

**U.S. Bank Trust, N.A. v Howells**

2017 NY Slip Op 32003(U)

September 22, 2017

Supreme Court, Tompkins County

Docket Number: 2014-1088

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State  
of New York held in and for the Sixth Judicial  
District at the Tompkins County Courthouse, Ithaca,  
New York, on the 21<sup>st</sup> day of July, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : TOMPKINS COUNTY

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U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF8  
MASTER PARTICIPATION TRUST,

Plaintiff,

DECISION AND ORDER

Index No. 2014-1088  
RJI No. 2015-0075-C

-vs-

SEAN HOWELLS A/K/A SEAN E HOWELLS,  
KATE HOWELLS A/K/A KATE E. HOWELLS,  
"JOHN DOE #1" to "JOHN DOE #10," the last 10  
names being fictitious and unknown to plaintiff, the  
persons or parties, if any, having or claiming an  
interest in or lien upon the mortgaged premises  
described in the verified complaint

Defendants.

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**EUGENE D. FAUGHNAN, J.S.C.**

This case is again before the Court for consideration of a Motion for Summary Judgment made by Plaintiff, U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust (“US Bank”). Plaintiff previously filed a Motion for Summary Judgment in 2016, which was opposed by Defendants Sean Howells and Kate Howells (“Howells”). This Court issued a Decision and Order dated December 6, 2016, denying the Motion without prejudice to renewal upon completion of discovery. Following that Decision and Order, the Defendants conducted discovery, including a deposition of Stephanie Lopez, an employee of Caliber Home Loans (“Caliber”), the loan servicer and attorney in fact for Plaintiff. Defendants also obtained an expert’s opinion as to the authenticity of the original Note. Following discovery, Plaintiff filed a renewed Motion for Summary Judgment on May 26, 2017. Defendants filed a Cross Motion on June 2, 2017, seeking their own Summary Judgment and dismissal of the complaint. The parties appeared for oral argument on the Motion and Cross Motion on July 21, 2017.

A detailed recitation of the facts is contained in the Court’s earlier Decision and Order, and the Court will only briefly highlight some of the pertinent facts. On August 5, 2008, Defendants executed a Note and Mortgage on their property in Tompkins County in favor of Beneficial Homeowners Service Corporation (“Beneficial”). Plaintiff submitted evidence on both motions regarding the transfer of the Mortgage and Note to Plaintiff. Ms. Lopez provided an affidavit stating that Plaintiff became holder of the Note via Allonge and delivery of the Note from Beneficial to Plaintiff’s document custodian, Wells Fargo Bank (“Wells Fargo”). *See Lopez June 13, 2016 affidavit* at ¶13. In fact, the Note attached to the Complaint does contain an Allonge assigning the Note to US Bank. Beneficial assigned the Mortgage to Plaintiff on May 13, 2014. *Id.* at ¶14 .

Defendants contend that when they first took out the loan, they were assured by

Beneficial that the interest rate would be reduced after six months. Unfortunately, that did not occur, and the Beneficial office closed and was sold to HSBC. Defendants entered into a payment plan with HSBC, but then the bills were increased suddenly, and Defendants fell behind in payments. Defendants' papers also describe various steps taken over the course of years to resolve the matter with the lender.

Plaintiff commenced this action for foreclosure on December 3, 2014. Defendant served a *pro se* Answer in February, 2015. Defendants filed an Amended Answer with Affirmative Defenses and Counterclaims on April 6, 2016. Plaintiff filed a Verified Reply to the Counterclaims on April 27, 2016.

Plaintiff made a Motion for Summary Judgment and an Order of Reference, which Defendants opposed. Defendants raised issues as to Plaintiff's standing and whether Plaintiff was in possession of the underlying Note. That led to the Court's Decision and Order of December 6, 2016, which, among other things, permitted Defendants discovery requests.

In accordance with the Decision and Order, Defendants obtained deposition testimony of Ms. Lopez on March 1, 2017. Defendants also had the Note examined by their own expert, Richard T. Picciochi, who concluded that the Note contained the original signatures and was not a copy.

After that discovery was completed, Plaintiff filed the current Motion. Plaintiff argues that it has established a *prima facie* case for judgment of foreclosure, and that it has now established its standing. It took possession of the original Note, through its designated agent and document custodian Wells Fargo, prior to the commencement of the action and remained in possession of Note until it provided the Note to its counsel, after commencement of the action. Caliber, acting as Plaintiff's loan servicer and attorney in fact, creates and maintains loan files and records on behalf of Plaintiff and can verify Plaintiff's physical possession of the Note.

Plaintiff contends that the documentary evidence, and testimony of Ms. Lopez clearly establish its standing to maintain this action.

