

**US Bank N.A. v Lieberman**

2011 NY Slip Op 31962(U)

June 1, 2011

Sup Ct, NY County

Docket Number: 402881/10

Judge: Ellen Frances Gesmer

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

HON. ELLEN GESMER

PRESENT: \_\_\_\_\_

PART 24

*Justice*

Index Number : 402881/2010

**US BANK NATIONAL ASSOCIATION**

VS.

**LIEBERMAN, WILLIAM**

SEQUENCE NUMBER : 002

OTHER RELIEFS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

**FILED** EXPENSE NUMBERED

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

Answering Affidavits – Exhibits \_\_\_\_\_

JUL 01 2011

Replying Affidavits \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is decided by the attached  
decide decision & order.*

Dated: 7-1-11

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 24

-----X  
US BANK NATIONAL ASSOCIATION AS TRUSTEE  
OF THE BANC OF AMERICA FUNDING 2006-A  
TRUST,

Plaintiff,

-against-

WILLIAM LIEBERMAN, JOANNE OMARK LIEBERMAN,  
THE LANDING HOME OWNERS ASSOCIATION, INC.,  
WELLS FARGO BANK,

Defendants.

-----X  
US BANK NATIONAL ASSOCIATION AS TRUSTEE  
OF THE BANC OF AMERICA FUNDING 2006-A  
TRUST,

Third-Party Plaintiff,

-against-

KERMIT ROYCE,

Third-Party Defendant.

-----X

DECISION AND ORDER  
Motion Sequences 2 & 3

Index No. 402881/10

**FILED**

**JUL 08 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Third-Party Index No. T402881/10

Hon. Ellen Gesmer, JSC

Motion sequences two and three are consolidated for disposition.

This is an action for foreclosure in which plaintiff US Bank National Association (US Bank) seeks to foreclose against the interests of defendants Johanna Omark Lieberman s/h/a Joanne Omark Lieberman (Wife) and William Lieberman (Husband) in their residential real property located at 17 Hudson Drive, Dobbs Ferry, New York (the Residence), which they own as tenants by the entirety.

In motion sequence two, plaintiff US Bank National Association (US Bank) moves for "an Order pursuant to CPLR §§2001 [sic] and §§2004 [sic] together with such other and further relief as to this Court seems just and proper."

In motion sequence three, the Wife moves, pursuant to CPLR §3212, for summary judgment

dismissing the complaint asserted against her, with prejudice, and seeking leave to apply for sanctions and/or counsel fees against US Bank. US Bank opposes the Wife's motion and cross-moves, pursuant to CPLR §3212, for summary judgment on its complaint asserted against the Wife.

### **FACTS**

In 2005, the Wife and the Husband signed a contract to purchase the Residence. At that time, they resided in California. The Wife never signed any loan or mortgage documents in connection with the purchase of the Residence, and no one ever discussed with her or disclosed to her the terms of the financing of the New York property.

The Wife and the Husband executed durable powers of attorney in favor of third-party defendant Kermit Royce (Royce) to act as their attorney-in-fact in the purchase of the Residence. Royce signed the loan application on behalf of the Husband alone. The Wife maintains that the purpose of her executing the power of attorney in Royce's favor was to have Royce attend the closing on her behalf and to insure that her name was on the deed; she never intended for Royce to obligate her to any loan.

Neither the Husband nor the Wife appeared at the closing, and Royce acted as their agent at that time. He signed the deed on behalf of both the Husband and the Wife. He signed the mortgage and the note on behalf of the Husband only. He signed the HUD settlement agreement on behalf of both the Husband and the Wife, and that document lists both the Husband and the Wife as the borrowers, even though the Wife is not a borrower under the note or the mortgage.

In August 2007, the Husband commenced a divorce action against the Wife in this court, which is still pending before me under New York County Supreme Court index number 308962/07. The Wife claims that the Husband handled all of their financial transactions during the marriage, and that, when they purchased the Residence, she believed that the Husband was going to use the proceeds of

the sale of their California home to purchase the New York residence. The Wife claims that she learned for the first time during the divorce action that the Husband did not do so. The Wife states in her affidavits on this motion that she learned during the divorce action that the loan taken out by the Husband to purchase the Residence is an interest-only adjustable rate mortgage which, she asserts, was designed so that the mortgagor would not accumulate equity in the premises. The Wife states that she had no relationship with the lender, no knowledge of the terms of the loan, and that she certainly never agreed to borrow money by a loan that she categorizes as a risky and unconventional product.

