

Bank of N.Y. Mellon Trust Co., N.A. v Chang
2016 NY Slip Op 30431(U)
March 2, 2016
Supreme Court, New York County
Docket Number: 850368/14
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

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THE BANK OF NEW YORK MELLON TRUST
COMPANY, N.A. f/k/a The Bank Of New York
Trust Company, N.A., As Trustee For Chase
Mortgage Finance Corporation Multi Class Mortgage
Pass-Through Certificate Series 2007-S6,
Plaintiff-Petitioner(s),

Index #850368/14
Motion Cal. #

Motion Seq. #1
DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

-against-
HEON CHANG, JP MORGAN BANK, N.A.,
NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, AMERICAN EXPRESS TRAVEL
RELATED SERVICES, INC., BOARD OF MANAGERS
OF THE DOWNTOWN CONDOMINIUM, HOME
SECURITY SYSTEMS, INC., NEW BANK, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,
"JOHN DOES" and "JANE DOES," Said Names Being
Fictitious, Parties Intended Being Possible Tenants
Or Occupants Of Premises And Corporations, Other
Entities Or Persons Who Have, Claim Or May
Claim, A Lien Against, Or Other Interest In The Premises,
Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of
this Motion to: strike the answer and grant summary judgment, cross-motion to dismiss the
complaint

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	
Replying Affidavits & Exhibits Annexed	
Cross-motion & Exhibits Annexed	2
Supporting Affidavits	
Memoranda	3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

In this mortgage foreclosure action, the Plaintiff moves to strike the answer and award it summary judgment. The amount due on the mortgage is not at issue, as the principal Defendant, Heon Chang, makes no claim of payment. The defense, and the thrust of the cross-motion is the lack of standing of the Plaintiff due to defective paper work, including the content of the complaint.

The first issue is standing. The complaint, as an exhibit, attaches a copy of the assignment of the mortgage to the Plaintiff.

The Defendant contests the effectiveness of the affidavit of Patrick Pittman, the documents control officer of the Plaintiff. Mr. Pittman describes his duties, and the source of his knowledge. In so doing, the Defendant does not take into account 4517 and 4539 of the CPLR, which were enacted to cover situations such as this. Mr. Pittman attests to the regularity of the receipt and electronic recording of the Plaintiff's records, and his review of them. The cases relied on by the Defendant do not stand for the proposition that the messenger who delivered physical custody of documents must submit an affidavit of service. Indeed, whatever the language of the Defendant's cases, the underlying papers are not discussed, to I cannot compare the affidavits submitted there to the current papers, which I find meet statutory requirements.

The Defendant's argument about the lack of a verification of the complaint is a red herring. This is an action, not a proceeding under Article 4, of the CPLR, and thus verification is an option, not a requirement. Even assuming that a verification was needed, the lack of same can be amended [*SLG GRAYBAR, L.L.C. v. JOHN HANNAWAY LAW OFFICES*, 1999, 182 Misc.2d 217, 696 N.Y.S.2d 645]. Also, the Defendant did not object to the supposed lack of a verification until the making of this motion. Although there is no particular time frame for objecting to the lack of a verification, it was not done pursuant to CPLR 3022. In addition, CPLR 3020(b) sets forth those instances where a verification is mandatory, foreclosure actions are not included.

All preliminary notices have been served, and not denied by the Defendant.

The complaint, contrary to the argument of the Defendant, is definite as to the acquisition of the note and its timing. Indeed the Plaintiff's affidavit makes a point of pointing out the acquisition of the note prior to the date of commencement of the action. In addition, the assignment of the bond and note are sufficient as a matter of law. [In a mortgage foreclosure action, a plaintiff has standing where it is the holder or assignee of the underlying note at the time the action is commenced (see *U.S. Bank, N.A. v. Collymore*, 68

A.D.3d 752, 753–754, 890 N.Y.S.2d 578) *U.S. BANK NAT. ASS'N v. AKANDE*, --- N.Y.S.3d ---2016 WL 6186082016 N.Y. Slip Op. 01167, 2nd Dept. Feb. 17, 2016]. A written assignment is as good as actual delivery [*AURORA LOAN SERVS., LLC v. TAYLOR*, 25 N.Y.3d 355, 361–362]. The Plaintiff's witness has attested to the procedures of the Plaintiff, as well as the actual possession of the note and mortgage, in addition to the assignment. The Plaintiff therefore has standing to prosecute this action. Since there is no claim of payment, the motion to strike the answer, defenses and counterclaims, is granted, as is the the motion for summary judgment and a reference, and the substitution of Ben Cohen as a Defendant in place of "John Doe.". The order submitted with the motion has been signed.

The issue of the signing of the allonge is also a red herring. It is raised without any factual support.

The affirmative defenses are all stricken. The Defendant has not raised them in his motion to dismiss. The counterclaim for fraud is stricken for noncompliance with the pleading requirements of CPLR 3016. The allegations of fraud in the counterclaim are addressed to the pleading, which has been addressed above, and not to the underlying transaction.

The counterclaim for negligent misrepresentation is stricken. This counterclaim, like the fraud claim is addressed to the pleadings and not to the transaction. The sufficiency of the pleadings, and not the transaction. Indeed, even though the counterclaim apparently addresses the amount of money owed, the answer does not assert payment as an affirmative defense.

The demand for a declaratory judgment as to the ownership of the note is stricken. The issue of ownership, either physical or by assignment, has been addressed above.

The counterclaim seeking to quiet title is mis-pled. There is no dispute that the Defendant is the current owner of the condominium unit. He will cease to be if he is not the successful bidder at auction, or has not settled with the Plaintiff prior to the sale. At this point there is no issue of ownership. That will attend the reference and report of the referee.

The counterclaim for unjust enrichment is also stricken. The Defendant claim payment of the mortgage, but does not illustrate such payments with of the tender of installment payments. This is a motion for summary judgment. The Defendant was under a duty to marshal the facts and evidence at this command, and has not.

The last counterclaim seeks a discharge of the Plaintiff's lien. This is based on the bare allegation that the Plaintiff wrongfully recorded a lien. This is inconsistent with the

claim of payment.

The motion for summary judgment in favor of the Plaintiff is granted. The affirmative defenses and counterclaims of the Defendant are stricken. The motion for the appointment of a referee hear and ascertain and compute the damages is granted.

This constitutes the decision and order of the court.

Dated: March 2, 2016


GEOFFREY D. WRIGHT
AJSC