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<b>Bank of N.Y. v Waters</b>
2013 NY Slip Op 50585(U)
Decided on April 15, 2013
Supreme Court, Kings County
Saitta, J.
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Decided on April 15, 2013

**Supreme Court, Kings County**

**The Bank of New York, as successor to JP MORGAN CHASE BANK, N.A., as Trustee for Bear Stearns Asset Backed Securities Trust 2006-SD2, Asset Backed Certificates, Series 2006-SD2, Plaintiff, .**

**against**

**Tania Waters, ISMAILA IBRAHIM; NATIONAL CITY BANK, and "JOHN DOE No.1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint, Defendants.**

2283/2008

Plaintiffs Attorney -

Shapiro, DiCaro &amp; Barak, LLP

250 Mile Crossing Boulevard, suite 1

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Defendants Pro-se -

Tania Waters & Ismaila Ibrahim

906 East 49th Street

Brooklyn, New York 11203

Wayne P. Saitta, J.

Plaintiff in this action to foreclose on a mortgage on real property located at 906 East 49th Street, Brooklyn New York, THE BANK OF NEW YORK, moves this Court ex-parte for an Order appointing a referee to compute.

Upon reading the Summons, Verified Complaint and Notice of Pendency filed in this action on January 22, 2008 and exhibits annexed thereto, the Affirmation of John A. DiCaro, [\*2] Esq. Of Shapiro, DiCaro & Barak, LLC, counsel for Plaintiff, dated October 11 2011, the Affidavit of Marc J. Hinkle sworn to March 1, 2001, and after due deliberation thereupon, the motion for an Order of Reference is denied for the reasons set forth below.

Defendants TANIA WATERS and ISMAILA IBRAHIM, are owners of the property located at 906 East 49th Street, Brooklyn, New York. On September 21, 2005, Defendants executed a note for the sum of \$350,000 which they borrowed from PHH Mortgage Corp., (hereinafter "PHH"). On the same date they also entered into a mortgage on the property with PHH.

The mortgage was purportedly assigned to THE BANK OF NEW YORK, as successor to JP MORGAN CHASE BANK , N.A., as Trustee for Bear Stearns Asset

Backed Securities Trust 2006-SD2LT loan, Asset Backed Certificates, Series 2006-SD2,

by a written assignment dated January 3, 2008. The assignment covered the mortgage but did

not include the note.

The assignment was executed by Andrea Kanopka, an Assistant Vice President of MERS.

Plaintiff, served a summons and complaint on the mortgagors TANIA WATERS and ISMAILA IBRAHIM, neither of whom appeared or filed an answer.

The complaint states in paragraph 6 "If Plaintiff is not the original mortgagee then the information regarding the chain of title will be contained in Schedule D." In turn, Schedule D states that " The Plaintiff became the owner of the note and mortgage as a result of a purchase thereof for valuable consideration prior to the commencement of this action. The Assignment of mortgage memorializing Plaintiff's interest has not yet been recorded; however, plaintiff has standing to prosecute the foreclosure action in its capacity as beneficial owner and holder of the note and mortgage."

Paragraph 11 of the complaint alleges that the Plaintiff is the true and lawful owner of said bond/note and mortgage . . ."

The Court denied a previous motion for a referee by Plaintiff, on August 10, 2010 on the grounds that Plaintiff has submitted no evidence that the purported assignor had authorized MERS to assign the mortgage.

On this application Plaintiff has still not submitted any proof that PHH authorized MERS to assign this mortgage. Plaintiff instead argues that the note contains an allonge and blank indorsement and is a negotiable instrument. Plaintiff further argues that the note was negotiated to Plaintiff by delivery, and that as a result of its being in possession of the note, the mortgage was transferred to it as in incident of the negotiation of the note.

However, the pleadings in this case are vague and conclusory as to how Plaintiff came into possession of the note. Schedule D annexed to the complaint simply states that Plaintiff became the owner of the note and mortgage as a result of a purchase thereof for valuable consideration prior to the commencement of this action and that it is the beneficial owner and holder of the note and mortgage. It does not state that the note was negotiated by delivery, or the date of any delivery.

Paragraph 11 of the complaint alleges, in a similarly conclusory manner, that Plaintiff is the true and lawful owner of the said note and mortgage..

