Wilmington Trust, N.A. v Sulton
2024 NY Slip Op 31053(U)
March 14, 2024
Supreme Court, Kings County
Docket Number: Index No. 508595/14
Judge: Derefim B. Neckles
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At an IAS Term FRP 2 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 14th day of March, 2024.

PRESENT:

HON. DEREFIM B. NECKLES,
Justice.

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WILMINGTON TRUST, N.A., NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR MFRA TRUST 2015-1,

Plaintiff,

- against -

MS 7, MS9
Index No. 508595/14

ANDRE SULTON; TIMOTHY DASH; MR. ROMAIN; MRS. ROMAIN; ALMA "DOE" and KEVIN "DOE",

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	175-180 213-214, 216-221
Opposition Affidavits (Affirmations)	197-199, 237-241 232-234
Reply Affidavits (Affirmations)	202 243-244
Sur-Reply Affidavits (Affirmations)	207
Supplemental Affidavits (Affirmations)	237-241

In this action to foreclose a mortgage encumbering the property at 2101 Bergen Street in Brooklyn (Block 1449, Lot 138) (Property), plaintiff moves (in motion sequence [mot. seq.] seven) for an order, pursuant to RPL § 254 (10): (1) appointing a receiver to oversee, manage and operate the Property, and (2) directing distribution

[* 1]

of rental proceeds to the plaintiff (NYSCEF Doc No. 175).

Defendant Andre Sulton (Sulton or Defendant Borrower) moves (in mot. seq. nine) for an order: (1) dismissing the amended complaint based on the statute of limitations, pursuant to CPLR 3211 (a) (5), and (2) dismissing the amended complaint for lack of standing, pursuant to CPLR 3211 (a) (3).

Background

Wells Fargo Bank, N.A. (Wells Fargo) commenced this action on September 18, 2014 to foreclose a mortgage encumbering the Property, which was executed by Sulton, the Defendant Borrower, on March 20, 2008, to secure a promissory note in favor of the original lender, Wachovia Mortgage, FSB (Wachovia), in the principal amount of $618,750.00. The 2008 mortgage was recorded on September 9, 2009 in the name of Mortgage Electronic Registration Systems, Inc. (MERS) solely as nominee for Wachovia.

The Note was Allegedly Permanently Lost, Stolen or Destroyed

Wells Fargo's original 2014 complaint specifically alleged that the note was "delivered and endorsed over to" it on an unspecified date and that Wells Fargo "has attempted to locate the whereabouts of said note . . ." and concluded, after a "diligent search" of its offices without success, that the original note is "permanently lost, stolen or inadvertently destroyed" (NYSCEF Doc No. 1, complaint at ¶¶ 3-3a). Wells Fargo's complaint annexed *a copy* of the note with an *undated* allonge in favor of Wells Fargo and a lost note affidavit (*id.*). The lost note affidavit by Wells Fargo's

employee advised that the original note had been lost since September 10, 2012, before which it was in Wells Fargo's possession (*id.*, Lost Note Affidavit of Kristoffer Michael Pumario, Vice President Loan Documentation at ¶ 4).

Wells Fargo's 2017 Summary Judgment Motion

On or about January 20, 2017, Wells Fargo moved for summary judgment, an order of reference and a default judgment against the non-answering defendants. Interestingly, Wells Fargo's motion was supported by a fact affidavit from an employee of Fay Servicing, attorney in fact for "Wilmington Trust, National Association, not in its individual capacity, but solely as trustee for MFRA Trust 2015-1" (Wilmington) (NYSCEF Doc No. 72 at ¶ 1). Defendant Sulton, based on the Lost Note Affidavit, cross-moved for an order, pursuant to General Business Law (GBL) § 394-a (2) and Uniform Commercial Code (UCC) § 3-804, directing Wells Fargo to post an undertaking in a sum not less than twice the amount of the underlying note.

By a March 5, 2018 decision and order of the court (Partnow, J.), Wells Fargo's motion was denied with leave to renew on presentation of an affidavit submitted either by an officer of Wells Fargo, or of a person acting with a valid power of attorney from Wells Fargo (NYSCEF Doc No. 111). The court noted that Wells Fargo's fact affidavit "does not explain the relationship, if any, between Wells Fargo, the plaintiff herein, and Wilmington. . . which apparently appointed Fay Servicing to act as its attorney in fact" and "does not annex a power of attorney or any other documentation evidencing that Fay Servicing is authorized . . ." (*id.* at 6).