Defendants contend that the testimony from Ms. Lopez is inadequate, and that it does not establish that Plaintiff had possession of the Note prior to the commencement of the action. They contend that Lopez's testimony did not give factual details about the physical delivery of the Note, and Lopez relied upon records from Wells Fargo, and that she does not have personal knowledge as to the record keeping practices of Wells Fargo. She also testified about records kept in a system known as DokTrak, but Defendants believe that Plaintiff has failed to establish a business records exception to hearsay. Defendants finally argue that Plaintiff has not shown the connection between Plaintiff and Wells Fargo, the document custodian; or between Beneficial and Caliber (since Caliber executed the Allonge on behalf of Beneficial).

#### ANALYSIS

A plaintiff establishes a prima facie case for summary judgment in a foreclosure action by producing the mortgage, the unpaid note and evidence of defendant's default. *JP Morgan Chase Bank, Nat'l. Assn. v. Venture*, 148 AD3d 1269 (3<sup>rd</sup> Dept. 2017); *Deutsche Bank, Nat'l Trust Co. v. Monica*, 131 AD3d 737 (3<sup>rd</sup> Dept. 2015). Where the defendant raises the issue of standing as an affirmative defense, the plaintiff must also prove its standing. *Deutsche Bank v. Monica, supra*; see *Aurora Loan Servs., LLC v. Taylor*, 25 NY3d 355 (2015). Plaintiff establishes standing "where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced." *Everhome Mtge. Co. v. Pettit*, 135 AD3d 1054, 1055 (3<sup>rd</sup> Dept. 2016), quoting *Chase Home Fin., LLC v. Miciotta*, 101 AD3d 1307, 1307 (3<sup>rd</sup> Dept. 2012). The Note and not the mortgage "is the dispositive instrument that conveys standing to foreclose." *Deutsche Bank v. Monica, supra*, citing *Aurora Loan Servs., LLC v. Taylor, supra*. "Physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation' if it is indorsed to plaintiff or is

indorsed in blank.” *HSBC Bank USA, N.A. v. Corazzini*, 148 AD3d 1314, 1315 (3<sup>rd</sup> Dept. 2017), quoting *Citibank NA v. Abrams*, 144 AD3d 1212, 1214 (3<sup>rd</sup> Dept. 2016). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.” *U.S. Bank, N.A. v. Collymore*, 68 AD3d 752, 754 (2<sup>nd</sup> Dept. 2009); see *Deutsche Bank Trust Co. Ams. v. Vitellas*, 131 AD3d 52, 59 (2<sup>nd</sup> Dept. 2015). Possession of the note through Plaintiff’s document custodian is sufficient to establish standing. See e.g. *Chase Home Fin., LLC v. Spiegel*, 2017 NY Misc. LEXIS 1879 (Sup. Ct. Suffolk County 2017) (“the establishment of the plaintiff’s actual possession of the mortgage note or its constructive possession through a custodial agent on a date prior to the commencement of the action is so conclusive that it renders, unavailing, all claims of defects in allonges.” *Id.* at \*7-8); *Bayview Loan Servicing, Inc. v. Kelly*, 2015 NY Misc LEXIS 3332 (Supr. Ct, Suffolk County 2015).

In the first motion for an Order of Reference on this case, Defendant raised several questions as to the Plaintiff’s standing, and the possession of the Note. These included: 1) The Complaint stated that the Note was indorsed and delivered to Plaintiff prior to commencement of the action, but the affidavit in support stated the Note was delivered to Wells Fargo; 2) Plaintiff had not established any connection between Wells Fargo and Plaintiff; and 3) the Allonge to the Note was made from Beneficial, by Caliber, as its attorney in fact, but the connection between Beneficial and Caliber had not been established.

At the deposition of Ms. Lopez, Plaintiff herein actually produced the wet-ink Note, confirmed as original by the Defendant’s own expert. The Note was originally in favor of Beneficial and then it was indorsed by specific indorsement to Plaintiff. While Defendant points to the discrepancy between the Complaint (stating that the Note was delivered to Plaintiff) and the June 13, 2016 affidavit from Ms. Lopez (that the Note was delivered to Wells Fargo), Plaintiff’s position is that the Note was delivered to Wells Fargo, and that Wells Fargo is the

document custodian for Plaintiff. If Wells Fargo had possession of the original Note prior to commencement, then US Bank would be the proper Plaintiff only if Wells Fargo was the document custodian for US Bank. Although there has been no evidence by contract or affidavit from Wells Fargo or US Bank of the custodial relationship between the two, Ms. Lopez has provided sworn statements that the business records from Caliber reflect that the Plaintiff's designated document custodian is Wells Fargo. (See October 17, 2016 Lopez Affidavit at ¶5 and May 8, 2017 Lopez Affidavit at ¶5). That statement is un rebutted by Defendant.

Ms. Lopez testified by deposition on March 1, 2017. She personally reviewed the electronic records related to the Defendants' Loan, through Caliber's document tracking system, DokTrak<sup>1</sup>, which states where the documents would be stored on a particular date. (Transcript at p.22). She testified that the original loan agreement, and the Allonge, would have been physically kept in a collateral file (Transcript at pp.10, 26-27), and those original documents would have been with Wells Fargo Bank (Id. at p.25-27). Once Wells Fargo notified Caliber that they had a document, it would be entered into the DokTrak system. (Id. at p.29). In this case, the DokTrak system reflects the Note was delivered to Wells Fargo on February 13, 2014, and when the Complaint was filed in December, 2014, the original Note would have been with Wells Fargo. (Id. at p.25).

