JP Morgan Chase Bank, N.A. v Ramirez
2011 NY Slip Op 30488(U)
February 18, 2011
Supreme Court, Suffolk County
Docket Number: 1777/2006
Judge: Jr., Paul J. Baisley
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JP MORGAN CHASE BANK, N.A. f/k/a JP MORGAN CHASE BANK f/k/a THE CHASE MANHATTAN BANK, AS TRUSTEE,

Plaintiffs,

-against-

INDHIRA RAMIREZ, JOSEPH JAMES, KEISH McCLOUD a/k/a KEISHA McLEOD, MYRNA JAMES, NORTH FORK BANK, JOHN DOE (Said name being fictitious, it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities if any, having or claiming an interest or lien upon the mortgaged premises.),

Defendants.

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INDEX NO.: 1777/2006
CALENDAR NO.: 200801076EQ
MOTION DATE: 10/6/2010
MOTION SEQ. NO.: 011 MG
012 XMD
013 XMD

PLAINTIFF'S ATTORNEY:
PORZIO, BROMBERG & NEWMAN
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DEFENDANTS' ATTORNEY:
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304 Park Ave. South, Suite 206
New York, New York 10010

Upon the following papers numbered 1 to 50 read on this motion to dismiss complaint; cross motion to substitute as plaintiff; cross motion for sanctions : Notice of Motion/ Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers 14-34; 35-38 ; Answering Affidavits and supporting papers 39-40 ; Replying Affidavits and supporting papers 41-45; 46-47; 48-50 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (011) by defendant Indhira Ramirez for an order dismissing the complaint against her is granted; and it is

ORDERED that the cross motion (012) by FNBN I, LLC, for, inter alia, an order permitting it to be substituted as plaintiff is denied; and it is

ORDERED that the cross motion (013) by defendant Indhira Ramirez for an order awarding her costs and imposing financial sanctions against Gary Fellner, Esq., is denied; and it is

ORDERED that the Court, sua sponte, hereby vacates the note of issue and strikes this action from the trial calendar; and it is further

ORDERED that defendant Indhira Ramirez shall serve a copy of this order on the Calendar Clerk and, upon receipt of such copy, the action shall be reactivated as an IAS matter and shall not be restored to the Trial Calendar until it is certified as ready by the IAS justice assigned.

This is an action to foreclose a mortgage on residential premises known as 11 Rainbow Court, Middle Island, New York. In July 2003, defendant Indhira Ramirez obtained a loan in the

principal amount of $346,750 from First National Bank of Arizona (FNBA). As security for the loan, Ramirez executed a fixed rate note for such amount and gave a mortgage on the premises known as 11 Rainbow Court to FNBA. The mortgage states, in part, that Mortgage Electronic Registration System (MERS) "is a separate corporation acting solely as nominee for the lender and lender's successors and assigns," and that MERS is the mortgagee of record "[f]or purposes of recording this mortgage." It further states that MERS, as nominee for the lender and the lender's successors and assigns, has the right to exercise those rights granted to the lender under the terms of the mortgage agreement, including the right to foreclose and sell the property. The mortgage, but not the note, was recorded in the office of the Suffolk County Clerk on May 4, 2004.

The action was commenced by plaintiff JP Morgan Chase Bank, N.A. (Chase) on January 17, 2006. According to the complaint, Ramirez defaulted on her obligation to make the loan payment due on September 1, 2005 and every month thereafter. More particularly, the first paragraph of the complaint states that plaintiff "with an address in C/O Homecomings Financial Network, Inc. . . is the holder of a mortgage bearing date the 18th day of July, 2003 executed by Indhira Ramirez to secure the sum of $346,750.00 . . . and recorded at Liber 20738 of Mortgages at Page 346 in the Office of the Clerk of the County of Suffolk on the 7th day of May, 2004; said mortgage was assigned by virtue of an Assignment of Mortgage." The fourth paragraph of the complaint states that the defendants named in the attached Schedule C, for the purpose of securing a sum of money, "bound themselves . . . in the amount of said sum of money, all as more fully appears together with the terms of repayment of said sum in 'Schedule C,'" and describes Schedule C as "a copy of the bond or note, or if the note cannot be found, a summary of the terms of the note, or an accurate reference to the assumption agreement, evidencing the indebtedness." Schedule C, annexed to the complaint, is an unsigned statement that reads as follows: "After due diligence, plaintiff cannot locate the promissory note referred to in the recorded mortgage. The books and records of the plaintiff verify the existence of a note made by Indhira Ramirez to First National Bank of Arizona dated July 18, 2003 in the face amount of $346,750 payable $2,514.18 per month commencing September 1st, 2003, said payment to include interest at the rate of 7.87% per annum maturing on the 1st day of August 2033." It is noted that Schedule C is a preprinted form apparently created by the law firm that drafted the complaint and initially represented plaintiff, Steven J. Baum & Associates, and that the particular information pertaining to the action is handwritten on the form. Ramirez served an answer asserting various affirmative defenses and interposing counterclaims for, among other things, declaratory and injunctive relief. A note of issue and certificate of readiness were filed in this action on May 23, 2008.

