

Onewest Bank, FSB v Galli

2012 NY Slip Op 30762(U)

March 23, 2012

Sup Ct, Richmond County

Docket Number: 131312/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:131312/09
Motion No.: 001, 002**

**ONEWEST BANK, FSB, as successor in interest to
INDYMAC BANK, FSB,**

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**JOHN A. GALLI,
GEORGANN GALLI, and
"JOHN DOE #1" through "JOHN DOE #10",
inclusive the last ten names being fictitious and unknown
to the plaintiff, the persons or parties intended being the persons,
tenants, occupants, or corporations, if any, having or claiming
an interest in or lien upon the mortgaged premises described
in the complaint**

Defendants

The following items were considered in the review of the following motion for summary judgment dismissing the defendants' affirmative defenses and a cross motion to dismiss the plaintiff's complaint.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Affirmation in further support and in opposition to cross motion	3
Reply Affirmation	4
Answering Affidavits	
Replying Affidavits	
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The plaintiff moves for partial summary judgment dismissing the defendants' third, fourth, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fifteenth and sixteenth affirmative defenses. In opposition, the defendants cross-move for summary judgment arguing that the plaintiff lacks standing; lacks capacity to commence and maintain this action; failed to

elect remedies pursuant to RPAPL § 1301; and failed to provide each defendant with the requisite acceleration notices. The plaintiff's motion is denied, and the defendants' motion is granted.

Facts

This is an action to foreclose real property known as 231 Douglas Road, Staten Island, New York. On August 26, 2003 John A. Galli and Georgann Galli executed a promissory note and mortgage in favor of WMC Mortgage Corp. ("WMC") in the amount of \$550,000. The mortgage contained the following language concerning the business entity known as Mortgage Electronic Registration Systems, Inc. ("MERS"):

I understand and agree that MERS holds legal title to the rights granted by me in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successor and assigns) has the right:

(A) to exercise any or all of those rights, including, but not limited to, the right to foreclose and sell the Property; and

(B) to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

In addition the Promissory Note submitted in connection with these motions contain an undated Allonge to Promissory Note stating: "Pay to the Order of INDYMAC BANK, FSB Without Recourse WASHINGTON MUTUAL BANK". On October 22, 2004, MERS purportedly assigned this mortgage as nominee for WMC to Washington Mutual Bank, FA.

On November 16, 2004 the defendants executed a promissory note and mortgage in favor of Washington Mutual Bank, F.A. in the amount of \$457,050.77. Once again, the Promissory Note submitted for consideration in connection with these motions contains an undated Allonge to Promissory Note that states "Pay to the Order of IndyMac Bank, FSB Without Recourse

Washington Mutual Bank”. Simultaneously, the defendants executed a Consolidation, Extension and Modification Agreement (“CEMA”) with Washington Mutual Bank, F.A. on the same day. Exhibit A of the CEMA lists the 2003 WMC mortgage executed by the defendants as well as the concurrently executed Washington Mutual Bank, FA mortgage as being consolidated, extended and modified by this agreement. However, WMC was not a signatory to the November 16, 2004 CEMA.

Two years later on April 5, 2006, MERS as nominee for Washington Mutual Bank, FA purportedly assigned the 2003 WMC mortgage and the 2004 Washington Mutual Bank, FA mortgage to Washington Mutual Bank. A second assignment on the same day had Washington Mutual Bank, F/K/A Washington Mutual Bank, FA purportedly made the following assignments to MERS as nomminee for Indymac Bank, FSB:

Mortgage dated 08/26/2003 made by John A. Galli and Georgeann Galli, Husband and Wife to Mortgage Electronic Registration Systems, Inc. as nominee for WMC Mortgage Corporation in the principal sum of \$550,000.00 and recorded on 01/28/2004, in the office of the CLERK of the County of RICHMOND, in Book 17109 of Mortgages, page 242.

ASSIGNMENT FROM: Mortgage Electronic Registration Systems, Inc. as nominee for WMC Mortgage Corporation to Mortgage Electronic Registration Systems, Inc. as nominee for Washington Mutual Bank, FA dated 10/22/2004 recorded 6/2/2005.

ASSIGNMENT FROM: Mortgage Electronic Registration Systems, Inc. As nominee for Washington Mutual Bank FA to Washington Mutual Bank dated 4/4/2006 to be recorded concurrently.

2nd Mortgage dated 11/16/2004 recorded 6/2/2005 in document control 48484 between John A. Galli and Georgeann Galli, aka Georgeann Galli husband and wife and Washington Mutual Bank, FA in the amount of \$457,050.77

Consolidation, Extension, and Modification Agreement made by

John A. Galli and Georgeann Galli, aka Georeann Galli husband and wife and Washington mutual Bank, FA dated 11/16/2004 recorded 6/2/2005 in document number 48485 consolidated mortgages 1 & 2 to form a single lien in the amount of \$1,000,000.00

On April 14, 2006 the defendants executed another Promissory Note and Mortgage this time in favor of IndyMac Bank, FSB in the amount of \$143,595.50. Concurrently with the third mortgage, the defendants executed a Consolidation, Extension and Modification Agreement in favor of IndyMac Bank, FSB. Once again, neither WMC, nor Washington Mutual Bank f/k/a Washington Mutual Bank, FA were signatories to this second CEMA.