In the divorce action, this court directed the Husband to pay the note *pendente lite*, which he failed to do. As a result, US Bank commenced this foreclosure action in the Supreme Court, Westchester County, on or about April 7, 2009. In its Complaint, US Bank asserts three causes of action: (1) breach of the note and mortgage; (2) reformation of the mortgage to add the Wife as a mortgagor; and (3) imposition of an equitable lien.

By order filed September 14, 2009, the Westchester Supreme Court granted US Bank's motion for summary judgment against the Husband, granted default judgments against co-defendants The Landing Home Owners Association, Inc. and Wells Fargo Bank, N.A., and denied US Bank's summary judgment motion against the Wife. On or about December 31, 2009, US Bank moved to reform the mortgage on the Residence to have the Wife added as a co-mortgagor, to impress an equitable lien on the premises, and to foreclose on that lien. After some correspondence between counsel for US Bank and the Wife concerning the fact that her name is not on the mortgage or the note, US Bank withdrew its motion to reform the mortgage.

On August 16, 2010, the Westchester Supreme Court granted the Wife's motion to transfer venue to this court. On December 2, 2010, the parties appeared in this court and signed a Preliminary Conference Order (the PC Order), setting deadlines for discovery. Pursuant to the PC Order, all

disclosure was to be completed on or before March 30, 2011. In addition, counsel for US Bank was directed to comply with 22 NYCRR §202.12-a(f) by filing an affidavit or affirmation attesting to the scope and accuracy of the papers filed in the residential foreclosure action. The time for discovery has now expired and the matter awaits scheduling for trial.

### ANALYSIS

#### US Bank's Motion Sequence Two

CPLR §2214(a) requires that a notice of motion "shall specify ... the relief demanded and the grounds therefore ... ." US Bank's motion sequence two is procedurally defective in that the notice of motion fails to specify the relief being sought and the grounds upon which that relief is based. Hence, US Bank's motion sequence two is denied.

#### The Wife's Summary Judgment Motion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006] [internal quotation marks and citation omitted]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]); see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

That portion of the Wife's motion seeking summary judgment dismissing the complaint asserted as against her, with prejudice, is granted. The Wife has met her burden of establishing her right to the relief requested by submission of the relevant documents and her affidavits. Specifically, it is undisputed that the Wife never signed, and is not named in, the note or the mortgage. Furthermore,

she was not even aware of the specifics of the financing for the purchase of the Residence until approximately two years later when the divorce action between the Husband and the Wife commenced. In response, US Bank has not come forward with evidence in admissible form sufficient to dispute the Wife's motion, or, as discussed further below, to support its own cross-motion.

U.S. Bank's Cross-Motion for Summary Judgment

Not only has US Bank failed to articulate any legal grounds to support its claim for breach of the note and mortgage as against the Wife, but all of the evidence presented establishes that the Wife was never a signatory to any of those documents and, therefore, cannot be held to have assented to their terms (*Matter of Express Industries & Terminal Corp. v New York State Department of Transportation*, 93 NY2d 584 [1999]; *Minelli Construction Company, Inc. v Volmar Construction, Inc.*, 82 AD3d 720 [2d Dept 2011]).

US Bank has also not established the requisite grounds to grant it the equitable relief of reformation of the mortgage and note.

[T]here is a heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties, and a correspondingly high order of evidence is required to overcome that presumption. The proponent of reformation must show in no uncertain terms, not only that mistake or fraud exists, but exactly what was agreed upon between the parties.

(*Chimart Associates v Paul*, 66 NY2d 570, 574 [1986]). US Bank has not provided any evidence to demonstrate that the Wife and the mortgagee ever came to any agreement (*ABA Consulting, LLC v Liffy Van Lines, Inc.*, 67 AD3d 401 [1<sup>st</sup> Dept 2009]). The only documents that bear the Wife's name are the contract of sale, which she signed personally, and the deed and HUD settlement agreement, which were each signed on her behalf by Royce. The documents that US Bank wishes to reform do not bear her signature or even mention her name. Therefore, US Bank has failed to meet its burden to permit reformation of the mortgage and note.

Furthermore, the court is not persuaded by US Bank's unsupported arguments that it is entitled to reformation based on a potential mistake of the parties or scrivener's error.

[I]n order to base reformation of an instrument upon a claim of mistake, what must be shown is either mutual mistake or mistake on one side induced by fraud on the other....The very documents submitted demonstrate there was no mutual mistake....A mere claim of mutual mistake does not establish the fact. There is no evidence sufficient to raise the issue of mutual mistake.

(*Gaylor's National Corp. v Arlen Realty & Development Corp.*, 112 AD2d 93, 96 [1<sup>st</sup> Dept 1985] [internal quotation marks and citations omitted]).

