Gurevich v JP Morgan Chase
2013 NY Slip Op 33290(U)
July 22, 2013
Supreme Court, Richmond County
Docket Number: 150159/13
Judge: John A. Fusco

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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YULIYA GUREVICH,

Plaintiff,

-against-

JP MORGAN CHASE,

Defendant.

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DCM Part 4

Present:

HON. JOHN A. FUSCO

DECISION AND ORDER

Index No. 150159/13

Motion No. 1424-001

The following papers numbered 1 to 4 were marked fully submitted on the 7th day of June, 2013.

	Papers Numbered
Notice of Motion to Dismiss, with Supporting Papers and Exhibits (dated April 23, 2013)	1
Affirmation in Opposition, with Exhibits (dated May 14, 2013)	2
Reply (dated May 30, 2013)	3
Sur-Reply (dated June 6, 2013)	4

Upon the foregoing papers, defendant's pre-answer to dismiss the complaint for, *inter alia*, failure to state a cause of action is granted, and the complaint is dismissed.

It is undisputed on the papers before this Court that plaintiff executed and delivered an adjustable rate note and mortgage in the principal amount of $2,140,000.00 to Washington Mutual Bank, FA (hereinafter, ""WaMu") on or about August 20, 2004. Subsequently, the Office of Thrift Supervision closed WaMu, and on September 25, 2008 appointed the Federal Deposit Insurance Corporation (hereinafter "FDIC") as Receiver.

On the same date, WaMu's assets were transferred to the FDIC, which then sold what appears to have been the greater part of those assets to defendant JP Morgan Chase (hereinafter "Chase") pursuant to the terms of a Purchase and Assumption Agreement (hereinafter "PAA") for the price of $1,900,000.00 To the extent relevant, the PAA provides the following in Article III, § 3.1:

ARTICLE III
PURCHASE OF ASSETS

> 3.1 **Assets Purchased by Assuming Bank** Subject to Sections 3.5, 3.6 and 4.8[1], the Assuming Bank hereby purchases from the Receiver, and the Receiver hereby sells, assigns, transfers, conveys and delivers to the Assuming Bank, all right, title and interest to the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired) ... of the Failed Bank whether or not reflected on the books of the Failed Bank as of Bank Closing.

Plaintiff alleges that sometime thereafter, she was informed by Chase or its servicer that Chase had acquired the right to enforce the promissory note secured by her mortgage, whereupon she made an unstated number of monthly payments to Chase. Insofar as it appears, the unpaid principal balance as of August 2, 2012 was $2,162,365.12, plus accrued interest from July 1, 2012 in the amount of $11,282.08 (Plaintiff's Sur-Reply, Exhibit "1").

On or about March 11, 2013, plaintiff commenced the action which is the subject of this motion by the filing of a summons and complaint with the Richmond County Clerk. The complaint alleges three causes of action against Chase: for fraud, unjust enrichment

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[1]The foregoing sections are inapplicable to these proceedings.

and to quiet title (presumably, by invalidating any rights which Chase may claim to the premises indentured under the WaMu mortgage). In sum and substance, the gravamen of the complaint is that (1) there was never any valid assignment of plaintiff's WaMu note and first mortgage to Chase; (2) defendant intentionally misrepresented to plaintiff that it was entitled to enforce the note secured by said first mortgage; (3) in accordance with defendant's intent and in reliance upon this misrepresentation, plaintiff began paying her mortgage debt obligation to Chase; (4) plaintiff tendered these periodic payments based on a good faith belief that she was paying down her mortgage debt obligation to the party entitled to receive payment; (5) Chase as not so entitled; and (6) as a result of the foregoing, Chase was unjustly enriched (and plaintiff defrauded) in the amount of such payments, for which plaintiff remains fully liable to unknown third parties.

In moving to dismiss the complaint, defendant maintains, *inter alia*, that the complaint lacks sufficiently detailed allegations of fraud to withstand dismissal (*see* CPLR 3016[b]); that the terms of the PAA demonstrate that Chase purchased all of WaMu's loans from the FDIC; that plaintiff's note and mortgage were among the assets acquired; and that Chase thereby became entitled to assert a possessory interest in plaintiff's premises as security for the re-payment of the debt memorialized in her promissory note. In addition, Chase maintains that as the owner and holder of the note and mortgage, plaintiff's claim of potential liability to third persons is baseless.

In opposition, plaintiff asserts that the complaint is legally sufficient, and that the documentary evidence upon which defendant purports to rely is inconclusive. In the

alternative, plaintiff requests leave to re-plead in the event that the complaint is dismissed.

It is well settled that on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, [the] motion ... will fail" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). Nevertheless, it is equally well established that where, as here, evidentiary material is considered, "the criterion [becomes] whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*). Accordingly, if it can be shown that a material fact claimed by the pleader is "not a fact at all" and that "no significant dispute exists regarding it", the motion can be granted (*id.*).

In order to make out a prima facie case of fraud, the complaint must allege the following five elements: (1) representation of material facts; (2) falsity; (3) scienter; (4) reliance; and (5) injury (*see* Morales v AMS Mtge. Servs., Inc., 69 AD3d 691, 692). Here, at least three of these five elements are lacking.

