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U.S. Bank Natl. Assn. v Steinberg
2013 NY Slip Op 52167(U)
Decided on November 29, 2013
Supreme Court, Kings County
Schmidt, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on November 29, 2013

Supreme Court, Kings County

**U.S. Bank National Association AS TRUSTEE FOR MORGAN
STANLEY MORTGAGE LOAN TRUST 2006-17XS (2006-17XS),
Plaintiff,**

against

**Becalel Steinberg, FRIDA STEINBERG F/K/A FRIDA GENUTH,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
JP MORGAN CHASE BANK, NA, AMERICAN EXPRESS
BANK FSB, NEW YORK CITY PARKING VIOLATIONS
BUREAU, "JOHN DOE #1" to "JOHN DOE #10," the last 10
names being fictitious and unknown to 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.**

3234/12

Plaintiff Attorney: McCabe, Weisberg & Conway, P.C., 145 Huguenot Street, Ste., 210, New Rochelle, NY 10801

Defendant Attorney: Jon A. Lefkowitz, Esq., 1222 Avenue M, Suite 204, Brooklyn, NY 11230

David I. Schmidt, J.

Upon the foregoing papers in this foreclosure action, U.S. Bank National Association as trustee for Morgan Stanley Mortgage Loan Trust 2006-17XS (2006-17XS) (Morgan Stanley [*2]Mortgage Trust) moves for an order (1) granting summary judgment, pursuant to CPLR 3212, against defendants Becalel Steinberg and Frida Steinberg f/k/a Frida Genuth (the Steinberg defendants or the Steinbergs) and striking the Steinberg defendants' answer; (2) granting the Morgan Stanley Mortgage Trust a default judgment, pursuant to CPLR 3215, against the non-appearing defendants; (3) appointing a referee to compute the sum due and owing to Morgan Stanley Mortgage Trust; and (4) amending the caption to substitute Sol Steinberg in place of "John Doe #1", and striking the names of defendants sued herein as "John Doe #2" through "John Doe No.10."

Background and Procedural History

The Steinberg Note And Mortgage

On July 19, 2006 the Steinbergs refinanced their home at 1814 58th Street in Brooklyn by executing a mortgage and a promissory note in the principal amount of \$495,000.00 (Steinberg Note) in favor of Hemisphere National Bank. [FN1] Becalel Steinberg executed the Steinberg Note and mortgage, while his wife, Frida Steinberg, is a signatory to the mortgage. The Steinberg Note states that it was made "to the order of the Lender," Hemisphere National Bank, the originator of the Steinberg's home loan. The Steinberg Note states that "Borrower" "understand[s] that the Lender [Hemisphere National Bank] may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the Note Holder." A copy of the Steinberg Note in the record reflects an undated indorsement in blank from Hemisphere National Bank.

The mortgage specifically names Mortgage Electronic Registration Systems, Inc. (MERS), as "nominee for Lender [Hemisphere National Bank]" and provides that "FOR PURPOSES OF

RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD." The record reflects that the mortgage was recorded in the New York City Register's office, Department of Finance on July 31, 2006.

Defendant Becalel Steinberg allegedly defaulted under the Steinberg Note by failing to pay monthly principal and interest payments on April 1, 2010, and each month thereafter.

The MERS Mortgage Assignment

The mortgage recording documents in the record reflect that MERS "AS NOMINEE FOR HEMISPHERE NATIONAL BANK" purported to assign the mortgage to the Morgan Stanley Mortgage Trust by assignment dated May 18, 2011 (MERS Mortgage Assignment). The MERS Mortgage Assignment provides that it "ASSIGN[S] AND TRANSFER[S] . . . all right, title and interest in and to that certain Mortgage . . ." The MERS Mortgage Assignment also states that MERS "caused this instrument to be signed by its Assistant Secretary," and reflects that "Pat Labelle" executed the document as "Assistant Secretary" on May 18, 2011 in Palm Beach, Florida. The MERS Mortgage Assignment in the record is not accompanied by any evidence of Labelle's authority to act on behalf of MERS.

