

U.S. Bank Natl. Assn. v Jabin
2015 NY Slip Op 32116(U)
November 2, 2015
Supreme Court, Richmond County
Docket Number: 130662/2009
Judge: Thomas P. Aliotta
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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**U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR CSAB MORTGAGE-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2007-1**

3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

TP 12

**Present:
Hon. Thomas P. Aliotta**

- against -

**SHAGUFTA JABIN A/K/A SHAGUFTA M. JABIN,
NATIONAL CITY BANK, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, WALL
STREET MORTGAGE BANKERS, LTD. D/B/A
POWER EXPRESS, CHARLES LEE, KEN CARMINE,
130662/2009
MICHAEL PASCUCCI,**

Defendants.

DECISION and ORDER

Index No.

**Motion Nos. 1512 - 002
3061**

- 003

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The following papers numbered 1 to 3 were fully submitted on the 12th day of
August, 2015.

Papers Numbered

Plaintiff's Notice of Motion for a Judgement of Foreclosure and Sale, with Supporting Papers (dated April 1, 2015).....	1
Notice of Cross Motion by Defendant Shagufta Jabin to Vacate Order dated December 29, 2014, pursuant to CPLR 5015(a)(3), with Supporting Papers (dated July 27, 2015).....	2
Plaintiff's Affirmation in Opposition to Defendant's Cross Motion and in Reply (dated August 6, 2015).....	3

Upon the foregoing papers, plaintiff's motion (Seq. No. 002) for a Judgment of
Foreclosure and Sale is granted; the cross motion (Seq. No. 003) by defendant Shagufta Jabin is

denied.

This action to foreclose a mortgage dated February 15, 2007, encumbering premises the premises located at 196 Regis Drive, Staten Island, New York 10304, was commenced on May 4, 2009 by plaintiff U.S. Bank National Association, as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2007-1 (hereinafter, "plaintiff"). Said mortgage was given to secure a note executed on the same day by defendant Shagufta Jabin (hereinafter, "defendant") in the principal sum of \$349,440.00. Insofar as it appears, the mortgage was assigned to plaintiff on April 24, 2009 by defendant's lender, Wells Fargo Bank, N.A., which is also plaintiff's servicing agent. It is alleged in the complaint that defendant defaulted on the subject loan by failing to make the monthly mortgage payments due on December 1, 2008, and thereafter. This action ensued wherein defendant, by her attorney, Elwaleed M. Ahmed, Esq., interposed an answer to the complaint dated May 22, 2009 asserting but a single purported defense, *i.e.*, that she was in the process of negotiating a loan modification and removing "the stated lien". On February 5, 2010, the matter was assigned to the Foreclosure Conference Part ("FCP") of the Richmond County Supreme Court, where at least fifteen unproductive settlement conferences were conducted pursuant to CPLR 3408 before the action was released from FCP. On December 29, 2014, the Honorable Charles M. Troia granted plaintiff's unopposed motion for, *inter alia*, summary judgment and the appointment of a referee to compute.

Presently before this court is plaintiff's motion for a Judgment of Foreclosure and Sale and defendant's cross motion to vacate Judge Troia's Order pursuant to CPLR 5015(a)(3) on the grounds that it was obtained as a result of fraud, misrepresentation or other misconduct on the part of plaintiff. More particularly, defendant claims that plaintiff's affidavit dated April 29, 2014 in support of the prior summary judgment motion with regard to its possession of the subject note

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at the time this action was commenced is “demonstrably false”. According to the cross movant, the averments of plaintiff’s fact witness, *i.e.*, the Vice President of Loan Documentation for Wells Fargo Bank, N.A., are “inconsistent” with the endorsement of said note, in blank, by defendant’s lender, Wells Fargo Bank, N.A., plaintiff’s servicing agent, and the express terms of the Pooling and Servicing Agreement (hereinafter, “PSA”) that govern CSAB Mortgage-Backed Pass-Through Certificates, Series 2007-1. With regard to the latter, defendant contends that pursuant to the PSA dated April 2007, defendant’s “loan documents” were deposited with one of two Trust Custodians, which then *retained them* for the benefit of the Trust’s certificate holders. The two designated Custodians are Wells Fargo Bank, N.A. and LaSalle Bank, N.A. Notably, the transfer of the subject loan documents to these Custodians was made on or before the Trusts’s specified “closing date” of May 4, 2007.

