

**DLJ Mtge. Capital, Inc. v Pittman**

2014 NY Slip Op 32426(U)

September 8, 2014

Supreme Court, Kings County

Docket Number: 506702/2013

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

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**DLJ MORTGAGE CAPITAL, INC.,**

**Plaintiff,**

**-against-**

**BERTHA PITTMAN, et al,**

**Defendants.**

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**DECISION/ORDER**

**Index No. 506702/13**

**Submitted: 5/1/14  
Motion Sequence #1**

**Property:  
1637 St. Marks Avenue  
Block 1454 Lot 65**

**HON. DEBRA SILBER, A.J.S.C.:**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Vista Holding, Inc.'s motion to dismiss the complaint as barred by the statute of limitations and for lack of standing.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>1-15</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>16-19</u>
Reply and Exhibits Annexed.....	<u>20-23</u>

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendant Vista Holding Inc. moves, pursuant to CPLR § 3211, a pre-answer motion, to dismiss plaintiff's complaint as barred by the statute of limitations or for lack of standing to sue. Plaintiff opposes the motion. The motion is denied in part for the reasons herein and granted in part.

Plaintiff commenced the instant action on October 30, 2013. The action seeks to foreclose a mortgage made by defendant Bertha Mae Pittman on October 24, 2001 to D&M Financial Corp. (Hereafter "D&M"). Defendant Pittman's default in her payment of said mortgage in August 2002 is undisputed. Defendant Vista Holding is the current

owner of the subject property, following the execution of a deed dated September 27, 2002 and recorded with the Kings County Clerk on September 30, 2002 at Reel 5821, Page 926. The property is an 8 family apartment building.

In 2003, plaintiff's predecessor in interest, Fairbanks Credit Corp., who acquired the mortgage and note from D&M, commenced an action (5766/03) to foreclose the mortgage. In the complaint in that action, Fairbanks declared that it had elected to accelerate the mortgage loan. Upon default of the mortgage in the 2003 action, Fairbanks moved for an Order of Reference in or about January of 2004, which was granted on February 26, 2004. Fairbanks later moved for a Judgment of Foreclosure and Sale, which the Court granted on June 7, 2005 [Justice Bunyan]. Vista Holdings was named a party defendant in that action.

The assignment of the mortgage and note by D&M to Fairbanks was dated November 11, 2003<sup>1</sup> and was recorded February 11, 2004 as CRFN 2004000083057.

Subsequently, in 2009, defendant Vista Holdings succeeded in vacating its default in answering the complaint, then the Order of Reference and Judgment of Foreclosure were vacated, and the action dismissed for lack of standing, without prejudice, on plaintiff's default, based upon the fact that the assignment of the mortgage to Fairbanks had taken place after the commencement of the action. Plaintiff's motion to vacate this order and excuse plaintiff's default was denied on November 2, 2009. [Justice Bunyan].

On December 29, 2011, Fairbanks assigned the mortgage and note to US Bank National Association as Trustee for Credit Suisse First Boston Mortgage Securities

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<sup>1</sup>This date is after the action was commenced.

Corp. Pass-Thru Certificate, Series 2004-AR6. The assignment was recorded on January 13, 2012 as CRFN 2012000016231.

On December 5, 2012, US Bank National Association as Trustee assigned the mortgage and note to DLJ Mortgage Capital, the plaintiff herein. The assignment was signed on December 5, 2012 and recorded on June 4, 2013, as CRFN 2013000220529.

Plaintiff DLJ Mortgage commenced the instant action on October 30, 2013. The complaint seeks to foreclose the mortgage. The plaintiff seeks payment from the date of defendant Pittman's default, August 24, 2002 (Schedule C to the Complaint).

### **Statute of Limitations**

Movant Vista Holdings contends that plaintiff's complaint is barred by the statute of limitations and therefore should be dismissed pursuant to CPLR § 3211(a)(5).