Sulton's cross motion for an undertaking was granted and Wells Fargo was directed to post an undertaking of at least $1,247,500.00 due to the lost note within 30 days, or by April 26, 2018 (*id.* at 7-8).

Wells Fargo inexplicably failed to post the undertaking.

Wells Fargo's Renewed Summary Judgment Motion

On May 20, 2020, Defendant Sulton moved to dismiss this action, pursuant to CPLR 8502, based on Wells Fargo's *two-year failure* to post an undertaking, as mandated by statute and the court's March 2018 order (NYSCEF Doc No. 113).

On September 14, 2020, Wells Fargo moved to renew its 2017 summary judgment motion or, alternatively, for an order, pursuant to CPLR 5015 (a) (2), vacating the court's March 2018 Order on the ground that Wells Fargo suddenly "located and maintained" the wet ink note "as of October 25, 2015" (NYSCEF Doc No. 129 at ¶ 17).

By a September 9, 2022 decision and order (September 2022 Order), the court (Partnow, J.) denied Wells Fargo's motion to vacate the March 2018 Order, and specifically held that:

> "the 'newly-discovered evidence' is affidavit testimony from Sherri W. McManus (McManus), Wells Fargo's Vice President Loan Documentation, which *only* attests that '[f]ollowing commencement of this foreclosure action [on September 18, 2014], the original Note was located and maintained by Wells Fargo as of October 26, 2015' (NYSCEF Doc No. 129 at ¶ 17). Curiously, McManus *does not explain when, how and where the original wet ink note was 'located' or any of the circumstances surrounding the search for and purported discovery* of the original note. McManus does not even address why the complaint and the Lost Note Affidavit,

> annexed to the complaint, inconsistently allege that '[s]ince SEPTEMBER 10, 2012 the subject Note has been inadvertently lost, misplaced or destroyed[,]' and Wells Fargo failed to amend the 2014 complaint once the note was 'located' in October 2015 (NYSCEF Doc Nos. 129 and 137). In addition, McManus does not explain why Wells Fargo failed to oppose defendant Sulton's 2017 cross motion for an undertaking on the ground that it 'located and maintain[ed]' the original note just after Wells Fargo's 2014 commencement of this action in October 2015" (NYSCEF Doc No. 167 at 9 [emphasis added]).

The court granted dismissal if Wells Fargo failed to post the undertaking within 30 days. Wells Fargo posted an undertaking.

Wells Fargo's Instant Motion for a Receiver

Two months later, on November 22, 2022, Wells Fargo moved for an order appointing a receiver for the Property and directing that the rental income be distributed to it (NYSCEF Doc No. 175). Wells Fargo asserts that Section H of the 1-4 Family Rider to the mortgage provides, in relevant part, that "Borrower absolutely and unconditionally assigns and transfers to Lender all the rents and revenues ('Rents') of the Property . . ." and that a "judicially appointed receiver" may take control of or maintain the Property "at any time when a default occurs" (NYSCEF Doc No. 177 at ¶ 8; NYSCEF Doc No. 178, mortgage Rider at § H).

Notably, Wells Fargo failed to mention in its moving papers that it had *already assigned the mortgage* to another entity prior to moving for a receiver.[1]

On April 11, 2023, Defendant Borrower Sulton, in opposition, submitted an affidavit asserting that Wells Fargo's motion should be denied because: (1) "Plaintiff fails to allege any waste or irreparable harm to the property, let alone clear and convincing evidence of it"; (2) "I am preserving the property while defending Plaintiff's claims, which I do not believe will be successful"; (3) "[t]he mortgage provided that if there was a new servicer I was to be provided notice"; (4) "Plaintiff has not submitted any evidence of any default in payment"; and (5) "I do not believe the correct party is making this motion as the party that holds the mortgage is certainly not Wells Fargo" (NYSCEF Doc No. 198 at ¶¶ 4-9; *see also* NYSCEF Doc No. 197, defense counsel's opposing affirmation).