According to the affidavit of Brian Burnett, an Assistant Vice President of OneWest Bank, FSB (“OneWest”) that on or about July 11, 2008, IndyMac Bank, FSB failed and went into receivership. Upon entering receivership it changed its name to IndyMac Federal Bank, FSB and on or about March 19, 2009 merged with OneWest. According to Mr. Burnett, OneWest acquired all of IndyMac’s assets. However, notably absent from the record is a copy of the purchase and assumption agreement between OneWest and IndyMac.

On or about September 1, 2008 the defendants allegedly defaulted on the notes and mortgages.

The plaintiff moved for partial summary judgment dismissing the defendants third, fourth, sixth, seventh, eighth, tenth, twelfth, thirteenth, fifteenth and sixteenth affirmative defenses. The defendant cross moves to dismiss the plaintiff’s action arguing that the plaintiff: 1) lacks standing; 2) lacks capacity to commence and maintain this action; and 3) failed to elect remedies pursuant to RPAPL § 1301. In opposition to the defendants’ cross motion, the plaintiff submits attorney certified copies of the relevant notes and mortgages encumbering 231 Douglas Road, Staten Island, New York.

Discussion

The court will address the defendants' cross-motion to dismiss the complaint pursuant to CPLR § 3211(a). The record in this case shows that MERS assigned the mortgage several times before the original notes and mortgages found their way to the plaintiff in this action. Here the court must determine whether the plaintiff in a foreclosure action must establish a clear chain of title of the relevant notes and mortgages prior to commencing the foreclosure proceeding. This court concludes that a foreclosing plaintiff must establish how it came to possess the relevant notes and mortgages it wishes to foreclose.

On June 7, 2011 the Appellate Division, Second Department issued its decision in the *Bank of New York v. Silverberg* case.¹ In that case the court was called to resolve the issue of, “. . . whether a party has standing to commence a foreclosure action when that party's assignor—in this case, Mortgage Electronic Registration Systems, Inc. . . . was listed as a nominee and mortgagee for the purposes of recording, but was never the actual holder or assignee of the underlying notes.”² The Appellate Division, Second Department held that such a party did not have standing to commence a foreclosure action.

In a mortgage foreclosure action, a plaintiff must be both the holder or assignee of the mortgage and the underlying note at the time the action is commenced.³ Here, as was the case in *Silverberg*, MERS purportedly transferred the WMC mortgage to Washington Mutual Bank, FA in connection with a consolidation as nominee. In turn, MERS as the nominee of Washington Mutual Bank, FA assigned the mortgage to Washington Mutual Bank. Subsequently, Washington Mutual Bank assigned the mortgages, prior assignments and CEMAs to MERS as nominee of IndyMac Bank, FSB. The Appellate Division, Second Department found in

¹ 86 AD3d 274, [2d Dept 2011].

² Id.

³ Id.

Silverberg that “. . . as ‘nominee,’ MERS’s authority was limited to only those powers which were specifically conferred to it and authorized by the lender.” Here, as was the case in *Silverberg*, MERS lacked the authority to assign the underlying notes. Consequently, how the plaintiff came into possession of the mortgages and notes in this case is suspect.

The plaintiff cites a multitude of cases purportedly holding that possession of the physical notes establishes its standing to commence this action.⁴ But each of these cases predate the Appellate Division, Second Department’s decision in *Silverberg*. Consequently, this court finds that the initial transfer between WMC Mortgage and Washington Mutual Bank, F.A. is a nullity and therefore the plaintiff must establish how it procured the notes and mortgages for 231 Douglas Road, Staten Island, New York.

Given this court’s decision on the cross-motion the plaintiff’s motion for summary judgment is denied.

Accordingly, it is hereby:

ORDERED, that John A. Galli and Georgann Galli’s cross-motion dismissing the plaintiff’s complaint is granted and the complaint is dismissed without prejudice; and it is further

ORDERED, that the plaintiff’s motion to foreclose is denied.

ENTER,

DATED: March 23, 2012

Joseph J. Maltese
Justice of the Supreme Court

⁴ See, *GECMC 2007-C1 Ditmars Lodging, LLC v. MOHOLA*, 2010 NY SlipOp 31790; see, *US Bank, N.A. v. Flynn*, 27 Misc3d 802 [2010], see, *Deutsche Bank National Trust Company v. Gillio*, 22 Misc3d 1131(A) [2009].