There is no dispute that plaintiff's predecessor in interest, Fairbanks Capital, attempted to accelerate the mortgage debt when it filed its summons and complaint on February 14, 2003. However, the acceleration was adjudicated to be a nullity on the grounds that it did not own the mortgage and note when it commenced the action, when the court signed an order dismissing the Fairbanks action.

An action to foreclose a mortgage may be brought to recover unpaid sums which came due within the six-year period immediately preceding the commencement of the action. See, *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2<sup>nd</sup> Dept 2012]; CPLR § 213 [4]. When a mortgage is payable in installments, a separate cause of action accrues for each installment that is not paid, and the statute of limitations for each payment begins to run on the date each installment becomes due. See, *Wells Fargo*

*Bank, N.A. v Burke*, 94 AD3d 980; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2<sup>nd</sup> Dept 2011]; *Loiacono v Goldberg*, 240 AD2d 476, 477 [2<sup>nd</sup> Dept 1997]; *Pagano v Smith*, 201 AD2d 632, 633 [2<sup>nd</sup> Dept 1994]. However, even if a mortgage is payable in installments, once the entire mortgage debt is accelerated, the entire amount becomes due and payable, and the statute of limitations begins to run on the entire debt. *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2<sup>nd</sup> Dept 2001] *Lavin v Elmakiss*, 302 AD2d 638, 639 [2<sup>nd</sup> Dept 2003]; *Zinker v Makler*, 298 AD2d 516, 517 [2<sup>nd</sup> Dept 2002].

While the mortgage provides that acceleration of the mortgage debt on the mortgagor's sale or transfer of the property without the Lender's consent is optional with the holder of the note and mortgage, commencement of a foreclosure action triggers an acceleration of the entire mortgage debt.

As discussed above, plaintiff's predecessor had not been assigned the note or the mortgage at the time its foreclosure action was commenced. Fairbanks therefore did not have the authority to accelerate the debt or to foreclose at that point in time. See, *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2<sup>nd</sup> Dept 2008]. If a mortgagee does not have standing to commence a foreclosure, it has no standing to accelerate the mortgage. See, *Wells Fargo Bank, N.A. v Burke*, 26 Misc 3d 1218(A) [Sup Ct Kings 2010], *affd* 94 AD3d 980; *EMC Mtge. Corp. v Suarez*, 49 AD3d 592.

Movant argues that this does not matter, because Fairbanks subsequently accelerated the mortgage, after it acquired standing to do so, by moving for an order of reference and for a judgment of foreclosure and sale. Specifically, movant cites

affidavits in support of those motions wherein the affiant recited the factual history of the action, including its prior election to accelerate the mortgage. Movant thus avers that the acceleration took place in January 2004, based upon the affidavit filed as part of Fairbanks' ex parte motion for an Order of Reference on default—an affidavit which merely recites the case's prior factual history. To be clear, no written notice of acceleration is alleged to have been served on defendant, not for the transfer to Vista and not for defendant's default, both occurring in 2002.

Movant has failed to demonstrate that the maturity of the loan was validly accelerated, in accordance with the terms of the note and mortgage, prior to October 30, 2013, the date this action was commenced. See, *Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980; *EMC Mtge. Corp. v Suarez*, 49 AD3d at 593; *Sarva v Chakravorty*, 34 AD3d at 439; *Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d at 339; *Loiacono v Goldberg*, 240 AD2d at 477; *Pagano v Smith*, 201 AD2d at 633; *Ward v Walkley*, 143 AD2d at 417. The plaintiff's predecessor's description in two motions of an acceleration, which Fairbanks believed had already occurred, does not qualify as "clear and unequivocal" notice of a mortgage holder's acceleration of the maturity of the debt. Further, plaintiff correctly argues that movant's position in 2009 that Fairbanks lacked standing and was without authority to accelerate or foreclose results in movant being estopped from taking a contrary position herein.