Wilmington is Substituted as Plaintiff

Meanwhile, on December 6, 2022, "Plaintiff" moved (in mot. seq. eight) for an order granting it leave to amend the complaint, pursuant to CPLR 1018 and 3025 (b), to substitute Wilmington in place of Wells Fargo as the Plaintiff (NYSCEF Doc No. 184). By an August 21, 2023, order, the court (Partnow, J.) granted the motion to amend the complaint and caption to reflect that Wilmington is Wells Fargo's mortgage assignee and the new plaintiff in this foreclosure action (NYSCEF Doc No. 210).

[1] Wells Fargo allegedly assigned *the mortgage* to MTGLQ Investors LP in April 2015, shortly after commencement of this action (*see* NYSCEF Doc No. 211, amended complaint at ¶ 6).

Wilmington's 2023 Amended Complaint

On September 26, 2023, Wilmington filed an amended complaint alleging that Sulton executed a March 20, 2008 note in favor of Wachovia for $618,750.00, which was secured by a mortgage "executed, acknowledged and delivered to" MERS as nominee for Wachovia (NYSCEF Doc No. 211 at ¶¶ 3 and 5). Regarding the chain of title of the *mortgage*, the amended complaint alleges that:

> "[t]hereafter said mortgage was assigned to WELLS FARGO BANK, N.A. by assignment of mortgage dated March 11, 2011 and recorded on March 25, 2011 in CRFN: 2011000108628. Said assignment of mortgage was thereafter corrected by correction assignment of mortgage to WELLS FARGO BANK, N.A. dated March 3, 2014 and recorded on March 20, 2014 in CRFN: 2014000097091. Thereafter said mortgage was assigned to MTGLQ INVESTORS LP by assignment of mortgage dated April 6, 2015 and recorded on April 21, 2015 in CRFN: 2015000132889. Thereafter said mortgage was assigned to WILMINGTON . . . by assignment of mortgage dated August 20, 2015 and recorded on January 29, 2016 in CRFN: 2016000032003 (*id.* at ¶ 6).

The amended complaint further alleges that:

> "Plaintiff (a) is the owner and holder of the subject note and mortgage *or has been delegated the authority to institute a mortgage foreclosure action* by the owner and holder of the subject mortgage and note . . ." (*id.* at ¶ 7 [emphasis added]).

Notably, unlike the original complaint, the amended complaint ***does not allege*** that the note was permanently lost, stolen or inadvertently destroyed, as attested to by Wells Fargo's document custodian in the Lost Note Affidavit. In addition, the amended complaint ***fails to mention, address or elaborate on*** Wells Fargo's conclusory claim that it suddenly found and maintained the wet ink note as of October 25, 2015.

However, the amended complaint alleges ***for the first time*** that a "prior action was commenced at law or otherwise for the recovery of the sum or any part thereof secured by the said instrument[s] . . . on April 1, 2011, bearing Index Number 7466/2011" (2011 Foreclosure Action) and that "*Plaintiff* discontinued said action" (*id.* at ¶ 16 [emphasis added]). The amended complaint does not identify who the plaintiff was in the 2011 Foreclosure Action.

Wilmington's amended complaint asserts two causes of action: (1) foreclose of the Property pursuant to the mortgage, and (2) to reform the 2008 mortgage, nunc pro tunc, to the date of recording to change the legal description of the Property based on the original parties' mutual mistake (*id* at ¶¶ 23-27).

Sulton's Pre-Answer Dismissal Motion

On October 16, 2023, Defendant Sulton filed a pre-answer motion to dismiss Wilmington's amended complaint, pursuant to CPLR 3211 (a) (3) and (a) (5), based on the statute of limitations and lack of standing (NYSCEF Doc No. 213). Defense counsel argues that Wilmington's second cause of action for reformation of the March 20, 2008 mortgage is time-barred as of March 20, 2014, pursuant to CPLR 213, "as the mortgage was executed more than six years [before] the action was commenced" on September 18, 2014 (NYSCEF Doc No. 214 at ¶¶ 3 and 6).

Defense counsel argues that "the first cause of action must be dismissed because Plaintiff did not possess the underlying note at the time the action was commenced on September 18, 2014" (*id.* at ¶ 10). Defendant also submits a memorandum of law

making that same argument (NYSCEF Doc No. 215 at 5).