The MERS Mortgage Assignment was apparently prepared and recorded in preparation for foreclosure litigation, since it states that "[w]hen recorded mail to" the attention of plaintiff's counsel at McCabe, Weisberg and Conway, P.C.

The Instant Foreclosure Action

The Morgan Stanley Mortgage Trust commenced this foreclosure action against the Steinbergs and others on February 8, 2012, nearly two years after defendants' alleged payment default. Plaintiff's unverified complaint contains a single allegation regarding its standing to [*3] maintain this foreclosure action, alleging that "[p]laintiff is the *holder* of said note and mortgage [which] was indorsed by blank indorsement and delivered to Plaintiff prior to commencement of this action" (emphasis added). Plaintiff's complaint presents a purported copy of the original Steinberg Note bearing an indorsement in blank from Hemisphere National Bank, which reflects that Marta Elias signed the document as "Assistant Secretary" of Hemisphere National Bank on an unspecified date.

Regarding the MERS Mortgage Assignment, plaintiff's complaint further alleges that "[s]aid

mortgage w[as] assigned from [MERS], as nominee for Hemisphere National Bank, NA to [Morgan Stanley Mortgage Trust], [p]laintiff, by Assignment of Mortgage dated May 18, 2011 to be recorded in the Office of the County Clerk of Kings County."

The Steinberg defendants answered the complaint on or about February 27, 2012, denying the material allegations therein and asserting seven affirmative defenses, including that plaintiff "has no standing to bring this action."

Plaintiff's Summary Judgment Motion

The Morgan Stanley Mortgage Trust now seeks, amongst other relief, summary judgment against the Steinberg defendants. The Morgan Stanley Mortgage Trust's moving papers consist of attorney affirmations and a May 16, 2013 affidavit from Patricia A. Labelle in her capacity as "Servicer and Attorney in Fact" of the Morgan Stanley Mortgage Trust (Labelle Moving Affidavit). The Labelle Moving Affidavit is, presumably, from the same "Pat Labelle" who executed the MERS Mortgage Assignment as "Assistant Secretary" of MERS, yet conspicuously absent from the Labelle Moving Affidavit is any reference to the MERS Mortgage Assignment.

The Labelle Moving Affidavit represents that it is based on Labelle's familiarity with "records maintained by 1st United Bank as servicer for [the Morgan Stanley Mortgage Trust] for purpose of servicing mortgage loans." Labelle also avers that "[i]n connection with making this affidavit, I have personally examined these business records reflecting data and information as of May 16, 2013." While the Labelle Moving Affidavit states that Labelle's personal knowledge is limited to her review of 1st United Bank's mortgage servicing business records, Labelle fails to identify, describe or annex the particular business records upon which her limited knowledge is based.

Significantly, the Labelle Moving Affidavit makes the conclusory representation that "[p]laintiff has been in continuous possession of the note and mortgage since prior to the commencement of this action," without providing any factual details, or the source of Labelle's knowledge. In addition to a lack of foundation, the Labelle Moving Affidavit fails to provide evidence that the originating lender, Hemisphere National Bank, indorsed and physically delivered the Steinberg Note to the Morgan Stanley Mortgage Trust.

The Steinberg defendants oppose plaintiff's motion on the ground that the Morgan Stanley Mortgage Trust lacks standing to foreclose, citing the Appellate Division, Second Department's holding in [Bank of NY v Silverberg \(86 AD3d 274 \[2011\]\)](#). Specifically, defendants contend

that Labelle lacked actual authority to execute the MERS Mortgage Assignment.

In response to defendants' standing challenge, the Morgan Stanley Mortgage Trust contends that "a Limited Power of Attorney was executed which granted [p]laintiff the right to assign the mortgage." Plaintiff's reply papers include a copy of the limited power of attorney from U.S. Bank National Association (US Bank), pursuant to which 1st United Bank was appointed "Attorney-in-Fact" for US Bank to, among other things:

"execute and acknowledge in writing or by facsimile stamp all documents customarily and reasonably necessary and appropriate [to] . . .

"4.[e]xecute bonds, notes, mortgages, deeds of trust and other contracts, agreements and instruments regarding the Borrowers and/or the Property, including but not limited to the execution of releases, satisfactions, assignments, loan modification agreements, loan assumption agreements, subordination agreements, property adjustment agreements, and other instruments pertaining to mortgages or deeds of trust, and execution of deeds and associated instruments, if any, conveying the Property, in the interest of [US Bank], as [*4]Trustee."

While the limited power of attorney between US Bank and 1st United Bank states that it was "issued in connection with [1st United Bank's] responsibilities to service certain mortgage loans (the Loans) held by U.S. Bank in its capacity as Trustee," plaintiff provides no evidence that the Steinberg's loan was amongst the "Loans" referenced therein. Regardless, plaintiff's production of the limited power of attorney regarding 1st United Bank's servicing rights does not obviate the need for plaintiff to produce admissible testimonial and/or documentary evidence proving that Hemisphere National Bank physically delivered the Steinberg Note to the Morgan Stanley Mortgage Trust prior to commencement.

Discussion

(1)

Summary judgment is a drastic remedy that should only be granted when no triable issues of fact exist (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The moving party bears the initial burden of establishing its prima facie entitlement to summary judgment, as a matter of law, with admissible evidence demonstrating the absence of material facts (*see CPLR 3212 [b]; Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to make that showing requires

denying the motion regardless of the adequacy of the opposition ([see Vega v Restani Constr. Corp.](#), 18 NY3d 499, 502 [2012]; [Ayotte v Gervasio](#), 81 NY2d 1062 [1993]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues" ([Ruiz v Griffin](#), 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]). Thus, issue-finding and not issue-determination is key in deciding a summary judgment motion ([see Sillman v Twentieth Century-Fox Film Corp.](#), 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]).

(2)

Plaintiff's Standing To Foreclose

Plaintiff is not entitled to the relief it seeks because it has failed to proffer any evidence of its standing to foreclose under the Steinberg Note at the time of commencement. As discussed below, there are triable issues of fact regarding delivery of the Steinberg Note from the originating lender and indorser, Hemisphere National Bank, to the Morgan Stanley Mortgage Trust, requiring denial of the instant motion in its entirety.

"To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, *ownership of the mortgage*, and the defendant's default in payment" ([Campaign v Barba](#), 23 AD3d 327, 327 [2005] [emphasis added]). Where, as here, standing to commence a foreclosure action is raised by the defendant as an affirmative defense to the complaint, the burden shifts to the foreclosing party and "it is incumbent upon the plaintiff to establish its standing to be entitled to relief" ([Deutsche Bank Natl. Trust Co. v Rivas](#), 95 AD3d 1061, 1061 [2012]; *see also* [Citimortgage, Inc. v Stosel](#), 89 AD3d 887, 888 [2011] [same]; [U.S. Bank, N.A. v Collymore](#), 68 AD3d 752, 753 [2009] [holding "(w)here, as here, standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief"]).

The Court of Appeals has held 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 County Chamber of Commerce v Pataki](#), 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]). In [Caprer v Nussbaum](#) (36 AD3d 176, 182 [2006]), the Appellate Division, Second Department explicitly 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." Similarly, the Appellate Division, First Department has held that "standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is [*5]capable of judicial resolution" ([Security Pac. Natl. v Evans, 31 AD3d 278, 279 \[2006\]](#)).

In [GRP Loan, LLC v Taylor \(95 AD3d 1172 \[2012\]\)](#), the Appellate Division, Second Department summarized the threshold evidentiary showing that is necessary in order to establish a foreclosing party's standing:

"[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 prior to commencement of the action with the filing of the complaint . . . *Either* a written assignment of the underlying note *or* the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*id.* at 1173[internal quotation marks and citations omitted] [emphasis added]).