Plaintiff's attorney alleges in his affirmation that "a complete copy of the fully indorsed note was inadvertently excluded from the Plaintiff's Summons and Complaint at the time of filing" and annexes what he claims to a complete copy of the note. [\*3]

The copy of the note submitted with this new motion does contain an indorsement on page five of the note as well a separate page title "Allonge" with an indorsement. Both indorsements are undated.

The copy of the note submitted with the new motion raises serious questions. The copy of the note originally submitted with the summons and complaint contains no indorsement on page 5 whereas the copy submitted with this motion contains on the face of page 5 an indorsement by Janice Grant, who held herself out as Assistant Vice president of PHH. Over that indorsement is stamped the words "Endorsement Deleted".

The purported allonge is signed by Derrick Downs, who is also listed as an Assistant Vice President of PHH.

This is not merely a matter of having submitted an incomplete copy of the note with the summons and complaint. The copy of page 5 of the note has clearly been altered to add an indorsement after filing the summons and complaint. Plaintiff's counsel has not offered an adequate or credible explanation as to how there was no indorsement on page 5 of the copy of the note at the time it was submitted with the summons and complaint.

This raises serious issues as to whether the Plaintiff was in fact the holder of the note at the commencement of the action. If in fact the indorsement was added to page 5 after the summons and complaint were filed then the note was not a negotiable instrument at the time this action was commenced, and could not be transferred by mere delivery.

Further, the fact the page 5 of the note was altered casts doubt as to whether the purported allonge was part of the note at the commencement of the actions. Plaintiff has offered no explanation as to how the allonge page was not included in the copy of the note submitted with the summons and complaint, if it was securely fastened to the note .

Additionally, the purported assignment by MERS assigns the mortgage to " The Bank of New York, as successor to JP Morgan Chase Bank , N.A., as Trustee for Bear Stearns Asset Backed Securities Trust 2006-SD2 *LT loan*, Asset Backed Certificates, Series 2006-SD2," (emphasis added) not to Plaintiff THE BANK OF NEW YORK, as successor to JP MORGAN CHASE BANK , N.A., as Trustee for Bear Stearns Asset Backed Securities Trust 2006-SD2, Asset Backed Certificates, Series 2006-SD2.

On its face it appears that the mortgage was assigned to a different entity than the Plaintiff. The Court has no way of determining whether these are two distinct entities created for two different securitizations or what the relationship between the entities might be.

The issue of standing is an affirmative defense which is deemed waived if not raised in an answer. However, ownership of the note is part of a Plaintiff's prima facie case and its burden of proof. In a foreclosure case, the Plaintiff must plead and prove as part of its prima facie case that it owns the note and mortgage and has the right to foreclose. [\*Wells Fargo Bank, N.A., v Cohen\*, 80 AD3d 753](#), 915 N.Y.S.2d 569 (2d Dept 2011); [\*Argent Mtge. Co., LLC v. Mentasana\*, 79 AD3d 1079](#), 915 N.Y.S.2d 591 (2d Dept 2010); [\*Campaign v Barba\*, 23 AD3d 327](#), 805 NYS2d 86 (2nd Dept 2005). It is proper for the court to deny an application for a default judgement and order of reference where the underlying papers presented to the court are defective on their face or do not contain sworn or affirmed allegations demonstrating the merit of the claims. [\*Crain AG v 206 West 41st St. Hotel Assoc. LP\*, 87 AD3d 174](#), 926 NYS2d 438 (1st Dept 2011); [\*Beltre v. Babu\*, 32 AD3d 722](#), 821 N.Y.S.2d 69 (1st Dept 2006); [\*State v Williams\*](#), 44 AD3d 1149, 843 NYS2d 722 (3rd Dept 2007).

Conclusory statements that Plaintiff became owner of the note prior to the [\*4] commencement of the action alone are insufficient. Plaintiff has not submitted a statement from anyone with knowledge that the note was in fact physically delivered to Plaintiff or when it was delivered. Nor was there submitted any books or records of the Plaintiff indicating that the note was negotiated or physically delivered to the Plaintiff or when it was negotiated or delivered.

Most disturbingly, Plaintiff presents the Court with two different versions of the note, one of which was altered and is not a true copy. Plaintiff does not even attempt to offer an explanation for why an altered document was submitted to the Court.

Additionally, in this case, the purported assignment presented indicates that the

mortgage was assigned to a different entity.

The Court can not turn a blind eye to the alteration of documents submitted or documents which on their face indicate another entity may own the mortgage, simply because the application is on default.

WHEREFORE, the ex parte application for an order of reference is denied.

E N T E R:

JSC

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