

Washington Mutual Bank v Grossman

2008 NY Slip Op 33484(U)

December 23, 2008

Supreme Court, Nassau County

Docket Number: 006736/07

Judge: Daniel R. Palmieri

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5/2/08

SHORT FORM ORDER

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
WASHINGTON MUTUAL BANK,

TRIAL TERM PART: 48

Plaintiff,

INDEX NO.: 006736/07

-against-

**MOTION DATE: 7-18-07
SUBMIT DATE: 11-24-08
SEQ. NUMBER - 001**

**LANCE SCOTT GROSSMAN A/K/A LANCE S.
GROSSMAN, LORI ANN GROSSMAN A/K/A
LORI A. GROSSMAN, "JOHN DOES" and
"JANE DOES", said names being fictitious,
parties intended being possible tenants or
occupants of premises, and corporations, other
entities or persons who claim, or may claim
a lien against the premises,**

**MOTION DATE: 8-8-07
SUBMIT DATE: 11-14-08
SEQ. NUMBER - 002**

Defendants.

-----X

The following papers have been read on this motion:

Notice of Motion, dated 6-25-08.....	1
Notice of Cross Motion, dated 7-23-08.....	2
Affirmation in Opposition to Cross Motion, dated 8-23-08.....	3
Affidavit in Reply, dated 11-21-08.....	4
Affirmation in Reply, dated 11-25-08.....	5
Letters and Stipulations between the parties and the Court dated 11-26-08, 11-24-08, 11-21-08, 11-21-08, 11-21-08, 10-29-08, 9-24-08, 8-27-08, 8-27-08, 8-1-08, 7-2-08, 6-24-08, 5-27-08, 4-29-08, 3-26-08, 3-25-08, 2-19-08, 1-7-08, 1-7-08, 12-4-07, 11-1-07, 10-9-07, 9-19-07, 8-30-07, 8-7-07, 7-12-07, (collectively referred to and bound together as.....	6

Plaintiff's motion for summary judgment pursuant to CPLR §3212 is denied. Defendant's cross motion for summary judgment dismissing the complaint on the grounds of lack of standing is granted CPLR §3112 and the action is dismissed. The counterclaims are dismissed. All other requests for relief are denied.

As can be gleaned from the itemization of the papers submitted, after this motion was made the parties suspended activity while they apparently sought to resolve their differences. It was only recently that they resumed an exchange of papers and submitted the issues for decision. The Court has included in one composite and bound bundle the various letters leading to the submission in order to create a complete record of activity.

In 2001, defendants executed and delivered to Fleet National Bank a consolidated mortgage on premises known as 924 Jewel Drive, North Woodmere, New York, in the total principal amount of \$255,800.00 (the Mortgage). In the Mortgage "MERS" is identified as a corporation acting solely as a nominee for the lender (identified as Fleet National Bank). For purposes of recording the Mortgage MERS is identified as the mortgagee of record. However no other authority is granted to MERS by virtue of the Mortgage and the lender remains the owner of the Mortgage and the debt which it secures.

This action was commenced by plaintiff Washington Mutual Bank (WaMu) on April 19, 2007 pursuant to a summons and a complaint which alleges that "plaintiff is still the owner of the aforementioned instruments". The "aforementioned instruments" are all described as having been made in favor of the original lender and mortgagee Fleet National Bank, with no identification or cross reference to WaMu. Attached to the moving papers as

an exhibit is a copy of an assignment from MERS, as nominee and mortgagee of record for Fleet, to WaMu dated May 8, 2007 and attached to plaintiff's affirmation in Opposition to the cross motion is a second similar assignment from MERS to WaMu. Both assignments are dated May 8, 2007 and notarized the same day. Both assignments recite that MERS is the nominee and mortgagee of record for Fleet but neither recite that MERS is the owner and holder of the Mortgage and neither gives the source of MERS' authority to assign. Both assignments are effective on or before April 6, 2007. There is no explanation as to how they both happened to be signed and notarized on the same day. The notes underlying the Mortgage are endorsed by WaMu but the endorsements are undated. It is evident however that the assignments were both made after the commencement of this action and that MERS is not given the authority to foreclose or sue on the debt. *Cf., Mortgage Elec. Registration Sys. Inc. v. Coakley*, 41 AD3d 674 (2d Dept. 2007).

