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<b>U.S. Bank Natl. Assn. v Guy</b>
2013 NY Slip Op 51532(U)
Decided on August 22, 2013
Supreme Court, Kings County
Schmidt, J.
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Decided on August 22, 2013

**Supreme Court, Kings County**

**U.S. Bank National Association, As Trustee, On Behalf Of  
The Holders Of The Adjustable Rate Mortgage Trust 2007-1,  
Adjustable Rate Mortgage- Backed Pass Through  
Certificates, Series 2007-1, Plaintiff,**

**against**

**Paula Guy, Advantage Assets II, Inc.; Arrow Financial  
Services, LLC; Mortgage Electronic Registration Systems,  
Inc., As Nominee For Credit Suisse Financial Corporation;  
New York City Environmental Control Board, New York  
City Parking Violations Bureau; New York City Transit  
Adjudication Bureau; John Does' and Jane Does', said names  
being fictitious, parties intended being possible tenants or  
occupants of premises, and corporations, other entities or  
persons who claim, or may claim, a lien the premises,  
Defendants.**

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Plaintiff Attorney: Tyne Modica, Esq., Rosicki, Rosicki & Associated, P.C., 51 E. Bethpage Road, Plainview, NY 11803

Defendant Attorney: Steven Alexander Biolsi, 7101 Austin Street, Suite 201B, Forest Hills, NY 11375

David I. Schmidt, J.

The following papers numbered 1 to 11 read herein:Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed1-3

Opposing Affidavit (Affirmation)4-5

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Upon the foregoing papers, defendant Paula Guy (Guy) moves for an order (1) dismissing the complaint of plaintiff U.S. Bank National Association, as trustee, on behalf of the holders of the adjustable rate mortgage trust 2007-1, adjustable rate mortgage-backed pass through certificates, series 2007-1 (US Bank Trust), pursuant to CPLR 3211 (a), and (2) granting defendant Guy the full costs of this motion, including an award of counsel fees and expenses in the sum of at least three thousand dollars, assessed against

plaintiff.

*Background Facts and Procedural History*

On October 26, 2006, defendant Guy, as both borrower and mortgagor, executed a promissory note and an adjustable rate mortgage, with an initial interest rate of 8.375%, in the principal amount of \$520,000.00. The promissory note named Credit Suisse Financial Corporation (Credit Suisse), the originator of the loan, as the lender/payee. The mortgage named Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Credit Suisse, as mortgagee. The mortgage was duly recorded in the Office of the New York City Register, Department of Finance, on November 15, 2006, under file number 2006000634899, covering the residential premises located at 947 Liberty Ave., Brooklyn, New York.

The complaint alleges that the mortgage was thereafter assigned to DLJ Mortgage Capital, Inc. (DLJ) on May 18, 2007, and that the mortgage was subsequently assigned to plaintiff US Bank Trust on October 4, 2011. The mortgage recording documents on the Automated City Register Information System ("ACRIS") website of the Office of the City Register, New York City Department of Finance, are consistent with those allegations.

[\[FN1\]](#)

The "Corporate Assignment of Mortgage" between DLJ and plaintiff reflects that Select Portfolio Services, Inc. (SPS), the mortgage servicer of defendant's home loan, played a dual role in the assignment process by acting as agent for both "Assignor" and "Assignee." The assignment reflects that SPS executed the mortgage assignment on October 4, 2011, on behalf of DLJ in its capacity as DLJ's "Attorney-in-Fact," in care of itself, and accepted the mortgage assignment in favor of US Bank Trust in care of itself. Bill Koch, Document Control Officer at SPS, executed the mortgage assignment from DLJ to US Bank Trust, which was recorded February 14, 2012..

Shortly thereafter, US Bank Trust commenced this foreclosure action against defendant Guy on June 5, 2012, alleging that it "is the holder of the subject note an[d] [sic] mortgage, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note ...." The complaint alleges that defendant Guy defaulted upon her monthly payment obligations under a

December 20, 2010 loan modification under the Home Affordable Modification Program (HAMP) as of February 1, 2012, and seeks to foreclose on the above-referenced mortgage.

