SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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WELLS FARGO BANK, N.A.,

Plaintiff, Decision and order

- against - Index No. 501374/12

ABRAHAM NEIMAN, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU AND "JOHN DOE #1" THROUGH "JOHN DOE #10", the last ten named being fictitious and unknown to the plaintiff, the person or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the Mortgaged premises described in the Complaint,

Defendants, March 4, 2014

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff Wells Fargo has moved seeking summary judgement and a referee to compute in the foreclosure action. The defendant Abraham Neiman has cross moved seeking to dismiss the complaint essentially on the grounds the plaintiff lacks standing to proceed with the lawsuit. Papers were submitted by both parties and arguments held and after reviewing the arguments of all parties this court now makes the following determination.

On September 12, 2003 the defendant Abraham Neiman signed a note and mortgage concerning property located at 4019 14th Avenue in Kings County. The lender was BNY Mortgage Company LLC. The mortgage was delivered to Mortgage Electronic Registrations Systems, Inc., as nominee for BNY Mortgage and the mortgage was then assigned to the plaintiff Wells Fargo and such assignment was recorded on June 2, 2011. This lawsuit was commenced on June 2,

2012, after the assignment had taken place. The defendant has failed to make the required monthly mortgage payments beginning February 2011. That non-payment precipitated the foreclosure action. The above noted motions have followed.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

It is well settled that standing is waived whenever the question of standing is not asserted in an answer or pre-answer motion (Deutsche Bank National Trust Company v. Hussain, 78 AD3d 989, 912 NYS2d 595 [2d Dept., 2010]). Moreover, courts have held that rule only applies where the defendant has asserted an answer or a pre-answer motion to dismiss and has failed to include claims of lack of standing. Where a defendant has not answered at all, the failure to allege any lack of standing does not constitute a waiver (see, Citigroup Global Markets Realty Corp. v. Randolph Bowling, 25 Misc.3d 1244(A), 906 NYS2d 778 [Supreme Court, Kings County 2009]). In this case the answer specifically denied

standing, thus the answer therefore satisfies this preliminary requirement.

Turning to the issue of standing it is well settled that a mortgage may not be foreclosed unless the plaintiff maintains a legal or equitable interest in the mortgage (Wells Fargo Bank N.A., v. Marchione, 69 AD3d 204, 887 NYS2d 615 [2d Dept., 2009]). Thus, for a plaintiff to establish standing it must be demonstrated that the plaintiff was 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, U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 890 NYS2d 578 [2d Dept., 2009]).

The plaintiff presents two distinct legal justifications demonstrating standing. The first is the assignment from MERS to the plaintiff. However, a careful examination of the assignment documents demonstrates that the note was never actually assigned to MERS. The mortgage states that MERS is acting "solely as a nominee for the Lender and Lender's successors and assigns" (see, Mortgage dated September 12, 2003). Thus, at most, MERS merely possessed the mortgage but not the underlying note. It is well settled that a mortgage is merely security for a debt or obligation and cannot exist independent of the debt, thus, the transfer of a mortgage without the note is a nullity which cannot confer legal possession and hence standing (Deutsche Bank National Trust Company v. Spanos,

102 AD3d 909, 961 NYS2d 200 [2d Dept., 2013]). Moreover, cases that have interpreted similar or identical language concerning MERS acting as nominee have uniformly concluded that as nominee MERS has no authority to assign the note which it never possessed (see, Bank of New York v. Silverberg, 86 AD3d 274, 926 NYS2d 532 [2d Dept., 2011], Aurora Loan Services LLC v. Weisblum, 85 AD3d 95, 923 NYS2d 609 [2d Dept., 2011]).

In this case the documents submitted do not authorize MERS to act in any other capacity, consequently, the plaintiff cannot maintain ownership of the note based upon an assignment from MERS.

The plaintiff further argues that it has standing to proceed with the action since it was in actual physical possession of the note at the commencement of the action (see, Mortgage Electronic Registration Systems Inc., v. Coakley, 41 AD3d 674, 838 NYS2d 622 [2d Dept., 2007]). This is true argues plaintiff since it is the bearer of an endorsed in blank instrument pursuant to §§3-204(2), 3-301 of the Uniform Commercial Code. Moreover, the specific endorsement, an apparent allonge, is on the same piece of paper that is first signed by Mr. Neiman and thus sufficiently connected to the note. UCC §3-202(2) states that "an indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." Since the endorsement is "affixed" to the note it is a valid negotiable instrument (see, HSBC Bank Usa National Association v. Svetlana Roumiantseva, 39 Misc3d 1239(A), 2013 WL 2500829 [Supreme Court Kings County 2013]).

Furthermore, as explained in Homecomings Financial LLC v. Guldi, 108 AD3d 506, 969 NYS2d 470 [2d Dept., 2013] factual details of delivery are necessary only when there is no other evidence of actual possession. Thus, there is no requirement for a plaintiff to demonstrate how it obtained a note when it undoubtedly had possession of the note prior to the commencement of the action. Thus, Amanda Weatherly a vice president of loan documentation for Wells Fargo who had personal knowledge of the documents, submitted an affidavit wherein she states that the plaintiff is the holder of the original note. Considering these assertions any factual details regarding the delivery of the note are superfluous.

Therefore, based on the foregoing, the plaintiff has demonstrated standing. Consequently, the motion seeking summary judgement is hereby granted.

So ordered.

ENTER:

DATED: March 4, 2014
Brooklyn NY

Hon. Leon Ruchelsman
JSC