

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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HSBC BANK USA, NATIONAL ASSOCIATION, AS
TRUSTEE FOR WELLS FARGO ASSET SECURITIES
CORPORATION, MORTGAGE ASSET-BACKED PASS-
THROUGH CERTIFICATES SERIES 2007-PA2,

Plaintiffs,

-against-

DECISION & ORDER

JEFFREY F. MILLER,
CHASE BANK USA, N.A.,
CAPITAL ONE BANK USA, N.A.,
GEMINI CAPITAL GROUP, LLC,

Defendants.

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Motion Return Date: August 11, 2014
RJI No.: 52-35458 2014
Index No.: 0514-2014

Appearances: Frenkel Lambert Weiss Weisman & Gordon, LLP
Attorneys for the Plaintiff
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Bay Shore, NY 11706
By: Christopher P. Kohn, Esq.

Jeffrey F. Miller
Pro se Defendant
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Cincinnati, Ohio 45202

Schick, J.:

This matter comes on by *pro se* Defendant's Motion to Dismiss Plaintiff's foreclosure action, in lieu of an Answer, based upon documentary evidence (CPLR 3211[a]1) and for lack of legal capacity to sue (i.e. standing, CPLR 3211[a]3). This is Plaintiff's second attempt to foreclose upon Defendant's mortgaged

property located 108 Lakeshore Drive., Rock Hill, Sullivan County, New York. The first was terminated on May 6, 2014, without prejudice, on the ground that Plaintiff did not establish that the Note had been assigned from the lender to Plaintiff and, therefore Plaintiff lacked standing to prosecute (Plaintiff's Ex. E).¹

To commence a foreclosure action, Plaintiff must establish it has a legal or equitable interest in the obligation, the Note, and the security, the mortgage. (Wells Fargo Bank, NA v Marchione, 69 AD3d 204, 207 [2d Dept 2009]). Plaintiff establishes standing by proffering evidence that it holds or has been assigned the underlying Note, either by physical delivery or execution of a written assignment prior to commencing the action by filing the Notice of Pendency and the Complaint. (Wells Fargo Bank, NA v Marchione, 69 AD3d at 207-209; US Bank v Collymore, 68 AD3d 752, 754 [2d Dept 2009]).

Where Plaintiff is not the lender and standing to sue is contested (HSBC Bank USA, NA v Taher, 104 AD3d 815 [2d Dept 2013]), as is the case here, the Court's first obligation is to ascertain the chain of custody of the Note to determine whether the Plaintiff was the beneficial owner of the Note at the time the foreclosure was commenced. (Caprer v Nussbaum, 36 AD3d 176, 182 [2006]; Wells Fargo Bank Minn. NA v Mastropaolo, 42 AD3d 239, 242 [2007]; Bank of NY v Silverberg, 86 AD3d 274, 280 [2d Dept 2011]).

The underlying Complaint (Ex. D ¶ 17), dated March 10, 2014, alleges, as it must (Wells Fargo Bank, NA v Marchione, 69 AD3d at 207-208), that "plaintiff is now the owner and holder of the said note and mortgage securing the same or has been delegated the authority to institute a mortgage foreclosure action by the owner...." Nevertheless, the question remains whether evidence in the record

¹ Plaintiff's motion to reargue was likewise denied, on October 29, 2009 (Defendant's Ex.C).

supports that assertion (Mortgage Electronic Registration System Inc. v Coakley, 41 AD3d 674 [2007]).

Complicating matters, Plaintiff's Complaint (Plaintiff's Ex. D) is supported by a "lost note affidavit" (Plaintiff's Ex. G) and a "gap assignment" document (Ex. H), which are proffered to correct earlier shortcomings and which allegedly establish standing to foreclose. The Lost Note Affidavit is by an employee of Wells Fargo Bank, N.A., the "Servicer in the above captioned matter" (which paper has no caption) says he "is authorized to make this Affidavit on behalf of HSBC Bank, USA as Trustee for Wells Fargo Asset Securities, etc. Therein it is alleged that Defendant signed a Note in the amount of \$525,000.00, issued by the lender, Real Estate Mortgage Network, Inc., which was secured by a mortgage upon Defendant's above noted premises. The Affidavit states that the Note and Mortgage were recorded by the Sullivan County Clerk on March 9, 2007, and that the original Note has been lost, misplaced or destroyed and replaced by a "certified true copy." The Affidavit is accompanied by what is purported to be a copy of the original Note containing Defendant's signature and has, stamped upon it, assignments from the lender, Real Estate Mortgage Network, Inc, to Wells Fargo Bank, NA and another blank endorsement ("Pay to the Order of ***") signed by a Vice President of Wells Fargo Bank, NA.² Neither stamp is dated and it is unclear whether the stamped endorsements appear on the original document or only upon the copy. The Note also contains a typed Addendum: "***HSBC Bank USA National Association as Trustee for Wells Fargo Asset Securities Corporation Mortgage Asset-Backed Pass-Through Certificates Series 2007-PA2" which is unsigned and undated.

² Another copy of the note appears in Defendant's Ex. D with only one stamp upon its face.

Assuming, *arguendo*, that the copy of the Note is admissible evidence of the note, the question remains what evidence in the record clarifies that chain of ownership of the Note from the original lender to Plaintiff? Plaintiff argues, as it has previously argued, that the "assignment chain" for the mortgage has been made clear (Affirmation, Sect. IV). This argument was accepted previously and may be acceptable here, but it is of no moment because a plain review of these documents does not clarify the chain of assignment of the obligation, the Note in question. For example, what evidence is there that Wells Fargo Bank N.A. sold/assigned/bundled the Note into the "Wells Fargo Asset Securities Corporation Mortgage Asset-Backed Pass-Through Certificates Series 2007-PA2" and what evidence exists in the record indicating that Defendant's obligation is part of the bundled "2007-PA2" package?