Thus, the branch of movant's motion to dismiss plaintiff's complaint on statute of limitations grounds is denied. However, while the complaint cannot be dismissed on the grounds that the statute of limitations has run, plaintiff may not collect any payments which became due prior to the date which is six years prior to commencement of this action, as they are barred by the statute of limitations. The first payment that may be

sued for is the payment which came due on November 1, 2007. Plaintiff acknowledges this in ¶ 47 of its affirmation in opposition, although they claim they are entitled to the principal balance that was due in August, 2002 but interest from November 1, 2007. That is not accurate, as both the interest and principal that came due prior to November 1, 2007 may no longer be sued for.

### **Standing**

Movant Vista Holdings contends that the documentary evidence [CPLR § 3211(a)(1)] shows that plaintiff's chain of ownership is defective, and thus the plaintiff lacks the capacity to sue because of lack of standing [CPLR § 3211(a)(3)]. Specifically, they argue that the assignment from Fairbanks to US Bank National Association was invalid because it was not executed by Fairbanks, but rather by Wells Fargo, N.A. as Fairbanks' attorney-in-fact. They aver that no corporate resolution or power of attorney was recorded authorizing Wells Fargo to assign the mortgage on behalf of Fairbanks. They also aver that there is no proof of assignment of the subject note. Vista also objects to the subsequent assignment between US Bank and DLJ for the same reasons.

Plaintiff incorrectly argues that since this is a pre-answer motion and not a summary judgment motion, the standard of review is whether "plaintiff's complaint states a valid cause of action . . . upon any reasonable view of the stated facts." A motion to dismiss based on documentary evidence, here the recorded documents, is not a motion to dismiss for failure to state a cause of action.

The only way to discuss movant's claim is to discuss each document separately. The first document challenged is not the assignment from the original mortgagee, D&M, to Fairbanks, (recorded February 11, 2004) but the two subsequent assignments.

On January 13, 2012, an assignment from Fairbanks to US Bank as Trustee for Credit Suisse First Boston was recorded, which was executed on December 29, 2011 (Exhibit D to the motion). It was signed by someone named Nicholas Wolf, identified thereon as "Vice President, Loan Documentation" of Wells Fargo Bank, N.A., "as attorney-in-fact for Fairbanks Capital Corporation." Movant Vista seems to argue that the power of attorney wasn't recorded, so Mr. Wolf's authority is absent. They posit that a corporate resolution from Fairbanks might be a proper substitute. However, on its face, the document is a valid assignment of the mortgage and the debt (note) "all moneys now owing or that may hereafter become due or owing in respect thereof." It is signed, notarized and recorded, and is thus sufficient as a document of assignment. If the signor lacked authority to sign the document, that issue could hinder the plaintiff in making out a prima facie case for summary judgment, but does not constitute a valid challenge to the four corners of the document in a motion to dismiss based upon documentary evidence.

The court notes that in 2004, Fairbanks changed its name to Select Portfolio Servicing, Inc. In 2005, the company was acquired by Credit Suisse First Boston, and is operated as a wholly owned subsidiary, according to Credit Suisse's website. Plaintiff herein, DLJ Mortgage Capital, is a subsidiary of Credit Suisse (USA) Inc., a Swiss corporation affiliated with Credit Suisse First Boston, as part of Credit Suisse Group AG.

Therefore, both the first assignment challenged as well as the most recent assignment, to DLJ Mortgage Capital, plaintiff herein, transferred the asset from one subsidiary to a different subsidiary of Credit Suisse, both by Wells Fargo as attorney-in-fact. If Wells Fargo had no authority to transfer the mortgage and note from Fairbanks,

which is not established by movant on its documentary evidence, Credit Suisse First Boston would still be the holder of the mortgage.

To complete the review, the court notes that the assignment from US Bank as Trustee for Credit Suisse First Boston, by Wells Fargo Bank as its attorney-in-fact to DLJ, executed December 6, 2012, prior to the commencement of this action, is similarly facially sufficient from the four corners of the document.

The court finds the motion fails to make out a prima facie case for dismissal on this ground. A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) will be granted if the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [movant’s] claim” (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [2002] [internal quotation marks omitted]; see also *Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2010]; Siegel, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, CPLR C3211:10, at 21-22). Documents where the contents are “essentially undeniable” include judicial records, mortgages, deeds, contracts and other written agreements (*Fontanetta*, 73 AD3d at 84-85). An insurance policy also suffices as “documentary evidence” for CPLR 3211 (a) (1) purposes (see e.g. *Sands Point Partners Private Client Group v Fidelity Natl. Tit. Ins. Co.*, 99 AD3d 982 [2012] [copy of policy conclusively established entitlement to 3211 (a) (1) dismissal of complaint]). Lastly, a complaint containing factual claims flatly contradicted by documentary evidence should be dismissed (*Well v Yeshiva Rambam*, 300 AD2d 580, 581 [2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [1997], cert. denied 522 US 967 [1997]).

Herein, the assignments of the mortgage and note are valid on their face, and so do not “resolve all factual issues as a matter of law,” as is required for dismissal.

The court also finds movant's arguments concerning the Wells Fargo Power of Attorney to be misplaced. If an assignment is valid on its face, then no one can challenge the validity of the assignment except the assignor. See, *In Re Holden*, 271 NY 212, 218 [1936]. Thus, movant has not proven that plaintiff lacks standing based upon documentary evidence, pursuant to CPLR § 3211. See, *Deutsche Bank National Trust v Haller*, 100 AD3d 680 [2<sup>nd</sup> Dept 2012]; *Deutsche Bank National Trust v Rivas*, 95 AD3d 1061 [2<sup>nd</sup> Dept 2012]; *HSBC v Hernandez*, 92 AD3d 843, 844 [2<sup>nd</sup> Dept 2012].

Next the court reviews movant's argument that the assignment documents fail to assign the note, and the court finds that movant is not correct.

In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. See, *Bank of New York v Silverberg*, 86 AD3d 274; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 709 [2009]; *Wells Fargo Bank, N.A. Marchione*, 69 AD3d 204, 207-208 [2<sup>nd</sup> Dept 2009]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2<sup>nd</sup> Dept 2007]; *Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 546-547 [2<sup>nd</sup> Dept 2003]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414 [2<sup>nd</sup> Dept 1996]. As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note. See, *Bank of New York v Silverberg*, 86 AD3d 274; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674. "A transfer of the mortgage without the debt is a nullity, and no interest is acquired by it." *Bank of New York v Silverberg*, 86 AD3d 274; *US Bank, N.A. v Collymore*, 68 AD3d at 754; *Kluge v Fugazy*, 145 AD2d 537, 538 [2<sup>nd</sup> Dept 1988]. A mortgage is merely security for a debt or other obligation and cannot exist independently of the

note, the debt or obligation. *Bank of New York v Silverberg*, 86 AD3d 274; *FGB Realty Advisors v Parisi*, 265 AD2d 297, 298 [2<sup>nd</sup> Dept 1999].

Consequently, the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt. *Bank of New York v Silverberg*, 86 AD3d 274; *FGB Realty Advisors v Parisi*, 265 AD2d 297; Bergman on New York Mortgage Foreclosures § 12.05 [1] [a] [1991].

Movant argues that the language in the assignments is inadequate to assign the note. In response, plaintiff argues that in *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3<sup>rd</sup> Dept 2012], the Appellate Division found that the exact language used in these disputed assignments was broad enough to transfer the interest in the mortgage as well as the underlying debt secured by the note. That document assigned the mortgage "together with all rights therein and thereto, all liens created or secured thereby, all obligations therein described, the money due and to become due thereon with interest."

The court finds that the language in the assignments herein, "all moneys now owing or that may hereafter become due or owing in respect thereof," is completely comparable to the assignment language in *Chase*. Further, the beneficial owner remained at all relevant times Credit Suisse First Boston, and the multitude of paperwork they generated by switching ownership of the debt from one subsidiary of that Bank to another could not divest the bank of standing to foreclose, even if an error was made in the paperwork, as they could readily correct it.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
September 8, 2014

  
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Hon. Debra Silber, A.J.S.C.