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<b>Citibank N.A. v McCray</b>
2013 NY Slip Op 51931(U)
Decided on November 22, 2013
Supreme Court, Bronx County
González, J.
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Decided on November 22, 2013

**Supreme Court, Bronx County**

**Citibank N.A. AS TRUSTEE ON BEHALF OF BEAR STEARNS ALT-A TRUST PASS THROUGH 2007-3,  
Plaintiff,**

**against**

**Henry McCray, CITIBANK N.A. AS TRUSTEE FOR CERTIFICATEHOLDERS OF BEAR STEARNS SECOND LIEN TRUST 2007-1 MORTGAGE-BACKED CERTIFICATES 2007-1, CRIMINAL COURT OF THE CITY OF NEW YORK, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, and "JOHN DOE #1" through "JOHN DOE No.10", the last 10 names being fictitious and unknown to the Plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint., Defendants.**

35064/13

For Plaintiff: Cohn & Roth by Alexander Crul, Esq.

For Defendant: Henry McCray, pro se

Lizbeth González, J.

The underlying foreclosure action was filed by plaintiff Citibank N.A. on behalf of Bear Stearns Alt-A Trust Pass Through 2007-3 ("CitiBank"). Defendant Henry McCray is the owner of the mortgaged premises located at 2124 Vyse Avenue in Bronx County ("subject premises"). The self-represented defendant seeks dismissal of the action on standing grounds. In his affirmation in opposition, Citibank's counsel requests that defendant's motion be held in abeyance until the action is settled or released from the Bronx County Residential Foreclosure Part. By Order dated 6/28/13, Justice Robert E. Torres released the underlying action from the foreclosure conference part. No further submissions or applications have been filed.

#### Procedural History

[\*2]

Mr. McCray previously commenced an action against Colorado Federal Savings Bank ("CFSB") and MERS as nominee for Colorado Federal Savings Bank ("MERS") under Index No. 304749/2012 to discharge the first and second Mortgages for the subject premises as null and void. By Stipulation dated 8/23/12 and so-ordered on 8/29/12, Mr. McCray and defendant Colorado Federal Savings Bank agreed that:

1. Colorado FSB had no interest in the mortgages for 2124 Vyse Avenue, Bronx, New York, to wit, a mortgage in the amount of \$475,000 recorded with the NYC City Register on 1/25/07 as City Register File No. 2007000047574 ("First Mortgage") and a mortgage in the amount of \$114,000 recorded on the same date as City Register File No. 2007000047575 ("Second Mortgage"), or the debt secured thereby.

2. Mr. McCray would discontinue the action against Colorado FSB with prejudice and amend the caption, thus leaving MERS as the sole defendant.

MERS filed the two McCray mortgages with the NYC City Register on 1/25/07. As the remaining defendant in the McCray action, MERS moved to dismiss the summons and complaint for failure to state a cause of action and on standing grounds because there was no justiciable controversy. By Decision and Order dated 9/11/12, Justice Lucindo Suarez granted the MERS motion to dismiss the action, stating *inter alia*:

In his complaint, plaintiff had alleged that the mortgages should be deemed nullities because CFSB held the notes and MERS held the mortgages.

In lieu of answering the complaint, MERS moves pursuant to CPLR 3211 (a) (3)(7) for dismissal on the grounds that the plaintiff fails to state a cause of action and that plaintiff lacks standing since there is no justiciable controversy...In support of the application, MERS submits copies of the two mortgages filed with the Office of the City Register in 2007. The mortgages, both dated January 11, 2007 and executed by the plaintiff, contain near identical wording stating that MERS acted solely as the nominee for CFSB. Whether MERS possessed both the notes and the mortgages at the time of recording does not negate MERS' ability, as CFSB's nominee, to record each mortgage. The fact that the note and the mortgage may have been separated appears to affect a mortgagee's ability to foreclose and is not an indication that the mortgage lien itself is invalid...

[\*3]

However, the fact that CFSB no longer possesses an interest in the debt does not invalidate the mortgages if the notes and the mortgages have been transferred or assigned to another entity, nor has plaintiff alleged that the debts have been discharged. The complaint lacks any other allegation on which a declaration deeming the subject mortgages null and void may be made.

Defendant McCray now moves to dismiss Citibank's foreclosure action because it lacks standing. In opposition, Citibank's counsel maintains that the plaintiff in this matter has standing to foreclose because he holds "the original Note." The original Note, signed by the defendant and "endorsed in blank," was allegedly delivered to and held by Citibank prior to the commencement of this action but there is no corroborating affidavit based on personal knowledge. Attached as exhibits to counsel's affirmation are three Notes executed between Colorado Savings Bank and borrower Henry McCray: 1) an Adjustable

Rate Note in the amount of \$427,500; 2) an Interest-Only Addendum to Adjustable Rate Promissory Note that immediately superseded the initial Note's payment schedule and calculation of interest rate, monthly payments and late charges; and 3) a Floor Rate Addendum to Note. Mr. McCray is the only signatory; all three Notes are dated 1/11/07. The holder of the second and third Notes is undisclosed.

