HSBC Bank, USA v Alvalle
2008 NY Slip Op 33555(U)
November 18, 2008
Supreme Court, Suffolk County
Docket Number: 16465/07
Judge: Peter Fox Cohalan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX # 16465-07
RETURN DATE: **3-17-08**
MOT. SEQ. # **003**

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

PRESENT:
Hon. PETER FOX COHALAN

---x

HSBC BANK USA, National Association, as Trustee for Securitized Asset Securities Corporation Mortgage pass-Through Certificates Series 2004-SC1,

Plaintiff,

-against-

RUTH ALVALLE, RICHARD DORF and "JOHN DOE#1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lien upon the Mortgager premises described in the Complaint.

Defendants.

---x

CALENDAR DATE: June 4, 2008
MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:

Eschen, Frenkel, Weisman & Gordon
20 West Main St.
Bay Shore, NY 11706

DEFT'S/RESP ATTORNEY:

Matthew Muraskin, Esq.
Atty for Ruth Alvalle
1772 E. Jericho Tpke.
Huntington, NY 11743

Upon the following papers numbered 1 to 20 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-14 ; Notice of Cross-Motion and supporting papers ____ ; Answering Affidavits and supporting papers 15-18 ; Replying Affidavits and supporting papers 19-20 ; Other ____ ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the plaintiff, HSBC Bank USA, National Association, as Trustee for Securitized Asset Securities Corporation Pass-Through Certificate Series 2004-SC1 (hereinafter HSBC) 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 on the issue of standing.

The plaintiff instituted this foreclosure action seeking to foreclose on premises located at 21 Oregon Road South in West Babylon, Suffolk County on Long Island, New York. The defendants, Ruth Alvalle and Richard Dorf, executed a note and mortgage with H & R Block Mortgage Corporation, dated January 26, 2006, in the amount of $406,000.00 payable in monthly installments of $2,608.98. The defendants failed to pay under the terms of the note and mortgage on or about March 1, 2007 and the plaintiff commenced this present action on or about June 8, 2007. The note and mortgage were assigned to Option One Mortgage Corporation on May 9, 2006 and recorded on November 21, 2006. However, the papers are silent on HSBC's interest in this action other than a statement that there was an assignment without a date and recorded on July 5, 2007 but not evidenced in the exhibits attached to the moving papers. The plaintiff now moves for summary judgment pursuant to CPLR §3212 and the defendant, Ruth Alvalle, opposes the motion claiming, inter alia, indemnification from the co-defendant, Richard Dorf, and, at oral argument, the plaintiff's standing to institute this lawsuit.

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 established 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 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).

Here, in the case at bar, and 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 has 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 mortgage assignment from H & R Block Mortgage Corporation to Option One Mortgage Corporation and the plaintiff. Further, the plaintiff alleges itself as a trustee for another owner, Securitized Asset Securities Corporation Pass-Through Certificate Series 2004-SC1 (hereinafter Securitized), yet there is no evidence of Securitized's ownership interest in the mortgage and note or under what authority HSBC has to represent the interests of Securitized.

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."

Thus, questions of fact are raised as to the authority/standing of the plaintiff, who is alleged to take its interest through an assignment from Option One Mortgage Corporation but provides no evidence of such assignment, to commence a mortgage foreclosure action. There is an issue of whether or not it owned the mortgage and note upon which it seeks the present relief. Further the very nature of the plaintiff as a trustee for another entity requires the Court to examine the trust documents between the two (2) entities to ensure that plaintiff has been provided authority to not only own a mortgage and note but authority to institute this action as a trustee on behalf of Securitized.

The Court in ***Caprer v. Nussbaum***, 36 AD3d 176, 825 NYS2d 55 (2nd Dept. 2006) dealing with the issue of standing set forth:

> "A plaintiff generally has standing only to assert claims on behalf of himself or herself. Although there are situations in which representative or organizational standing is permitted (see, CPLR §1004; ***Rudder v. Pataki***, 93 NY2d 273, 278 [1999]; ***Matter of Dairylea Coop. v. Walkley***, 38 NY2d 6, 9 [1978]), one does not as a general rule have standing to assert claims on behalf of another (see, ***Society of Plastics Indus. v. County of Suffolk***, 77 NY2d 761, 773 [1991]; ***Matter of Hebel v. West***, 25 AD3d 172, 175 [2005]). As explained by the Court of Appeals: 'Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation (***Matter of Dairylea Coop. v. Walkley***, 38 NY2d 6, 9). Standing is a threshold determination, resting in part on policy considerations,

> that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria. (see, Comment,*183 Standing of Third Parties to Challenge Administrative Agency Actions, 76 Cal L Rev 1061, 1067-1068 [1988]; see also, Warth v Seldin, 422 US 490, 498)' ***Society of Plastics Indus. v. County of Suffolk***, supra at 769. "

Finally, Judge 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

[* 5]

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). The Court would also caution counsel to review the new CPLR §3408 dealing with foreclosure issues to ensure compliance in the event this mortgage falls with the parameters of CPLR §3408

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 (i.e., standing is a contested issue of fact) which precludes summary disposition at this time.

The foregoing constitutes the decision of the Court.

Dated: November 18, 2008

J.S.C.