

Wilmington Trust, N.A. v Teo
2019 NY Slip Op 30903(U)
April 1, 2019
Supreme Court, Kings County
Docket Number: 520106/2017
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of APRIL 2019.

PRESENT:
HON. RICHARD VELASQUEZ

Justice.

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WILMINGTON TRUST, NATIONAL ASSOCIATION
AS SUCCESSOR TRUSTEE TO CITIBANK, N.A.
AS TRUSTEE FOR BEAR STEARNS ALT-A
TRUST 2006-4,

PlaintiffS,

Index No.: 520106/2017

-against-

Decision and Order

WEI P. TEO, 70 CLERMONT AVE., LTD., LENDING
HOME FUNDING CORPORATION, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,
AS NOMINEE FOR HBSC MORTGAGE
CORPORATION (USA), CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD,

Defendants.

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The following papers numbered 24 to 115 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	24-36, 39-46
Opposing Affidavits (Affirmations) _____	48-71, 72-95
Reply Affidavits (Affirmations) _____	96-98,99-108,113-114

After oral argument and a review of the submissions herein, the Court finds as follows:

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Defendant, LENDING HOME FUNDING CORPORATION, NRTL TRUST 2016-LH1 successor in interest (hereinafter NRTL TRUST), move this court for an order dismissing the plaintiff's complaint pursuant to CPLR § 3211(a)(3) & (a)(7) dismissing the complaint as against them on the basis that the plaintiff has failed to demonstrate they are the holder of the note. Alternatively, defendant also moves pursuant to CPLR (a)(1) & (a)(7) based on documentary evidence conclusively establishes the statute of limitations on the mortgage claim has run. Plaintiff opposes the same.

Defendant, 70 CLERMONT AVE., LTD (hereinafter "70 CLERMONT") move pursuant to CPLR 3212 for and order granting summary judgment on their counter-claim, pursuant to RPAPL 1501(4), for discharge and voidance of the mortgage of HSBC Mortgage Corporation as executed by defendant Wei P. Teo on March 29, 2006; and (b) dismissing plaintiff's complaint for failure of the statute of limitations. Plaintiff opposes the same.

ARGUMENTS

Defendant, NRTL TRUST, contends the plaintiff fails to state a cause of action and lacks standing to quiet alleged mortgage interest in premises located at 70 Clermont Ave. Brooklyn, NY 11205 because the plaintiff fails or allege or otherwise demonstrate it is the holder of the March 26, 2006 Mortgage note. Alternatively, defendant NRTL TRUST contends that the action as against it should be dismissed pursuant to 3211(a)(1) & (a)(5) on the basis that documentary evidence conclusively establishes that the statute of limitations has run. Defendant NRTL TRUST contends the plaintiff's predecessor CITIBANK commenced a foreclosure action on November 17, 2009, establishing acceleration on that date. Defendant further contends six (6) years from the date of

acceleration would be December 8, 2015 and the plaintiff has not sought to foreclose the mortgage since the first dismissal of its predecessor's foreclosure on December 3, 2013, therefore the complaint should be dismissed. Defendant 70 CLERMONT joins in the defendant NRTL TRUST arguments.

Plaintiff opposes the same contending Defendant NRTL TRUST has misinterpreted the applicable statute of limitations. Plaintiff further argues its defendant's burden to prove they lack standing and the defendants have failed to do so. Plaintiff further contends the affirmation of the Vice President of servicer for the named plaintiff that stating the plaintiff has been in physical possession of the note is enough to establish standing. Further, plaintiff contends Plaintiff contends a Notice of revocation was sent. Plaintiff contends an affirmative act of revocation occurring during the six-year Statute of Limitations period is sufficient to toll the statute of limitations. Plaintiff also contends that the discontinuance signed by both parties acts as a revocation.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **"The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40

NY2d at 636, 389 NYS2d 314, 357 NE2d 970). “[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion” (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65).

As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (see *Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 AD3d 674, 838 NYS2d 622; *Smith v. Wagner*, 106 Misc 170, 178, 174 NYS 205 [“assignment of the debt carries with it the security therefor, even though such security be not formally transferred in writing”]; see also *Weaver Hardware Co. v. Solomovitz*, 235 NY 321, 331–332, 139 NE 353 [“a mortgage given to secure notes is an incident to the latter and stands or falls with them”]; *Matter of Falls*, 31 Misc 658, 660, 66 NYS 47, *affd.* 66 App.Div. 616, 73 NYS 1134 [“The deed being given as collateral for the payment of the note, the transfer of the note carried the security”]). By contrast, **“a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it”** (*Merritt v. Bartholick*, 36 NY 44, 45; see *Carpenter v. Longan*, 16 Wall. 271, 83 US 271, 274, 21 LEd 313 [an assignment of the mortgage without the note is a nullity]; *US Bank N.A. v. Madero*, 80 AD3d 751, 752, 915 NYS2d 612; *U.S. Bank, N.A. v. Collymore*, 68 AD3d at 754, 890 NYS2d 578; *Kluge v. Fugazy*, 145 AD2d 537, 538, 536 NYS2d 92 [plaintiff, the assignee of a mortgage without the underlying note, could

