Combs v Ocwen Loan Servicing, LLC
2014 NY Slip Op 33362(U)
December 10, 2014
Supreme Court, Kings County
Docket Number: 501420/14
Judge: Lawrence S. Knipel

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of December, 2014

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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MARC D. COMBS, et ano.,

Plaintiffs ,

- against - Index No. 501420/14

OCWEN LOAN SERVICING, LLC., et al.

Defendants.

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The following papers numbered 1 to 4 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers Plaintiffs' Memo of Law in Opposition	3

Upon the foregoing papers, defendants Ocwen Loan Servicing, LLC (Ocwen), US Bank National Association as Trustee for J.P. Morgan Mortgage Acquisition Corp. 2005-FRE1ASSET Backed Pass-Through Certificates, Series 2005-FRE1 (the "Trust"); JP Morgan Chase & Co., J.P. Morgan Mortgage Acquisition Corporation, J.P. Morgan Acceptance

MS #3

Corporation 1 and Mortgage Electronic Registration Systems (MERS) move for an order, pursuant to CPLR 3211 (a)(1) and (a)(7), dismissing the complaint of plaintiffs Marc D. Combs and Mychelle Combs.

Plaintiffs are the owners of the property located at 1506 Pacific Street in Brooklyn. On July 25, 2005, plaintiffs executed a mortgage on the property to secure a note from Fremont Funding Corp. (Fremont) in the amount of $463,000.00. The mortgage was recorded on August 30, 2005 in the name of MERS as nominee for Fremont. According to an assignment instrument dated October 2, 2009 and recorded November 18, 2009, the mortgage was purportedly assigned from MERS to the Trust.

Plaintiffs commenced the instant action pursuant to article 15 of the Real Property Actions and Proceedings Law (RPAPL) to quiet title to the subject property, to invalidate the mortgage and assignment and for an award of actual and punitive damages against Ocwen, the servicer of the mortgage, for allegedly improper application of escrow payments. In their verified complaint, plaintiffs set forth causes of action alleging that: 1) the mortgage and note were "intentionally separated" when the mortgage was recorded in the name of MERS, thereby rendering the note unsecured; 2) the MERS mortgage and October 2, 2009 assignment are unenforceable; 3) the purported October 2, 2009 assignment of the mortgage is invalid as it was made during Fremont's bankruptcy; 4) the purported assignment of the mortgage to the Trust is void as it was made after the "closing date" set forth in the Pooling

and Servicing Agreement (PSA) creating the Trust and 5) Ocwen improperly applied escrow payments to pay water charges and arbitrarily increased the monthly payment as a result.

In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The court must accept the facts alleged in the complaint to be true and determine only whether the facts alleged fit within any cognizable legal theory (*see Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2000]). The court "is not concerned with determinations of fact or the likelihood of success on the merits" (*Detmer v Acampora*, 207 AD2d 477 [1994] *see Stukuls v State of New York*, 42 NY2d 272, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002]).

An action to quiet title may be brought "[w]here a person claims an estate or interest in real property ... to compel the determination of any claim adverse to that of the plaintiff which the defendant makes...." (RPAPL § 1501). A claim for quiet title requires a plaintiff

to allege "the existence of a removable 'cloud' on the property, which is an apparent title, such as in a deed or other instrument, that is actually invalid or inoperative" (*Barberan v Nationpoint*, 706 F Supp 2d 408, 418 [SDNY 2010]).

The court finds no merit in plaintiffs' first cause of action for a judgment declaring the note unsecured on the ground that the mortgage, recorded in the name of MERS, was "intentionally separated" from the note. In *Merritt v Bartholick*, (36 NY 44 [1867]) the Court of Appeals held that as a mortgage is but an incident to the debt which it is intended to secure; the security cannot be separated from the debt, and exist independently of it (*see HSBC Bank USA, N.A. v Miller*, 26 Misc 3d 407 [Supreme Court, Sullivan County 2009]). Moreover, the mortgage is not invalid merely because it was recorded in the name of MERS as nominee for Fremont (*see Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90 [2006]).

Aside from the recording of the mortgage in the name of MERS, plaintiffs have not made any further allegations which call into question the validity of the underlying mortgage itself. Plaintiffs do not allege that the mortgage and/or note were forged or procured as the result of fraud. Plaintiffs state in their complaint that they "do not contend that they are not obligated under the note signed at closing." Thus, plaintiffs have not stated a cause of action for a judgment declaring that the underlying mortgage is invalid.

The gravamen of the second, third and fourth causes of action is that the purported assignment of the mortgage from MERS to the Trust is invalid.

To the extent that plaintiffs are seeking in their fourth cause of action to invalidate the alleged assignment of the mortgage based on a violation of the PSA forming the Trust, plaintiffs' have no standing to bring this claim (*Rajamin v Deutsche Bank Nat. Trust Co.*, US Dist Ct, SD NY, Mar. 28, 2013, Swain, J.; ["a nonparty to a PSA lacks standing to assert noncompliance with the PSA as a claim or defense unless the non-party is an intended (not merely incidental) third-party beneficiary of the PSA"]; *Karamath v U.S. Bank, N.A.*, US Dist Ct, ED NY, Aug. 29, 2012, Levy, J. [mortgagor "is not a party to the PSA or to the Assignment of Mortgage, and is not a third-party beneficiary or either, and therefore has no standing to challenge the validity of that agreement or the assignment"]).

