

**Wells Fargo Bank, N.A. v Gallo**

2011 NY Slip Op 33318(U)

June 27, 2011

Supreme Court, Queens County

Docket Number: 34182/09

Judge: Augustus C. Agate

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Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff Wells Fargo commenced this action by filing a summons and complaint and a Notice of Pendency December 22, 2009. Plaintiff seeks to foreclose on a consolidated mortgage on the subject real property known as 137-39 95<sup>th</sup> Street, Ozone Park, New York, also known as Block 11531 Lot 38 on the Tax Map of the City of New York, Queens County, to secure the repayment of a consolidated note, evidencing a loan in the consolidated amount of \$335,000.00 extended to defendant John A. Gallo.

Plaintiff alleges in its complaint that John A. Gallo, for the purposes of securing to Option One Mortgage Corporation its successors and assigns, the sum of \$335,000.00 made a "certain bond, note consolidation, extension, modification, recasting or assumption agreement, which was recorded on October 18, 2007, in the Office of the City Register, Queens County." Plaintiff alleges that as security for this debt, a Consolidation, Extension and Modification Agreement (CEMA) was executed and delivered to Option One Mortgage Corporation, which was recorded on October 18, 2007, in the Office of the City Register, Queens County. The mortgages named in the CEMA were consolidated into a single first mortgage on the subject real property, in the sum of \$335,000.00..

Schedule D attached to and incorporated into the complaint recites the history of the consolidated mortgage as follows: John A. Gallo gave a mortgage to H & R Block Mortgage Corporation, dated April 19, 2006, in the principal sum of \$309,000.00 which was recorded on August 3, 2006; that said mortgage was assigned by H & R Block Mortgage Corporation to Option One Mortgage Corporation, by an assignment recorded on January 31, 2008. John A. Gallo gave a mortgage to Option One Mortgage Corporation dated August 13, 2007 in the principal sum of \$27,555.49, and recorded on October 18, 2007. These two mortgages were consolidated pursuant the CEMA dated August 13, 2007, and recorded on October 18, 2007, and that the consolidated mortgage was transferred pursuant to a transfer of "the instant note and mortgage" pursuant to an assignment of mortgage dated December 18, 2009.

Plaintiff alleges that it is the owner and holder of the subject mortgage and note, or that it has been delegated to institute a mortgage foreclosure action by the owner of said mortgage and note, and that Mr. Gallo defaulted in his monthly payments, as set forth in Schedule C attached to and incorporated into the complaint. According to Schedule C of the complaint the

last installment was paid on March 1, 2009, and that the first unpaid installment occurred on April 1, 2009.

Mr Gallo in his verified answer asserts twenty three affirmative defenses, including lack of standing.

Defendants City of New York Parking Violations Bureau and Environmental Control Board have failed to appear or answer or otherwise respond to the complaint within the time prescribed by law, and have defaulted in this action.

Plaintiff has submitted affidavits of service with respect to Melanie Berrios, a/k/a John Doe #1; Carmen Ramos a/k/a John Doe #2, Leonardo Gallo a/ka/John Doe # 3; Vivian Ramos a/k/a John Doe #4; Grisel Ramos a/k/a John Doe #5; Paul Morillio a/k/a John Doe #6, Minerva Morillio a/k/a John Doe # 7; Lordes Morillio a/k/a John Doe # 8; Fiona Baxter a/k/a John Doe #9, and Doreen Mainer a/k/a John Doe #10. These defendants have failed to appear or answer or otherwise respond to the complaint within the time prescribed by law, and have defaulted in this action.

In support of the motion for summary judgment, the plaintiff offers a copy of the pleadings, affidavits of services, as well as the following documents:

A copy of the April 19, 2006 mortgage on the subject real property given by John A. Gallo to H & R Block Mortgage Corporation, which was recorded on August 3, 2006 in the Office of the City Register of the City of New York. Said mortgage refers to a note dated April 19, 2006 in the amount of \$309,000.00 given by Mr. Gallo to H & R Block Mortgage Corporation.

A copy of a "GAP NOTE", which John A. Gallo obtained from Option One Mortgage Corporation, in the sum \$24,654.98, dated August 13, 2007.

A copy of a "GAP MORTGAGE" dated August 13, 2007, on the subject real property given by John A. Gallo to Option One Mortgage Corporation, which refers to the note of August 13, 2007 in the sum of \$27,555.49. The gap mortgage was recorded on October 18, 2007.

A copy of an allonge, which refers to the note dated August 13, 2007, made by John A. Gallo, and states that the loan amount of \$335,000.00.

A consolidated note dated August 13, 2007 given by John A. Gallo to Option One Mortgage Corporation, in the sum of \$335,000.00. Said note recites that it "AMENDS AND RESTATES IN THEIR ENTIRETY, AND IS GIVEN IN SUBSTITUTION FOR THE NOTES DESCRIBED IN EXHIBIT A OF THE

NEW YORK CONSOLIDATION, EXTENSION, AND MODIFICATION AGREEMENT [CEMA] DATED THE SAME DATE AS THIS NOTE".