The Court is satisfied that Plaintiff has established its possession of the Note prior to commencement of the action. Plaintiff has shown through affidavits, deposition testimony and production of the original Note at Lopez's deposition, that the original Note was in the possession of Wells Fargo (Plaintiff's document custodian) prior to and on December 3, 2014. Although Defendant contends that the Lopez Affidavits do not give details as to the physical delivery of the Note to Wells Fargo, such evidence is not necessary. Plaintiff herein possesses a Note that bears an indorsement to the Plaintiff, and therefore it is entitled to enforce the Note.

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<sup>1</sup>The affidavits that have been submitted refer to DokTrak, but the deposition calls it DocuTrack. For purposes of this Decision and Order, DokTrak will be used.

*Duestche Bank v. Monica, supra*. “While ‘the better practice would have been for’ plaintiff to describe the precise mechanics of how the note came into its possession, that information was not required in light of the extensive proof showing that plaintiff possessed the original note by the time that this action was commenced.” *Corazzini, supra* at 1316, *citing Aurora Loan Servs., LLC v. Taylor*, 25 NY3d at 362 and *Bank of N.Y. Mellon v. McClintock*, 138 AD3d 1372, 1374-1375 (3<sup>rd</sup> Dept. 2016). When the Note is attached to the Complaint, it is not necessary to give factual details of its delivery. *JP Morgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643 (2<sup>nd</sup> Dept. 2016). The evidence in this case established that Plaintiff was the holder of the Note prior to, and at the time of, commencement of this action. *See e.g. Corazzini, supra; Bank of N.Y. Mellon v. Cronin*, 151 AD3d 1504 (3<sup>rd</sup> Dept. 2017).

The Court finds *US Bank v. Morales*, 2017 NYLF Lexis 554 (Sup. Ct. Orange County 2017), cited by Defendants, to be distinguishable, as that case involved a Note indorsed in blank, and no contract describing who owned the Note. The current case involves an Allonge to the Plaintiff, and therefore, even though the Note may have been in possession of Wells Fargo, there was no question as to who owns the Note.

Defendants also argue that Ms. Lopez’s reliance on information contained in Caliber’s DokTrak system is inadmissible hearsay, because Ms. Lopez did not personally know how the DokTrak document was created, or the manner in which information was placed in it, and did not know the business practices of Wells Fargo. Ms. Lopez did state in her Affidavits that Caliber is the servicer and attorney in fact for Plaintiff. (June 13, 2016 Lopez Affidavit and Exhibit “A” thereto). Given Caliber’s agency status as servicer of the loan, and the testimony that the records from Wells Fargo were incorporated into Caliber’s own records, and routinely relied upon by Caliber in its business, the Court finds the evidence to qualify as business records. *See Monica, supra*.

The preceding discussion is sufficient to establish Plaintiff’s standing in this case, and

possession of the Note. Therefore, any alleged defect in the Allonge would be irrelevant at this point. *Bayview Loan Service, supra*. However, the Plaintiff also provided additional, or clarifying evidence as to the relationship between Beneficial and Caliber, which question was raised in the Court's first Decision and Order on this matter. After that Decision and Order, Ms. Lopez provided additional information that shows Caliber was designated as successor servicer and attorney in fact for Beneficial and had authority to endorse the Note and assign the mortgage to the Plaintiff. Defendant has not rebutted that claim.

### CONCLUSION

Based upon the foregoing, the Court concludes that Plaintiff was in possession of the Note prior to the commencement of the action, and has standing to maintain it. Plaintiff has established its entitlement to judgment as a matter of law, and Defendants have not raised a triable issue of fact as to a bona fide defense.

Accordingly, Plaintiff's motion is GRANTED and the Cross Motion is DENIED. Plaintiff is to provide a revised proposed Order of Reference within 20 days of the date this Decision is signed.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: September 22, 2017  
Ithaca, New York

  
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HON. EUGENE D. FAUGHNAN  
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion:

- 1) Plaintiff's Notice of Renewed Motion for Summary Judgment dated May 12, 2017, with Affidavit of Stephanie Lopez, sworn to May 8, 2017 with attached exhibits; Affirmation of Rachel G. Packer, Esq., dated May 11, 2017 with attached exhibits; and Memorandum of Law dated May 11, 2017
- 2) Defendants' Notice of Cross Motion dated June 2, 2017 with Affirmation of Edward Kopko, Esq., dated June 2, 2017 with attached Exhibits; Affidavit of Kate Howells, sworn to January 26, 2016; and Memorandum of Law dated June 2, 2017;
- 3) Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendants' Cross Motion dated June 23, 2017.