not bring a foreclosure action]; *Flyer v. Sullivan*, 284 AppDiv 697, 698, 134 NYS2d 521 [mortgagee's assignment of the mortgage lien, without assignment of the debt, is a nullity]; *Beak v. Walts*, 266 AppDiv 900, 42 NYS2d 652). A "mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*FGB Realty Advisors v. Parisi*, 265 AD2d 297, 298, 696 NYS2d 207). Consequently, the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt (*id.*; see *Bergman on New York Mortgage Foreclosures* 12.05[1][a][1991]); quoting *Bank of New York v. Silverberg*, 86 AD3d 274, 280, 926 NYS2d 532, 537 (2011).

In the present case, contrary to the plaintiff's contention it is the plaintiff's burden to establish standing if it is challenged by a defendant. Standing requires an inquiry into whether a litigant has "an interest ... in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v. Nussbaum*, 36 AD3d 176, 182, 825 NYS2d 55; see *New York State Assn. of Nurse Anesthetists v. Novello*, 2 NY3d 207, 211, 778 NYS.2d 123, 810 NE2d 405; *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 AD3d 239, 242, 837 NYS2d 247). **Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief** (see *U.S. Bank, N.A. v. Collymore*, 68 AD3d 752, 753, 890 NY2d 578; *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 AD3d at 242, 837 NYS2d 247). In a mortgage foreclosure action, a **"plaintiff has 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"** (see *U.S. Bank, N.A. v. Collymore*, 68 AD3d at 753, 890 NYS2d 578; *Countrywide Home Loans, Inc. v. Gress*, 68 AD3d 709, 709, 888

NYS2d 914; *Wells Fargo Bank, N.A. v. Marchione*, 69 AD3d 204, 207–208, 887 NYS2d 615; *Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 AD3d 674, 674, 838 NYS2d 622; *Federal Natl. Mtge. Assn. v. Youkelsone*, 303 AD2d 546, 546–547, 755 NYS2d 730; *First Trust Natl. Assn. v. Meisels*, 234 AD2d 414, 651 NYS2d 121); quoting *Bank of New York v. Silverberg*, 86 AD3d 274, 279–80, 926 NYS2d 532, 536–37 (2011). In the present case, the plaintiff has failed to annex the note. Notably, the defendant annexes a copy of the March 26, 2009 note to HBSC, said note is not endorsed by HBSC to plaintiff. In response plaintiff fails to annex any note endorsed to the plaintiff from HBSC. Plaintiff's attempt to annex an affidavit of the Vice President of servicer for the plaintiff is insufficient to overcome the documentary evidence of the note not being endorsed to the plaintiff. Therefore, the plaintiff has failed to demonstrate that they are the holder of the note.

Additionally, pursuant to CPLR 213 (4); "The following actions must be commenced within six years: (4) an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein" N.Y. C.P.L.R. 213 (McKinney).

In the present case, plaintiff contends the six-year statute of limitation period was tolled as a result of the revocation they sent on December 14, 2015, such argument is unavailing. In the present case, six years from the date of acceleration was December 8, 2015. The alleged revocation was sent on December 14, 2015, this is after the Statute of Limitations had already expired. Additionally, the discontinuance plaintiff contends acts as a revocation is not annexed to the plaintiff's papers and as such this court cannot begin

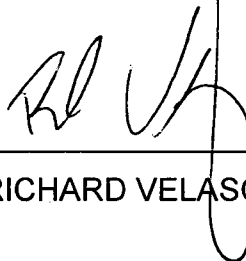
to determine when the dismissal was executed and what the dismissal states. Therefore, the plaintiff has failed to establish there was a tolling of the statute of limitations.

Defendant 70 CLERMONT's motion for summary judgment is supported by only an attorney affirmation, which is not based on personal knowledge of the facts, and has no probative value (see, *Skinner v. City of Glen Cove*, 216 AD2d 381, 628 NYS2d 719; *Thoma v. Ronai*, 189 AD2d 635, 592 NYS2d 333, *affd.* 82 NY2d 736, 602 NYS2d 323, 621 NE2d 690); quoting *Bendik v. Dybowski*, 227 AD2d 228, 229, 642 NYS2d 284, 286 (1996).

Accordingly, Defendant, NRTL TRUST's, motion to dismiss plaintiff's complaint is hereby Granted, for the reasons stated above. Defendant 70 CLERMONT's, motion for summary judgment is hereby denied, however, the complaint against defendant 70 CLERMONT is also dismissed based on documentary evidence of no mortgage note and the statute of limitations, for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: April 1, 2019


RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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