A copy of the CEMA, dated August 13, 2007, between John A. Gallo, and the lender One Option Mortgage Corporation, which recites that the total unpaid principal balance of the notes is \$335,000.00, and that \$27,555.49 was advanced to the borrower or on his account, immediately prior to the consolidation.

An assignment dated November 17, 2007, and recorded on January 31, 2008, by H & R Block Mortgage Corporation to Option One Mortgage Corporation, of the mortgage pertaining to the subject property dated and recorded on August 3, 2006 given by John A. Gallo to H & R Block Mortgage Corporation.

An assignment of the mortgage on the subject property by Sand Canyon Corporation, formerly known as Option One Mortgage Corporation to Wells Fargo, dated December 18, 2009, and recorded on January 11, 2010.

Plaintiff has also submitted an affidavit from Michelle Halyard, a vice president of American Home Mortgage Servicing Inc., who states that this entity is the loan servicing agent and attorney in fact for Wells Fargo. She states that Mr. Gallo failed to make all of the monthly payments of due as required by the note and mortgage, and sets forth the date of default as April 1, 2009 and recites that amounts due for principal, interest, late charges and advances for taxes, hazard insurance, appraisal and inspections for a total of \$370,428.92. Plaintiff has also submitted a copy of the May 16, 2008 limited power of attorney appointing Option One issued in connection with the servicing of certain mortgage loans.

Plaintiff contends that Mr. Gallo's affirmative defenses lack merit. With respect to the defense of standing, Wells Fargo asserts that it was properly assigned the mortgage prior to the commencement of this action and that there is no requirement said assignment be recorded prior to the commencement of the action. It is further asserted that the transfer is reflected by the endorsement to plaintiff in the allonge; that the transfer of the note assigned all of the assignors' rights, title and interests in the loan to the plaintiff; and that the transfer was further memorialized by the execution of the December 18, 2009 assignment. Plaintiff, thus, asserts that it is the owner of the consolidated note and consolidated mortgage.

Defendant Gallo in his cross motion for summary judgment dismissing the complaint asserts that the plaintiff lacks standing to commence this action on the grounds that the assignment of the

mortgage was not recorded until after the commencement of the within action; that the CEMA was defective on its face; and that plaintiff has failed to produce the 2006 note and subsequent assignments of said note, which resulted in the CEMA. Defendant asserts that the CEMA is deficient as the Gap Note is for the sum of \$24,654.08, while the Gap Mortgage refers to the sum of \$27,555.49; that the CEMA states that the earlier mortgage was dated and recorded on August 3, 2006, while plaintiff relies upon a mortgage dated April 19, 2006; and that as the assignment of the 2006 mortgage did not occur until after the CEMA was executed, it was not properly consolidated with the Gap Mortgage.

Defendant further asserts that the complaint should be dismissed, as plaintiff's moving papers are devoid of a copy of the note dated April 19, 2006 given by Gallo to H & R Block Mortgage Corporation. It is asserted that as plaintiff has failed to produce said note, and all subsequent assignments on which the CEMA is based, it lacks standing to bring the within foreclosure action.

Plaintiff in opposition to the cross motion asserts that the CEMA establishes the chain of ownership of the mortgages, and that the consolidated mortgage was assigned to it by Sand Canyon Corporation. Counsel has included a printout from the website of New York State Department of State, Division of Corporations, which lists Sand Canyon Corporation as an entity whose name was Option One Mortgage Corporation. It is asserted that all of the assignments in the mortgage chain were executed prior to the commencement of this action, that the relationship between plaintiff and Wells Fargo was recited in the CEMA, and that Gallo ratified and accepted the terms of the consolidated mortgage agreement. Finally, plaintiff asserts that it produced the consolidated note which was recorded with the CEMA agreement, and that at the time the consolidated mortgage was entered into, the prior notes were no longer controlling.

"In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage ( *see Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207 [2009]). A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint ( *see Wells Fargo Bank, N.A. v Marchione*, 69 AD3d at 207-209; *U.S. Bank N.A. v Collymore*, 68 AD3d 752, 754 [2009]). Thus, as long as the plaintiff can establish its lawful status as assignee, either by written assignment or physical delivery, prior to the commencement of the filing of the complaint, the recording of a written assignment after the commencement of the action does

not defeat standing (see *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754)" (*Aurora Loan Services LLC, v Weisblum*, AD3d , 2011 NY Slip Op 4184, 2011 NY App Div Lexis 4108 [2011]).