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

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Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may

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reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Cicccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

Inasmuch as defendants have raised the issue of standing in their answer, they have not waived the contention and thus it is part of the plaintiff's burden in the first instance to establish its right to commence the action. *Wells Fargo Bank Minnesota, Nat. Ass'n. v.*

Mastropaolo, 42 AD3d 239, 242 (2d Dept. 2007). Here, plaintiff has not made a *prima facie* showing of entitlement to relief because its own submission establishes that plaintiff did not have standing to commence this foreclosure and the lack thereof was not cured by submission of a second corrected assignment of the Mortgage. *Washington Mutual Bank v. Patterson*, 21 Misc. 3d 1145(A) (Sup. Ct. N.Y. County 2008). *Cf.*, *Bankers Trust Company v. Hoovis*, 263 AD2d 937 (3rd Dept. 1999), assignment including delivery of the note and mortgage predated commencement of foreclosure. Thus, as noted above, the motion should be denied irrespective of the content of the opposing papers.

A plaintiff in a foreclosure action must establish that it has a legal or equitable interest in the Mortgage and underlying debt, *i.e.* that at the time of commencement of the action it is the owner of the Mortgage and debt. *Fremont Investment & Loan v. Laroc*, 21 Misc.3d 1124(A) (Sup. Ct. Queens Cty. 2008).

It is axiomatic that a plaintiff has standing to bring a foreclosure action on a note and mortgage if at the time the action is commenced it is the owner thereof, either as the original mortgagee or as a bona fide assignee of such mortgagee's rights. *National Mtge. Consultants v Elizaitis*, 23 AD3d 630 (2d Dept. 2005); *Federal Nat. Mtge. Assn. v Youkelsone*, 303 AD2d 546 (2d Dept. 2003). The unavoidable corollary is that if it does not enjoy such status at the time the action is commenced, it lacks standing to do so, in that it has no legal or equitable interest in the property or the debt upon which to prosecute an action. *Katz v East-Ville Realty Co.*, 249 AD2d 243 (1st Dept. 1998); *Kluge v Fugazy*, 145 AD2d 537 (2d Dept. 1988); *Countywide Home Loans v Taylor*, 17 Misc 3d 595 (Sup Ct Suffolk County 2007). Given

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the undisputed dates recited above, the Court finds that the plaintiff had not received an assignment of the note and mortgage before it commenced the action, and therefore did not have the standing to do so.

That the assignments are made effective on a date which predates commencement of the action does not alter the fact that WaMu was not the owner of the Mortgage when it commenced this action. Moreover, still lacking is any evidence of any authority granted to MERS to make an assignment of the Mortgage. MERS is only designated as a nominee for recording and an assignment is not simply a recording. Also noted is that the sole submission by any person on behalf of WaMu professing to have knowledge of the facts is a brief affidavit from an officer of WaMu as part of the initial moving papers which makes no mention of how WaMu came into ownership of the Mortgage. All other submissions by plaintiff are made by plaintiff's attorney. An affirmation of an attorney which fails to rely on any personal knowledge or on any admissible documentation, is lacking in evidentiary value. *Feratovic v. Lun Wah, Inc.*, 284 AD2d 368 (3d Dept. 2001). The action must therefore be dismissed. CPLR 3212.

In light of this determination, the Court does not reach the other bases advanced by the defendants for denying the plaintiff's motion for summary judgment and issuance of an order of reference.


Inasmuch as the complaint has been dismissed, it is not necessary for the Court to address the other grounds for dismissal alleged in defendants' cross motion. To the extent that the defendants seek summary judgment on their counterclaims, they are not addressed because they are essentially no more than affirmative defenses cloaked as counterclaims, do

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not seek any cognizable affirmative relief and are thus rendered academic by the dismissal of the complaint. Accordingly, the counterclaims are dismissed as mooted by the dismissal of the complaint.

This constitutes the decision and order of this Court.

ENTER

DATED: December 23, 2008



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

JAN 02 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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