

Wells Fargo Bank, N.A. v Mone
2015 NY Slip Op 30506(U)
March 19, 2015
Supreme Court, Suffolk County
Docket Number: 12-10461
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-17-14 (001)
MOTION DATE 7-31-14 (002)
MOTION DATE 10-1-14 (003)
ADJ. DATE 11-6-14
Mot. Seq. # 001 - MD
 # 002 - MD
 # 003 - MD

-----X
WELLS FARGO BANK, N.A. as Trustee for
OPTION ONE MORTGAGE LOAN TRUST
2005-2 Asset Backed Certificates, Series 2005-2,

Plaintiff,

- against -

VINCE J. MONE,

Defendant.
-----X

JORDAN T. SCHILLER, ESQ.
Attorney for Plaintiff
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New York, New York 10004

WILLIAM GRAUSSO, ESQ.
Attorney for Defendant
131 West Main Street
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Upon the following papers numbered 1 to 64 read on these motions to compel, for summary judgment, and to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; 17 - 25; 26 - 43; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 16; 44 - 50; 51 - 64; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (seq. #001) by defendant to compel, this motion (seq. #002) by plaintiff for summary judgment, and this motion (seq. #003) by defendant to dismiss are consolidated for the purposes of this determination; and it is further

ORDERED that this motion (seq. #001) by defendant for an Order, pursuant to CPLR 3124 and 3126, compelling plaintiff to comply with defendant's combined demands is denied; and it is further

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ORDERED that this motion (seq. #002) by plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment in its favor and for an award of attorney's fees is denied; and it is further

ORDERED that this motion (seq. #003) by defendant to dismiss, pursuant to CPLR 3211 (a) (1) and (a) (7), is denied.

This is a declaratory judgment action pursuant to RPAPL article 15 for the imposition of an equitable first priority lien in favor of plaintiff in the loan amount of \$600,000.00 from the date of closing, February 9, 2005, upon defendant's premises located at 922 Sound Shore Road, Jamesport, New York. Plaintiff, Wells Fargo, N.A. as Trustee for Option One Mortgage Loan Trust 2005-2 Asset Backed Certificates, Series 2005-2, commenced this action on March 29, 2012.

Plaintiff alleges by verified complaint that on February 9, 2005, defendant having accepted the terms of the loan agreement, executed an original mortgage and its attached interest-only rider in plaintiff's favor against the subject property as security and in return for the aforementioned loan. In addition, plaintiff alleges that its settlement agent attempted to record said documents in the Suffolk County Clerk's Office but that they were: (i) rejected due to incomplete or improper signatures; (ii) lost in transit; or (iii) misplaced by plaintiff's settlement agent or an employee of the Suffolk County Clerk's Office. Plaintiff insists that defendant must sign duplicates of said documents inasmuch as he agreed to be bound by the terms and conditions of the loan agreement and asserts that defendant has refused or failed to re-execute or complete duplicate original mortgage documents. By its complaint, plaintiff seeks a declaration that it has an equitable first priority lien in favor of plaintiff in the loan amount of \$600,000.00 from the date of closing, February 9, 2005, upon defendant's premises; the imposition of a constructive and/or resulting trust upon said premises for said lien; a declaration that a copy of the final order entered herein be recorded among the land records of Suffolk County together with true copies of the original mortgage and its attached original rider and that said order be indexed in the manner appropriate to the original documents and in the names of the parties referenced therein. Plaintiff also alleges that defendant breached his agreement under the loan agreement to execute and provide those documents necessary to grant plaintiff and its assignees a first priority security interest in the subject property and seeks specific performance of defendant's agreement under the loan agreement by executing documents necessary for the recording of the original mortgage and its rider. Defendant served his answer containing affirmative defenses, including standing, and counterclaims.