Thereafter, by order dated June 25, 2009, this Court (Mayer, J.) denied motions by First National Bank of Nevada (FNBN) for leave to amend the caption to substitute itself as plaintiff and for summary judgment in its favor on the foreclosure action, finding that triable issues of fact exist regarding the ownership of the note executed by Ramirez. The Court determined, among other things, that although FNBN alleged the subject note was transferred to it by an allonge, the evidence submitted in support of its motions was insufficient to establish the claim that the subject note was properly assigned by MERS, as nominee, to Chase prior to the commencement of this action. By that same order, the Court also denied a motion by FNBN for the imposition of sanctions against Ramirez, as well as motions by Ramirez for leave to amend her answer and for dismissal of the complaint under CPLR 3211. Subsequently, on March 26, 2010, Ramirez, by certified mail, served a notice on Chase pursuant to CPLR 3216 demanding that it resume prosecution of the action and

serve a note of issue within 90 days after receipt of such notice. The notice also warned that failure to comply with the demand within the 90-day period will be a basis for a dismissal motion. The notice to Chase was addressed to the location indicated in the caption, namely 9350 Waxie Way, San Diego, CA. Ramirez also served, by certified mail, a copy of the 90-day notice on the law firm Porzio, Bromberg & Newman, P.C., which substituted in as plaintiff's counsel back in 2007.

Ramirez now moves for an order pursuant to CPLR 3216 dismissing the complaint for want of prosecution. Ramirez argues that Chase lacks standing and has effectively abandoned the action. As evidence of Chase's alleged abandonment of its foreclosure claim, Ramirez points out that the law firm originally representing plaintiff in this action, Steven J. Baum & Associates, has not appeared on the case since 2007, and that Gary Fellner, Esq., a principal of Porzio, Bromberg & Newman, has appeared at numerous conferences with the Court claiming to represent different purported "assignees of plaintiff's foreclosure rights," namely FNBN, the Federal Deposit Insurance Company and, now, FNBN I, Inc. Moreover, Ramirez alleges Chase ignored the demand made under CPLR 3216. In support of the motion, Ramirez submits copies of the note of issue and certificate of readiness; copies of correspondence from Gary Fellner, Esq., a principal of the Porzio, Bromberg & Newman law firm, dated August 20, 2007, July 31, 2008 and May 20, 2009, regarding the action; copies of the 90-day notice and proof of mailing; and a copy of the order issued by Justice Mayer in June 2009.

FNBN I, LLC cross-moves for an order permitting it, in its alleged capacity "as successor of the Federal Deposit Insurance Corporation ('FDIC')," to be substituted as plaintiff in this action "on the ground that FNBN I, LLC lawfully succeeded to the rights of the FDIC in connection with the underlying note and mortgage at issue following the FDIC's takeover of the failed banking institution, First National Bank of Nevada." FNBN I further moves for an order striking the jury demand filed by Ramirez and granting it leave to file a notice of pendency against the subject property. In addition, it seeks summary judgment in its favor against Ramirez and the appointment of a referee to compute the amount due under the note and mortgage. FNBN I's submissions in support of the cross motion include a copy of the note executed by Ramirez and a purported allonge, which is separate from the note, undated and typewritten on Bank of Nevada stationery; a copy of a purported assignment of the subject mortgage by MERS, "as nominee for First National Bank of Arizona," to JP Morgan Chase Bank dated December 29, 2005; and a copy of a purported assignment of the mortgage by Chase to FNBN dated August 25, 2007. Also submitted by FNBN I is an affidavit of Lisa Magnuson, identified as a "Limited Signing Officer" of Residential Funding Company, LLC; an affidavit of Robert Schwarzlose, identified as a " Manager, Resolutions & Closings," of the Federal Deposit Insurance Corporation; and an affidavit of Donald Brewster, Deputy General Counsel of PennyMac Loan Services, LLC and PNMAC Capital Management, LLC. In addition, the cross-moving papers include a copy of a purported assignment by the Federal Deposit Insurance Corporation as Receiver for FNBN to FNBN I of "all of its rights, title and interest in and to the following: Mortgage dated July 18, 2003 granted by Indhira Ramirez to First National Bank of Arizona in the amount of $346,750.00 . . . which mortgage secures the note and encumbers the property more particularly described therein." According to the statement of the notary at the bottom of the document, the purported assignment to FNBN I was executed on February 9, 2009. FNBN I does not address in its cross-moving papers the merits of the motion by Ramirez to dismiss for want of prosecution.