### Discussion

Citibank relies exclusively on the Second Department's seminal decision in *Bank of New York v Silverburg*, 86 AD3d 274 (2d Dept 2011). The borrowers in *Silverburg* questioned the Bank of New York's standing to commence a foreclosure action where MERS, its assignor, was listed for recording purposes as a nominee and mortgagee in the underlying mortgage instruments but was never the actual holder or assignee of the underlying Notes.

The Second Department describes the Mortgage Electronic Registration Systems, Inc. ("MERS") as a system designed in 1993 by several large participants in the real estate mortgage industry to "streamline the mortgage process." (*Silverburg* at 278.) By appointing MERS as their common agent on all mortgages registered in the MERS system through the payment of an annual fee, MERS members purport to electronically track ownership interests in residential mortgages; facilitate the transfer of loans into pools of other loans which were then sold to investors as securities; and avoid payment of mortgage recording fees to local governments. (*Silverburg, id.*) In emphasizing that a "mortgage is merely security for a debt or other obligation" that cannot exist independently of the debt or obligation, the Second Department noted that "the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt." (*Silverburg* at 280.) The appellate court accordingly reversed the lower court and dismissed the complaint against the borrowers on standing grounds as follows:

Here, the consolidation agreement purported to merge the two prior notes and mortgages into one loan obligation. Countrywide, as [\*4] noted above, was not a party to the consolidation agreement...The plaintiff relies upon the language of the consolidation agreement, which provides that MERS was "acting solely as a nominee for (Countrywide) and (Countrywide's) successors and assigns...For purposes of recording this agreement, MERS is the mortgagee of record." However, as "nominee," MERS' authority was limited to only those

powers which were specifically conferred to it and authorized by the lender...Hence, although the consolidation agreement gave MERS the right to assign the mortgages themselves, it did not specifically give MERS the right to assign the underlying notes, and the assignment of the notes was thus beyond MERS' authority as nominee of agent of the lender. (*Silverburg* at 281.)

(A)ssuming that the consolidation agreement transformed MERS into a mortgagee for the purpose of recording - even though it never loaned any money, never had a right to receive payment of the loan, and never had a right to foreclose on the property upon a default in payment - the consolidation agreement did not give MERS title to the note, nor does the record show that the note was physically delivered to MERS. (*Silverburg* at 282.)

In sum, because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected 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. (*Silverburg* at 283.)

In the prior action filed by Mr. McCray, the borrower alleged that his two Mortgages should be deemed nullities because Colorado Savings held the Notes and MERS held the Mortgages; there, Judge Suarez determined that while the separation of the Notes and Mortgage did not itself invalidate the mortgage lien it would likely affect a mortgagee's ability to foreclose.

In a foreclosure action, standing means entitlement to enforce the Note and Mortgage. A plaintiff in a foreclosure action has standing where it is both the holder or assignee of the Mortgage and the underlying Note at the time that the action was commenced. ([OneWest Bank FSB v Carey, 104 AD3d 444](#) [1st Dept 2013]; [Bank of New York Mellon Trust Co. NA v Sachar, 95 AD3d 695](#) [1st Dept 2012]; [GRP Loan, LLC v Taylor, 95 AD3d 1172](#) [2nd Dept 2012].) In the prior McCray action, Judge Suarez found that MERS acted solely as nominee for CFSB in filing the two Mortgages. Here, counsel for Citibank states that he holds the initial Note but makes no reference to the Mortgages. The chain of custody is undisclosed. [\*5]

Significantly, there is no proof that Citibank held both the Mortgages and the Notes when it commenced this action. Notwithstanding plaintiff's representation that "should Defendant not be approved for a loan modification, Plaintiff will respond to the

unsubstantiated allegations of the Defendant...and move this Court for Summary Judgment on the Complaint," no further submissions or applications have been made.

After careful consideration and review, the defendant's motion is granted for good cause shown. Citibank has no demonstrated right to the debt in the absence of a chain of custody and proof that the Mortgage and Notes were lawfully assigned to and held by Citibank prior to the commencement of this action. This Court accordingly determines that the plaintiff lacks standing to foreclose. The underlying action is dismissed. The defendant shall serve a copy of this Order with Notice of Entry upon the plaintiff within 30 days.

This is the Decision and Order of the Court.

Dated: November 22, 2013

So ordered,

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Hon. Lizbeth González, JSC

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