

Zuniga v BAC Home Loans Servicing, LP

2014 NY Slip Op 33854(U)

September 2, 2014

Supreme Court, Nassau County

Docket Number: 3999/13

Judge: Jeffrey S. Brown

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 16
JONATHAN ZUNIGA and ANA MORALES,

Plaintiff(s),

-against-

INDEX # 3999/13

Mot. Seq. 2

Mot. Date 3.6.14

Submit Date 7.2.14

BAC HOME LOANS SERVICING, LP f/k/a
COUNTRYWIDE HOME LOANS SERVICING, LP,

Defendant(s).

-----X

The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

Defendant BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP (BAC) moves pursuant to CPLR 3211(a)(7) to dismiss the complaint or, in the alternative for summary judgment pursuant to CPLR 3212; and for summary judgment on defendant's counterclaim.

This action arises from a loan transaction that took place on September 9, 2008 when plaintiffs executed a note in favor of Premium Capital Funding, LLC, d/b/a Topdot Mortgage, in the principal amount of \$354,823. The debt was secured by a mortgage of same date encumbering premises known as 429 Northern Parkway, Uniondale, New York, executed in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Premium Capital Funding, LLC, d/b/a Topdot Mortgage. The mortgage was recorded in the Office of the Clerk of Nassau County on September 17, 2008.

Subsequent to plaintiffs' default on the loan, beginning on or about August 1, 2009, and continuing to the present, defendant BAC commenced a mortgage foreclosure action under index number 012518/10. By order of the Hon. Thomas A. Adams, the motion by BAC for summary judgment, and an order of reference, was denied without prejudice.

BAC was granted leave in the foreclosure action "to renew upon proper proof of compliance with § 1304[Real Property Actions and Proceedings Law] or a basis for exclusion from the section's requirements."

In the event BAC did not timely renew the application, BAC was directed to file a note of issue within 90 days of July 9, 2012 (the date of entry of the order). Upon BAC's default, the order advised that the court, on its own motion, "may dismiss the action for 'want of prosecution.' "

On or about April 3, 2013, plaintiffs commenced this action to quiet title¹ on the subject premises. Pursuant to stipulation dated May 15, 2013, defendant's late answer was accepted on or about June 17, 2013.

Defendant BAC now moves to dismiss the complaint pursuant to CPLR 3211(a)(7) or CPLR 3212 on the grounds that, as the holder of the mortgage and note, defendant has the authority and legal capacity to enforce its rights pursuant to the loan documents. In this regard, defendant BAC contends that plaintiffs have failed to state a cause of action in light of the relevant mortgage documents, which are in defendant BAC's possession, and which, according to defendant BAC, establish that it is the holder of the original mortgage. Moreover, since plaintiffs have failed to reply to BAC's counterclaim, BAC seeks default judgment on its counterclaim seeking recovery against plaintiff based on their initiation of a frivolous lawsuit.

In opposing defendant BAC's motion, plaintiffs argue that BAC has failed to present documentary evidence, or evidence in admissible form, to substantiate its claim that it is the lawful owner of the promissory note and mortgage at issue. In the absence of such ownership, plaintiffs argue that defendant BAC is merely a servicer which holds no interest in the property.

¹Real Property Actions and Proceedings Law Article 15 provides that "a person [who] claims an estate or interest in real property . . . may maintain an action against any other person . . . to compel determination of any claim adverse to that of plaintiff" (§ 1501[a]).

In this regard, plaintiffs maintain that MERS² was a trading house for mortgages – not promissory notes. Once plaintiffs' mortgage entered the MERS system, it was traded among members as a commodity independent of the note. (Complaint ¶ 16). It is plaintiffs' contention that, since on or about September 9, 2008, their mortgage and promissory note have been divorced from each other.

In support of its motion, defendant BAC has annexed a copy of the note, together with an undated allonge, on a separate page, which contains an endorsement from Premium Capital Funding, LLC d/b/a Topdot Mortgage to Countrywide Bank, FSB, as well as a second allonge,³ on an unattached separate piece of paper, containing a blank endorsement referencing a closing date of September 9, 2008. Both allonges are signed by "Joseph Mansi" Director of Operations. Defendant BAC has also submitted a document labeled "corrective assignment" of the Zuniga/Morales mortgage dated October 7, 2011, recorded November 4, 2011, from MERS, as nominee for Premium Capital Funding LLC d/b/a Topdot Mortgage, to Bank of American, N.A., as successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. The document states that it corrects a previous assignment dated May 21, 2010 by changing the assignor's name to read Mortgage Electronic Registration Systems, Inc., as nominee for Premium Capital Funding, LLC, d/b/a "Toobot" (presumably Topdot) Mortgage, a New York limited liability company. The previously referenced document labeled "Corporation Assignment of Mortgage," dated May 21, 2010 and signed by "Tom Garcia," Assistant Secretary, was submitted by defendant BAC.

