

Rowland v HSBC Bank USA

2014 NY Slip Op 32479(U)

September 23, 2014

Supreme Court, New York County

Docket Number: 158951/2012

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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CAROLE ROWLAND,

Plaintiff,

-against-

HSBC BANK USA, et al.,

Defendants.
-----X

DECISION AND
ORDER

Index No. 158951/2012

HON. ANIL C. SINGH, J.:

In this action regarding real property. Defendant Mortgage Electronic Registration System, Inc. (“MERS”) moves for an order pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7) dismissing the complaint in its entirety. Plaintiff opposes the motion.

On July 31, 2007, plaintiff obtained a \$1,000,000 loan from Wall Street Mortgage Bankers evidenced by a promissory note (“the Note”) and secured by a mortgage (“the Mortgage”) on her residence located at 635 West 42nd Street, New York, NY (“the property”). In the mortgage, MERS is identified as the mortgagee and also designated as the “nominee for Lender and Lender’s successors and assigns.”

Plaintiff asserts the following claims against defendant: (1) lack of standing, (2) fraud in the concealment, (3) fraud in the inducement, (4) intentional infliction of emotional distress, (5) slander of title, (6) quiet title (7) declaratory relief.

A motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law (Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]). When defendant argues plaintiff has failed to

state a claim, “the court must accept as true the facts as alleged in the complaint, and afford plaintiffs the benefit of every possible favorable inference” (Chapman, Spira & Carson, LLC v. Helix BioPharma Corp., 115 A.D.3d 526 (2014)).

Plaintiff alleges in her complaint that defendant MERS is the beneficiary under the Mortgage and/or is a participant in the imperfect securitization of the Note and/or Mortgage. MERS argues that plaintiff has failed to establish any viable cause of action against MERS, as there is no present controversy between the parties and the documentary evidence shows that MERS has no interest in the relevant property.

Lack of Standing

Plaintiff’s first claim against MERS is that it lacks standing to foreclose on the property. MERS contends that this claim fails as a matter of law because it is premised on a non-existent foreclosure action. Moreover, MERS has not asserted any claim to the property since it surrendered all its interest in the Mortgage, property or plaintiff’s mortgage loan when it assigned its interest to Wells Fargo. Plaintiff counters arguing that that assignment was invalid.

Ultimately, plaintiff’s claim for lack of standing fails because standing is not a valid cause of action. Plaintiff has not cited to an existing foreclosure action brought by MERS in which standing would be an issue. “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.” (Bank of New York v Silverberg, 86 AD3d 274, 279 [2d Dept 2011]). Plaintiff concedes that MERS does not have the beneficial interest in the mortgage or note thus, the assignment validity is irrelevant where no controversy exists because there is no foreclosure action. Plaintiff’s first cause of action against MERS is hereby dismissed.

Fraud in the concealment and Fraud in the inducement

Plaintiff's fraud claims against MERS rests in a non-party, Axiom, failing to notify plaintiff that the loan at issue was securitized and sold to multiple investors. In regards to the alleged improper securitization process, courts have uniformly rejected the argument that securitization of a mortgage loan provides the mortgagor a cause of action. Brown v Deutsche Bank Nat. Trust Co., 116 AD3d 444 [1st Dept 2014].

On a separate theory of liability, plaintiff cites to HUD's regulation on mortgage servicing transfers to give rise to a duty to disclose. The rule states that, "each transferor servicer and transferee servicer of any mortgage servicing loan shall deliver to the borrower a written Notice of Transfer." (24 CFR 3500.21)¹. This rule does not apply to the case at bar since it refers to the mortgage loan servicing practices while plaintiff complains of the actual underlying transfer of the mortgage. (See Wanger v EMC Mtge. Corp., 103 Cal App 4th 1125, 1129, 127 Cal Rptr 2d 685 [Cal Ct App 2002]).

Regardless of whether there lies a duty, plaintiff has failed to plead the elements for fraud with sufficient particularity pursuant to CPLR §3016(b). Plaintiff mentions the non-party Axiom for the first time in their opposition and it is unclear what the relationship is between MERS and Axiom that would give rise to liability against MERS (see Berardi v Berardi, 108 AD3d 406, 406 [1st Dept 2013 (finding plaintiff's allegations as vague and conclusory since it is without any specific instances of the alleged misconduct) Accordingly, plaintiff's second and third causes of actions against defendant MERS fails.

Intentional Infliction of Emotional Distress

¹ As of July 16, 2014 this rule, where plaintiff purports MER's duty lies, is no longer operative but for purposes of this motion it is considered valid.

Plaintiff avers defendant “attempt[ed] to foreclose on [the] property.” (Comp. at ¶79). “The conduct alleged here, [] does not remotely approach the required standard.” (Howell v New York Post Co., Inc., 81 NY2d 115, 116 [1993]). Plaintiff fails to substantiate a claim for intentional infliction of emotional distress thus it is dismissed.

Slander of Title

“The elements of a cause of action for slander of title are: a communication (1) falsely casting doubt on the validity of complainant's title; (2) reasonably calculated to cause harm; and (3) resulting in special damages” (Rosenbaum v City of New York, 24 AD3d 349, 355 [1st Dept 2005] rev'd on other grounds, 8 NY3d 1 [2006]). Here, in plaintiff's complaint she merely states in conclusory manner that she has “incurred expenses in order to clear title to the Property.” Among other fatal issues, plaintiff has failed to allege her special damages with sufficient particularity (Collision Plan Unlimited, Inc. v Bankers Trust Co., 63 NY2d 827, 831 [1984]). Accordingly, this cause of action is dismissed.

Quiet Title

Plaintiff's sixth cause of action for quiet title claims the Mortgage constitutes a cloud upon plaintiff's title to the property. (Comp at ¶89). A mortgage is not a cloud upon title constituting an irregularity in the chain of title or property but rather it is a “conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms.” (MORTGAGE, Black's Law Dictionary (9th ed. 2009)). Therefore a claim for quiet title cannot stand under that theory.

For the first time in her opposition papers, plaintiff avers the mortgage is invalid since “defendant extended a loan without verifying [her] capacity for repayment” and constitutes a

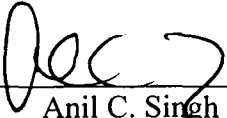
breach of a federal regulation. (Plaintiff's opposition at ¶207). Even assuming the truth of the matter asserted, this alleged breach is not a basis for setting aside the mortgage and is irrelevant to a determination of a claim to real property.

Declaratory Relief

An actual controversy is a prerequisite to declaratory relief and a "declaratory judgment may not be granted if it will only result in an advisory opinion." (Combustion Eng'g, Inc. v Travelers Indem. Co., 75 AD2d 777, 778 [1st Dept 1980] affd., 53 NY2d 875 [1981]). Here, plaintiff seeks a "judicial determination of the rights, obligations and interest of the parties with regard to the Property" (Comp. at ¶102). Yet, defendant has not even commenced a foreclosure action on the Property. Until there is a declared default and the commencement of foreclosure proceedings, there is no justiciable controversy." (Fairhaven Properties, Inc. v Garden City Plaza, Inc., 119 AD2d 796 [2d Dept 1986]). Plaintiff's claims for declaratory relief are premature and warrant dismissal.

For those reasons, the plaintiff's complaint is dismissed without leave to re-plead. The foregoing constitutes the decision and order of the court.

Date: September 23, 2014
New York, New York


Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**