Plaintiff seeks summary judgment on its complaint and attorney's fees. The Court notes that the copies of the original note and mortgage indicate the lender to be "The New York Mortgage Co., LLC, A New York Corporation" and an assignment dated February 9, 2005

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indicates that said note and mortgage were assigned to “Option One Mortgage Corporation a California Corp.” In addition, the note contains an allonge paying it to the order of “Option One Mortgage Corporation a California Corp.” by authorized signer Anna Frange, VP of Closing, Funding and Shipping of “The New York Mortgage Co., LLC, A New York Corporation.”

Defendant requests dismissal on the grounds that plaintiff failed to demonstrate standing as assignee of the mortgage or holder of the note and mortgage at the commencement of this action, and in any event, a trustee plaintiff cannot be the rightful owner of the mortgage and plaintiff has not provided a power-of-attorney for each assignment in the chain of title of the mortgage. Defendant’s submissions include a copy of an assignment of mortgage dated July 27, 2011, indicating that “The New York Mortgage Co., LLC” assigned the subject mortgage to “Sand Canyon Corporation FKA Option One Mortgage Corporation.”

A defendant waives the defense of lack of standing unless it is raised in either the answer or in a pre-answer motion to dismiss the complaint (*see* CPLR 3211 [e]; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). “A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the . . . action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez*, 92 AD3d 843). However, “a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it,” since a mortgage is merely security for a debt and cannot exist independently of it (*U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748, 942 NYS2d 122 [2d Dept 2012]; *see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; *see also Homecomings Fin., LLC v Guldi*, 108 AD3d 506, 969 NYS2d 470 [2d Dept 2013]).

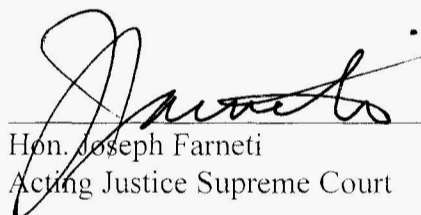
Here, the issue of standing cannot be determined as a matter of law on this record (*see Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061, 1062, 945 NYS2d 328 [2d Dept 2012]). The motion for summary judgment is supported only by copies of the mortgage loan documents and the 2005 assignment, powers-of-attorney, and the affidavit of Kyle Lucas, a Senior Loan Analyst by Ocwen Corporation, whose indirect subsidiary is Ocwen Loan Servicing LLC (“Ocwen”). Ms. Lucas states that Ocwen services defendant’s loan as authorized attorney-in-fact

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for plaintiff and attaches the limited power-of-attorney. Plaintiff does not explain either in its complaint or anywhere else in the submitted motion papers its relationship to either the original lender or the assignees. Specifically, plaintiff did not submit an affidavit from someone with personal knowledge providing factual details of a physical delivery of the note to plaintiff or assignment of the note and mortgage to plaintiff prior to the commencement of this action (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d at 682-683). Thus, plaintiff has failed to demonstrate that it has standing to commence this action. In addition, defendant's motion to dismiss must be denied as questions of fact exist as to, among other things, whether the note was physically delivered to plaintiff or the note and mortgage were assigned to plaintiff prior to the commencement of the action (*see id.*, 100 AD3d at 683; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d at 1062).

Finally, the request by defendant to compel plaintiff to provide a response to those portions of his combined demands which were objected to by plaintiff in its responses to combined demands is denied inasmuch as the affirmation of good faith submitted by defendant's counsel did not satisfy 22 NYCRR § 202.7, as it did not refer to any "communications between the parties evincing a diligent effort to resolve the dispute, or indicating good cause why no such communications occurred" other than a letter dated March 4, 2013 to plaintiff's counsel requesting outstanding documents and more information concerning objections within fifteen days and notifying that thereafter defendant counsel would "pursue [his] option through the court." (*Matter of Greenfield v Board of Assessment Review for Town of Babylon*, 106 AD3d 908, 908, 965 NYS2d 555 [2d Dept 2013]; *see also Murphy v County of Suffolk*, 115 AD3d 820, 982 NYS2d 380 [2d Dept 2014]).

Dated: March 19, 2015



Hon. Joseph Farneti
 Acting Justice Supreme Court

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