However, the court finds plaintiffs' second and third causes of action, to the extent they seek to quiet title and invalidate the October 2, 1999 assignment of mortgage, state cognizable causes of action (*see Honig v U.S. Bank N.A.*, 40 Misc 3d 1214 [A], 2013 NY Slip Op 51189 [U] [Supreme Court, Nassau County 2013]). The October 2, 1999 recorded assignment from MERS to the Trust purports to transfer only the mortgage. It is well established that an assignment of the mortgage without the underlying note is a nullity (*U.S. Bank Nat. Assn. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]; *HSBC Bank USA v Hernandez*, 92 AD3d 843, 843-844 [2d Dept 2012]; *Deutsche Bank National Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept.2011]). 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" (*GRP Loan, LLC v Taylor*, 95 AD3d 1172,1173 [2d Dept 2012] [citations omitted]). "[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 [2d Dept 2007]). "The 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 (UCC § 3–202 [3], [4])" (*Slutsky v Blooming Grove Inn*, 147 AD2d 208, 212 [2d Dept 1989]). 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." 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]).

The Trust argues that the recorded October 2, 1999 assignment is inconsequential as the note was properly delivered to the Trust pursuant to the PSA. However, while the Trust has submitted a copy of the note in its reply papers, this document alone does not conclusively dispose of plaintiffs' claims. Along with a copy of the note, the Trust attaches a separate page which contains an endorsement from Fremont in blank. The Trust alleges that the separate page is attached because the endorsement is on the back of the last page of the note. However, this is not substantiated by an affidavit of someone who physically

examined the original note. Further, assuming there is an endorsement in blank on the back of the note, in order to establish ownership of the note (and, consequently, the mortgage), the Trust must provide an affidavit of someone with personal knowledge who provides factual details as to the note's physical delivery (*see Homecomings Fin., LLC v Guldi*, 108 AD3d 506, 509 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 682 [2d Dept 2012]; *HSBC Bank USA v Hernandez*, 92 AD3d at 844 [2d Dept 2012]. The attorney for the Trust does not provide such factual details in his affirmations nor does he attest to having personal knowledge.

With respect to the fifth cause of action alleging that Ocwen improperly applied escrow payments for water charges, Ocwen submits a copy of the mortgage and cites the following provisions:

> 3. Monthly Payments for Taxes and Insurance
>
> (a) Borrower's Obligations.
>
> I will pay to Lender all amounts necessary to pay for taxes assessments, water charges, sewer rents and other similar charges...Each Periodic Payment will include an amount to be applied toward payment of the following items which are called "Escrow Items."
>
> (1) The taxes, assessments, water charges, sewer rents and other similar charges, on the Property which under Applicable Law may be superior to this Security Instrument as a lien on the Property. . .
>
> * * *
>
> After signing the Note, or at any time during this term, Lender may include these amounts as Escrow Items. The

> monthly payment I will make for Escrow Items will be based on Lender's estimate of the annual amount required.
>
> I will pay to lender all of these amounts to Lender unless Lender tells me, in writing, that I do not have to do so...
>
> . . .Lender will estimate from time to time the amount of Escrow Funds I will have to pay by using assessments and bills and reasonable estimates of the amount I will have to pay for Escrow Items in the future. . .

The foregoing provisions clearly entitle Ocwen to include charges for escrow items such as water charges in plaintiffs' monthly mortgage payment and adjust the amount of monthly escrow payments based on the amount charged in water bills. Even affording the pleadings a liberal construction and accepting all facts alleged as true (*see Leon v Martinez*, 84 NY2d 83, 87[1994]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]), plaintiffs have not clearly articulated a cause of action for damages resulting from Ocwen's calculation and application of escrow payments. In his affirmation, plaintiffs' attorney states that Ocwen used escrow funds to pay a water bill that was later found to be erroneous and that Ocwen has not endeavored to recover the erroneous payment from the Department of Environmental Protection (DEP). However, plaintiffs do not cite to any provisions in the mortgage documents which obligate Ocwen itself to recover any erroneously charged funds from the DEP and reapply them to plaintiffs' account. Moreover, the mortgage terms provide that the amount of monthly escrow payments will be estimated "from time to time" using assessments and bills. It is not clear from the complaint or

counsel's affirmation whether Ocwen is presently overestimating the escrow amounts unreasonably in light of recent accurate water bills.

As a result, defendants' motion to dismiss the complaint is granted to the extent that the first, fourth and fifth causes of action are dismissed. Dismissal of the fifth cause of action is without prejudice to replead in an amended complaint. The motion to dismiss is otherwise denied with respect to the second and third causes of action seeking to quiet title and invalidate the October 2, 1999 assignment of the mortgage to the Trust.

The foregoing constitutes the decision and order fo the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL