

LaSalle Bank NA v Richards

2009 NY Slip Op 32305(U)

October 6, 2009

Supreme Court, New York County

Docket Number: 109613/08

Judge: Nicholas Figueroa

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

PRESENT: _____
Justice

PART 46

La Salle Bank

INDEX NO. 109613/08

- v -

MOTION DATE _____

Richards, Carole

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision and order.

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

FILED
OCT 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/6/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----x
LASALLE BANK NA, as Trustee for Washington
Mutual Mortgage Pass-Through Certificates WMALT
Series 2006-AR8 Trust,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 109613/08

CAROLE RICHARDS, et al.,

Defendants.

-----x
Nicholas Figueroa, J.S.C.:

FILED
OCT 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

LaSalle Bank has moved for summary judgment (CPLR 3212) in its action to foreclose a mortgage on New York City property. Defendant Carole Richards opposes on the theory that LaSalle lacks standing to prosecute its claim.

LaSalle filed its complaint on July 14, 2008, seeking to foreclose a mortgage securing a note payable to VirtualBank, a division of Lydian Private Bank. At the loan's origination in 2006, the mortgage was put into the name of Mortgage Electronic Registration Systems, Inc. ("MERS"), as VirtualBank's nominee and as mortgagee of record.

In support of its summary judgment motion, LaSalle has submitted documents showing that defendant incurred, and defaulted on, a debt to VirtualBank, and that such debt is secured by a mortgage. Although these instruments thus relate to the ownership interest of an entity other than LaSalle, the complaint avers that LaSalle "is the holder of a note and mortgage being foreclosed." Defendant's answer and papers on this motion suggest that the complaint was framed purposefully to avoid asserting that LaSalle held the particular instruments at bar (as opposed to "a" note and mortgage unrelated to this action) when it began this action. In other

words, defendant not only in effect accuses the complaint of obfuscating, but also, challenges LaSalle's standing, since only the owner of the mortgage and note at issue can commence a foreclosure action (*Fed. Natl. Mtge. v Youkelsone*, 303 AD2d 546; *First Trust Natl. Assn. v Meisels*, 234 AD23d 414; *Kluge v Fugazy*, 145 AD2d 537, 538).

In reply, LaSalle does not directly address the question of whether, when it filed the complaint, it owned the very mortgage and note at issue. Instead, it attaches a copy of an instrument of assignment, dated July 14, 2009, identifying MERS as assignor and LaSalle as assignee.

As evidence of LaSalle's ownership of the mortgage at the time it commenced this action, the assignment instrument is problematic, even if only because the complaint appears to refer to the assignment as a matter that would be only prospective at the time of the complaint's filing. In other words, taking the complaint at its word, it is assumed that the assignment instrument was executed after the complaint was filed, even if, arguendo, both the pleading and the instrument were executed on the same date. Furthermore, there is authority for the proposition that a nominee such as MERS does not in any event have power to assign ownership of a mortgage effectively (*LaSalle Bank Natl. Assn. v Lamy*, 12 Misc 3d 1191[A]; *Bank Natl. Assn. v Daniels*, Index No. 0112327/07 (NY Sup. Ct. Jul. 11, 2008); *GMAC Mtge. LLC v Marsh*, Index No. 017486/07 (NY Sup. Ct. Apr. 23, 2008).

This is not to ignore the precedents that appear to be inconsistent with *Lamy* (see, e.g., *LaSalle Bank Natl. Assoc. v Ahearn*, 59 AD3d 911; *Indymac Bank v Bethley*, 22 Misc 3d 1119[A]; *Washington Mut. Bank v Patterson*, 21 Misc 3d 1145; *Deutsche Bank Trust Co. Americas Peabody*, 20 Misc 3d 1108). Nor is it to overlook precedents indicating that a nominee

or other agent may be empowered by its principal to transfer or affect or enforce the principal's interest in a mortgage (*Mortgage Electronic Registration Sysys., Inc. v Einhorn*, Index No. 105980/03 (Sup. Ct. NY Co.); *see College Mgt. Co. v Belcher Oil Co.*, 159 AD2d 339, 341; *cf. Fairbanks Capital Corp. v Nagel*, *supra*).

All of the foregoing, however, may in the end be academic, in light of certain well-established principles. First, even if the mortgage had been effectively assigned to LaSalle prior to commencement of this action, LaSalle would nevertheless be without standing unless it then owned the note as well (*Merritt v Bartholick*, 36 NY 44, 45; *Flyer v Sullivan*, 284 AD 697, 698; *Beak v Walts*, 266 AD 900; *Manne v Carlson*, 49 AD 276, 278). Second, even in the absence of an effective written assignment by such time, LaSalle might yet have had standing to bring this action. After all, an assignment of a mortgage need not be in writing, but may be accomplished instead by delivery of the mortgage to the assignee (*Fryer v Rockefeller*, 63 NY 268, 276) or through transfer of ownership in the note (*see Mortgage Electronic Registration Sysys. v Coakley*, 41 AD3d 674 [“[A]t the time of the commencement of this action, MERS was the lawful holder of the promissory note ... and of the mortgage, which passed as an incident of the promissory note,” and cases cited therein; *Fremont Invest. & Loan, v LaRoc*, 21 Misc 3d 1124). Thus, it appears that there is one piece of proof that is critical to plaintiff's standing, and such item has not been proffered to date: evidence of LaSalle's ownership in the note, whether by physical custody, assignment, or endorsement, when it brought this action.

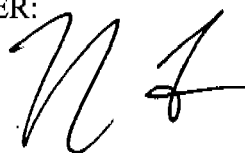
In view of all of the foregoing, LaSalle's motion for summary judgment is denied, without prejudice to its renewal on a motion supported by documents showing that LaSalle held

[* 5]
or otherwise owned the subject note, and with it the mortgage, prior to its commencement of this action. If, however, no such motion is made within sixty (60) days of the date of entry of this decision, summary judgment shall be entered dismissing the complaint (CPLR 3212[b]).

This constitutes the decision and order of the court.

Dated: October 6, 2009

ENTER:



J.S.C.

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OCT 07 2009
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