

Bank of Am., N.A. v Kim
2011 NY Slip Op 31602(U)
May 11, 2011
Sup Ct, NY County
Docket Number: 102007-10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Bank of America

Plaintiff (s),

INDEX NO.

102 007/10

- v -

MOTION DATE

003

MOTION SEQ. NO.

KIM

Defendant(s).

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

PAPERS NUMBERED

FILED

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows: **MAY 13 2011**

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

PC set for 6/23/10 @ 9:30am.

Dated: 5/11/11

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

RECEIVED
MAY 13 2011
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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CIVIL

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

(epandem seom) omx (a) mltm
(llw) mltm (m) mltm
mtr/mtr/mtr mtr/mtr
mtr/mtr/mtr

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Bank of America, National Association as
successor by merger to
LaSalle Bank, N.A., *as trustee for*
WaMu Mortgage Pass Through
Certificates Series 2007- OA5 Trust,

Plaintiff (s),

- against-

Yun J. Kim a/k/a Yun Kim a/k/a Yun J. Shin;
Dongkya Shin a/k/a Dong Kyu Shin;
J.P. Morgan Chase Bank, N.A.; Board of
Managers of Atelier Condominium
Homeowners' Association; City of New York
ECB, City of New York PVB, Rosenwasser,
Grossman Consulting; Hampton Air East, Inc.,
Li Ming Chou; Shu Fang Chou; Kan Ying Chou,

Defendant (s).

-----X

DECISION/ORDER

Index No.: 102007-10
Seq No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED

MAY 13 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Kim and Shin n/m (3211) w/YJK, DKS affid, exhs	1
Bank's opp w/EMO affirm, exhs	2
Kim and Shin reply w/ES affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action brought by plaintiff to foreclose a mortgage secured by a condominium apartment (Unit 8D) ("unit") located at 635 West 42nd Street, New York, New York, also known as the Atelier Condominium. Yun J. Kim a/k/a Yun Kim a/k/a Yun J. Shin ("Yun") and Dongkya Shin a/k/a Dong Kyu Shin ("Dong") have brought this

motion for dismissal of the complaint against them, alleging that plaintiff lacks standing to bring this foreclosure action (CPLR 3211 [a] [3]).

Defendants have appeared in this action. Their answer and this motion was made while they were self represented. They now have an attorney who filed a reply affirmation on their behalf and appeared for oral argument.

At the outset, the court addresses plaintiff's claim that the motion should be denied for improper service. Apparently defendants served the wrong attorney. Since plaintiff has opposed the motion on the merits and not shown any prejudice, this is rejected as a basis to deny the motion and it will be decided on the merits.

Discussion

CPLR 3211[a][3] permits the court to dismiss an action when the party bringing it lacks standing to do so. "The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution" (Community Bd. 7 v. Schaffer, 84 N.Y.2d 148, 154-155 [1994]).

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]). Plaintiff is also afforded the benefit of every possible favorable inference (Goshen v. Mutual Life Ins. Co. of New York, *supra*; Leon v. Martinez, 84 NY2d 83, 88[1994]; Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]).

Bank of America ("BOA") contends that it has a valid Assignment of Mortgage by J.P. Morgan Chase Bank, N.A., the successor-in-interest of Washington Mutual Bank (a/k/a WaMu f/k/a Washington Mutual Bank, N.A. BOA provides documentary

evidence in the form of a recorded Assignment of Mortgage (“assignment”). The assignment was prepared in December 2009 and recorded February 25, 2010. This action was commenced with the filing of the summons and complaint on February 16, 2010.

BOA takes the position that the mortgage assignment was valid when delivered, not when it was filed, consequently BOA contends it had standing to bring this action when it was commenced. Yun and Dongkya, disagree however, arguing that because there is no affidavit by a person with knowledge stating that the assignment was, in fact, delivered prior to the commencement of this action, this is fatal to plaintiff’s action. They contend that the assignment is only valid upon being recorded, unless there is actual proof of delivery.

An action to foreclose a mortgage may not be brought by one who has no title to it (Kluge v. Fugazy, 145 A.D.2d 537 [1988]). Where the mortgage has been assigned, and the assignment is complete at the time the action is commenced, the assignee has standing to bring the action in its own name (Bankers Trust Co. v. Hoovis, 263 A.D.2d 937 [3rd Dept 1999]). BOA has presented documentary evidence tending to show the assignment was made. Since the execution date is generally controlling, it is presumed that the assignment was delivered prior to the commencement date of this action, since the document predates its commencement (see, Bankers Trust Co. v. Hoovis, supra). In doing so, plaintiff defeats defendants’ motion for the dismissal of this action based upon lack of standing. Defendants’ argument, that the attorney does not have personal knowledge of delivery, imposes a burden on plaintiff that it does not have at this stage

in the proceedings (see, Worldcom, Inc. v. Dialing Loving Care Inc., 269 A.D.2d 159 [1st Dept 2000] attorney's conclusory affirmation insufficient to defeat motion for summary judgment).

Yun and Dong next argue that this case should be dismissed because the mortgage they obtained was procured through fraud. They claim that despite having income of just \$21,000 per year, they were found qualified for a mortgage they could not pay and that the interest rates were higher than they had been told or expected. These arguments, however, reach the ultimate issues in this case which remain to be decided either by way of a dispositive motion under CPLR 3212 or at trial where defendants can prove their defenses. Therefore, plaintiffs' motion to dismiss the complaint for this reason is denied as well.

To the extent that defendants also claim they have demanded original documents which have been withheld, these demands are best handled in the context of preliminary conference where the court can set a discovery schedule. The court directs that the parties appear for a **preliminary conference on June 23, 2010 at 9:30 a.m in Part 10 at 60 Centre Street**. No further notices will be sent.

Conclusion

In accordance with the foregoing,

It is hereby:

ORDERED that the motion by defendants' Yun J. Kim a/k/a Yun Kim a/k/a Yun J. Shin ("Yun") and Dongkya Shin a/k/a Dong Kyu Shin ("Dong") for the dismissal of the complaint is denied in all respects; and it is further

[* 7]
ORDERED that the parties appear for a **preliminary conference on June 23, 2010 at 9:30 a.m in Part 10 at 60 Centre Street**; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
May 11, 2011

So Ordered:



Hon. Judith J. Gische, JSC

FILED

MAY 13 2011.

**NEW YORK
COUNTY CLERK'S OFFICE**