The standard set forth in the *Taylor* case is premised on the court's prior holdings that "a promissory note [is] a negotiable instrument within the meaning of the [New York] Uniform Commercial Code [UCC]" ([Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674, 674 \[2007\]](#)). In *Slutsky v Blooming Grove Inn* (147 AD2d 208 [1989]), the court confirmed that Article 3 of the UCC is applicable to foreclosure actions, wherein the Second Department specifically held:

"[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 (*cf.*, UCC 3-202 [3], [4])" (*id.* at 212).

UCC § 3-202 (1) provides, in pertinent part, that "[i]f the instrument is payable to order *it is negotiated by delivery* with any necessary indorsement" (emphasis added). UCC § 3-204 (2) further provides that "[a]n indorsement in blank specifies no particular indorsee and may consist of a mere signature. A note payable to order and indorsed in blank becomes payable to bearer and *may be negotiated by delivery* alone until specially indorsed" (UCC § 3-204 [2] [emphasis added]).

In sum, a party has standing to foreclose under a "pay to the order" promissory note that was indorsed in blank — like the Steinberg Note at issue here — by evidencing that the note was negotiated by the indorser's *physical delivery* of the note to the foreclosing party. A party cannot prove prima facie standing to foreclose by claiming mere possession of a note, since UCC "holder" status and standing to foreclose is premised on negotiation by means of the lender's (or prior note holder's) *indorsement and physical delivery* of the negotiable instrument (*see Bank of NY Mellon v Deane*, 41 Misc 3d 494 [Sup Ct, Kings County 2013] [discussing application of the UCC and the foreclosing plaintiff's "misunderstanding of the general law of negotiable instruments in its equation of the status as holder' to mere possession of the instrument"]).

(a)

Delivery Of The Steinberg Note

Plaintiff's reliance on the conclusory statement in the Labelle Moving Affidavit that plaintiff has had "continuous possession" of the Steinberg Note to establish the Morgan Stanley Mortgage Trust's standing is misplaced. Plaintiff's unverified complaint similarly alleges, in conclusory fashion, that "[p]laintiff is *the holder* of said note and mortgage [which] was indorsed by blank indorsement and delivered to [p]laintiff prior to commencement of this action" (emphasis added). Plaintiff's attempt to equate "possession" of the note with the UCC's requisite delivery is unavailing.

Plaintiff has failed to establish that it became a "holder" of the Steinberg Note, within the meaning of the UCC, by evidencing the physical delivery of the Steinberg Note from Hemisphere National Bank to the Morgan Stanley Mortgage Trust. The Labelle Moving Affidavit is patently insufficient to establish plaintiff's standing because it contains no specific factual details (i.e., when, who, what, where and how) evidencing Hemisphere National Bank's delivery of the Steinberg Note to the Morgan Stanley Mortgage Trust.

In addition, the Labelle Moving Affidavit fails to describe or provide any evidence of the [*6]scope or nature of Labelle's authority, if any, to act or speak on plaintiff's behalf. Significantly, the Labelle Moving Affidavit does not identify Labelle's actual employer or Labelle's affiliation, if any, with the Morgan Stanley Mortgage Trust. Instead, Labelle vaguely represents that "[i]n the regular performance of my job functions, I am familiar with business records maintained by 1st United Bank as servicer for [the Morgan Stanley Mortgage Trust] for

the purpose of servicing mortgage loans." While the Labelle Moving Affidavit seemingly implies that Labelle is currently employed, in some capacity, by 1st United Bank, US Bank's mortgage servicing agent, Labelle also executed the MERS Mortgage Assignment as the "Assistant Secretary" of MERS. Therefore, Labelle wears at least two hats in the context of this foreclosure action, neither of which is that of the foreclosing party here.

Also, the Labelle Moving Affidavit avers that "[i]n connection with making this affidavit, I have personally examined [1st United Bank's] business records[,]" yet Labelle fails to identify, describe or annex the records upon which her limited knowledge is based. Regardless, Labelle's review of mortgage servicing records is entirely irrelevant to the factual circumstances under which the Steinberg Note was delivered from the lender, Hemisphere National Bank, to the Morgan Stanley Mortgage Trust prior to commencement.

