

Adams v US Bank Natl. Assoc.
2012 NY Slip Op 32165(U)
August 10, 2012
Supreme Court, Queens County
Docket Number: 927/2012
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

DEA ADAMS,

Plaintiff,

-against-

US BANK NATIONAL ASSOCIATION, et
 al.,

Defendants.

Index

Number 927 2012

Motion

Date May 15, 2012

Motion

Cal. Numbers 2, 3

Motion Seq. Nos. 1, 2

The following papers numbered 1 to 30 read on this motion by defendants Rosicki and Rosicki & Associates, P.C. (Rosicki and Rosicki), Danielle Mastriano, Veronica Rivera and Paramount Land Inc. (Paramount) (collectively the Rosicki defendants) pursuant to CPLR 3211 and CPLR 3013, 3014, 3015 and 3016 to dismiss the complaint asserted against them based upon lack of standing, failure to state a cause of action, the pendency of a prior action, collateral estoppel, and to cancel the notice of pendency; this motion by defendants U.S. Bank, N.A., U.S. Bank Home Mortgage, Teresa Bulver, Heather Patton s/h/a Heather Postlewaite, MERSCORP Holdings, Inc. s/h/a MERSCORP/MERS (MERSCORP) and Kim Stewart (collectively the U.S. Bank defendants) pursuant to CPLR 3211(a)(7) to dismiss the complaint asserted against them; this cross motion by defendants Mortgage Source LLC (Mortgage Source) and Michael Amico pursuant to CPLR 3211(a)(7) to dismiss the complaint asserted against them.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits1-8
 Notice of Cross Motion- Affidavits - Exhibits.....9-10
 Answering Affidavits - Exhibits11-24
 Reply Affidavits25-30

Upon the foregoing papers it is ordered that the motions numbered 2 and 3 on the motion calendar for May 15, 2012 are joined solely for purposes of disposition of the instant motions and

are determined together as follows:

Plaintiff, appearing pro se, commenced this action pursuant to article 15 of the RPAPL, alleging two causes of action. The causes of action appear to be based upon her claims that she is the owner of the real property known as 75-10 95th Avenue, Ozone Park, New York (“subject property”), and that defendants engaged in alleged fraud, and violated various federal statutes. Plaintiff seeks a judgment declaring title to the property to be vested in her and that defendants have no estate, right, title or interest to the property, enjoining defendants from asserting any estate, right, title or interest in the subject property adverse to her, and awarding her the amount of \$2,000,000.00 as “restitution.”

In lieu of answering the complaint, the Rosicki defendants and the U.S. Bank defendants separately move to dismiss the complaint asserted against them. The Rosicki defendants also seek to cancel the notice of pendency. Defendants Mortgage Source LLC and Michael Amico cross-moves to dismiss the complaint asserted against them. Plaintiff opposes the motions and cross motion.

CPLR 3013 requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense. In addition, CPLR 3016 requires that where a cause of action is based upon fraud, the circumstances constituting the wrong be stated in detail.

The Appellate Division, Second Department, has explained that:

“[w]hen determining a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]), the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 87-88; *Cayuga Partners v 150 Grand*, 305 AD2d 527 [2003]).”

(*Uzzle v Nunzie Court Homeowners Assn, Inc.*, 70 AD3d 928 [2010]).

The instant complaint is less than intelligible, but seems to center upon a claim by plaintiff that defendants improperly caused the transfer of a promissory note secured by a mortgage recorded against the property. It contains many allegations which are phrased as questions (paragraph nos. 31-37) (asking whether defendants can prove facts), or demands for explanations or information (*see* paragraphs nos. 27-30), rather than allegations of facts. These allegations are improper under CPLR 3013.

To the extent the complaint also contains other allegations which are not phrased as

questions or demands for explanations and information, the court shall consider whether they are sufficiently particular (CPLR 3013) and state a cause of action upon which relief may be granted (*see* CPLR3211[a][7]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994], *supra*).

