Northfield Bank v Chime
2013 NY Slip Op 30446(U)
March 4, 2013
Supreme Court, Richmond County
Docket Number: 131565/10
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK **Index No.:131565/10**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:001, 002**

NORTHFIELD BANK,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

MICHAEL CHIME,
MARYJO CHIME, a/k/a MARY JO CHIME,
NYC ENVIRONMENTAL CONTROL BOARD,
"JOHN DOE #1-5" and
"JANE DOE #1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants

The following items were considered in the review of the following motion for summary judgment and cross-motion to dismiss.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Affirmation in Reply	3
Exhibits	Attached to Papers

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

The plaintiff moves for an order of reference appointing a referee to compute. The defendant, Michael Chime, cross-moves to dismiss the plaintiff's complaint for lack of standing. The defendant's cross-motion is granted. The plaintiff's motion is denied.

Facts

This is an action to foreclose a mortgage in the consolidated amount of $250,000 secured by property located at 177 Harrison Place, Staten Island, New York (Block 150 Lot 98). The plaintiff commenced this action by filing a summons and complaint with the Richmond County

Clerk on or about October 4, 2010. The defendants failed to answer the complaint, but in accordance with CPLR § 3408 mandatory settlement conferences for residential foreclosures were held on May 24, 2011, August 31, 2011, November 30, 2011, February 8, 2012 and February 22, 2012. The matter was not settled and the action was released from the foreclosure conference part.

Discussion

In the cross-motion the defendant argues that the plaintiff lacks standing to bring this foreclosure action. Moreover, the defendant argues that the plaintiff failed to provide the defendant with the requisite acceleration notice and 90 day notice pursuant to RPAPL§ 1304.

To support his position that the plaintiff lacks standing the defendant argues that Freddie Mac acquired the note and mortgage in question on April 6, 2007, yet there is no agreement that defines the relationship between the plaintiff and Freddie Mac whereby the plaintiff is empowered to bring this foreclosure action. In opposition to the defendant's cross-motion the plaintiff annexed a copy of Section 66.17 of the Freddie Mac Single Family Servicer Guide, Volume 2 effective as of June 13, 2012 that states:

> . . .The Servicer must instruct the foreclosure counsel or trustee to process the foreclosure in the Servicer's name.
>
> If an assignment of the Security Instrument to Freddie Mac has been recorded, then the Secuity Instrument must be assigned back to the Servicer before the foreclosure counsel or trustee filed the first legal action. Refer to Section 66.18 for an explanation of first legal action.
>
> To have the Security Instrument assigned back to the Servicer, the Servicer must submit a completed assignment with Form 105, Multipurpose Loan Servicing Transmitta, to Freddie Mac . . . Freddie Mac will execute the assignment and return it to the Servicer within seven Business Days of receiving the document . . .

However, it is unclear if these requirements were in effect when the foreclosure process began in this action in 2010. Moreover, assuming that these requirements were in effect at the time of the commencement of this foreclosure action, there is no evidence that the security instrument was ever assigned back to the plaintiff servicer.

The Court of Appeals spoke of standing to foreclose a mortgage over one hundred years ago in the *Matter of Pirie,*[1] where it stated that, "[t]he collateral lien of the mortgage could have no legal existence when separated from the note and transferred to others than the holder of the note, but so long as the two remain together, owned and possessed by the same person, they operate together and are obligations for the payment of the same indebtedness."[2] The Appellate Division, Second Department in the 1988 case of *Kluge v. Fugazy*, held that a foreclosure action, ". . . may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity."[3] Essentially, the *Kluge* decision found that because the plaintiff did not have title to the mortgage and note, it lacked standing to bring the action in foreclosure.

The plaintiff argues that a defense of standing is waived if not raised in a pre-answer motion to dismiss, or stated as a separate defense in the answer. It is the plaintiff's contention since there was a default on the part of the defendant the defense of standing is waived forever. To support this position the plaintiff relies on *Wells Fargo Bank Minn., N.A. v. Mastropaolo*,[4] where the Appellate Division, Second Department held that the failure of a defendant to either: 1) assert the affirmative defense of lack of standing in an answer; or 2) move to make a pre-answer motion to dismiss arguing lack of standing, would result in that defense being waived. In arriving at this holding the Appellate Division, Second Department reasoned from a string of cases that ". . . for purposes of the waiver rule set forth in CPLR 3211(e), standing and capacity

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[1] 198 NY 209 [1910].

[2] *Id., citing, Bergen v. Urbahn*, 83 NY 49, [1880].

[3] 145 AD2d 537, [2d Dept 1988].

