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New York Mtge. Trust, Inc. v Dasedemir
2012 NY Slip Op 52186(U)
Decided on November 30, 2012
Supreme Court, Kings County
Schack, J.
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Decided on November 30, 2012

Supreme Court, Kings County

New York Mortgage Trust, Inc., Plaintiff,
against
Adem Dasedemir, NURTEN DASDEMIR, et. al., Defendants.

18194/11

Plaintiff

Deutsch & Schneider, LLP

Glendale NY

Arthur M. Schack, J.

In this mortgage foreclosure action, for the premises located at 75 West End Avenue,

Brooklyn, New York (Block 8726, Lot 57, County of Kings), plaintiff NEW YORK MORTGAGE TRUST, INC. (NYMT), moves, upon the default of defendants, for an order of reference and related relief. The instant motion is denied without prejudice, with leave to renew within sixty (60) days of this decision and order, by providing the Court with: (1) written proof of the grant of authority from the original mortgagee, NEW YORK MORTGAGE COMPANY, LLC (NYMC) to its nominee, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), to assign the subject mortgage and note to plaintiff NYM; and, (2) an affidavit from the conflicted Nathan Reese, a possible robo-signer in this action, explaining why he acted as both assignor and assignee of the subject mortgage and note in the instant action.

Mr. Reese, on July 7, 2011, assigned the subject mortgage and note from MERS, as [*2] nominee for NYMC, to assignee NYMT, as Vice President of MERS. Then, 27 days later, on August 3, 2011, Mr. Reese executed the verification to the instant complaint, stating "I am the VICE PRESIDENT of the plaintiff [NYMT] in the within action." Further, Mr. Reese, on October 11, 2011, executed the affidavit of amount due for an order of reference in the instant action, as Vice President of NYMT. Also, Mr. Reese executed the MERS assignment, the complaint verification and the affidavit of amount due before the same New York County Notary Public, Monica Mendoza.

Moreover, Mr. Reese, on August 11, 2011, before another notary public, executed the affidavit attached to the affirmation of plaintiff's counsel, pursuant to the Chief Administrative Judge's Administrative Order 548/10, as amended by Administrative Order 431/11, requiring an affirmation by plaintiff's counsel that counsel has communicated with a representative of plaintiff who personally reviewed the documents and records in the action for factual accuracy and confirmed their accuracy. AO 431/11 and its predecessor, AO 548/10, were promulgated to stop numerous foreclosure action problems with respect to standing, faulty notarizations and "robo-signing." Plaintiff's counsel affirmed, on August 22, 2011, that based upon his conversations with Mr. Reese, "as well as upon my own inspection and other reasonable inquiry under the Circumstances . . . the Summons, complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law." In ¶ 6 of the verified complaint, plaintiff's counsel falsely states, "[t]hat at the time this proceeding is commenced, plaintiff is the holder and owner of the subject mortgage and note."

However, Nathan Reese's assignment of the subject mortgage and note to NYMT, for MERS, as nominee for NYMC, in the instant foreclosure action is without legal authority. Therefore, plaintiff NYMT could not be the holder of the subject mortgage and note when the action commenced. Thus, plaintiff NYMT lacked standing to commence the instant foreclosure action. The instant motion for an order of reference and related relief, with a defective MERS assignment to plaintiff NYMT, is denied without prejudice with leave to renew within sixty (60) days if plaintiff can demonstrate how MERS, as nominee for NYMC, had authority to assign the subject mortgage and note to plaintiff NYMT. Mr. Reese's conflicted activities and the false affirmation of plaintiff's counsel pervert the purpose of Administrative Order 548/10, as amended by Administrative Order 431/11.