Ramirez opposes the cross motion by FNBN I and cross-moves for an order imposing financial sanctions against Mr. Fellner and awarding her costs pursuant to Part 130 of the Uniform Rules for Trial Courts. Ramirez asserts the imposition of sanctions is warranted, as Mr. Fellner filed the cross motion for substitution and other related relief despite knowing FNBN I lacks standing to foreclose on the mortgage. Mr. Fellner opposes the motion, arguing that it is procedurally improper for Ramirez to file a cross motion in response to FNBN I's cross motion. The Court notes that the "Affirmation in Further Support of Defendant's Cross Motion for Sanctions" submitted by Ramirez without leave of this Court was not considered in the determination of the motion for sanctions (*see* CPLR 2214 [c]).

To commence a foreclosure action a plaintiff must have a legal or equitable interest in the mortgage (*Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207, 887 NYS2d 615 [2d Dept 2009]; *see Katz v East-Ville Realty Co.*, 249 AD2d 243, 672 NYS2d 308 [1st Dept 1998]). A party has standing to enforce a note secured by a mortgage on real property by foreclosing on the mortgage if it is the holder of both the note and the mortgage at the time the action is commenced (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615; *Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 755 NYS2d 730 [2d Dept 2003]; *Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]). Further, while a note secured by a mortgage is a negotiable instrument, a mortgage is but an incident to the debt which it is intended to secure (*see Merritt v Bartholick*, 36 NY 44 [1867]; *Slutsky v Blooming Grove Inn*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]; *Flyer v Sullivan*, 284 AD 697, 134 NYS2d 521 [1st Dept 1954]; *see also Copp v Sands Point Mar.*, 17 NY2d 291, 270 NYS2d 599 [1966]). "'The mortgagee holds simply a chose in action, secured by a lien upon the land'" (*Becker v McCrea*, 193 NY 423, 427, 86 NE 463 [1908], *quoting Packer v Rochester & Syracuse R.R. Co.*, 17 NY 283 [1858]). A transfer of the mortgage without the note, therefore, "is a nullity, and no interest is acquired by it," as the security "can not be separated from the debt and exist independently of it" (*Merritt v Bartholick*, 36 NY 44, 45; *see Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92). For the same reason, an assignment of a mortgage interest given by one who does not own the debt is a nullity (*see Jackson ex dem. Curtis v Bronson*, 19 Johns 325 [1822]; *Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92; *Flyer v Sullivan*, 284 AD 697, 134 NYS2d 521). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*US Bank Natl. Assn v Madero*, __ AD3d __, 2011 NY Slip Op 00505 [2d Dept 2011]). Thus, to establish a prima facie case in an action to foreclose a mortgage, a plaintiff must establish the existence of the note and mortgage, its ownership interest in both, and the defendant's default (*see Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; *see also Merritt v Bartholick*, 36 NY 44).

FNBN I's cross motion for leave to substitute as plaintiff in this action is denied. CPLR 1018 provides that "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined as a party." The determination to substitute a party is a matter within the discretion of the trial court (*see NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563, 792 NYS2d 510 [2d Dept 2005]), and an application for substitution may be denied if the event requiring substitution occurs before a final judgment and the application was not made within a reasonable time (*see* CPLR 1021). Contrary to the conclusory assertions by the attorney for FNBN I, the documentary evidence

submitted in support of its cross motion fails to demonstrate that Chase was, in fact, the lawful holder of the note when the action was commenced (*see US Bank Natl. Assn v Madero*, __ AD3d __, 2001 NY Slip Op 00505; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578). Significantly, the purported endorsement of the note given by Ramirez to FNBN, which is on a separate page bearing FNBN's letterhead and is not dated, does not comply with the requirements of UCC § 3-302 (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578; *Slusky v Blooming Grove Inn*, 147 AD2d 208, 542 NYS2d 721). Moreover, the purported assignment to Chase states that MERS, as nominee of FNBA – not FNBN – "assigns and transfers to JP Morgan Chase . . . all beneficial interest under that certain mortgage executed by Indhira Ramirez . . . recorded in Book 20738 on Page 345 on 5/7/2004 of official Records in the County Recorder's Office of Suffolk County." Similarly, as indicated above, the purported assignments from Chase to FNBN and from the Federal Deposit Insurance Corporation to FNBN I state only that the assignor's interest in the mortgage is being assigned.