Stated more directly, it is alleged that pursuant to the governing PSA, the Jabin note and mortgage were deposited either with Wells Fargo Bank, N.A. or LaSalle Bank, N.A. when the Trust was formed in 2007. Thus, it is argued that the averments of plaintiff’s fact witness, *i.e.*, that U.S. Bank National Association was in possession of defendant’s note at the time this action was commenced, is “inconsistent” with the express terms of the PSA providing that “the Custodians will maintain custody of certain mortgage files relating to the mortgage loans on behalf of the trust”.

In furtherance of her claim that the prior Order was obtained by fraud, misrepresentation or other misconduct, the cross movant points out that the summons and complaint in this action

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was prepared and filed by the discredited law firm of Steven J. Baum, P.C.¹, which was investigated by both the US Attorney for the Southern District of New York and the New York State Attorney General, for, *inter alia*, allegedly filing misleading pleadings, affidavits and mortgage assignments in state and federal courts.

It is well established that in a foreclosure action wherein a defendant contends that the plaintiff obtained a judgment in its favor by making fraudulent allegations in the complaint about its legal existence and standing to commence the action, such claims amount to allegations of intrinsic fraud (*see* New Century Mtge. Corp. v Corriette, 117 AD3d 1011, 1012; Bank of N.Y. v Stradford, 55 AD3d 765, 765-766). In such cases, “[a] defendant seeking to vacate a default pursuant to CPLR 5015(a)(3) based on intrinsic fraud must establish both a reasonable excuse for the default and a potentially meritorious defense to the action” (New Century Mtge. Corp. v Corriette, 117 AD3d at 1012).

Here, the cross-moving defendant proffers no excuse for her failure to oppose plaintiff’s prior motion for summary judgment and the appointment of a referee (*see* Wells Fargo Bank, N.A. v Braun, 123 AD3d 698, 698-699). Moreover, the allegations of purported fraud are broad and unsubstantiated (*see* Aames Capital Corp v Davidsohn, 24 AD3d 474, 475), and constitute a belated attempt by defendant to re-cast a challenge to plaintiff’s standing, which she waived by failing to raise it in either her answer or in a pre-answer motion to dismiss (*see* CPLR 3211[e]; Wells Fargo Bank, N.A. v Erobobo, 127 AD3d 1176, 1177-1178; Bank of NY

¹ On or about December 27, 2011, a Consent to Change Attorney was filed transferring this action to the law firm of Gross Polowy LLC.

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Mellon Trust Co. v McCall, 116 AD3d 993, 993). In any event, it is the opinion of this Court that the cross movant lacks standing to challenge plaintiff's possession or status as an assignee of the note and mortgage based on, where applicable, purported noncompliance with the terms of the PSA (*see* Wells Fargo Bank, N.A. v Erobobo, 127 AD3d at 1178), and/or the effect of any perceived noncompliance with those terms, which should not be construed in a manner that would impair the long recognized methods of transferring a negotiable instrument such as a promissory note under the Uniform Commercial Code (*see e.g.* UCC 3-202[1]; 3-204[2]).

Accordingly, it is

ORDERED, that plaintiff's motion for a Judgment of Foreclosure and Sale is granted; and
it is further

ORDERED, that the cross motion by defendant Shagufta Jabin is denied.

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Order Signed herewith.

E N T E R,

Dated: November 2, 2015

Hon. Thomas P. Aliotta
J.S.C.