

U.S. Bank N.A. v Friedman

2014 NY Slip Op 30753(U)

March 21, 2014

Sup Ct, Rockland County

Docket Number: 032128/11

Judge: Gerald E. Loehr

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR MASTR ADJUSTABLE RATE
MORTGAGES TRUST 2007-1, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2007-1,

Plaintiff,

AMENDED DECISION AND ORDER

Index No.: 032128/11

-against-

LEONARD FRIEDMAN, KARYN FRIEDMAN,
NATIONAL CITY BANK, and "JOHN DOE#1"
through "JOHN DOE#10" the last ten names
being fictitious and unknown to the Plaintiff, the
person or parties intended being the person or parties,
if any, having or claiming an interest or lien upon
the mortgaged premises described in the complaint,

Defendants.

-----X
LOEHR, J.

In this foreclosure action, the Court, in a Decision and Order dated June 28, 2013, having granted the Plaintiff summary judgment as to the execution and delivery of the Note and Mortgage and the Defendants' default thereunder, but have denied summary judgment on the issue of Plaintiff's standing – specifically, when the Original Note, indorsed by the original lender, had been delivered to Plaintiff¹ – the matter was tried before me on February 28, 2014,

¹ With respect to standing, where, as here, a defendant has put standing in issue, the plaintiff must prove its standing, that is that it had been assigned the mortgage and note prior to the commencement of the foreclosure (*Deutsche Bank National Trust Company v Haller* (100 AD3d 680, 682 [2d Dept 2012])). A valid assignment can be effectuated by a written assignment

and the Plaintiff called as its sole witness, Rashad Blanchard, an employee of Ocwen, which subsequently became the servicer of this loan. Mr. Blanchard testified that Plaintiff had possession of the original indorsed Note based on: 1) his having examined it approximately 30 days ago and 2) that the original indorsed Note had been delivered to Plaintiff on April 16, 2007 based on the records of the original servicer, Well Fargo Bank. As Plaintiff failed to lay a proper foundation for the admission of the Well Fargo Bank records, they are inadmissible hearsay (*Unifund CCR Partners v Youngman*, 89 AD3d 1377, 1377-78 [4th Dept 2011]; *Palisades Collection, LLC v Kedik*, 67 AD3d 1329 [4th Dept 2009]; *accord JP Morgan Chase Bank, N.A. v Rads Group, Inc.*, 88 AD3d 766 [2d Dept 2011]) and all that has been established is that Plaintiff had possession of the original indorsed Note some 30 days ago – long after this case was commenced. Thus, Plaintiff having failed to establish that it owned the Note on the date this case was commenced, it does not have standing to maintain this action and the Complaint is dismissed on that basis.

of the mortgage and note executed by one with authority, or by indorsement and delivery of the note – the mortgage following the note by operation of law (*Bank of New York v Silverberg*, 86 AD3d 274 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]).

Here, the documents show that MERS purported to assign the Note and Mortgage on behalf of ABC to Plaintiff on August 17, 2011. As MERS had no apparent authority to assign the Note, this assignment assigned nothing (*Bank of New York v Silverberg*, 86 AD3d 274 [2d Dept 2011]; *Aurora Loan Services, LLC v Weisblum* (85 AD3d 95 [2d Dept 2011])). Plaintiff, however, does not now rely on this written assignment but on an assignment by delivery of the Note under an undated indorsement prior to the commencement of the case. In support thereof, Plaintiff has submitted the Note, indorsed by an officer of ABC, and the Affidavit of an Assistant Vice President of American Home who avers, “based on the books and records of Plaintiff and [American Home],” that the indorsed Note had been delivered to Plaintiff “since on or before January 16, 2007.” These records have not been submitted nor an explanation why, if they did, Plaintiff felt the need to do a written assignment in 2011.

Deutsche Bank National Trust Company v Haller (100 AD3d 680, 682 [2d Dept 2102]) now requires more stringent proof where a plaintiff is trying to prove standing by delivery of the note under an undated indorsement, particularly where the plaintiff’s conduct has been inconsistent with such asserted prior assignment. Thus, in *Haller*, where the plaintiff was asserting standing by virtue of a note delivered under an undated indorsement, the Second Department said:

“Here, the evidence submitted by the Plaintiff in support of its motion did not demonstrate that the note was physically delivered to it prior to the commencement of the action. The 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.”

This constitutes the decision and order of the Court.

Dated: New City, New York
March 21, 2014



HON. GERALD E. LOEHR
J.S.C.

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