

U.S. Bank National Association v Molina

2007 NY Slip Op 34341(U)

December 31, 2007

Supreme Court, Suffolk County

Docket Number: 0032779/2006

Judge: Peter Fox Cohalan

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 RETURN DATE: 4-4-07
 MOT. SEQ. # 001 & 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

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 U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

-against-

GONZALO MOLINA; IVONE MOLINA; MORTGAGE
 ELECTRONIC REGISTRATION SYSTEMS, INC. AS
 NOMINEE AND MORTGAGEE OF RECORD;
 ACCREDITED HOME LENDERS, INC.; "JOHN DOES"
 and "JANE DOES", said names being fictitious, parties
 intended be ng possible tenants or occupants of
 premises, and corporations, other entities or persons
 who claim, or may claim, a lien against the premises,

Defendants.

-----x

CALENDAR DATE: September 26, 2007
 MNEMONIC: MD; XMD

PLTF'S/PET'S ATTORNEY:

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 51 E. Bethpage Road
 Plainview, NY 11803

DEFT'S/RESP ATTORNEY:

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 Woodbury, NY 11797
 McCabe, Weisberg & Conway
 Attys for MERS
 53 W. 36th St.
 New York, NY 10018

Upon the following papers numbered 1 to 28 read on this motion for summary judgment and cross motion ;
 Notice of Motion/Order to Show Cause and supporting papers 1-12 ; Notice of Cross-Motion and
 supporting papers 13-20 ; Answering Affidavits and supporting papers 21-25 ; Replying
 Affidavits and supporting papers 26-28 ; Other _____ ; and after hearing counsel in support of and
 opposed to the motion it is,

ORDERED that this motion by the plaintiff, US Bank National Association, for
 summary judgment pursuant to CPLR §3212 and the appointment of a referee in this
 mortgage foreclosure proceeding is denied as there are readily identifiable issues of fact
 which preclude summary disposition. The cross-motion by the defendants, Gonzalo Molina et
 al., for dismissal pursuant to CPLR §3211(a) on the grounds of standing is also denied in that
 standing is a contested issue of fact at this time.

The plaintiff instituted this foreclosure action seeking to foreclose on premises
 located at 4 Legacy Court in Huntington Station, Suffolk County on Long Island, New York.
 The defendant, Gonzalo Molina (hereinafter "Molina"), executed a note and mortgage with
 Accredited Home Lenders, Inc., (hereinafter "AHL"), dated December 27, 2005, in the amount
 of \$600,000.00. Molina has failed to pay under the terms of the note and plaintiff commenced
 this present action on or about November 20, 2006. The plaintiff moved for summary
 judgment pursuant to CPLR §3212 and Molina cross-moved to dismiss pursuant to CPLR
 §3211(a) claiming that the plaintiff lacked standing to bring this action at the time of its
 commencement because it was not the holder of the mortgage or the note sought to be
 foreclosed.

For the following reasons, the plaintiff's motion for summary judgment pursuant to CPLR §3212 and the appointment of a referee to compute in this mortgage foreclosure proceeding is denied as the plaintiff has failed to establish as a matter of law that it is the record holder of the mortgage and the note at the time of commencement of this proceeding. The cross-motion by Molina et al. for dismissal pursuant to CPLR §3211(a) is denied as the plaintiff maintains it is the rightful assignee. There is a question of fact whether or not the plaintiff was the record holder of the note and mortgage at the time of commencement of the action.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. *Elzer v. Nassau County*, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); *Steven v. Parker*, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); *Gaeta v. New York News, Inc.*, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in *Sillman v. Twentieth Century Fox*, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*DiMenna & Sons v. City of New York*, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is 'arguable' (*Barnett v. Jacobs*, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, *Thomas v. Drake*, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. *S.J. Capelin Assoc., v. Globe*, 34 NY2d 338, 357 NYS2d 478 (1974).