Ramirez' motion for an order dismissing the complaint for want of prosecution is granted. A plaintiff served with a 90-day notice pursuant to CPLR 3216 must comply with the notice by timely filing a note of issue or by moving, before the expiration of the 90-day period, either to vacate the notice or to extend the 90-day period (*see Sanchez v Serje*, 78 AD3d 1155, 913 NYS2d 919 [2d Dept 2010]; *Serby v Long Is. Jewish Med. Ctr.*, 34 AD3d 441, 824 NYS2d 119 [2d Dept 2006], *lv denied* 8 NY3d 805, 831 NYS2d 107 [2007]; *Yuen v Staten Is. Univ. Hosp.*, 277 AD2d 369, 716 NYS2d 880 [2d Dept 2000], *lv denied* 96 NY2d 709, 725 NYS2d 640 [2001]; *Vijax Corp. v Jacobs*, 270 AD2d 253, 704 NYS2d 850 [2d Dept 2000]). A plaintiff who fails to pursue either option may still avoid dismissal of the complaint by demonstrating a justifiable excuse for the delay in responding to the 90-day notice and a meritorious cause of action (*see Picot v City of New York*, 50 AD3d 757, 855 NYS2d 237 [2d Dept 2008]; *Serby v Long Is. Jewish Med. Ctr.*, 34 AD3d 441, 824 NYS2d 119; *see also Baczkowski v Collins Const. Co.*, 89 NY2d 499, 655 NYS2d 848 [1997]). Here, in addition to not responding to the 90-day demand, Chase failed to offer any reasonable excuse for not prosecuting this action after the order issued by the Court in June 2009. As indicated above, Chase served no papers in opposition to the motion to dismiss, and FNBN I did not address the merits of the motion in its cross-moving papers. Thus, under the particular circumstances, dismissal of the foreclosure action against Ramirez for failure to prosecute is appropriate (*see Baczkowski v Collins Const. Co.*, 89 NY2d 499, 655 NYS2d 848; *Dominguez v Jamaica Med. Ctr.*, 72 AD3d 876, 898 NYS2d 869 [2d Dept 2010]; *Michaels v Sunrise Bldg. & Remodeling, Inc.*, 65 AD3d 1021, 885 NYS2d 110 [2d Dept 2009]; *Sharpe v Osorio*, 21 AD3d 467, 800 NYS2d 213 [2d Dept 2005]). The remaining claims in this action are severed and continued.

Ramirez' motion for an order awarding her legal fees and imposing financial sanctions against Mr. Fellner is denied. Pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts, a court, in its discretion, may award costs and impose sanctions for frivolous conduct in a civil action or proceeding (22 NYCRR §130-1.1[c]). Conduct is regarded as frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," if "it asserts material factual statements that are false," or if it is undertaken to "delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR §130-1.1[c]). When determining whether conduct is frivolous and, therefore, sanctionable, a court must consider the circumstances under which the conduct took place and whether or not the conduct was continued when its lack of legal or factual basis was apparent or

should have been apparent (22 NYCRR §130-1.1[c]). Ramirez' submissions in support of the motion are insufficient to establish that Mr. Fellner engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c) (*see Kaplon-Belo Assoc., Inc. v D'Angelo*, 79 AD3d 931, 912 NYS2d 886 [2d Dept 2010]; *cf. Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1008, 913 NYS2d 663 [2d Dept 2010]; *Pedri v Pedri*, 51 AD3d 645, 857 NYS2d 498 [2d Dept 2008]; *Mascia v Maresco*, 39 AD3d 504, 833 NYS2d 207 [2d Dept], *lv denied* 9 NY3d 813, 848 NYS2d 24 [2007]; *Ofman v Campos*, 12 AD3d 581, 788 NYS2d 115 [2d Dept 2004], *lv dismissed* 4 NY3d 846, 797 NYS2d 422 [2005]).

Finally, a court may vacate a note of issue at any time on its own motion if it appears that a material fact in the certificate of readiness is incorrect (*see*, 22 NYCRR 202.21 [e]; *Simon v City of Syracuse Police Dept.*, 13 AD3d 1228, 787 NYS2d 577 [4th Dept 2004], *lv dismissed* 5 NY2d 746, 800 NYS2d 375 [2005]). Here, based on the evidence submitted with the moving papers and the confusion regarding plaintiff's standing and prosecution of this foreclosure action, the Court concludes that the certificate of readiness contains a misstatement of material fact, namely, that disclosure is complete and the action is ready for trial. Accordingly, the Court, sua sponte, vacates the note of issue filed by plaintiff and strikes this action from the trial calendar (*see* 22 NYCRR 202.21 [e]).

Dated: February 18, 2011

PAUL J. BAISLEY, JR.
J.S.C.