Background

The DASDEMIR defendants, on February 6, 2007, borrowed \$673,000.00 from NYMC and executed a mortgage and note for that amount. In the subject mortgage it states that NYMC is the "lender" and MERS "is a separate corporation that is acting solely as a nominee for Lender" and "FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD." The subject note states that NYMC is the "Lender" and the "Note Holder" is "[t]he Lender or anyone who takes this Note by transfer." MERS, as nominee for NYMC, recorded the subject mortgage and note on March 8, 2007, in the Office of the City Register of the City of New York, at CRFN 2007000126475. The DASDEMIR defendants allegedly defaulted in their mortgage loan payment on November 1, 2010

Subsequently, MERS, as nominee for NYMC, assigned the instant nonperforming mortgage and note to NYMT, on July 7, 2011, with Nathan Reese executing the assignment as Vice President of MERS. This assignment was recorded in the Office of the City Register of the [*3]City of New York, on July 26, 2011, at CRFN 20011000263593. However, there is no evidence that MERS, as NYMC's nominee, was authorized by NYMC, its principal, to assign the subject DASDEMIR mortgage and note to plaintiff NYMT.

Plaintiff NYMT commenced the instant foreclosure action on August 10, 2011 by filing with the Kings County Clerk's Office the summons and complaint. Then, plaintiff NYMT filed the notice of pendency on August 23, 2011. On October 19, 2011, plaintiff NYMT filed the instant motion for an order of reference. As noted above, attached to plaintiff NYMT's moving papers is the October 11, 2011-affidavit of amount due by Nathan Reese, in which he

claims to be Vice President of plaintiff NYMT.

Further, the Court needs to address questions about the employment status of the conflicted Mr. Reese. According to p. 18 of plaintiff NYMT's April 4, 2012-proxy statement, filed with the U.S. Securities and Exchange Commission, pursuant to § 14 (a) of the Securities Exchange Act of 1934, "Nathan R. Reese is our Vice President and Secretary. Mr. Reese was named Vice President of our Company in March 2007 and Secretary effective January 1, 2008 . . . In his capacity as Vice President, Mr. Reese manages company operations . . . and is responsible for . . . foreclosure and delinquency monitoring." Yet, Mr. Reese, as MERS' Vice President, assigned the subject mortgage and note to assignee plaintiff NYMT, for whom he is in charge of foreclosures. Plaintiff NYMT, despite Mr. Reese's conflicted employment, according to p. 21 of the above-named proxy statement, rewarded Mr. Reese with compensation packages of \$322,505 in 2010 and \$328,948 in 2011.

The conflicted Mr. Reese must explain to the Court why he acted as both assignor and assignee in the instant action. The Court notes that plaintiff NYMT, according to p. 21 of the above-named proxy statement, included in the compensation rewarded to the conflicted Mr. Reese in 2011 a \$100,000 cash bonus and a restricted stock award valued at \$8,821.00, for his "individual performance and the Company's performance in 2011."

Discussion

Real Property Actions and Proceedings Law (RPAPL) § 1321 allows the Court in a foreclosure action, upon the default of defendant or defendant's admission of mortgage payment arrears, to appoint a referee "to compute the amount due to the plaintiff." Plaintiff NYMT's motion application for an order of reference is a preliminary step to obtaining a default judgment of foreclosure and sale. (*Home Sav. Of Am., F.A. v Gkanios*, 230 AD2d 770 [2d Dept 1996]).

However, the instant motion for an order of reference and related relief is denied. Plaintiff NYMT lacks standing. MERS lacks authority to assign the subject DASDEMIR mortgage and note to plaintiff NYMT. Further, there is no evidence presented that MERS physically possessed the DASDEMIR note. Under the terms of the DASDEMIR note, NYMC, not MERS, is the "Note Holder." As described above, the DASDEMIR note defines the "Note Holder" as the "[t]he Lender or anyone who takes this Note by transfer."

