

**U.S. Bank Natl. Assn. v Daniels**

2008 NY Slip Op 32050(U)

July 11, 2008

Supreme Court, New York County

Docket Number: 0112327/2007

Judge: Shirley Werner Kornreich

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PRESENT: **HON. SHIRLEY WERNER KORNREICH**

PART 54

*ice*

Index Number : 112327/2007

**U.S. BANK NATIONAL**

VS.

**DANIELS, JASON**

SEQUENCE NUMBER : # 002

DISMISS COMPLAINT

INDEX NO. 112327-07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #002

MOTION CAL. NO. \_\_\_\_\_

d on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

**FILED**

JUL 16 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits 1 Exhibits 5

Answering Affidavits 1 Exhibits 3

Replying Affidavits N/A

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 7/11/08

**HON. SHIRLEY WERNER KORNREICH**  
*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X

U.S. BANK NATIONAL ASSOCIATION, AS :  
TRUSTEE OF J.P. MORGAN ALTERNATIVE :  
LOAN TRUST 2006-A4, :  
:  
Plaintiff, :  
-against- :

Index No. 112327/2007

JASON DANIELS, MORTGAGE ELECTRONIC :  
REGISTRATION SYSTEMS, INC., ACTING :  
SOLELY AS NOMINEE FOR COUNTRYWIDE :  
BANK, N.A. ITS SUCCESSORS AND ASSIGNS, :  
NEW YORK CITY PARKING VIOLATIONS :  
BUREAU, NEW YORK CITY ENVIRONMENTAL :  
CONTROL BOARD, BOARD OF MANAGERS OF :  
THE CHELSEA 19 CONDOMINIUMS, NEW :  
YORK CITY DEPARTMENT OF SOCIAL :  
SERVICES AND DIVISION OF LIENS AND :  
RECOVERY, NEW YORK CITY TRANSIT :  
ADJUDICATION BUREAU, AND "JOHN DOE #1" :  
THROUGH "JOHN DOE #10", THE LAST TEN :  
NAMES BEING FICTITIOUS AND UNKNOWN :  
TO THE PLAINTIFF, THE PERSON OR PARTIES :  
INTENDED BEING THE PERSONS OR PARTIES, :  
IF ANY, HAVING OR CLAIMING AN INTEREST :  
IN OR LIEN UPON THE MORTGAGE PREMISES :  
DESCRIBED IN THE COMPLAINT, :  
:  
Defendants. :

**DECISION AND ORDER**

**FILED**  
JUL 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X

**KORNREICH, SHIRLEY WERNER, J.:**

Defendant Jason Daniels brings this motion to dismiss a foreclosure action brought by Plaintiff U.S. Bank National (U.S. Bank), as trustee, of JP Morgan Trust Alternative Loan Trust 2006-A4 (JP Morgan), pursuant to CPLR 3211. Daniels argues that because the Complaint fails

to establish a valid assignment of the operative mortgage and note, U.S. Bank lacks standing or capacity to sue under CPLR 3211(a)(3), or a sufficient cause of action under CPLR 3211(a)(7).

Daniels also argues that pursuant to CPLR 3211(a)(1), U.S. Bank has submitted deficient documentary evidence to sustain its cause of action. U.S. Bank opposes the motion.

### ***Key Facts Alleged in the Complaint***

On or about September 12, 2007, U.S. Bank filed a Complaint to foreclose a mortgage on real property located at 251 West 19<sup>th</sup> Street, Apartment 1C, New York, New York (Property).

The property is a condominium apartment acquired by Daniels in 2006. The property is subject to a mortgage in the amount of \$1 million (Mortgage) which secures payment of an Interest-Only Adjustable Rate Note (Note) originally in favor of Mortgage Electronic Registration System, Inc. (MERS), acting solely as a nominee for Countrywide Bank, NA (Countrywide). The mortgage and note dated June 27, 2006, were recorded on July 25, 2006. U.S. Bank alleges that the mortgage and note were assigned to it on September 10, 2007.

### ***Discussion and Ruling***

In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002).

Plaintiffs are afforded "the benefit of every possible favorable inference." *Id.* at 87-88; *see Leon v. Martinez*, 84 NY2d 83 (1994); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976).

Turning to Daniels' claim under CPLR 3211 (a) (1) that the action is barred by documentary evidence, the documentary evidence will not satisfy this ground unless it "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen*, 98 N.Y.2d at 326. The court's undertaking "is to determine whether plaintiff's pleading states a

cause of action. The motion [to dismiss] must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Richbell Info. Services, Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 289 (1st Dept. 2003).

