Bal v Bank of Am., N.A.
2015 NY Slip Op 32982(U)
May 20, 2015
Supreme Court, Queens County
Docket Number: 701077/13
Judge: Valerie Brathwaite Nelson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE VALERIE BRATHWAITE NELSON** IA Part 7
Justice

FILED
JAN 14 2016
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QUEENS COUNTY

KULDEEP BAL AND AVTAR SINGH BAL, x

Plaintiffs,

-against-

BANK OF AMERICA, N.A. and FEDERAL HOME LOAN MORTGAGE CORPORATION,

Defendants.

x

Index Number: 701077/13

Motion Date: November 17, 2014

Motion Calendar Numbers: 13 & 14

Motion Sequence Nos.: 1 & 2

The following numbered papers read on this motion by defendant Bank of America, N.A. (BANA) pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it; and this motion by defendant Federal Home Loan Mortgage Corp. (Freddie Mac) for summary judgment dismissing the complaint insofar as asserted against it.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	EF#13-35, 37-40
Answering Affidavits - Exhibits	EF#42-53, 54-65
Reply Affidavits	EF#66-77, 78-80

Upon the foregoing papers it is ordered that the motions with sequence nos. 1 and 2 are consolidated for the purpose of disposition and are determined as follows:

Plaintiffs commenced this action on April 11, 2013 asserting causes of action based upon fraud, unjust enrichment and to quiet title. Plaintiffs allege that they are the record owners of the real property known as 71-09 31st Avenue, East Elmhurst, New York

(Block 1120, Lot 42) (the subject property) pursuant to a deed dated March 27, 1997. Plaintiffs also allege that on July 26, 2005, plaintiff Kuldeep Bal obtained a mortgage loan in the sum of $534,000.00 from Countrywide Bank, a Division of Treasury Bank, N.A. (Countrywide) and plaintiffs Kuldeep Bal and Avtar Singh Bal gave a first mortgage on the subject property to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Countrywide. It is alleged that MERS, as Countrywide's nominee, assigned the first mortgage to defendant BANA by assignment dated October 18, 2007. On November 5, 2007, plaintiffs allegedly gave a second mortgage (the gap mortgage) on their property to BANA to secure a promissory note executed by plaintiff Kuldeep Bal, evidencing a loan in the principal amount of $16,074.80. On the same date, plaintiffs allegedly executed a Consolidation, Extension and Modification Agreement (the CEMA), whereby the first mortgage and the second mortgage liens were consolidated into a single lien in the principal amount of $567,000.00.

Plaintiffs, after making certain written requests to the servicer of the consolidated mortgage loan, allegedly received certain copies of loan documents which purportedly showed that at the time of the execution of the CEMA, defendant BANA was not the holder of the Countrywide note, and the October 18, 2007 assignment was ineffectual to transfer the mortgage loan to BANA because the Countrywide note was not endorsed, or transferred, to MERS. According to plaintiffs, defendant BANA therefore did not own the Countrywide mortgage loan, and hence lacked authority to consolidate the first mortgage and gap mortgages, and enter into the CEMA. Plaintiffs allege that defendant BANA, nevertheless, misrepresented to plaintiffs that it had the right to enforce the Countrywide mortgage and enter into the CEMA, and failed to disclose to plaintiffs that it lacked physical possession of the Countrywide note. Plaintiffs also allege they relied upon such misrepresentations and omission in making the payments under the consolidated note and mortgage. Plaintiffs further allege that defendant Freddie Mac is not a holder of the consolidated note entitled to enforce it. Plaintiffs seek to recover monetary damages, including punitive damages, for disgorgement and refund of all moneys paid by them to defendants, to invalidate "any purported assignments" and to declare that plaintiffs have title to the subject property free and clear of any liens and encumbrances.

Defendants BANA and Freddie Mac each served answers, asserting various affirmative defenses.

Plaintiffs oppose the motions of defendants BANA and Freddie Mac.

At the outset, the Court notes that to the extent defendant Freddie Mac asserts plaintiff's opposition papers were untimely served, it has not been prejudiced as a result because it took the opportunity to serve reply papers (*see* CPLR 2004, 2214; *Bakare v*

Kakouras, 110 AD3d 838 [2d Dept 2013]; *Lawrence v Celtic Holdings, LLC*, 85 AD3d 874, 875 [2d Dept 2011]).

It is well established that the proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendants BANA and Freddie Mac assert there is no basis in law or fact for the relief requested in the complaint, because the consolidated mortgage is a valid encumbrance on the subject property, and defendant Freddie Mac claims it is the rightful holder and owner of the Countrywide note, the gap note and the consolidated note. Defendants BANA and Freddie Mac contend BANA owned the Countrywide mortgage loan at the time of the execution of the CEMA, because BANA had been validly transferred the Countrywide note pursuant to an undated allonge bearing a special endorsement by payable to the order of BANA. Defendants BANA and Freddie Mac additionally contend that plaintiffs lack standing to challenge the October 18, 2007 assignment of the Countrywide loan documents to BANA, but in any event, plaintiffs' objections to the assignment are without merit. Defendant BANA also contends that it is not a proper party defendant with respect to the quiet title claim because it no longer owns or services the consolidated mortgage loan, and the causes of action for fraud and unjust enrichment fail to state a cause of action. Defendant BANA further contends that plaintiffs did not sufficiently plead a claim for fraud with particularity, and the unjust enrichment claim is vague and conclusory.

In opposition, plaintiffs argue that summary judgment is premature because additional discovery is required, defendants have failed to establish their entitlement to summary judgment, and there are questions of fact as to the validity of the allonge to the Countrywide note, and as to whether defendant Freddie Mac is the holder of the Countrywide, gap and consolidated notes.

In an action to quiet title, the complaint must allege that the defendant claims, or that it appears from the public records or from the allegations of the complaint that the defendant might claim, an estate or interest in the real property adverse to that of the plaintiff, and it must allege the particular nature of the estate or interest (*see* RPAPL 1515). "To maintain an equitable quiet title claim, a plaintiff must allege actual or constructive possession of the property and the existence of a removable 'cloud' on the property, which is an apparent title, such as in a deed or other instrument, that is actually invalid or inoperative" (*Barberan v Nationpoint*, 706 F Supp 2d 408, 418 [SD NY]; *see* RPAPL 1515) (see *Acocella v Bank of New York Mellon*, 127 AD3d 891 [2d Dept 2015]). A party which has no material subsisting

right, title or interest in the realty involved, or in the object sought, is not a proper party with respect to a quiet title claim (*see McGahey v Topping*, 255 AD2d 562 [2d Dept 1998]; *see also Ellison Heights Homeowners Assn., Inc. v Ellison Heights LLC*, 112 AD3d 1302 [4th Dept 2013]).

In support of its motion, defendant BANA submits, among other things, an affidavit of Jane Cashel, an assistant vice president of BANA, indicating BANA transferred its mortgage interest in the subject property when it assigned the consolidated note and mortgage to Nationstar Mortgage LLC (Nationstar) by assignment dated January 7, 2013, and a copy of the January 7, 2013 assignment. Defendant BANA has established *prima facie* that it transferred its interest in the subject property when it assigned the Countrywide consolidated note and mortgage to Nationstar. It makes no claim of any other interest or estate in the real property, adverse to that of plaintiff. Plaintiffs have failed to demonstrate the existence of a defense warranting the denial of summary judgment dismissing the cause of action insofar as asserted against defendant BANA, seeking to quiet title by, in effect, cancelling the first mortgage, gap mortgage and consolidated mortgage.

With respect to that branch of the motion by defendant Freddie Mac for summary judgment dismissing the third cause of action in the complaint insofar as asserted against it, plaintiffs acknowledge that plaintiff Kuldeep Bal took out the first mortgage loan and was obligated to repay it, and make no claim that the first mortgage, gap mortgage or the consolidated mortgage have been satisfied or discharged. Rather, their allegations in effect challenge the current standing of defendant Freddie Mac to bring a foreclosure action (*see generally Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2d Dept]). Although a first note and mortgage still exist when a balance of a first mortgage loan is increased with a second mortgage loan and a CEMA is executed to consolidate the mortgage into a single lien (*see Benson v Deutsche Bank Nat. Trust, Inc.*, 109 AD3d 495, 498 [2d Dept 2013]), plaintiffs make no allegation that Countrywide, or any lender or loan servicer other than defendant Freddie Mac, claims an interest in the Countrywide mortgage, gap mortgage or the consolidated mortgage, or an entitlement to payments on the consolidated mortgage debt. Plaintiffs' implication, moreover, that the first mortgage is owned by Countrywide or some other entity or entities "is highly implausible," since it would mean that since 2007 there has been no billing or other collection effort by the first mortgage loan's true owner (*Rajamin v Deutsche Bank Natl. Trust Co.*, 757 F3d 79, 85 [2d Cir 2014]; *see Zutel v Wells Fargo Bank, N.A.*, 2014 WL 4700022, 2014 US Dist LEXIS 132810 [ED NY 2014]). Nor do plaintiffs allege that they are in default under the consolidated mortgage or that there is a pending foreclosure action in existence or being threatened. They do not allege that the consolidated mortgage itself is defective, and do not seek the rescission of the CEMA. Under such circumstances, plaintiffs have failed to demonstrate there is a present justiciable controversy relative to the first mortgage, gap mortgage, consolidated mortgage or CEMA,

meriting declaratory relief (*see Jahan v U.S. Bank Nat. Assn.*, 127 AD3d 926 [2d Dept 2015] [claim for a declaratory judgment regarding validity of a note and mortgage dismissed because no justiciable controversy as to whether the property was wrongfully encumbered]; *Acocella v Bank of New York Mellon*, 127 AD3d 891 [2d Dept 2015] [claim to cancel a mortgage on ground an assignment of the mortgage was a nullity because it was made without a corresponding written assignment or physical delivery of the underlying mortgage note to the assignee]; *Fairhaven Properties, Inc. v Garden City Plaza, Inc.*, 119 AD2d 796 [2d Dept 1986] [claim for a declaratory judgment on the priority of liens on a real estate property are premature if no foreclosure proceedings have been commenced]; *Shui Fong Loo v HSBC Mgte. Corp. (USA)*, 36 Misc 3d 1223(A) [Sup Ct Suffolk County 2012] [claim seeking a declaratory judgment that bank did not have proper possession of the mortgage note was premature until foreclosure proceedings were commenced]; *Ocampo v JP Morgan Chase Bank, N.A.*, 2015 WL 1345282, 2015 US Dist. LEXIS 36670 [ED NY 2015] [claim for a judgment declaring mortgage note improperly transferred and obligations of mortgagors under the note to be null and void was premature where no foreclosure proceedings were commenced]; see also *Karamath v U.S. Bank, N.A.*, 2012 WL 4327613, *7, 2012 US Dist LEXIS 135038 [ED NY2012] [claim that mortgage was improperly assigned, causing the bank to lack standing to foreclose, should be raised as an affirmative defense in a foreclosure action], report and recommendation adopted, 2012 WL 4327502, 2012 US Dist LEXIS 135007 [ED NY 2012]). In addition, in a mortgage foreclosure action, a plaintiff's standing is measured from the date of commencement (*see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *Bank of N.Y. v Silverberg*, at 279). Thus, should plaintiffs be subject to a foreclosure action for default under the consolidated mortgage, the affirmative defense of lack of standing might be relevant therein.

With respect to the first cause of action for fraud asserted against defendants, "[a] cause of action to recover damages for fraud requires allegations that the defendant (1) misrepresented or omitted a material fact, (2) knew such facts were false, 3) its misrepresentations or omissions were made with the intention of inducing plaintiff's reliance, 4) plaintiff justifiably relied on the misrepresentation or omission, and 5) plaintiff suffered damages as a result (*see Barclay Arms, Inc. v Barclay Arms Assocs.*, 74 NY2d 644 [1989]; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 [1958]; *Orlando v Kukielka*, 40 AD3d 829 [2d Dept 2007]). "Pursuant to CPLR 3016(b), a cause of action alleging fraud must be pleaded with particularity so as to inform the defendant of the alleged wrongful conduct and give notice of the allegations the plaintiff intends to prove" (*McDonnell v Bradley*, 109 AD3d 592, 593 [2d Dept 2013]). Plaintiffs have failed to allege that they were fraudulently induced to enter into the CEMA or gap mortgage, and make no claim that they did not get the benefit of the bargain of those agreements. Rather, plaintiffs only allege that they were fraudulently induced into making the payments under the consolidated note and mortgage. They have failed to plead the concrete and particularized injury they have suffered thereby (*see* CPLR 3016; *Tamir v Bank of New York Mellon*, 2013 WL 4522926, 2013 US Dist LEXIS 122033 [ED NY 2013]).

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With respect to the second cause of action for unjust enrichment, "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2014] [internal quotation marks omitted]; *see Robertson v Wells*, 95 AD3d 862, 864 [2d Dept 2014]; *Levin v Kitsis*, 82 AD3d 1051, 1053 [2d Dept 2011]; *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp., Ctr.*, 59 AD3d 473, 481 [2d Dept 2009]). "[A] plaintiff's allegation that the [defendant] received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment" (*Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2d Dept 2015] ; *see McGrath v Hilding*, 41 NY2d 625, 629 [1977]; *Erlitz v Segal, Liling & Erlitz*, 142 AD2d 710, 712 [2d Dept 1988]). "Critical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust" (*McGrath v Hilding*, 41 NY2d at 629, citing Restatement of Restitution § 1, Comment A).

In this instance, the general factual assertions contained in the complaint do not satisfy the pleading requirements of unjust enrichment. The complaint does not allege that either defendant received any payments through some mistake or diversion practiced upon plaintiffs by defendants. Under the terms of the first mortgage and the consolidated mortgage, plaintiffs were to make mortgage payments to the applicable loan servicer. Defendant BANA has established it was the loan servicer of the first mortgage loan, as well as of the consolidated loan until 2012, when it transferred the servicing rights of the consolidated loan to Nationstar. Plaintiffs have failed to allege or prove that defendants BANA or Freddie Mac has collected any sums from them beyond that which were due under the mortgage agreements. Plaintiffs also have failed to demonstrate that additional discovery may lead to relevant evidence, or that the facts essential to justify opposition to the motions are exclusively within the knowledge and control of defendants (*see Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053, 1054 [2d Dept 2012]; *Zarzycki v Lan Metal Prods. Corp.*, 62 AD3d 788, 790 [2d Dept 2009]).

Accordingly, the motion by defendant BANA for summary judgment is granted pursuant to CPLR 3212 and the complaint insofar asserted against Bank of America, N.A. is dismissed. The motion by defendant Freddie Mac for summary judgment is granted pursuant to CPLR 3212 and the complaint insofar asserted against Federal Home Loan Mortgage Corp. is dismissed.

Dated: 5/20/15

VALERIE BRATHWAITE NELSON, J.S.C.

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