### *Defendant's Motion to Dismiss*

On July 11, 2012, defendant Guy moved, pursuant to CPLR 3211(a), to dismiss the complaint for lack of standing on the ground that the allegations in the complaint reflect that "[p]laintiff may not have received a proper assignment or delivery, actual or otherwise, of [the] note allegedly giving rise to this action." Defendant Guy's moving papers include the affidavit of Paula Guy, [\[FN2\]](#) and an attorney affirmation from Steven Biolosi, Esq., dated July 9, 2012 and July 11, 2012, respectively. [\[\\*3\]](#)

US Bank Trust opposed defendant's dismissal motion with an attorney affirmation from Robert King, Esq., and an affidavit from Gary Cloward of SPS, US Bank Trust's alleged document custodian and the servicer of defendant's mortgage, both dated September 26, 2012. Plaintiff claims that defendant's standing argument is without merit since "a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*see US Bank v Silverberg*, 86 AD3d 274, 279-280 [2011]). Without providing any factual details how plaintiff US Bank Trust derived an interest in the underlying note, plaintiff's counsel claims that an allonge "affixed to and a permanent part of the note ... contain[ing] an endorsement in blank signed by the attorney-in-fact for Credit Suisse" conclusively demonstrates plaintiff's standing to bring this action.

The Cloward opposing affidavit contends that both the note and mortgage were delivered to SPS on US Bank Trust's behalf on or about October 26, 2006, the note's origination date, based on Cloward's alleged review of US Bank Trust's business records in SPS' custody. Other than the alleged delivery date, the Cloward opposing affidavit provides no specific factual details (i.e., who, what, where, how) regarding the circumstances of the note's delivery to either plaintiff US Bank Trust or to SPS, as US Bank Trust's document custodian.

### *The Conditional Order of Dismissal*

Because US Bank Trust failed to submit any probative documentary or testimonial evidence from someone with personal knowledge of the note's delivery to US Bank Trust, and its opposition papers seemingly conflict with the complaint's allegation regarding the note's delivery on October 26, 2006,<sup>[EN3]</sup> this court conditionally granted defendant Guy's motion to dismiss the complaint, by order dated December 7, 2012, "unless, on or before January 14, 2013, plaintiff provides sufficient and proper documentation to establish plaintiff's standing in this case" (December 7th Order).

### *Plaintiff's Sur-Reply Submission*

Prior to the court-imposed deadline for further submissions in the December 7th Order, US Bank Trust submitted another affirmation from Robert King as a sur-reply in further opposition to defendant's dismissal motion based on "the file maintained in this action." The King sur-reply affirmation attached a copy of the limited power of attorney from U.S. Bank National Association (US Bank) appointing SPS "Attorney-in-Fact" to, among other things, "execute and acknowledge in writing or by facsimile stamp all documents customarily and reasonably necessary and appropriate [to] . . . [t]ransact business of any kind regarding the Loans, and obtain an interest therein and/or in any building securing payments thereof, as U.S. Bank's act and deed, to contact for, purchase, receive and take possession and evidence of title in and to the property and/or to secure payment of a promissory note . . . "

While the limited power of attorney between US Bank and SPS expressly provides that it "is being issued in connection with [SPS's] responsibilities to service certain mortgage loans (the "Loans") held by U.S. Bank in its capacity as Trustee," plaintiff failed to submit a schedule reflecting that defendant's loan is included in the "Loans" referenced therein. Instead, King's sur-reply affirmation made the conclusory representation that SPS, in its capacities as servicer of "the pooled loans," and the document custodian and attorney-in-fact for US Bank Trust, "maintains possession of the note on behalf of [US Bank Trust]" as one of its "responsibilities" and "did own and hold the note and mortgage at issue prior to commencement of the action."

Plaintiff also submitted a sur-reply affidavit from Cloward of SPS, which claims that the note was delivered to SPS "as plaintiff's attorney-in-fact and document custodian" on

November 6, 2006, based on his review of "the subject loan records." Mr. Cloward's sur-reply affidavit does not describe or attach the business records upon which his knowledge is based, nor does the affidavit describe any [\*4] of the factual details regarding the alleged delivery of the note to SPS on US Bank Trust's behalf on November 6, 2006.

Importantly, plaintiff's sur-reply does not explain why: (1) Cloward's previously submitted "Possession Affidavit" inconsistently averred that the note was delivered to SPS in its capacity as US Bank Trust's document custodian on or about October 26, 2006; (2) the complaint alleges that defendant Guy delivered the note to Credit Suisse on the October 26, 2006 origination date of the loan; and (3) DLJ, by SPS, assigned the mortgage to US Bank Trust, in care of SPS, on October 4, 2011, nearly five years after the October 26, 2006 origination date of the loan.