US Bank has also failed to establish a right to recover on the basis of unilateral mistake, as it has failed to allege facts that would sufficiently establish that its purported unilateral mistake was caused by fraudulent conduct on the part of the Wife (*see Wachovia Securities, LLC v Joseph*, 56 AD3d 269 [1<sup>st</sup> Dept 2008] [motion to dismiss denied]).

An allegation of scrivener's error is not available where there is no writing that incorrectly reflects the parties' intentions (*Rosalie Estates, Inc. v Colonia Insurance Company*, 227 AD2d 335 [1<sup>st</sup> Dept 1996]). Where, as here, the parties disagree as to the mortgage and note, US Bank cannot recover based on this theory (*Stonebridge Capital, LLC v Nomura International PLC*, 68 AD3d 546 [1<sup>st</sup> Dept 2009]).

Furthermore, US Bank's motion is unsupported by an affidavit of anyone with personal knowledge of the relevant facts. US Bank's conclusory statement that it was the Wife's clear intent to be bound by the note and mortgage, based on the argument that the mortgage funded her residence, is insufficient to defeat the Wife's motion for summary judgment (*X.L.O. Concrete Corp. v O'Connor*, 183 AD2d 487 [1<sup>st</sup> Dept 1992]; *Burt v Lenox Hill Hospital*, 141 AD2d 378 ([1<sup>st</sup> Dept 1988])).

Similarly, US Bank's cause of action seeking to impose an equitable lien on the Residence

*Decision and Order Motion Sequences Two and Three*

fails. “[A]n equitable lien is dependent upon some agreement express or implied that there shall be a lien on specific property” (*Teichman v Community Hospital of Western Suffolk*, 87 NY2d 514, 520 [1996] [internal quotation marks and citation omitted]; *Datlof v Turetsky*, 111 AD2d 364 [2d Dept 1985]). As discussed above, no such agreement exists between the Wife and the mortgagee. Therefore, no equitable lien may be imposed on the Residence.

In addition, US Bank has adequate remedies at law, which defeats its claim for the imposition of an equitable lien (*Boyle v Kelley*, 42 NY2d 88 [1977]; *Sisters of Charity Health Care System Nursing Home, Inc. v Jack Miceli, D.D.S., P.C.*, 52 AD3d 805 [2d Dept 2008]). US Bank’s legal remedies lie in suing the original mortgagee that sold it the mortgage and note. Furthermore, U.S. Bank has already been granted summary judgment on the note as against the Husband, and is seeking damages from Royce in the third-party action to this suit.

The court is also not persuaded by US Bank’s argument that more discovery is needed, since this action was commenced two years ago and the parties had agreed to complete all discovery by March 31, 2011. Further, a motion for summary judgment that was asserted as against the Wife in the Supreme Court, Westchester County, was denied prior to the action’s venue being transferred to this court. Therefore, in addition to the foregoing, pursuant to the doctrine of the law of the case, US Bank’s cross motion must be denied (*Romagnolo v Pandolfini*, 75 AD3d 632 [2d Dept 2010] [cross motion for summary judgment properly denied when the same relief was sought and previously denied]).

Finally, 22 NYCRR §202.12-a (f) requires counsel to file affidavits or affirmations confirming the scope of the inquiry and the accuracy of the papers filed in residential foreclosure actions. Since US Bank has failed to comply with the provisions of 22 NYCRR §202.12-a (f), the action is not properly maintained as against the Wife.

For all of the above reasons, US Bank's cross motion is denied and that portion of the Wife's motion seeking to dismiss the complaint asserted against her is granted with prejudice.

**Counsel Fees**

That branch of the Wife's motion seeking counsel fees is denied. The Wife bases her request for leave to apply for counsel's fees on Section 282 of the New York Real Property Law, which entitles mortgagors to recover attorneys' fees in actions arising out of foreclosure proceedings on residential properties. However, since the court has determined that the Wife is not a mortgagor with respect to the note and mortgage that is the subject of this action, she is not able to avail herself of this relief.

Lastly, the court declines to allow the Wife leave to seek sanctions against US Bank, in the exercise of the court's discretion (22 NYCRR 130-1.1).

In accordance with the above decision, it is

ORDERED that defendant Joanne Omark Lieberman's motion for summary judgment in her favor is granted, and the Complaint is dismissed as asserted against her, with prejudice, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

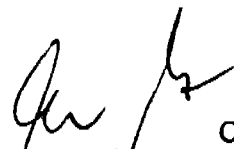
ORDERED that all relief requested but not granted above is denied.

**FILED**

Dated: July 1, 2011

ENTER:

**JUL 08 2011**



NEW YORK  
COUNTY CLERK'S OFFICE

Hon. Ellen Gesmer, J.S.C.

**HON. ELLEN GESMER**