There is no power of attorney recorded or presented to the Court authorizing MERS, as nominee of NYMC, to transfer the DASDEMIR mortgage and note. Real Property Law (RPL) § 254 (9) states:

Power of attorney to assignee. The word "assign" or other words of assignment, when contained in an assignment of a mortgage and bond or mortgage and note, must be construed as having included in their [*4] meaning that the *assignor does thereby make, constitute and appoint the assignee the true and lawful attorney, irrevocable, of the assignor, in the name of the assignor, or otherwise, but at the proper costs and charges of the assignee, to have, use and take all lawful ways and means for the recovery of the money and interest secured by the said mortgage and bond or mortgage and note, and in case of payment to discharge the same as fully as the assignor might or could do if the assignment were not made.* [Emphasis added]

To have a proper assignment of a mortgage by an authorized agent, a power of attorney is necessary to demonstrate how the agent is vested with the authority to assign the mortgage. "No special form or language is necessary to effect an assignment as long as the language shows the *intention of the owner of a right to transfer it* [Emphasis added]." (*Tawil v Finkelstein Bruckman Wohl Most & Rothman*, 223 AD2d 52, 55 [1d Dept 1996]). ([See *Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612](#) [2d Dept 2004]).

"Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress." (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 812 [2003], *cert denied* 540 US 1017 [2003]). Professor David Siegel (NY Prac, § 136, at 232 [4d ed]), instructs that:

[i]t is the law's policy to allow only an aggrieved person to bring a lawsuit . . . A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack "standing" is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.

"Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." ([Caprer v Nussbaum \(36 AD3d 176, 181 \[2d Dept 2006\]](#)). If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. ([Stark v Goldberg, 297 AD2d 203 \[1st Dept 2002\]](#)).

The Appellate Division, Second Department instructed, in [Aurora Loan Services, LLC v Weisblum \(85 AD3d 95, 108 \[2d Dept 2011\]](#)):

In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage (*see Wells Fargo Bank, N.A. v Marchione, 69 AD3d, 204, 207 [2d Dept 2009]*). A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint [*5] (*see Wells Fargo Bank, N.A. v Marchione, 69 AD3d at 207-209; U.S.*

Bank v Collymore, 68 AD3d 752, 754 [2d Dept 2009].)

Assignments of mortgages and notes are made by either written instrument or the assignor physically delivering the mortgage and note to the assignee. "Our courts have repeatedly held that a bond and mortgage may be transferred by delivery without a written instrument of assignment." (*Flyer v Sullivan*, 284 AD 697, 699 [1d Dept 1954]).

In the instant action, even if MERS had authority to transfer the mortgage to NYMT, NYMC, not MERS, is the note holder. Therefore, MERS cannot transfer something it never possessed. A "foreclosure of a mortgage may not be brought by one who has no title to it and *absent transfer of the debt*, the assignment of the mortgage is a nullity [*Emphasis added*]." (*Kluge v Fugazy* (145 AD2d 537, 538 [2d Dept 1988])). Moreover, "a mortgage is but an incident to the debt which it is intended to secure . . . the logical conclusion is that a transfer of the mortgage without the debt is a nullity, and no interest is assigned by it. The security cannot be separated from the debt, and exist independently of it. This is the necessary legal conclusion." (*Merritt v Bartholick*, 36 NY 44, 45 [1867]). The Appellate Division, First Department, citing *Kluge v Fugazy* in *Katz v East-Ville Realty Co.* (249 AD2d 243 [1d Dept 1998]), instructed that "[p]laintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact." (*See U.S. Bank v Collymore*, 68 AD3d at 754.

Presently, MERS lacks authority to assign the DASDEMIR mortgage and note. Nathan Reese, wearing his MERS' Vice President's hat as assignor, did not have specific authority to assign the DASDEMIR mortgage and note. Under the terms of the subject mortgage, MERS "is a separate corporation that is acting solely as a nominee for Lender [NYMC]." The term "nominee" is defined as "[a] person designated to act in place of another, usu. in a very limited way" or "[a] party who holds bare legal title for the benefit of others." (Black's Law Dictionary 1076 [8th ed 2004]). "This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves." (*Landmark National Bank v Kesler*, 289 Kan 528, 538 [2009]). The Kansas Supreme Court, in *Landmark National Bank*, at 539, observed:

The legal status of a nominee, then, depends on the context of

the relationship of the nominee to its principal. Various courts have interpreted the relationship of MERS and the lender as an agency relationship. See *In re Sheridan*, 2009 WL631355, at *4 (Bankr. D. Idaho, March 12, 2009) (MERS "acts not on its own account. Its capacity is representative."); *Mortgage Elec. Registrations Systems, Inc. v Southwest*, 2009 Ark. 152 ___, ___SW3d___, 2009 WL 723182 (March 19, 2009) ("MERS, by the terms of the deed of trust, and its own stated purposes, was the lender's agent"); *La Salle Nat. Bank v Lamy*, 12 Misc 3d 1191 [A], at *2 [Sup Ct, Suffolk County 2006]) . . . ("A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.")

The New York Court of Appeals in [MERSCORP, Inc. v Romaine \(8 NY3d 90 \[2006\]](#), explained how MERS acts as the agent of mortgagees, holding at 96: [*6]

In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. *Members contractually agree to appoint MERS to act as their common agent on all mortgages they register*

in the MERS system. [Emphasis added]

Thus, it is clear that MERS's relationship with its member lenders is that of agent with the lender-principal. This is a fiduciary relationship, resulting from the manifestation of consent by one person to another, allowing the other to act on his behalf, subject to his control and consent. The principal is the one for whom action is to be taken, and the agent is the one who acts. It has been held that the agent, who has a fiduciary relationship with the principal, "is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority." (*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1992]). "Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality." (*Elco Shoe Mfrs. v Sisk*, 260 NY 100, 103 [1932]). (*See Sokoloff v Harriman Estates Development Corp.*, 96 NY 409 [2001]); *Wechsler v Bowman*, 285 NY 284 [1941]; *Lamdin v Broadway Surface Advertising Corp.*, 272 NY 133 [1936]). An agent "is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." (*Lamdin*, at 136).

Thus, in the instant action, MERS, as nominee for NYMC, is NYMC's agent for limited purposes. It only has those powers given to it and authorized by NYMC, its

principal. Plaintiff NYMT failed to submit documents demonstrating how MERS is authorized, as nominee for NYMC, to assign the subject DASDEMIR mortgage and note to plaintiff NYMT. Therefore, with MERS lacking authority to assign the DASDEMIR mortgage and note, the June 7, 2011 assignment by the conflicted Mr. Reese is defective. In *Bank of New York v Alderazi* (28 Misc 3d 376, 379-380 [Sup Ct, Kings County 2010]), Justice Saitta instructed that:

A party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence (*Lippincott v East River Mill & Lumber Co.*, 79 Misc 559 [1913]) and "[t]he declarations of an alleged agent may not be shown for the purpose of proving the fact of agency." (*Lexow & Jenkins, P.C. v*

Hertz Commercial Leasing Corp., 122 AD2d 25 [2d Dept 1986]; *see also Siegel v Kentucky Fried Chicken of Long Is.* 108 AD2d 218 [2d Dept 1985]; *Moore v Leaseway Transp/ Corp.*, 65 AD2d 697 [1st Dept 1978].) "[T]he acts of a person assuming to be the representative of another are not competent to prove the agency in the absence of evidence tending to show the principal's knowledge of such acts or assent to them." (*Lexow & Jenkins, P.C. v Hertz Commercial Leasing Corp.*, 122 AD2d at 26, quoting 2 NY Jur 2d, Agency and Independent Contractors § 26). [*7]

