

Acocella v Wells Fargo Bank, N.A.

2014 NY Slip Op 33740(U)

February 24, 2014

Supreme Court, Westchester County

Docket Number: 53913/13

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

FILED & ENTERED
2 124/14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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FRANK A. ACOCELLA and ANDREA ACOCELLA,

Plaintiffs,

MOTION DATE: 2/14/14
INDEX NO.: 53913/13

-against-

WELLS FARGO BANK, N.A., THE BANK OF NEW YORK
MELLON AS TRUSTEE FOR CSMC TRUST 2011-11 &
GREEN TREE SERVICING LLC,

Defendants.
-----X

The following papers numbered 1 to 10 were read on this motion by defendants The Bank of New York Mellon as Trustee for CSMC Trust 2011-11 and Green Tree Servicing LLC for an Order dismissing this action.

Papers Numbered

- Notice of Motion - Affirmation (Vaughn) - Exhs. (1-5) - Affidavit (Daugherty) -
- Exhs. (A-D) - Memorandum of Law 1-6
- Answering Affirmation (Murphy) - Memorandum of Law 7-8
- Replying Affirmation (Vaughn) - Exh. - Memorandum of Law 9-10

Upon the foregoing papers, it is Ordered and adjudged that this motion by

defendants The Bank of New York Mellon as Trustee for CSMC Trust 2011-11 ("BONY") and Green Tree Servicing LLC ("Green Tree") (or collectively "moving defendants") for an Order pursuant to CPLR 3211, subdivision (a), paragraphs 1, 3 and 7, dismissing this complaint is granted. This action is dismissed.

The facts at bar establish that plaintiffs are the fee owners of the subject property located at 88 Temple Street, Harrison, and that they had executed a note and mortgage in favor of defendant Wells Fargo Bank, N.A. ("Wells Fargo"), on March 16, 2007, in the sum of \$650,000. The related note had been indorsed by Wells Fargo in blank. By correspondence dated May 4, 2011, plaintiffs had received written notice from defendant Green Tree that the servicing of plaintiffs' mortgage had been transferred to Green Tree. On October 19, 2011, plaintiffs had entered into a Modification Agreement which had reduced both the owed principal amount to \$648,175.46, as well as the interest rate.

Plaintiffs apparently thereafter had sent correspondence to defendant Green Tree requesting certain information pursuant to the Real Estate Settlement Procedures Act ("RESPA"), under 12 U.S.C. §2605 (no copy of this letter appears to be included in the record at bar). On November 27, 2012, defendant Green Tree had responded to plaintiffs, advising that service of their account had been transferred from Wells Fargo Home Mortgage to Green Tree, on May 4, 2011, but that no other changes to the account or its conditions had occurred, and that the account currently was owned by defendant CSMC Trust 2011-11, The Bank of New York Mellon. Green Tree further had advised that it was "in the process of retrieving and reviewing the origination and servicing filed and other information on the subject matter, in order to fully investigate your inquiry."

On March 11, 2013, defendant Green Tree further had advised plaintiffs that an

unrecorded assignment of the mortgage had been executed, on March 30, 2011, assigning the mortgage from "Wells Fargo Bank, N.A. successor by merger to Wells Fargo Home Mortgage, Inc. f/k/a Norwest Mortgage, Inc. to 'Blank'."

Plaintiffs immediately thereafter commenced this action pursuant to CPLR Article 15 seeking to quiet title and to specifically remove defendants' mortgage security interest on the property located at 88 Temple Street. Plaintiffs claim that there is a defect in the chain of title of the note and mortgage and that BONY lacks standing to collect mortgage payments because the original note in defendants' possession never had been endorsed to defendants.

Defendants presently are moving to dismiss plaintiffs' complaint, arguing that plaintiffs have failed to state a claim upon which relief may be granted. Specifically, defendants maintain that plaintiffs have continued making payments to Green Tree, that defendants have no obligation to demonstrate their status as a holder or assignee of the note or mortgage because they have not commenced a mortgage foreclosure proceeding, that plaintiff borrowers lack standing to dispute outside of a mortgage foreclosure action whether BONY or any other entity is the holder or assignee of the note and mortgage, and that plaintiffs have not alleged nor have they established that they have sustained any damages, and thus no justiciable controversy is presented. In any event, defendants contend that BONY is and has been in possession of the original note prior to the commencement of this action and that the submitted copy of the original note, endorsed in blank and made available for plaintiffs' inspection, directly contradicts defendants' allegation that defendants do not have possession of the original endorsed note.

Plaintiffs oppose defendants' dispositive motion, arguing that a justiciable

controversy does exist, that an Article 15 proceeding is an appropriate way to adjudicate defendants' claims adverse to plaintiffs' title and that this dismissal motion is not appropriate for adjudicating this action to quiet title. Notably absent from plaintiffs' opposition is citation to any case law supporting plaintiffs' position.

Defendants' dismissal motion is granted. In addition to the case law presented by moving defendants wherein other Courts uniformly have rejected and dismissed causes of action wherein, as here, admitted mortgagors have commenced actions against banks and/or servicing agents to quiet title on their mortgaged property¹, this Court previously has rejected such claims by the very same plaintiffs at bar who had been represented in that action by the same counsel as here. See Acocella against The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders CWALT, Inc. Alternative Loan Trust 2005-J1 Mortgage Pass-Through Certificates, Westchester County Index No. 53867/13. In granting dismissal of that action, this Court held that:


Plaintiffs may not properly invoke RPAPL Article 15 as a basis to extinguish their mortgage, as they clearly are attempting to do. There is no legal support for plaintiffs' position that where the holder of the note is different than the recorded holder of the mortgage that the mortgage lien is unenforceable and thus invalid. See Shui Fong Loo v. HSBC Mortg. Corp., 36 Misc.3d 1223(A) (Sup. Ct. Suff. Co. 2012) ... The Court agrees with [] defendant that plaintiffs necessarily are prematurely trying to obtain a judicial determination with respect to defendant's standing to bring a foreclosure action ... Plaintiff Frank Acocella admits that he had executed a note and mortgage in the original loan amount of \$546,000.00, that he had received the benefit of receiving said loan amount and that he has and continues to make payments required thereunder. Accordingly, there is no improper cloud on plaintiffs' title, plaintiffs are not entitled to a

¹See e.g., Branco v. US Mortgage Corporation et al. (McCormack, J.), Sup. Ct. Nass. Co. (Jan. 30, 2013); Kantzoglou v. bank of America National Association et al. (Elliot, J.), Sup. Ct. Qu. Co. (October 10, 2013); Chomicki v. Bank of America, N.A. (Mills, J.), Sup. Ct. New York Co. (March 21, 2013).

satisfaction of mortgage, see RPL §275, and no justiciable issue is presented to this Court. The Court will not issue advisory opinions, see Cuomo v. Liko, 71 N.Y.2d 349, 354 (1988), as limited judicial resources should not be squandered on contingent events or hypothetical problems which may or may not ever come to pass. See Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 518 (1986).

Consistent therewith, this Court herein finds that, since plaintiffs admit that they had entered into an original note and mortgage with Wells Fargo as well a modification of same, and they do not contend that they have repaid said monies, plaintiffs lack standing to bring this action, this Court further finding that no justiciable controversy exists.

Dated: February 24, 2014
White Plains, New York



MARY H. SMITH
J.S.C.

Parker Ibrahim & Berg, LLC
Attys. For Moving Defts.
5 Penn Plaza, Suite 2371
New York, New York 10001

The Murphy Law Group
Atty. For Pltfs.
2900 Westchester Avenue, suite 405
Purchase, New York 10465