In [*Homecomings Fin., LLC v Guldi*](#) (108 AD3d 506[2013]), an analogous case, the Second Department reversed an order granting the plaintiff summary judgment because Homecomings failed to establish its prima facie standing to foreclose. In that case, Homecomings failed to submit probative evidence of the Note's physical delivery prior to commencement of the action. The only proof of physical delivery of the note submitted by Homecomings was an affidavit from its servicing agent, claiming that the note was delivered to the servicer as custodian of Homecoming's business records.

The Second Department held that Homecoming's submission of the mortgage servicer's 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 508-09; [*see also HSBC Bank USA v Hernandez*](#), 92 AD3d 843, 844 [2012] [holding that "(t)he affidavit from the plaintiff's servicing agent did not give any factual details of a physical delivery of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action"]; [*Deutsche Bank Natl. Trust Co. v Barnett*](#), 88 AD3d 636, 638 [2011] [holding that affidavit of plaintiff's servicing agent without any factual details failed to establish that the note was physically delivered to plaintiff prior to commencement]).

Here, as in *Homecomings*, the Morgan Stanley Mortgage Trust has failed to satisfy its burden of establishing that it had the requisite standing to commence this foreclosure action. The Labelle Moving Affidavit does not establish that the Steinberg Note was duly negotiated within the meaning of the UCC. While the Labelle Moving Affidavit makes the conclusory assertion that plaintiff has been in "continuous possession" of the Steinberg Note, Labelle fails to address

the physical delivery of the Steinberg Note from Hemisphere National Bank to the Morgan Stanley Mortgage Trust. Further, the Labelle Moving Affidavit is admittedly based on Labelle's general review of 1st United Bank's mortgage servicing business records, rather than her own personal knowledge. Accordingly, plaintiff's conclusory assertions that the Morgan Stanley Mortgage Trust is the "holder" or in "possession" of the Steinberg Note without producing any probative, admissible evidence of delivery is insufficient, as a matter of law.

(b)

The MERS Mortgage Assignment

Plaintiff's reliance on the MERS Mortgage Assignment executed by "Pat Labelle" as evidentiary proof of Morgan Stanley Mortgage Trust's standing to foreclose is similarly misplaced, since MERS was merely a "nominee" of the originating lender, Hemisphere National Bank, for purposes of recording the mortgage instrument. MERS was never a "holder" of the Steinberg Note, and thus, could not confer any interest in the Steinberg Note to plaintiff.

Contrary to plaintiff's contentions, it failed to demonstrate its prima facie entitlement to [*7] judgment, as a matter of law, because "it did not submit sufficient evidence to demonstrate its standing as the lawful holder or assignee of the subject note on the date it commenced this action" (*see Collymore*, 68 AD3d at 754). In the seminal *Silverberg* case, the Second Department rejected a MERS mortgage assignment as evidence of standing, holding that "MERS was without authority to assign the power to foreclose to the plaintiff" since "MERS was never the lawful holder or assignee of the notes" (86 AD3d at 283).

Furthermore, the Second Department has repeatedly and consistently held that "[a]n 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 Collymore*, 68 AD3d at 754 [holding that "[w]here a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity"]; *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"]). Consequently, the MERS Mortgage Assignment does not constitute evidence of the Morgan Stanley Mortgage Trust's prima facie standing to foreclose, as a matter of law. Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: In February 2007, Hemisphere National Bank changed its name to Republic Federal Bank. Republic Federal Bank was subsequently closed by the Office of the Comptroller of the Currency (OCC) and put into receivership on December 11, 2009. The OCC appointed the Federal Insurance Deposit Company (FDIC) as receiver (*see* <http://www.fdic.gov/news/news/press/2009/pr09225.html>; <http://www.occ.gov/news-issuances/news-releases/2009/nr-occ-2009-155.html>).

[Return to Decision List](#)