The Appellate Division, Second Department in *Bank of New York v Silverberg*, (86 AD3d 274, 275 [2d Dept 2011]), confronted the issue of "whether a party has standing to commence a foreclosure action when that party's assignor—in this case, Mortgage Electronic Registration Systems, Inc. (hereinafter MERS)—was listed in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording, but was never the actual holder or assignee of the underlying notes." The Court held, "[w]e answer this question in the negative." MERS, in the *Silverberg* case and the instant DASDEMIR action, never had title or possession of the Note. The *Silverberg* Court instructed, at 281-282:

the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender (*see Aurora Loan Servs., LLC v Weisblum*, AD3d, 2011 NY Slip Op 04184, *6-7 [2d Dept 2011]; *HSBC Bank USA v Squitteri*, 29 Misc 3d 1225 [A] [Sup Ct, Kings County, F. Rivera, J.]; ; *LNV Corp. v Madison Real Estate, LLC*, 2010 NY Slip Op 33376 [U] [Sup Ct, New York County 2010,

York, J.]; *LPP Mtge. Ltd. v Sabine Props., LLC*, 2010 NY Slip Op 32367 [U] [Sup Ct, New York County 2010, Madden, J.]; *Bank of NY v Mulligan*, [28 Misc 3d 1226](#) [A] [Sup Ct, Kings County 2010, Schack, J.]; *One West Bank, F.S.B., v Drayton*, 29 Misc 3d 1021 [Sup Ct, Kings County 2010, Schack, J.]; *Bank of NY v Alderazi*, 28 Misc 3d 376, 379-380 [Sup Ct, Kings County 2010, Saitta, J.] [the "party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence"]; *HSBC Bank USA v Yeasmin*, 24 Misc 3d 1239 [A] [Sup Ct, Kings County 2010, Schack, J.]; *HSBC Bank USA, N.A. v Vasquez*, 24 Misc 3d 1239 [A], [Sup Ct, Kings County 2009, Schack, J.]; *Bank of NY v Trezza*, 14 Misc 3d 1201 [A] [Sup Ct, Suffolk County 2006, Mayer, J.]; [La Salle Bank Natl. Assn. v Lamy](#), [12 Misc 3d 1191](#) [A] [Sup Ct, Suffolk County, 2006, Burke, J.]; *Matter of Agard*, 444 BR 231 [Bankruptcy Court, ED NY 2011, Grossman, J.]; *but see U.S. Bank N.A. v Flynn*, [27 Misc 3d 802](#) [Sup Ct, Suffolk County 2011, Whelan, J.]

Moreover, the *Silverberg* Court concluded, at 283, that "because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the . . . assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff. Consequently, the plaintiff failed to show that it

had standing to foreclose." Further, the *Silverberg* Court observed, at 283, that "*the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property [Emphasis added].*"

The Court is granting plaintiff NYMT an opportunity to cure its defective standing. Plaintiff NYMT is granted leave to renew its motion for an order of reference and related relief, [*8] within sixty (60) days of this decision and order, if it can provide the Court with written proof of the grant of authority from the original mortgagee, NEW YORK MORTGAGE COMPANY, LLC (NYMC) to its nominee, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), to assign the subject mortgage and note to plaintiff NYM. Further, the conflicted Nathan Reese, a possible robo signer in this action, must provide the Court with an affidavit explaining why he acted as both assignor and assignee of the subject DASDEMIR mortgage and note in the instant action.

Conclusion

Accordingly, it is

ORDERED, that the motion of plaintiff, NEW YORK MORTGAGE TRUST, INC., for an order of reference for the premises located at 75 West End Avenue, Brooklyn, New York (Block 8726, Lot 57, County of Kings), is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, NEW YORK MORTGAGE TRUST, INC. to renew its motion for an order of reference for the premises located at 75 West End Avenue, Brooklyn, New York (Block 8726, Lot 57, County of Kings), within sixty (60) days of this decision and order, upon presentation to the Court of: (1) written proof of the grant of authority from the original mortgagee, NEW YORK MORTGAGE COMPANY, LLC (NYMC) to its nominee, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), to assign the subject mortgage and note to plaintiff NYM; and, (2) an affidavit from Nathan Reese explaining why he acted as both assignor and assignee of the subject mortgage

and note in the instant action.

This constitutes the Decision and Order of the Court.

ENTER

_____ HON. ARTHUR M. SCHACK

J. S. C.

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