The PAA annexed to defendant's motion papers expressly provides in Article III, section 3.1 that the "Receiver" (the FDIC) "sells, assigns, transfers, conveys and delivers to the Assuming Bank" (Chase), with exceptions not here relevant, "all right, title and interest of the Receiver in an to all of the assets ... of the Failed Bank" (WaMu). While plaintiff seeks to confuse the issue by, *e.g.*, referring to the missing list of assets in the (non-existent) "Schedule 3.1a" referenced in the above section, it is pertinent to note that the assets intended to be listed therein are specifically described as "[t]he subsidiaries,

joint ventures, partnerships and any other business combinations or arrangements, whether active, inactive, dissolved or terminated being purchased by [Chase]". Moreover, it contains cautionary language indicating that the foregoing list of acquired "entities" is not exclusive. Plainly, this language is wholly inapplicable to the disputed transfer of plaintiff's note and mortgage (*see* CPLR 3211[a][1]; *see* Martin v Liberty Mut. Ins. Co., 92 AD3d 729 [dismissal based on documentary evidence may be granted where such evidence conclusively establishes a defense to the cause of action as a matter of law]).

Moreover, even assuming arguendo that defendant's representation of its acquisition of plaintiff's note and mortgage was found to be false, the foregoing language of assignment is broad enough to dispel any claim of knowing falsity or an absence of good faith. So, too, are the decisions of those courts which have held that the wording of this PAA constitutes evidence (presumably, documentary) of "JPMC [Chase's] purchase[ ] of all of WaMu's loans and loan commitments" (JP Morgan Chase Bank, NA v Miodownik, 91 AD3d 546, 547, *lv dismissed* 19 NY3d 1017), and is sufficient to establish its "standing to foreclose on mortgages formerly held by WaMu" (JP Morgan Chase Bank, NA v Shapiro, 104 AD3d 411, 412).

Lastly, defendant has submitted to this Court as further proof of the assignment the affidavit of Carlos Barrios, a Home Loan Senior Research Specialist and Vice President for JP Morgan Chase Bank, NA, sworn to on May 17, 2013 (Defendant's Reply, Exhibit "1"). To the extent relevant, Barrios avers, "based on personal knowledge [and] ... a review of those records relating to the [plaintiff's] loan ... maintained by Chase in the course of its

regularly conducted business", that under the terms of the PAA executed on September 25, 2008, Chase acquired, *inter alia*, plaintiff's mortgage loan (No. 0681505137); that Chase is also in possession of the original note; that the mortgage has not been further assigned; and that Chase "is and remains the holder of the Note". While these core facts are disputed in, *e.g.*, the complaint, plaintiff has failed to produce any competent evidence supportive of her claims.

In this regard, the Court is not persuaded by plaintiff's citation to five pages (out of several hundred) from the deposition testimony of different Chase employee, given a year earlier in a different case (JP Mortgage Chase Bank, NA v Waisome, Case No. 2009 CA 005717), filed in a different Court (the Circuit Court of the Fifth Judicial Circuit, Lake County, Florida) for the ostensible purpose of suggesting the absence of any documentation (assignments, endorsement or allonges) "transferring [the] ownership [of WaMu's mortgages] from WaMu to Chase" (Affirmation in Opposition, Exhibit 1, pp 260-261)[2]. Here, the PAA contains the required language of assignment (notably, from the Receiver to Chase), and even if it did not, the challenged but unimpeached affidavit of defendant's Carlos Barrios is sufficient to establish its present possession of both the original note and mortgage. Since plaintiff does not claim to have made payments to any other entity, it follows that Chase is presently (if not previously) entitled to retain such payments as it may have received from plaintiff, and the latter has not been damaged

[2]The relevance of this testimony is also suspect, inasmuch as any assignment to Chase would have come from the FDIC rather than WaMu.

thereby[3]. Moreover, defendant has produced a copy of the original note endorsed in blank by WaMu (Defendant's Reply Affirmation, Exhibit "1"). It is familiar law that a note may be transferred by physical delivery and "the mortgage passes with the debt as an inseparable incident" thereof (US Bank, NA v Collymore, 68 AD2d 752, 754).

Finally, plaintiff's attempt to cast doubt upon the authenticity of the foregoing note by drawing attention to an unendorsed copy furnished to plaintiff by her loan services under date of August 2, 2012 (*see* Sur-Reply Affirmation dated June 6, 2013, Exhibit "1") is misplaced. Contrary to plaintiff's conclusory assertion (Sur-Reply Affirmation, para 12 *et seq*), neither this nor the copy of the note annexed as Exhibit "C" to defendant's Affirmation in Support of Motion dated April 23, 2013 purport to be copies of the original "wet ink" note.

In view of the uncontradicted evidence of defendant's possession of the original note and mortgage, plaintiff's cause of action to quiet title has also been shown to be without merit (*see* US Bank, NA v Collymore, 68 AD3d at 753-754).

In keeping with this determination, plaintiff's request for leave to re-plead is denied.

Plaintiff's remaining contentions have been considered and rejected.

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[3]For the same reason, plaintiff's cause of action for unjust enrichment must fail.

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Accordingly, it is

ORDERED, that defendant's motion to dismiss the complaint is granted, and the complaint is dismissed, with prejudice; and it is further

ORDERED that the Clerk enter judgment accordingly.

ENTER,

DATED: July 22, 2013

Hon. John A. Fusco, J.S.C.

GRANTED

JUL 22 2013

CLERK

Dated:
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