### *Discussion*

(1)

A motion to dismiss under CPLR 3211 requires a determination whether the complaint states a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading *has* a cause of action" ([Sokol v Leader, 74 AD3d 1180](#), 1181-82 [2010] [emphasis added], quoting [Guggenheimer v Ginzburg, 43 NY2d 268, 275 \[1977\]](#)). Dismissal results only if the movant demonstrates conclusively that no cause of action is pled, or that "a material fact as claimed by the pleader to be one is not a fact at all" (Sokol, 74 AD3d at 1182, quoting [Guggenheimer, 43 NY2d at 275](#); [see also Lawrence v Graubard Miller, 11 NY3d 588, 595 \[2008\]](#)). In considering a motion to dismiss for failure to state a claim, all factual allegations are accepted as true ([Sokol, 74 AD3d at 1181](#)). Legal conclusions and factual claims flatly contradicted by the evidence, however, will not be presumed true ([Sweeney v Sweeney, 71 AD3d 989, 991 \[2010\]](#); [Meyer v Guinta, 262 AD2d 463, 464 \[1999\]](#)).

Defendant Guy seeks dismissal of US Bank Trust's complaint on the ground that the allegations contained therein reflect that US Bank Trust "may not have received a proper assignment or delivery, actual or otherwise, of [the] note allegedly giving rise to this action." Upon defendant Guy's assertion of the defense of lack of standing, the burden

shifted to plaintiff US Bank Trust to demonstrate that it had standing to commence and prosecute this action (*US Bank, NA v Collymore*, 68 AD3d 752, 753 [2009]). As discussed below, plaintiff US Bank Trust failed to satisfy its burden of proving that the note was duly delivered to it prior to June 5, 2012, the commencement date of this foreclosure action.

(2)

In addition to an attorney affirmation, which makes the conclusory assertion that "plaintiff currently holds the note and mortgage as of October 26, 2006," plaintiff opposed defendant's motion to dismiss the complaint with a "Possession Affidavit" by Gary Cloward, the document control officer of SPS. While Cloward's opposing affidavit claims that the note and mortgage were delivered to SPS as plaintiff's alleged document custodian on October 26, 2006, that assertion is not based on Cloward's personal knowledge, since his affidavit explicitly states that it is based on his "review and examination of the subject loan records" that SPS maintains as document custodian for US Bank Trust.

Moreover, Cloward's assertion that the note and mortgage were delivered to US Bank Trust on October 26, 2006, is inconsistent with the complaint, wherein US Bank Trust alleges that: (1) defendant Guy executed and delivered the note to Credit Suisse on October 26, 2006, and (2) the mortgage was "thereafter" assigned to US Bank Trust on October 4, 2011.

Plaintiff's reliance on "an Allonge [to the note] which contains an endorsement in blank signed by the attorneys-in-fact for Credit Suisse" to establish US Bank Trust's standing is misplaced. It is well-established that "[t]he note secured by the mortgage is a negotiable instrument (see UCC 3-104), which requires indorsement on the instrument itself or on a paper so firmly affixed thereto as to become a part thereof" (UCC 3-202 [2]) in order to effectuate a valid assignment of the entire instrument" (*Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 212 [1989]). The five-page note at issue here is numbered "Page 1 of 5 Pages," "Page 2 of 5 Pages," "Page 3 of 5 Pages," "Page 4 of 5 Pages," and "Page 5 of 5 Pages." Although there was sufficient space for an endorsement on the last page of the note, plaintiff submitted an "ALLONGE TO NOTE" on a separate

unnumbered page, which is not firmly affixed to the promissory note, as is explicitly required under the UCC. In [\*5] addition, the court notes that as the subject allonge is undated, there is no indication as to when such document was prepared.

Plaintiff's contention that "defendant ratified plaintiff's ownership and authority to modify the terms of the note and mortgage" when defendant accepted a HAMP modification is similarly unavailing. Plaintiff fails to support this assertion with any legal authority whatsoever, and ignores the fact that the mortgage was assigned to US Bank Trust on October 4, 2011, nearly one year after SPS claims to have modified defendant's mortgage under HAMP in December 2010. Furthermore, defendant could not have ratified US Bank Trust's ownership of the note upon acceptance of the HAMP modification if defendant never "receive[d] proper notice that any debt due to the original lender was ever assigned to the Plaintiff," as the defense claims here.