Wilmington's Opposition

Wilmington, in opposition, submitted an attorney affirmation asserting that "[w]hile Wilmington Trust pleads for reformation, it is not for reformation in the traditional sense" but "[t]he gravamen of the reformation count sounds in Article 15 of the Real Property Actions and Proceedings to determine to what extent the mortgage encumbers[,]" and thus, the ten-year statute of limitations applicable to actions to quiet title to property should apply (NYSCEF Doc No. 232 at ¶¶ 11-13).

Wilmington's counsel further asserts that "Mr. Sulton makes the incredible argument that the amended complaint must be dismissed because Wilmington Trust did not have standing when the original complaint was filed by Wells Fargo in September 2014" (*id.* at ¶ 15). Wilmington's counsel argues that "[w]hen the plaintiff in a foreclosure action has been substituted, the substituted plaintiff must show the original plaintiff had standing to foreclose when it filed the complaint" (*id.* at ¶ 16). Essentially, Wilmington contends that there is no dispute that Wells Fargo had standing when it commenced this action because it is the successor-by-merger to Wachovia (*id.* at ¶ 17). Wilmington cites a number of cases, none of which involve the commencement by a successor-by-merger to the original lender where *the original note was lost* after its execution and remained lost at the time of commencement (*id.* at ¶ 16).

Discussion

(1)

Defendant's Dismissal Motion

The Statute of Limitations

A party who seeks dismissal of a claim, pursuant to CPLR 3211 (a) (5), on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired (*Benjamin v Keyspan Corp.*, 104 AD3d 891, 892 [2013]). The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, whether the statute of limitations was tolled (*Shalik v Hewlett Assoc., L.P.*, 93 AD3d 777, 778 [2012]), or whether the claim was interposed within the applicable limitations period (*Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2011]).

"A cause of action seeking reformation of an instrument on the ground of mistake, including an alleged scrivener's error, is governed by the six-year statute of limitations pursuant to CPLR 213 (6), which begins to run *on the date the mistake was made*" (*Rely-On-Us, Inc. v Torres*, 165 AD3d 719, 721 [2018] quoting *Lopez v Lopez*, 133 AD3d 722, 723 [2015] [emphasis added]). Thus, the statute begins to run on the date that the underlying mortgage was executed by the Defendant Borrower and MERS solely as nominee for Wachovia.

Here, there is no dispute that the subject mortgage was executed by Defendant Sulton on March 20, 2008, and thus, the six-year statute of limitations began to run on that date, and expired on March 20, 2014, prior to the commencement of this foreclosure action

on September 18, 2014. Wilmington's argument, without any supporting case law, that its claim for reformation of the property description in the mortgage is not "traditional," and thus, should be treated as a quiet title claim with a 10-year statute of limitations is rejected. Consequently, the second cause of action in the amended complaint for reformation of the mortgage based on mutual mistake is dismissed as time-barred.

Plaintiff's Standing to Foreclose

"On a defendant's motion pursuant to CPLR 3211 (a) (3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, 'the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law'" (*U.S. Bank Nat'l Ass'n v Clement*, 163 AD3d 742, 743 [2018] quoting *New York Cmty. Bank v McClendon*, 138 AD3d 805, 806 [2016]). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*Deutsche Bank Tr. Co. Americas v Vitellas*, 131 AD3d 52, 60 [2015]).

"In an action to foreclose a mortgage, the plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note" (*U.S. Bank Nat. Ass'n v Weinman*, 123 AD3d 1108, 1109 [2014]). "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" (*Bank of New York Mellon v Gales*, 116 AD3d 723, 724 [2014]; *U.S. Bank N.A. v Guy*, 125 AD3d 845, 846-847 [2015]). It is axiomatic

that a mortgage is merely security for a debt evidenced by a promissory note and cannot exist independently of the debt, and thus, a transfer of the mortgage without the underlying promissory note is a nullity, and *no interest* is acquired by it (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2011]).

"[P]ursuant to UCC [§] 3-804, which is intended to provide a method for recovering on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit due proof of the plaintiff's ownership of the note, the facts which prevent the plaintiff from producing the note, and the note's terms" (*HSBC Bank USA, Nat'l Ass'n v Gilbert*, 189 AD3d 1377 [2020]; *see also Wells Fargo Bank, N.A. v Meisels*, 177 AD3d 812, 814 [2019]).