To state a cause of action pursuant to article 15 of the RPAPL, the complaint must set forth facts showing the plaintiff’s estate or interest in the real property, and “the source from or means by which the plaintiff’s estate or interest immediately accrued to the plaintiff” (RPAPL 1515 [1] [a]). It also must allege facts showing that the defendant “might claim an estate or interest in the real property, adverse to that of the plaintiff, and the particular nature of such estate or interest” (RPAPL 1515 [1] [b]).

In the instant complaint, plaintiff alleges she is a “holder in due course holding proprietary interests superior to any and all others as claimed by all defendants herein.” To the degree such allegation can be understood to be a claim by plaintiff that she has an ownership interest in the subject property,¹ she has failed to allege the source from or means by which she acquired her ownership interest as is required by RPAPL 1515.

However, if plaintiff intends to rely upon a deed dated August 1, 2011 from Danielle T. Adams and Sandreaus Cobb, which appears of record as of January 18, 2012, to prove her ownership interest in the subject property, she has failed to allege that defendants Teresa Bulver, Heather Patton, Danielle Mastriano, Veronica Rivera, Kim Stewart, Michael Amico, and Paramount have made any claim of an estate or interest in such property, or the nature of such claimed estate or interest (RPAPL 1515).

With respect to defendant Rosicki and Rosicki, plaintiff alleges that the law firm “has established before the courts of NEW YORK STATE that it has a claim against the property.” Plaintiff apparently misunderstands the nature of the role of the law firm of Rosicki and Rosicki & Associates, P.C. in connection with the foreclosure action entitled *US Bank National Assn. v Adams*, (Supreme Court, Queens County, Index No. 32067/2010). The law firm is not a party in that action, but rather represents U.S. Bank, the plaintiff therein, and has made no claim, in its own capacity, of any estate or interest in the subject property. Likewise, it appears that plaintiff has named Danielle Mastriano as a defendant herein, simply because she prepared an affirmation (while a member of the Rosicki and Rosicki law firm), which was submitted to the court in the foreclosure action. In addition, the Rosicki defendants readily concede they have no claim of any estate or interest in the subject property.

To the extent the complaint may be read to include an allegation that defendant U.S. Bank claims to be the holder of a mortgage interest superior to plaintiff’s ownership interest in the property, that mortgage is dated January 14, 2010 and was recorded on February 2, 2010, prior to

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The phrase “holder in due course” is usually used in connection with negotiable instruments (*see* UCC 3-104, 302), and not documents of title (*see* UCC 3-103[1]).

the making and recording of the August 1, 2011 deed. It was executed by Danielle T. Adams and Sandreaus Cobb, as the mortgagors, in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Mortgage Source LLC (Mortgage Source), to secure a note dated January 14, 2010 evidencing a loan in the principal amount of \$497,483.00 (the Mortgage Source mortgage). Thus, plaintiff has no basis to complain that her ownership interest is subject to the Mortgage Source mortgage, because at the time of the execution and acknowledgment of the August 1, 2011 deed, the Mortgage Source mortgage was apparent on the face of the public record (*see Andy Assoc. v Bankers Trust Co.*, 49 NY2d 13, 20 [1979]; *Trust Co. of New Jersey v Genser*, 271 AD2d 524 [2000]; *see Real Property Law* § 291).

Although plaintiff refers in the complaint to a “non-existent debt,” she makes no allegation that she is an obligor on the note underlying the Mortgage Source mortgage. Nor has she alleged facts which support her claim that the mortgage debt, evidenced by the note, has been extinguished. A mere transfer of a promissory note (unless transferred back to the issuer) does not render the underlying debt extinguished (*see UCC* 3-203). At best, the complaint alleges that the note was not properly endorsed over to U.S. Bank and may not be enforced by defendant U.S. Bank. Plaintiff, however, makes no factual allegations to show that the mortgage debt has been paid in full or discharged, or that the Mortgage Source mortgage itself is defective, invalid or inoperative. Under these circumstances, plaintiff has failed to allege facts sufficient to show that the superior mortgage interest claimed by defendant U.S. Bank pursuant to the recorded mortgage is an improper or invalid cloud on her title (RPAPL 1515; *cf. Piedra v Vanover*, 174 AD2d 191 [1992] [claim that a deed was fraudulent]; *Harris v Thompson*, 24 Misc.3d 1248(A) [2009] [claim by plaintiff that a mortgage against the property was the product of fraudulent inducement]; *3021 Corp. v Napoli*, 49 NYS2d 399 [NY Sup 1944] [claim that the second mortgage was not a valid and subsisting lien against the premises, having been previously extinguished and discharged]).