Turning to Daniels' motion, the court will first address the threshold argument that U.S. Bank lacks standing or capacity to pursue its claims. CPLR 3211(a)(3) refers only to a plaintiff's "lack of capacity." Standing and legal capacity to sue, while similar, are contrasting doctrines. Legal capacity "concerns a litigant's power to appear and bring its grievance before the court. . . .often depending purely on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or. . . a business corporation." *Security Pac. Natl. Bank v. Evans*, 31 A.D.3d 278, 279 (1<sup>st</sup> Dept) , *appeal dismissed* 8 N.Y.3d 837 (2007). There is no allegation that U.S. Bank is not authorized to do business in New York. Daniels' claim that U. S. Banks lacks the *capacity* to sue is meritless.

The issue of standing requires more discussion. To have standing, a party must establish an "injury in fact--an actual legal stake in the matter being adjudicated." *Security Pac. v. Natl. Bank*, 31 A.D.3d at 279. "Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked." *Saratoga County of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 812 (2003). There is no specific reference in CPLR 3211 to standing and there is some confusion among the courts on how to treat standing arguments in the context of dismissal motions. *See e.g. Security Pac. v. Natl. Bank*, 31 A.D.3d at 278-284. That debate, which appears to focus on issues of timing and waiver, does not apply here, where the argument is based on whether U.S. Bank held a valid

mortgage and note on which Daniels defaulted. Daniels does not attack the pleading insofar as it alleges his default, only that U.S. Bank has not sufficiently pled its right to receive payment under a valid note. Without that, Daniels asserts, U.S. Bank neither has standing nor a sufficiently pled cause of action for foreclosure under CPLR 3211(a)(7).

Daniels bases his argument on the following language in the Complaint that, he asserts, shows the assignment had not yet been recorded when the Complaint was filed: “[t]he note and mortgage were assigned to U.S. Bank National Association, as Trustee of J.P. Morgan Alternative Loan Trust 2006-A4 by an assignment which is in the process of being recorded.” U.S. Bank complaint at ¶ 4. On its face, this argument has merit. *See Kluge v. Fugazy*, 145 AD2d 537, 538 (2d Dept 1988). In *Kluge* the court found that, “[a] foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.”

In assessing a motion under CPLR 3211, however, “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). For U.S. Bank to prove it has the requisite standing, it must establish “the existence of the mortgage and the mortgage note, ownership of the mortgage, and the defendant’s default in payment.” *Campaign v. Barba*, 23 A.D.3d 327 (2d Dept. 2005). To do so, U.S. Bank may rely on operative documents, such as “contracts, deeds, wills and mortgages.” CPLR 3211(a)(1). U.S. Bank’s Affirmation in Opposition to Daniels’ motion provides the requisite documentation needed to establish standing and to render the foreclosure claim sufficient. U.S. Bank has submitted the mortgage and note in question listing U.S. Bank as the Assignee/New Lender; a copy of a signed and notarized assignment of the mortgage and note from Countrywide

to U.S. Bank; and a description of the property subject to the mortgage. These documents show that the mortgage and note were assigned to U.S. Bank on September 10, 2007, prior to U.S. Bank filing its foreclosure action against Daniels two days later on September 12, 2007.

“Ownership of both the note and mortgage at the time of the commencement of a mortgage foreclosure action is a necessary element of the plaintiff’s cause of action.” *Lasalle Bank Natl. Assn. v. Lamy*, 824 N.Y.S.2d 769. Thus, U.S. Bank remedied the defect in its Complaint when it submitted its affirmation in opposition to Daniels’ motion to dismiss.

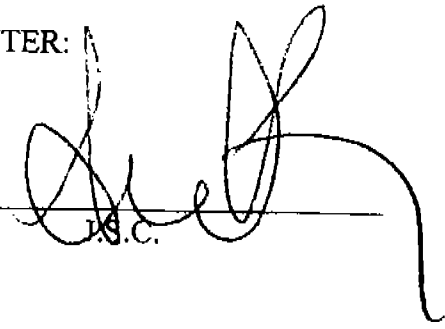
U.S. Bank’s submission of the valid assignment also undermines Daniels’ motion to dismiss pursuant to CPLR 3211(a)(1), in which he relies on the original mortgage predating the assignment. Indeed, in *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002), the Court of Appeals discussed the circumstances in which a successful motion to dismiss based upon documentary evidence may be brought. “Such motion may appropriately be granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” Given the fact that U.S. Bank produced the necessary documentation, Daniels’ motion to dismiss on the ground that a defense is based on documentary evidence is deficient. Accordingly, it is hereby

ORDERED that defendant Daniels’ motion to dismiss U.S. Bank’s foreclosure action pursuant to CPLR 3211(a)(1),(3), and (7) is denied; and it is further

ORDERED that plaintiff U.S. Bank shall file and serve an Answer to the Complaint within ten days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 28, 2008,  
at 9:30 A.M.

Date: July 11, 2008  
New York, N.Y.

ENTER:   
J.S.C.

**FILED**  
JUL 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK