

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

Bank of America, N.A.,

Plaintiff,

-against-

Micah Umeh,

Defendant.

Index No. 307613/2012
DECISION AND ORDER

HON. SHARON A.M. AARONS. J.S.C.:

Defendant Umeh moves for an order dismissing the complaint pursuant to CPLR 3211 (a) (1) and (10). Plaintiff Bank of America, NA ("Bank of America") submits written opposition. The motion is denied.

Plaintiff brings this action to recover on a promissory note. By bringing this action, plaintiff has elected not to foreclose on the mortgage which was given as security for the note.

In support of the motion, defendant submits the verified complaint; a copy of the note dated December 15, 2006, from the defendant to non-party Decision One Mortgage Company, LLC ("Decision One"), which, at the bottom of the second and last page, sets forth an undated assignment from Decision One to non-party Residential Funding Company, LLC ("Residential"); an "allonge" annexed to the note, which contains an undated notation stating "pay to the order of" Bank of America; and a copy of the mortgage securing the note. According to the defendant, the mortgage was never assigned by Decision One, establishing that the note and mortgage were "severed" from each other. Defendant maintains that plaintiff lacks standing to bring this action, as it is not the holder of both the note and the mortgage. Defendant also maintains that the assignments of the note

from Decision One to Residential, and then from Residential to plaintiff Bank of America, were invalid, as the assignments are undated, and there is no proof that any of the persons signing the documents had authority to do so. Lastly, defendant maintains that Decision One, which is nominally still the holder of the mortgage, is a necessary party to this action.

In opposition, plaintiff submits, again, the summons, the complaint, and the note. Plaintiff concedes that it did not record an assignment of the mortgage, but maintains that the transfer of the note effectively transferred the mortgage to the plaintiff. Plaintiff argues that the failure to assign the mortgage might have greater significance if plaintiff was seeking to foreclose the mortgage, but that it is not significant here, as plaintiff is suing on the note. Plaintiff contends that since the note was validly transferred by an assignment and subsequently by an allonge, it has standing to maintain this action, and Decision One is not an indispensable party to the action.

A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence "utterly refutes" the plaintiff's factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue. (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]; *Rodeo Family Enters., LLC v Matte*, 99 AD3d 781, 782, 952 N.Y.S.2d 581 [2d Dept. 2012].) To be considered "documentary evidence" within the meaning of CPLR 3211(a)(1), the evidence must be unambiguous and of undisputed authenticity. Judicial records, as well as documents reflecting out-of-court transactions, such as mortgages, deeds, leases and contracts, which in context are "essentially undeniable," qualify as "documentary evidence" in the proper case. (*Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 [2d Dept. 2010].)

A motion to dismiss a complaint on the ground that plaintiff failed to join a necessary party

pursuant to CPLR 3211 (a) (10) should be granted when "complete relief" may not be awarded by the Court in the absence of a necessary party. (*See also*, CPLR 1001 [a]; *Matter of Spence v Cahill*, 300 AD2d 992, 752 NYS2d 511 [4th Dept. 2002] [granting motion to dismiss where neighboring land owners were not made parties], *lv denied* 1 NY3d 508, 808 NE2d 1276, 777 NYS2d 17 [2004]).

Plaintiff contends that the mortgage (as distinguished from the note) was not assigned, and thus the holder of the mortgage is a necessary party. However, it is now well established that an attempted assignment of the mortgage without the underlying note is a nullity. (*Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637, 931 N.Y.S.2d 630 [2d Dept 2009]; *Bank of New York v Silverberg*, 86 AD3d 274, 281-283, 926 N.Y.S.2d 532 [2d Dept 2011].) Instead, possession of the mortgage follows as an incident of the note, and when the note changes hands, the mortgage interest automatically follows. (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; *U.S. Bank Natl. Assn. v Cange*, 96 AD 3d 825, 826, 947 NYS2d 522 [2d Dept 2012]); *U.S. Bank, NA v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]). These principles were stated in as follows:

> "[A] transfer of the mortgage without the debt is a nullity, and no interest is acquired by it" (*Merritt v Bartholick*, 36 NY 44, 45, 34 How Pr 129, 1 Transc App 63 [1867]; *see Carpenter v Longan*, 83 US 271, 274, 21 L Ed 313 [1873] [an assignment of the mortgage without the note is a nullity]; *US Bank N.A. v Madero*, 80 AD3d 751, 752, 915 NYS2d 612 [2011]; *US Bank, N.A. v Collymore*, 68 AD3d at 754; *Kluge v Fugazy*, 145 AD2d 537, 538, 536 NYS2d 92 [1988] [plaintiff, the assignee of a mortgage without the underlying note, could not bring a foreclosure action]; *Flyer v Sullivan*, 284 App Div 697, 698, 134 NYS2d 521 [1954] [mortgagee's assignment of the mortgage lien, without assignment of the debt, is a nullity]; *Beak v Walts*, 266 App Div 900, 42 NYS2d 652 [1943]). A "mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*FGB Realty Advisors v Parisi*, 265 AD2d 297, 298, 696 NYS2d 207 [1999]). Consequently, the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt (*id.*; *see* Bergman on New York Mortgage Foreclosures § 12.05 [1] [a] [1991])." (*Bank of N.Y. v. Silverberg*, 86 A.D.3d 274,

280-281, 926 N.Y.S.2d 532 [2d Dept. 2011].)

Accordingly, any person holding an interest in the mortgage only, without any interest in the note, has no enforceable interest. Therefore, Decision One is not an indispensable party to the action. Any interest which Decision One might claim are holder of the mortgage, without the note, is void. (*US Bank, N.A. v Collymore*, 68 AD3d at 754.) For this reason, any purported holder or assignee of the mortgage, which is not a holder of the note, is not a necessary party.

Defendant also asserts that the assignment of the note was not valid, because the assignments are undated, and there is no proof that any of the persons signing the documents had authority to do so. This argument is without merit. The note bears facially valid assignments, as does the allonge. (*See Deutsche Bank Trust Co. Ams. v. Codio*, 94 A.D.3d 1040, 943 N.Y.S.2d 545 [2d Dept. 2012] [by producing a document designated as an "allonge to note," which established that the plaintiff is the transferee of the subject mortgage note, the plaintiff made a showing sufficient to warrant denial of that branch of the motion of the defendant Dominic Codio which was pursuant to CPLR 3211 [a] [3].) In *Deutsche Bank Natl. Trust Co. v. Haller* (100 A.D.3d 680, 954 N.Y.S.2d 551 [2d Dept. 2012]), plaintiff bank, in support of its motion for summary judgment, relied on an undated endorsement. The Appellate Division did not found issues of fact warranted denying the bank's motion for summary judgment; it did not find that the undated endorsement was invalid. Here, as well, while defendant is entitled to challenge the endorsements by way of summary judgment motion, or otherwise, following joinder of issue, the endorsements are not on their face invalid, and do not "utterly refute" the plaintiff's assertion of standing. (*BAC Home Loans Serv. LP v. Findley*, 2013 N.Y. Misc. LEXIS 2055, 2013 NY Slip Op 31041[U] [Sup. Ct., Richmond Co.] [rejecting

defendant's argument that endorsements appearing on the "Allonge to Note" submitted by plaintiff are undated and, therefore, ineffective to conclusively establish when plaintiff became the holder of the note].)

The motion to dismiss is denied in its entirety.

This shall constitute the Decision and Order of the Court.

Dated: March 10, 2014

SHARON A.M. AARONS. J.S.C.