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PNMAC Mtge. CO, L.L.C. v Friedman
2012 NY Slip Op 50619(U)
Decided on March 21, 2012
Supreme Court, Richmond County
Aliotta, J.
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Decided on March 21, 2012

Supreme Court, Richmond County

<p style="text-align:center">PNMAC Mortgage CO, L.L.C., Plaintiff,</p> <p style="text-align:center">against</p> <p>Eva Friedman, JACOB FRANKFURTER, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and "JOHN DOE" and "JANE DOE", the last two names being fictitious, said parties intended being tenants or occupants, if any, having or claiming an interest in, or lien upon the premises described in the complaint, Defendants.</p>
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130486/11

Thomas P. Aliotta, J.

The following papers were marked fully submitted on the 19th day of January, 2012:

Pages

Numbered

Notice of Motion to Dismiss

by Defendants Eva Friedman and Jacob Frankfurter,

with Supporting Papers, Exhibits and Memorandum of Law

(dated September 1, 2011).....1

Affirmation in Opposition

by Plaintiff, with Supporting Papers and Exhibits

(dated November 8, 2011).....2

Affirmation in Reply

(dated December 12, 2011).....3

Upon the foregoing papers, the motion is granted and the complaint is dismissed.

This is an action to foreclose a mortgage in which plaintiff PNMAC Mortgage Co., LLC. (hereinafter "plaintiff") alleges that defendants Eva Friedman and Jacob Frankfurter (hereinafter "defendants") are in default as a result of their having failed to make the required payments since June 1, 2008. To the extent relevant, defendants executed a mortgage in favor of nonparty Mortgage Electronic Registration Systems, Inc (hereinafter "MERS") as nominee for American Brokers Conduit (hereinafter "ABC") as security for a note in the principal sum of \$440,000 given to fund their purchase of the premises known as 502 Weser Avenue on Staten Island (*see* Defendants' Exhibit "C"). Both the mortgage and an "Interest First Adjustable Rate Note" (hereinafter "note") in favor of ABC were executed on August 29, 2005 (*id.*).

It is undisputed that the above note was thereafter endorsed to nonparty Wells Fargo Bank, NA (hereinafter "Wells Fargo"). However, plaintiff contends that this endorsement

"was erroneous", and that the note in question either was never delivered or was returned to ABC (*see* Affirmation of Daniel H. Richland, Esq., para 10). Insofar as it appears, the note was subsequently endorsed "en [*2]blanc by allonge" and physically delivered to nonparty CitiMortgages, Inc. (*id.* at 11), which acquired ABC's interest in the subject mortgage via assignment by MERS on behalf of ABC on January 27, 2009 (*id.* at 12; *see* Plaintiff's Exhibit "B"). Following these transfers, MERS sought to foreclose on the subject mortgage, but its action was dismissed with prejudice, as it was the holder of neither the note or mortgage at the time the action was commenced. [\[FN1\]](#) The ensuing order of dismissal, entered on August 4, 2010, also directed the County Clerk to cancel the notice of pendency (*see* Plaintiff's Exhibit "C"). CitiMortgage, Inc. subsequently assigned its rights under the above mortgage to plaintiff on March 15, 2011 (*see* Plaintiff's Exhibit "B"), which commenced the instant foreclosure action on or about June 21, 2011 (*see* Defendants' Exhibit "A").

In a pre-answer motion to dismiss the complaint, defendants maintain, *inter alia*, (1) that plaintiff lacks standing; (2) the action is barred under the doctrines of collateral estoppel and/or res judicata; and (3) the complaint fails to state a cause of action (*see* CPLR 3211[a] [3], [5], [7]). In addition, defendants seek an order directing the County Clerk to cancel the notice of pendency and to enter an order pursuant to CPLR 6514(a) declaring the mortgage to be unenforceable because "it has become bifurcated from the note".