On a motion to dismiss pursuant to CPLR 3211(a)(1), dismissal is warranted where the documentary evidence totally refutes the plaintiffs' factual allegations conclusively establishing a defense as a matter of law (*Atlantic Capital Realty v Cayuga Capital Management, LLC*, 116 AD3d 890 [2d Dept 2014]). On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Dee v Rakower*, 112 AD3d 204, 208 [2d Dept 2013]). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transaction, occurrence intended to be proved and whether the requisite elements of any cause of action can be discerned from the complaint's

²As stated by the Court of Appeals in *MERSCORP, Inc. v Romaine*, 8 NY3d 90, 96 [2006], the MERS system was created in 1993 to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system for the electronic processing and tracking of ownership and transfer of mortgages. Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members.

³An indorsement in blank "specifies no particular indorsee and may consist of a mere signature" (Uniform Commercial Code § 3-204[2]).

[* 4]

allegations (*JP Morgan Chase v H.H. Elec. of N.Y. Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). Whether plaintiffs can ultimately establish their allegations is not part of the calculus in determining a CPLR 3211(a)(7) dismissal motion (*EBCI, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

The crux of the dispute herein lies in plaintiffs' challenge to the validity of the assignment of their mortgage and note, and defendant BAC's purported adverse interest in the property, which form the basis of their suite to quiet title.

The mortgage in question dated September 9, 2008 was given to MERS solely as nominee for lender Premium Capital Funding, LLC. The instrument states that:

"Borrower understands and agrees that MERS holds only legal title to the interests granted by the Borrower in this Security Instrument; but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assignees) has the right to exercise any and all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of Lender including, but not limited to, releasing or cancelling the Security Instrument."

Although this is not a foreclosure action, and defendant BAC's standing is not at issue, plaintiffs' claim to quiet title, and request to be adjudged the lawful owner of the premises with absolute and unencumbered title, requires resolution of the disputed issue of whether defendant BAC is the lawful holder or owner of the note and mortgage herein pursuant to valid assignments.

A promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (*Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2d Dept 20076]). The fact that the note herein contains no indorsement on its face, and the purported allonge was, apparently, not affixed to the note, is significant as Uniform Commercial Code § 3-202[2] provides that "[a]n 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 "in order to effectuate a valid assignment of the instrument (Uniform Commercial Code § 3-202[3], [4]).

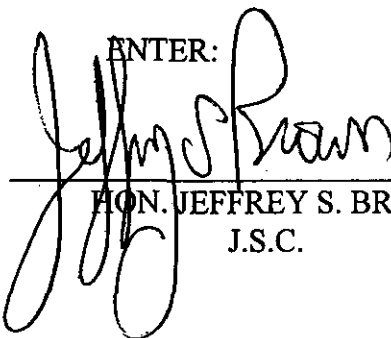
When a valid assignment is made, the assignee succeeds to the assignor's position and acquires whatever rights the latter had (*Matter of Stralem*, 303 AD2d 120, 123 [2d Dept 2003]). Either a written assignment of the underlying note or the physical delivery of the note is sufficient to transfer the obligation (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 844 [2d Dept 2012]). Where a note is properly transferred, a mortgage securing the debt passes with the debt as an inseparable incident (*Deutsche Bank Trust Co. Ams. v Codio*, 94 AD3d 1040, 1041 [2d Dept 2010]). In contrast, a mortgage is merely security for a debt and cannot exist independently of the debt (*FGB Realty Advisors v Parisi*, 265 AD2d 297, 298 [2d Dept 1999]). An assignment

of a mortgage, without the assignment of the underlying note, is a nullity and no interest is acquired by such transfer (*Bank of N.Y. Mellon v Gales*, 116 AD3d 723, 724 [2d Dept 2014]; *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]). As stated in *Bank of N.Y. v Silverberg*, 86 AD3d 274, 278-279 [2d Dept 2011], MERS frequently purports to take title to a mortgage as nominee while the lender retains the accompanying note that the mortgage was intended to secure. New York law, however, prohibits separation of a note and the mortgage securing it.

Inasmuch as the mortgage, note and assignments thereon may be considered an interest in real property that is adverse to plaintiffs' alleged ownership interest (*Barberan v Nationpoint*, 706 F Supp 2d 408, 419-420 [S.D.N.Y. Mar. 2, 2010]), plaintiffs have stated an adequately pleaded claim for a judgment of quiet title pursuant to Article 15 of the Real Property Actions and Proceedings Law.⁴ The documentary evidence submitted by defendant BAC does not conclusively dispose of that claim and, accordingly, the motion is **denied**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 2, 2014

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

Attorney for Plaintiff
David J. Broderick, PC
70-20 Austin Street, Ste. 111
Forest Hills, NY 11375
7187322102@fax.nycourts.gov

Attorneys for Defendant BAC
Frenkel Lambert Weiss Weisman & Gordon, LLP
53 Gibson Street
Bay Shore, NY 11706
6319824509@fax.nycourts.gov

ENTERED

SEP 04 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE

⁴To state a cause of action pursuant to § 1501 Real Property Actions and Proceedings Law the complaint must set forth facts showing the plaintiffs' estate or interest in the real property and that the defendant might claim an estate or interest in said property adverse to plaintiffs.