Here, upon the 2014 commencement of this action, Wells Fargo submitted the Lost Note Affidavit which "did not provide any facts as to when the search for the note occurred, who conducted the search, or when or how the note was lost" (*see Wells Fargo Bank, N.A. v Meisels*, 177 AD3d at 815). The Lost Note Affidavit failed to provide sufficient facts regarding the timing of the note's disappearance, it contained conclusory statements about the Lost Note and failed to sufficiently establish Wells Fargo's ownership of the note at the time of commencement in 2014. Contrary to Plaintiff's counsel's assertion, the mere fact that Wells Fargo is a successor-by-merger to Wachovia, the original lender, does not automatically prove Wells Fargo's ownership of the note and standing at the time of commencement in 2014, especially given the conflicting affidavits submitted regarding the date(s) on which the note was purportedly lost and later found. While Wilmington cites a number of cases involving successors-by-merger, none of those cases involve the commencement by a successor-by-merger to the original lender where *the original note*

was lost at the time of commencement.

Indeed, the court (Partnow, J.) previously determined in the September 2022 Order that triable issues of fact exist regarding Wells Fargo's standing to assert an interest in the mortgage at the time of commencement based on its admitted lack of possession of the note and the submission of conflicting fact affidavits (*see* NYSCEF Doc No. 167 at 9). As previously held, there are material issues of fact regarding Wells Fargo and Wilmington's standing to commence and proceed with this foreclosure action, the lost note and the factual circumstances regarding its disappearance and subsequent discovery, its chain of custody and how and when Plaintiff's counsel became the purported custodians of the "wet ink" note. Consequently, the Defendant Borrower's motion to dismiss the amended complaint for lack of standing is denied based on the existence of triable issues of fact.

(2)

Wilmington's Motion for a Receiver

In November 2022, *eight years after* the commencement of this action by Wells Fargo, Wilmington seeks, for the first time, the appointment of a receiver to take possession of the Property and collect and distribute rental income to it, pursuant to the terms of the 1-4 Family Rider to the mortgage.

The Second Department has held that "[u]nder Real Property Law § 254 (10), where . . . the parties to a mortgage agree that a receiver may be appointed in the event of default, the appointment of a receiver without notice and without regard to the adequacy of security is proper" (*366 Fourth St. Corp. v Foxfire Enterprises, Inc.*,

149 AD2d 692, 692 [1989] [emphasis added]). However, the Second Department has acknowledged that "under appropriate circumstances, a court of equity *may deny* such application" (*id.*; *see also Essex v Newman*, 220 AD2d 639, 640 [1995] [holding that "a court of equity, in its discretion and under appropriate circumstances, may deny . . . an application [for the appointment of a receiver] [emphasis added]).

Here, while the 1-4 Family Rider to the mortgage authorizes the appointment of a receiver in favor of "Lender" to collect the rents in the event of a default, Wilmington failed to submit admissible evidence conclusively demonstrating that it has standing to foreclose under the subject mortgage. The court previously denied Wells Fargo's summary judgment motion and its renewal motion because the record in this case contains conflicting information about the whereabouts of the promissory note when this action was commenced on September 18, 2014, and thereafter. There are triable issues of fact regarding the chain of title of the note, when the note was lost, stolen and/or destroyed and how and when it was found, if ever, and under what circumstances. Wilmington has failed to conclusively establish that it stands in the shoes of Wachovia, the original "Lender," and its successor-by-merger, Wells Fargo, and thus, Wilmington is not entitled to enforce the terms of the mortgage, including the 1-4 Family Rider provision regarding the appointment of a receiver.

Under the circumstances presented here, where there are triable issues of fact regarding Wilmington's standing to enforce the mortgage and foreclose on the Property

and Plaintiff's motion for the appointment of a receiver is not supported by evidence of the need for a receiver to protect, maintain and preserve the Property, this court finds, in its discretion, that the appointment of a receiver is unwarranted. Accordingly, it is

ORDERED that Plaintiff's motion for the appointment of a receiver (mot. seq. seven) is denied; and it is further

ORDERED that Defendant Sulton's pre-answer dismissal motion (mot. seq. nine) is only granted to the extent that the second cause of action to the amended complaint for reformation of the mortgage is dismissed with prejudice, pursuant to CPLR 3211 (a) (5); the motion is otherwise denied based on triable issues of material fact regarding Plaintiff's standing to foreclose.

This constitutes the decision and order of the court.

E N T E R,

A. J. S. C.

HON. DEREFIM B. NECKLES
A.J.S.C.

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