Fremont did not exist any longer on that date, as it was first subjected to a cease and desist order from the FDIC and then went into Bankruptcy. Then, its assets were apparently sold sometime in 2010 in a Chapter 11 Bankruptcy proceeding, which started in the summer of 2008, to Signature Group Holdings Inc. [\[FN1\]](#)

Further, it must be noted that the execution of an Assignment of Mortgage by MERS is barred by the Settlement Agreement between the US Attorney's Office on behalf of the United States of America and the Office of Steven J. Baum P.C. and Pillar Processing, LLC, dated October 6, 2011, which states at paragraph 14 that "Baum shall no longer permit anyone employed by or contracted by Baum to execute any assignment of a mortgage as an officer, director, employee, agent or other representative of MERSCORP, Inc., and/or Mortgage Electronic Registration Systems, Inc." The office of Mr. Baum was the attorney for the plaintiff when this matter was commenced, the assignment at issue is stamped "Pillar Processing LLC" and is signed on behalf of MERS by Elpiniki M. Bechakas, an attorney in the office of Steven J. Baum, according to the public internet attorney registration website maintained by the State of New York.

To the extent that plaintiff's counsel opposes the defendant's motion to dismiss with various affirmations of counsel, including one that states that the Note was indeed also assigned, and annexes (Exhibit B) a photocopy of a document alleged to be an assignment of the note, which is merely a blank piece of paper that states "Pay to the order of US Bank National Association as Trustee, without recourse," and is undated and signed by "Michael Koch, Vice President, Fremont Investment and Loan," this is insufficient. Ms. Jones, Vice President for Loan Documentation for Wells Fargo Bank N.A., states in her affidavit (Paragraph 5) "the Note was endorsed and was physically delivered to Wells Fargo/ASC as servicing agent and custodian for US Bank prior to the commencement of this action . . . Thus, Wells Fargo's records specifically reflect that, it was in physical possession of the endorsed note prior to the commencement of this action." The language in the affidavit indicates that the loan was assigned and transferred to plaintiff while Fremont Investment & Loan was still in existence, in July of 2006, but this is the only indication of this fact, and does not indicate delivery to plaintiff, but merely alleging

delivery to plaintiff's agent for servicing without any supporting documentation. Ms Jones provides no date of the alleged delivery, and as discussed above, at the time of the alleged delivery, Fremont may not have existed, or may have been subject to the restrictions on transfer in the proceedings in Bankruptcy Court, or may have been subject to the FDIC's cease [*3]and desist order. This cannot be ascertained without a date.

The affirmation of counsel that indicates that the current loan servicer has confirmed that the information in the complaint is accurate is also insufficient, as there is no indication that the alleged servicer is actually the servicer for this loan. The pooling and servicing agreement is between plaintiff and the servicer. There is nothing in the papers from Signature Group Holdings, Inc., the entity that now appears to own the Note and Mortgage, which confirms that they too have retained Wells Fargo as servicer for this loan.

In conclusion, plaintiff has failed to make out a prima facie case for summary judgment due to the defects in the documentation in their motion, described above. The defendant has made out a prima facie case for dismissal on the grounds that plaintiff lacked standing at the time the action was commenced, and may in fact still lack standing, which plaintiff has not overcome with any documentation, in admissible form or not, to prevent dismissal of the complaint.

This shall constitute the Decision and Order of the Court.

Dated: December 7, 2011

E N T E R :

Hon. Debra Silber A.J.S.C.

Footnotes

Footnote 1: <http://nationalmortgageprofessional.com/news18108/former-sub-prime-lender-fremont-exits-bankruptcy-and-re-emerges-signature-group-holdings>

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