Recognizing that US Bank Trust's opposition to defendant's motion was insufficient to establish prima facie standing, this Court issued the December 7th Order, granting defendant Guy's motion to dismiss "unless ... plaintiff provides sufficient and proper documentation to establish plaintiff's standing in this case." After this Court issued the December 7th Order, US Bank Trust timely submitted a sur-reply in further opposition to the motion, which consisted of another attorney affirmation and another affidavit from Cloward of SPS. For the reasons discussed below, plaintiff's sur-reply submission, like its opposition papers, fail to establish plaintiff's prima facie standing to maintain this action, as a matter of law.

(3)

The Court of Appeals has clearly stated that "[s]tanding 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 Co. Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]). In [Caprer v Nussbaum \(36 AD3d 176](#), 181 [2006]), the Second Department held that "[s]tanding 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."



Under New York law, it is axiomatic that a plaintiff has standing to commence a mortgage foreclosure action "where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Homecomings Fin., LLC v Guldi*, 108 AD3d 506, 2013 NY Slip Op 05048, \*2 [July 3, 2013]). "An assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it" (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 843 [2012]; see also *Kluge v Fugazy*, 145 AD2d 537, 538 [1988] [holding that "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"])).

In *Homecomings* (108 AD3d at 506), a factually analogous case, the Second Department recently reversed an order granting the plaintiff summary judgment because *Homecomings* failed to establish prima facie standing to foreclose. In that case, *Homecomings* failed to submit probative evidence that the note was physically delivered or duly assigned to it prior to commencement of the foreclosure action. Like plaintiff's submissions in this case, the only proof of physical delivery of the note submitted by *Homecomings* was an affidavit from its servicing agent, claiming that the note was duly delivered to its "custodian of records." The court held that an affidavit from plaintiff's servicer regarding delivery to plaintiff's custodian of records was "insufficient to demonstrate that the party commencing the action ... had standing to do so at the time of the filing of the summons and complaint." The court further held that the affidavit was "insufficient to establish that the plaintiff had physical possession of the note at any time" because it "did not give factual details as to the physical delivery of the note" (*Id.* at \* 3).

Here, as in *Homecomings*, plaintiff's submissions of attorney affirmations and affidavits from SPS, plaintiff's alleged document custodian, fail to establish that the note was either assigned to US Bank Trust or was physically delivered to US Bank Trust prior to the commencement of this foreclosure action. Furthermore, Cloward's affidavits, like those submitted in *Homecoming*, failed to provide any factual details regarding the physical delivery of the note to US Bank Trust and were [\*6]not based on personal knowledge. Consequently, dismissal of this action is appropriate.

Finally, an award of attorneys fees to defendant is unwarranted here, since defendant has failed to identify any contractual provision entitling it to such an award. "The general rule is that [a]n attorney's fee is merely an incident of litigation and is not recoverable

absent a specific contractual provision or statutory authority" (*Gorman v Fowkes*, 97AD3d 726, 727 [2012] [citations omitted]). Here, defendant's request for an award of costs is similarly denied as unwarranted.

Accordingly, it is

ORDERED that the branch of defendant Guy's motion to dismiss plaintiff's complaint is granted; and it is further

ORDERED that the complaint against defendant Guy is dismissed with prejudice; and it is further

ORDERED that the branch of Guy's motion for costs of this motion, including an award of counsel fees and expenses in the sum of three thousand dollars, is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

### Footnotes

**Footnote 1:** This court properly takes judicial notice of the mortgage recording documents on ACRIS (*see Des Fosses v. Rastelli*, 283 AD 1069, 1070 [1954] ["[t]his court has taken judicial notice of the deed in the foreclosure action from the Referee, to the respondents, dated April 6, 1953, and recorded April 15, 1953").

**Footnote 2:** Defendant Guy's three-page affidavit is included in, and considered on, this record, although the first two pages of the Guy affidavit were inadvertently omitted from defendant's moving submission. Because the missing affidavit pages do not raise new factual issues, consideration of the affidavit in its entirety is not prejudicial to a fair adjudication of this motion.

**Footnote 3:** Plaintiff's complaint alleges that "[o]n or about October 26, 2006, PAULA GUY executed and delivered to CREDIT SUISSE FINANCIAL CORPORATION, a certain note bearing date that day ... ." There is no allegation in US Bank Trust's complaint regarding the delivery of the note to US Bank Trust or to SPS on US Bank Trust's behalf on October 26, 2006.

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