A prima facie case in foreclosure is established by the mortgagee's production of the mortgage, the unpaid note and evidence of the mortgagor's default. However, where, as here, a plaintiff's standing has been placed in issue, it bears the initial burden of proving same before it is entitled to any relief (*see Citimortgage, Inc. v. Stosel*, 89 AD3d 887 [2nd Dept 2011]).

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is the holder or assignee of both the mortgage and underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (*id.* at 888 [internal quotation marks omitted]). While the mortgage passes with the debt as an inseparable incident thereof (*see US Bank NA v. Sharif*, 89 AD3d 723, 725 [2nd Dept 2011]), the reverse is not true, *i.e.*, an assignment of the mortgage without the underlying note is a nullity (*id.*, *see Citimortgage, Inc. v. Stosel*, 89 AD3d at 888).

In the instant case, plaintiff asserts its ownership of the note by claiming that the erroneous endorsement to nonparty Wells Fargo was properly voided when the endorser, ABC, subsequently added an "allonge endorsed en blanc" while in possession of the note (*see* Affirmation of Daniel H. Richland, Esq., paras 23-25).^[FN2] The "allonge" submitted by plaintiff provides that "[t]his Note Allonge is attached to and made a part of the Note, for the purpose of Noteholder Endorsement to evidence a transfer of Interest". It names "American Brokers Conduit" as the originator and is made payable to "to the Order of Without Recourse American Brokers Conduit by: Roger Kistler, Assistant Treasurer" (*see* Plaintiff's Exhibit "A"). The document is undated, but must have been added after the erroneous endorsement to Wells Fargo. According to plaintiff, this endorsement was sufficient under Uniform Commercial Code ("UCC") §3-208, which provides, in relevant part, that "[w]here an instrument is returned to or reacquired by a prior party he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument".

Nevertheless, there is no proof in the papers presently before the Court as to *when* the subject note was negotiated or transferred to plaintiff. As a result of this failure to establish that it was the [*3]lawful holder of both the note (whether by delivery or assignment) and mortgage prior to the commencement of this action, plaintiff has failed to sustain its burden of demonstrating its standing to commence this foreclosure action (*see US Bank NA v. Sharif*, 89 AD3d at 725; [Deutsche Bank Natl Trust Co v. Barnett](#), 88 AD3d 636, 637-638 [2nd Dept 2011]). Accordingly, defendants' motion to dismiss is granted.

So, too, is that branch of defendants' motion seeking to cancel the notice of pendency. In this regard, since the matter does not appear to involve issues of faulty service of a summons, bad faith, or any of the other grounds enumerated in CPLR 6514(a), (b) (*see generally Lessard Architectural Group, Inc., PC v. X & Y Dev Group, LLC*, 88 AD3d 768 [2nd Dept 2011]; [Deans v. Sorid](#), 56 AD3d 417 [2nd Dept 2008]), the notice of pendency will be cancelled in the exercise of the inherent power of the Court (*see generally Ewart v. Ewart*, 78 AD3d 992 [2nd Dept 2010]; [Coleman v. Coker](#), 66 AD3d 812 [2nd Dept 2009]); [Congel v. Malfitano](#), 61 AD3d 807 [2nd Dept 2009]).

The action being dismissed for lack of standing, there is no occasion for the Court to consider any further issue.

Accordingly, it is

ORDERED that the motion to dismiss is granted, without prejudice; and it is further

ORDERED that the complaint and any cross claims are dismissed; and it is further

ORDERED that the Clerk is directed to cancel the Notice of Pendency filed in connection herewith and mark his records accordingly.

ENTER,

/s/ Hon. Thomas P. Aliotta_____

J.S.C.

DATED: March 21, 2012

Footnotes

Footnote 1: See *Mortgage Electronic Registration Systems, Inc. as Nominee for American Brokers Conduit v. Eva Friedman, Jacob Frankfurter, et al.*, Index No. 131345/2009.

Footnote 2: UCC §3-204(2) provides that "An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed."

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