[4] 42 AD3d 239, [2d Dept 2007].

to sue are sufficiently related that they should be afforded identical treatment."[5] Those cases hinged on the Court of Appeals decision in *Matter of Prudco Realty Corp. v. Palermo*.[6] *Matter of Prudco Realty* involved an appeal from a decision of the Appellate Division, Second Department of an Article 78 proceeding, where Prudco Realty Corp. challenged the determination of the Zoning Board of Appeals of the Town of Brookhaven, that granted the application of the intervenor S.F. Shopping Center, Inc. for a certificate of existing use for the operation of a gasoline station.[7] In reversing the Special Term's holding that Purdco Realty Corp. lacked standing, the Appellate Division, Second Department held, "[a]s an owner of property located within 200 feet of the subject premises, petitioner was, as a matter of law, an 'aggrieved' person on whom subdivision 7 of section 267 of the Town Law conferred the right to seek judicial review of the determination of the respondent Zoning Board of Appeals of the Town of Brookhaven."[8] In affirming the Appellate Division, Second Department's decision in *Matter of Purdco Realty* the Court of Appeals addressed the issue of standing by stating, ". . . without asserting the petitioner's lack of standing to challenge the Board's determination pursuant to CPLR 3211(subd [a], par 3). . . CPLR 3211(subd [e]) provides that such a defense is waived if not raised either by motion or in the responsive pleading . . ."[9] But the Court of Appeals decision in *Matter of Prudco Realty* lacks the thorough consideration of the legal concepts of "capacity" and "standing" that it elaborates on in later decisions.

The Court of Appeals decision in *Matter of Town of Riverhead v. New York State Bd. Of Real Prop. Servs.* held that "capacity to sue is a threshold question involving the authority of a

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[5] Id. at 243.

[6] 60 NY2d 656, [1983].

[7] *Prudco Realty Corp. v. Palermo,* 93 AD2d 837, [2d Dept 1983].

[8] Id. at 837.

[9] *Matter of Prudco Realty Corp. v. Palermo*, 60 NY2d 656, [1983].

litigant to present a grievance for judicial review."[10] In *New York State Assn. Of Nurse Anesthetists v. Novello*,[11] the Court of Appeals held that standing requires an interest in the claim at issue before the court. "Standing involves a determination of whether 'the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution.'"[12] The Court of Appeals has held that standing cannot exist where the complaining party was not injured,[13] and that, "[w]ithout both capacity and standing a party lacks authority to sue."[14] The Appellate Division, Second Department adopted these holdings in *Caprer v. Nussbaum*.[15]

The Supreme Court of the United States in the case *City of Chicago v. Morales,* held that while standing is not a Constitutional issue requiring adherence by state courts, it is persuasive authority.[16] In *Allen v. Wright*, the high court stated that the concept of standing goes to the very jurisdiction of a court's authority to hear a dispute.[17] In fact, the Appellate Division, First Department cited the decision in *Allen* by Supreme Court of the United States when it found that it was proper for a trial court to *sua sponte* dismiss a derivative action due to lack of standing absent an objection to the plaintiff's standing by the defendants in *Stark v. Goldberg* .[18]

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[10] *Matter of the Town of Riverhead v. New York State Bd. Of Real Property Servs.*, 5 NY3d 36, 41 [2005].

[11] 2 NY3d 207, 211 [2004].

[12] *Matter of Graziano v. County of Albany*, 3 NY3d 475, 479 [2004].

[13] *Matter of Sarah K*, 66 NY2d 223, 240 [1985].

[14] *Matter of Graziano v. County of Albany,* 3 NY3d 47, 479 [2004].

[15] 36 AD3d 176, [2d Dept 2006].

[16] *See, City of Chicago v. Morales*, 527 US 41, [1999].

[17] *See, Allen v. Wright*, 468 US 737, [1984]; *see also, Matter of New York State Inspection, Security & Law Enforcement Employees v. Cuomo*, 64 NY2d 233, 241 n. 3[1984].

[18] 297 AD2d 203, at 281.

The issue before this court is whether the plaintiff had standing to commence this action; and if the plaintiff did not have standing, did the defendant in this foreclosure action waive this defense by failing to interpose an answer raising it as affirmative defense, or by making a pre-answer motion to dismiss. This court concludes that the plaintiff has failed to submit evidence demonstrating that it had title to both the mortgage and note at the time it commenced this foreclosure action.[19] Furthermore, based on the current body of law, failure to have standing at the commencement of an action is a jurisdictional defect which is covered by CPLR § 3211(a)(2) and therefore not subject to the waiver provisions of CPLR § 3211(e). Consequently, the plaintiff has not demonstrated standing to commence this action and therefore the complaint is dismissed.

As this court determined that the plaintiffs lacked standing to commence this action, the court did not consider the issues concerning the notice of acceleration and 90-day notice.

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion for an order of reference appointing a referee to compute is denied; and it is further

ORDERED, that the defendant's cross-motion to dismiss the complaint is granted without prejudice; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER,

DATED: March 4, 2013

Joseph J. Maltese
Justice of the Supreme Court

[19] *See, Kluge v. Fugazy*, 145 AD2d 408, [2d Dept 1988].