Plaintiff may have named Mortgage Source as a party defendant because it originated the mortgage. Mortgage Source, however, makes no present claim against the property, and is not a named party to the foreclosure action (Index No. 32067/2010). Mortgage Source concedes that prior to the bringing of this action, it sold the mortgage loan to U.S. Bank as the purchaser and assigned the underlying note to U.S. Bank. It is well settled that a predecessor in interest who makes no claim to the property is neither a necessary nor proper party to an action to quiet title (*see McGahey v Topping*, 255 AD2d 562 [1998]).

Plaintiff apparently named MERSCORP as a party defendant because under the Mortgage Source mortgage, MERS is named as a nominee for the lender thereunder and mortgagee for the purpose of recording. The term “nominee” is defined as “[a] person designated to act in place of another, usu[ally] in a very limited way” or “[a] party who holds bare legal title for the benefit of others” (Black’s Law Dictionary 1076 [8th ed 2004]). Thus, under the Mortgage Source mortgage, MERS is, in effect, a limited agent for a disclosed principal, i.e. the lender, and plaintiff has failed to allege that defendant MERSCORP has made, or might make, any claim of an estate or interest in such property, in its own capacity, or the nature of such claimed estate or

interest. As discussed above, plaintiff also has failed to make any allegation that the mortgage debt has been paid in full or discharged, or that the Mortgage Source mortgage itself is defective, invalid or inoperative.

Plaintiff, therefore, has failed to state a cause of action against the Rosicki defendants, the U.S. Bank defendants and defendants Mortgage Source and Michael Amico to quiet title.

With respect to the claim by plaintiff that defendants engaged in fraud and “fabrication” in relation to the endorsement of the mortgage note, the allegations are conclusory, and do not describe the circumstances constituting the alleged wrong with the detail and particularity required by CPLR 3016. As such, they are insufficient to satisfy the heightened pleading requirements with respect to a claim for fraud (CPLR 3211[a][7], 3016[b]).

To the extent plaintiff also alleges that defendants violated the Sarbanes-Oxley Act, the Federal Reserve Act, the Gramm-Leach-Bliley Act, the Bank Holding Company Act of 1956, the [Riegle-Neal] Interstate Banking and Branching Efficiency Act of 1994, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, the International Banking Act of 1978, the Federal Deposit Insurance Act and the Home Owners’ Loan Act, such allegations are unsupported by factual allegations. These allegations, consequently, do not give the court and defendants notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved (CPLR 3013). The conclusory allegation of violation of the federal acts, without more, is insufficient to state a legally cognizable claim (CPLR 3211[a][7]).

Under such circumstances, plaintiff has failed to state a cause of action against the Rosicki defendants, the U.S. Bank defendants and defendants Mortgage Source and Michael Amico for fraud or violation of federal acts.

Because plaintiff has failed to meet the pleading requirements under article 15 of RPAPL and the CPLR with respect to the quiet title claim, and the other claims do not seek a judgment that would affect the title to, or possession, use or enjoyment of real property, the notice of pendency is not authorized (*see* CPLR 6501).

Accordingly, the motion by the Rosicki defendants to dismiss the complaint asserted against them and cancel the notice of pendency is granted. The motion by the U.S. Bank defendants to dismiss the complaint asserted against them is granted. The cross motion by defendants Mortgage Source and Michael Amico seeking to dismiss the complaint asserted against them is granted.

Dated: August 10, 2012

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Howard G. Lane, J.S.C.

