

Deutsche Bank Natl. Trust Co. v Weiner

2012 NY Slip Op 30027(U)

January 9, 2012

Sup Ct, Richmond County

Docket Number: 130079/10

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:130079/10
Motion No.: 001**

**DEUTSCHE BANK NATIONAL TRUST COMPANY, as
Trustee for the CERTIFICATEHOLDERS OF
SOUNDVIEW HOME LOAN TRUST 2006-OPT1
ASSET BACKED CERTIFICATES SERIES 2006-OPT1,**

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**,KENNETH WEINER,
DONNA WEINER,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and
JOHN DOE "1" through "12" said persons or parties having or
claimed to have a right, title or interest in the Mortgaged premises
herein their respective names presently unknown to the Plaintiff,**

Defendants

The following items were considered in the review of the following motion for to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Answering Affidavits	3
Memorandum of Law in Reply	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Kenneth Weiner and Donna Weiner, move to dismiss the plaintiff's foreclosure action pursuant to a defense founded upon documentary evidence and that the pleading fails to state a cause of action. The defendant's motion is denied.

Facts

This is an action to foreclose property on Staten Island at Block 5316, Lot 30, known commonly as 54 Robinson Avenue. On or about December 30, 2005, Kenneth and Donna Weiner executed a mortgage and promissory note in favor of Equity Now, Inc. a New York corporation using their home at 54 Robinson Avenue, Staten Island, New York to secure a loan in the amount of \$150,000. Documentary evidence submitted by the parties shows that on February 21, 2006 Equity Now, Inc. assigned the mortgage and note to Option One Mortgage Corporation, a California corporation. The parties submit a second assignment for consideration in connection with this motion. The second assignment is between Sand Canyon Corporation formerly known as Option One Mortgage Corporation and the plaintiff. The assignment sets the effective date as December 4, 2009. The receipt of filing prepared by the Richmond County Clerk indicates that the presenter of this assignment was DOCX, 1111 Alderman Drive, Suite 350, Alpharetta, GA 30005, and that the receipt should be returned to DOCX at the same address. The assignment is signed by Sand Canyon officers, Veronica Turner, a Vice President and Christina Huang, an Assistant Secretary before a notary in Fulton County, Georgia.

This second assignment is in stark contrast to the March 18, 2009 sworn statement of Dale M. Sugimoto, President of Sand Canyon Corporation wherein he stated that, “Sand Canyon also does not own any residential real estate mortgages.”¹ Furthermore, the plaintiff submits the affidavit of Christina Glynn, a Default Litigation Specialist II for American Home Mortgage Servicing, Inc. the servicer for the plaintiff. In that affidavit Ms. Glynn states, “Based on my review of our servicing records, the Plaintiff took physical possession of the note and mortgage on March 10, 2006.”²

The movants argue that the second assignment is fraudulent. To support this position

¹Defendants’ Exhibit D at ¶ 6.

² Plaintiff’s Exhibit F at ¶ 3.

they annex other assignments purportedly executed by Christina Huang that show nonuniformity in her signature. The movants posit that the assignment was produced by DOCX employees at the direction of the plaintiff or the servicer, but not by the plaintiff itself.

The movants acknowledge that they fell behind on their mortgage payments beginning in August 2009 and continued until November 2009. On November 16, 2009 American Home Mortgage, Inc., the plaintiff's servicer issued a billing statement that the total amount due by December 16, 2009 was \$8,479.24. According to Donna Wiener, her husband tendered \$8,479.24 by cashier's check to the plaintiff on or about December 9, 2009. Donna Wiener attached a copy of the cashier's check dated December 9, 2009, but there is no mailing receipt. Additionally, Kenneth Wiener did not submit his own affidavit in support of the motion to dismiss. Subsequently, Kenneth Wiener received a letter dated December 22, 2009 from American Home Mortgage, Inc. returning the \$8,479.24 check. The letter stated that, "These funds are being returned to you because they do not represent the total amount due or are not in form of certified funds." The letter does not say that the check was tendered beyond December 16, 2009.

The plaintiff commenced this action by filing a complaint with the Richmond County Clerk on or about January 4, 2010. Kenneth and Donna Wiener move to dismiss the plaintiff's action, cancel the notice of pendency and for an award of attorney's fees and costs.

Discussion

When a party seeks dismissal on the ground that its defense is founded upon documentary evidence pursuant to CPLR 3211(a)(1), that party must submit documentary evidence that resolves all factual issues as a matter of law. That evidence must conclusively dispose of the plaintiff's claim.³ Here, the plaintiff submits the affidavit of Donna Wiener that avers that her

³ *Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, [2d Dept., 2009].

husband mailed a cashier's check for \$8,479.24 to the plaintiff on or about December 9, 2009. However, the Appellate Division, Second Department in *Fontanetta v. Doe* stated “. . . it is clear that affidavits and deposition testimony are not ‘documentary evidence’ within the intendment of a CPLR 3211(a)(1) motion to dismiss.”⁴ Therefore, Donna Wiener's affidavit cannot form a basis on which this court could dismiss the plaintiff's complaint.

Furthermore, the assignment of mortgage and note from Sand Canyon Corporation, formerly known as Option One Mortgage Corporation to the plaintiff is not ineffective on its face. The assignment transfers, “. . . the following described mortgage, securing the payment of a certain promissory note(s) for the sum listed below, together with all rights therein and thereto, all liens created or secured thereby, all obligations therein described, the money due and to become due thereon with interest, and all rights accrued or to accrue under such mortgage.”⁵

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. Dismissal is appropriate only when the facts as alleged do not fit within any cognizable legal theory.⁶ “On the question of whether the complaint states a cause of action sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every favorable inference. . . Further, ‘under CPLR 3211 a trial court may use affidavits in its consideration of a pleading motion to dismiss.’”⁷ Here, even if the assignment between Sand Canyon Corporation, formerly known as Option One Mortgage Corporation, to the plaintiff was ineffective on its face, the affidavit of Christina Glynn that stated the plaintiff took physical possession of the note and mortgage on March 10, 2006 precludes dismissal of the

⁴ 73 AD3d 78, 86 [2d Dept., 2010].

⁵ Defendant's exhibit “E”.

⁶ *Sokol v. Leader*, 74 AD3d 1180, [2d Dept., 2010]

⁷ *Fay Estates v. Toys “R” Us, Inc.*, 22 AD3d 712, [2d Dept., 2005].

action at this juncture.

Therefore, the motion to dismiss made by the defendants, Kenneth Wiener and Donna Wiener is denied. The remaining branch of that motion seeking an award of attorney's fees and costs is also denied.

Accordingly, it is hereby:

ORDERED, that the motion made by the defendants, Kenneth Wiener and Donna Wiener is denied; and it is further

ORDERED, that the parties return to DCM Part 3, (130 Stuyvesant Place, 3rd Floor) on **Tuesday, February 7, 2012 at 9:30 a.m.** for a Preliminary Conference.

ENTER,

DATED: January 9, 2012

Joseph J. Maltese
Justice of the Supreme Court