Plaintiff asserts the cure to its prior problems lies in Ex. F, which is a several hundred page long "pooling and servicing agreement", entitled "Wells Fargo Asset Securities Corporation (Depositor) and Wells Fargo Bank, N.A. (Master Servicer) and HSBC Bank USA, National Association (Trustee) Pooling and Servicing Agreement, dated May 27, 2007, \$1,027,084,570.00, Mortgage Asset-Backed Pass-Through Certificates Series 2007-PA2." This document indicates a relationship between Wells Fargo Asset Securities Corp. as depositor, and Wells Fargo Bank NA, as master servicer, and HSBC Bank NA, as trustee. Even if, *arguendo*, this Court accepts that Plaintiff has standing to prosecute a default of an obligation contained within the body of obligations which the package represents, the question remains whether Defendant's obligation is included in the bundle of obligations represented by that document.

Plaintiff asserts that "Miller's loan is included in this Pooling and Servicing Agreement" (Affirmation, ¶ 14) but does not indicate where in the document that information lies. Despite a reasonably rigorous review of the document, this Court

finds no reference to Defendant Miller's obligation in the Pooling and Servicing Agreement, nor does the assembled document clarify the circuitous route which the Note may be traveling.

Plaintiff submits, for the Court's review, an Assignment of Mortgage, dated December 12, 2008, by "original lender: Mortgage Electronic Registration Systems, Inc as nominee for Real Estate Mortgage Network Inc., its successors and assigns" to HSBC Bank USA, NA as Trustee for WFALT 2007-PA02" (Ex. H). Given that MERS is the agent of the lender (MERSCORP Inc. v Romaine, 8 NY3d 90 [2006]) and may submit documents to Clerks for registration, but has no power to assign the underlying debt without specific authority from the principal (Bank of NY v Silverberg, 86 AD3d 274 [2d Dept 2011]), this document has no probative value absent an attached power of attorney.

Plaintiff also attaches (Ex. H) a September 26, 2011, Corporate Assignment of Mortgage from MERS to HSBC Bank, NA as Trustee for Wells Fargo Asset Backed Securities Series 2007-PA2, with no mention of or reference to the underlying Note. Also in Ex. H, is the Sullivan County Clerk's recording, on July 18, 2013, of HSBC Bank USA as Trustee for WFALT 2007-PA02 by Wells Fargo Bank, NA as their attorney-in-fact assignment of the Miller mortgage to MERS. While other businesses may accept this document as evidence that Defendant's debt has been properly recorded, this Court sees no connection between "WFALT 2007-PA02" and the asset in the case caption, the aforementioned "Asset-Backed Pass-Through Certificates Series 2007-PA2" which allegedly contains Defendant's obligation. More importantly, the servicing agent's recording of the mortgage makes no mention of the Note or the transfer of the Note.

In deciding a Motion to Dismiss on the basis of presented documents (CPLR 3211[a]1) and/or for lack of standing (3211[a]3), the Complaint must be given a liberal construction (Way v. City of Beacon, 96 AD3d 829 [2d. Dept 2012]) and the Court should accept the facts as alleged in the Complaint as true, accord

Plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. (Aberbach v. Biomedical Tissue Services, LTD., et.al., 48 AD 3d 716 [2d Dept. 2008]; Rietschel v. Maimonides Med. Ctr., 83 AD3d 810 [2d Dept 2011]).

In this foreclosure matter Plaintiff controls the documentation required to establish its standing and reserving decision to enable Plaintiff to obtain discovery from Defendant makes no sense. This Court could assume, as Plaintiff argues, that the papers supplied by Plaintiff identify a chain of beneficial ownership of Defendant's obligation from the original lender to the current Plaintiff. However, the papers in the record supplied by Plaintiff, even after two earlier insufficient attempts, do not yet clearly, or self-evidently, identify Plaintiff as the beneficial owner of Defendant's obligation. While the Court must interpret the record favorably to Plaintiff, the Court may not fill in the blanks.

While the paper trail developed by the lending institutions and MERS may satisfy their needs, at this point, absent direction from a higher authority, the record developed here does not satisfy the requirements of the CPLR, RPAPL, Banking Law and earlier, cited, appellate court decisions.

This court is mindful that foreclosing upon a mortgage involves equity and unjust enrichment will not be countenanced. However, at this point Defendant identified a problem and has raised a sufficient challenge to Plaintiff's right to foreclose that the Motion to Dismiss is granted.

Therefore, it is

ORDERED that Defendant's Motion to Dismiss is granted (CPLR 3211), without prejudice; and it is further

ORDERED that the Complaint is dismissed (CPLR 3211) and the Notice of Pendency is cancelled (CPLR 6514).


This shall constitute the Decision of the Court. The original Decision and Order and all papers are being forwarded to the Sullivan County Clerk's Office for

filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

SO ORDERED.

Dated: Monticello, NY
August 27, 2014

ENTER



HON STEPHAN G. SCHICK, JSC

Papers Considered:

May 22, 2014, Defendant's Request for Extension of Time to File Responsive Pleading to the Complaint

July 1, 2014, Residential Foreclosure Conference Order.

July 10, 2014, Defendant's Notice of Motion to Dismiss with Affidavit and Exhibits A through I.

July 29, 2014, Plaintiff's Affirmation in Opposition with Exhibits A through H.

August 4, 2014, Defendant's Request for an extension of time.

August 11, 2014, Defendant's Reply Memorandum