After looking at the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [*Robinson v. Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact as to whether the plaintiff, US Bank National Association, had standing to maintain this action at the time it commenced this mortgage foreclosure proceeding. While the plaintiff alleges it is the holder of the mortgage and note by assignment, there is a disconnect between the original mortgagor, AHL and the plaintiff. Molina argues that plaintiff's assignment from Mortgage Electronic Registration Systems (hereinafter "MERS") as

a nominee for AHL cannot purport to transfer an interest because MERS was merely a nominee of AHL and not the owner of the mortgage and the note. Molina further argues that the plaintiff does not allege in its complaint that it is the owner or holder of either the mortgage or the bond.

In **LaSalle Bank Nat'l. Assn. v. Lamy**, 12 Misc3d 1191(A) the Court noted:

"It is axiomatic that to be effective, an assignment of the note and a mortgage given as security therefor must be made by the owner of such note and mortgage and that an assignment made by entities having no ownership interest in the note and mortgage pass no title therein to the assignee (see, **Matter of Stralem**, 303 AD2d 120, 758 NYS2d 345, and the cases cited therein). A nominee of the owner of the note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee."

The plaintiff, in opposition to the defendant's cross-motion to dismiss, alleges and attaches various assignments and allonge to the note showing assignments from AHL to Chase Home Finance, LLC., and then from Chase Home Finance, LLC. to the plaintiff; however, none of the assignments are dated so as to establish without question the plaintiff's right to maintain this lawsuit or to commence it at the time of the initiation of the lawsuit. Thus, questions of fact are raised as to the authority/standing of the plaintiff to commence a mortgage foreclosure action where there is an issue of whether or not it owned the mortgage and note upon which it seeks relief.

Finally, Judge Carmen Beauchamp Ciparick, concurring with the majority of the New York Court of Appeals in **Matter of Merscorp v. Romaine**, 8 NY3d 90, 828 NYS2d 266 (2006), noted:

"When presented with a MERS mortgage to record, the Clerk is able to discern from the face of the instrument that Mers has been appointed, as nominee, 'mortgagee of record.' As the instrument appears to reflect a valid conveyance (Real Property Law §290[3]), the Clerk is required to record the instrument in MERS' name 'as nominee for Lender' (Real Property Law §291). Given that the identity of the actual lender is ascertainable from the mortgage document itself-indeed the use of a nominee as the

equivalent of an agent for the lender is apparent and not unusual- I concur with the majority that the Clerk is obligated to record MERS mortgages.”

However, in a footnote to the above statement, Judge Ciparick went on to state

“I also agree that the issues concerning the underlying validity of the MERS instrument- in particular, whether its failure to transfer beneficial interest renders it a nullity under the real property law, whether it violates the prohibition against separating the note from the mortgage, and whether MERS has standing to foreclose on a mortgage-are best left for another day...” (emphasis supplied)

Here, in the case at bar, these very issues are the issues of fact that require resolution by a trier of fact and preclude this Court from finding as a matter of law that the plaintiff is the duly designated and rightful owner of the “mortgage and note” so as to have standing to institute this foreclosure action against the defendants. Since the question of ownership of the note and mortgage at the time of commencement of this lawsuit is so critical in this case, the plaintiff’s motion for summary judgment pursuant to CPLR §3212 must be denied. Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. VanNoy v. Corinth Central School District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985).

By the same token, the plaintiff by its complaint and papers alleges and suggests it is the rightful owner of the mortgage and the note and provides undated assignments or allonges to the note, thus warranting denial of defendant’s motion to dismiss pursuant to CPLR §3211. It is clear that further discovery is required to determine the plaintiff’s “standing” to institute the present action and that warrants denial of both the motion and cross motion at this time. Accordingly, the plaintiff’s motion for summary judgment pursuant to CPLR §3212 and the appointment of a referee in this mortgage foreclosure proceeding is denied as there are readily identifiable issues of fact which preclude summary disposition and the cross-motion by the defendants, Gonzalo Molina et al., for dismissal pursuant to CPLR §3211 (a) on the grounds of standing is also denied in that standing is a contested issue of fact at this time.

The foregoing constitutes the decision of the Court.

Dated: December 31, 2007



J.S.C.