On a motion for summary judgment in a foreclosure action, a plaintiff must make a primary showing by producing the mortgage, the unpaid note, bond or obligation and the evidence of default and the assignment of the mortgage documents to it (see *Rossrock Fund II, L.P. v Osborne* 82 AD3d 737 [2011]; *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482 [2003]; *EMC Mortgage Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]; *IMC Mortgage Co. v Griggs*, 289 AD2d 294 [2001]; *Patterson v Rodney*, 285 AD2d 453 [2001]; see also *Bercy Investors, Inc. v Sun*, 239 AD2d 161 [1997]).

Here, the consolidated note and consolidated mortgage at issue, were originally comprised of a first mortgage and note, dated April 19, 2006, between John A. Gallo and H & R Block Mortgage Corporation, and the Gap Note and Gap Mortgage between John A. Gallo and Option One Mortgage Corporation, both dated August 13, 2007. The CEMA defines the term "Notes" as the notes identified in Exhibit A to the agreement, which are secured by the mortgages. The CEMA recites that it consolidated the prior notes and mortgages into a single loan and a single mortgage. However, Exhibit A of the CEMA does not identify any notes. Rather, it identifies (1) the mortgage given by John A. Gallo dated August 13, 2007 in favor of Option One Mortgage Corporation, securing the original principal of \$27,555.49, and that this mortgage secures a note dated August 13, 2007; and (2) the mortgage given by John A. Gallo "dated November 14, 2003 in favor of H & R Block Corporation a California Corporation, a wholly owned subsidiary of Option One Mortgage Corporation, a California Corporation, securing the original principal amount of \$309,000.00...recorded on August 3, 2006 in the Queens County Registers Office, State of New York, at CERN # 20060004381880. At this date the unpaid principal balance secured by this mortgage is U.S.\$307,444.51. This Mortgage secures a Note dated April 19, 2006. This Mortgage has not been assigned at this time."

Exhibit C of the CEMA, consists of the consolidated note, which refers to the notes described in "Exhibit A". Exhibit D of the CEMA consists of the consolidated mortgage on the subject real property given by John A. Gallo to Option One Mortgage Corporation, to secure the note of August 13, 2007, in the sum of \$335,000.00. The CEMA was filed on October 18, 2007 in the Office of the Register of the City of New York.

Plaintiff, in support of the motion for summary judgment, seeks to rely on the consolidated note and consolidated mortgage

assigned to it by Option One Mortgage Corporation. The documentary evidence establishes that at time the consolidated mortgage was entered into on August 13, 2007, the original mortgage on the subject property held by H & R Block Mortgage Corporation had not been assigned to Option One Mortgage Corporation. The CEMA specifically acknowledges that said mortgage had not been assigned. There is no evidence that H & R Block Mortgage Corporation authorized Option One Mortgage Corporation to enter into the consolidated mortgage. Notably, the April 19, 2006 mortgage was not assigned by H & R Block to Option One Mortgage Corporation, until November 21, 2007 and was not recorded until January 31, 2008. Therefore, as Option One Mortgage Corporation was not the mortgagee of the original April 16, 2006 mortgage, it could not effectively consolidate that mortgage with the gap mortgage on April 13, 2007.

The December 18, 2009 assignment agreement between Option One Mortgage Corporation and Wells Fargo appears to recognize the deficiencies created by the consolidated mortgage, as there would be no need to individually assign the original and later mortgages, had they been effectively consolidated into a single mortgage

The December 18, 2009 assignment is sufficient to establish that plaintiff is the owner of the original April 19, 2006 mortgage, the August 13, 2007 gap mortgage and the August 13, 2007 gap note, as said assignment states that it is made "TOGETHER with the bond or note or obligation described in said mortgage...".

Plaintiff, however, has not submitted a copy of the April 19, 2006 note, and seeks to rely solely on the consolidated note. The original mortgage clearly refers to H & R Block Mortgage Corporation as the holder of the original April 19, 2006 note. There is no evidence that as of April 13, 2007, Option One Mortgage Corporation, physically possessed, or had been assigned the April 19, 2006 note by H & R Block Mortgage Corporation. Therefore, the evidence is insufficient to establish that Option One Mortgage Corporation had the authority to consolidate the April 16, 2006 note with the later gap note. Since the consolidated note relied upon here did not properly effectuate a consolidation of the original debt with the gap note (see *Aurora Loan Services LLC, v Weisblum*), the December 18, 2009 assignment did not effectuate a transfer of the entire indebtedness to the plaintiff.

The court notes that the corporate relationship between Option One Mortgage Corporation, and H & R Block Mortgage Corporation, a wholly owned subsidiary, by itself, is insufficient to establish that Option One Mortgage Corporation's

authority to consolidate both the original note and the original mortgage which were owned by H & R Block Mortgage Corporation.

Therefore, as plaintiff may not rely upon the consolidated note and as it has not established that it was in possession of the original note at the time it commenced the within action, it lacks standing to maintain this foreclosure action.

Accordingly, defendant's cross motion to dismiss the complaint is granted, and plaintiff's motion is denied in its entirety.

Dated: June 27, 2011

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AUGUSTUS C. AGATE, J.S.C.