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| <b>Shulla v Bank of N.Y.</b>                                                                                                                                                                                                   |
| 2021 NY Slip Op 31943(U)                                                                                                                                                                                                       |
| February 24, 2021                                                                                                                                                                                                              |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: 703674/2020                                                                                                                                                                                                     |
| Judge: Leslie J. Purificacion                                                                                                                                                                                                  |
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Short Form Order

FILED

## NEW YORK SUPREME COURT - QUEENS COUNTY

2/25/2021  
10:00 AMCOUNTY CLERK  
QUEENS COUNTYPresent: HONORABLE LESLIE J. PURIFICACION IA Part 39  
JusticeJoseph, Shulla G xIndex  
Number 703674 2020

Plaintiff,

Motion

-against-

Dates August 6, September 24 &  
November 11, 2020

Bank of New York

Defendant.

Motion Seq. Nos. 1, 2 & 3

The following numbered papers read on this motion by defendants Bank of New York Mellon f/k/a the Bank of New York as Trustee on Behalf of the Holders of the Alternative Loan Trust 2007-5CB Mortgage Pass-Through Certificates Series 2007-5CB (Bank of New York Mellon), Luis Roldan (Roldan), Mortgage Electronic Registration System, Inc. (MERS), Bayview Loan Servicing LLC (Bayview), Gavin Tsang (Tsang), Vice President BNY Corporate Trust, Gerard F. Facendola (Facendola), BNY Managing Director, and Naion Ahmed (Ahmed), for an order pursuant to CPLR § 3211 (a)(1), (5), (7), and (8), to dismiss the complaint of plaintiffs Shulla G. Joseph's and Martin W. Jute's (collectively referred to as plaintiffs); by separate notice of motion by defendant Corelogic Advanced Delivery Engines, LLC (Corelogic), incorrectly named as Bank of New York Mellon f/k/a The Bank of New York as Trustee on Behalf of the Holders of the Alternative Loan Trust 2007-5CB Mortgage Passthrough Certificates Series 2007-5CB Corelogic, for an order pursuant to CPLR § 3211 (a)(1), (3), and (7), to dismiss plaintiffs' complaint; and by separate notice of motion by Bank of New York Mellon, MERS, Bayview, Tsang, and Facendola, for an order pursuant to CPLR § 3211 (a)(1) and (5), to dismiss plaintiffs' complaint.

Papers  
Numbered

Notices of Motion - Affidavits - Exhibits ..... EF 5-18,  
41-47,  
51-61

|                                       |                    |
|---------------------------------------|--------------------|
| Answering Affidavits - Exhibits ..... | EF 48-50,<br>63-70 |
| Reply Affidavits .....                | EF 71              |

Upon the foregoing papers it is ordered that the motions are determined together as follows:

In 2016, Bank of New York Mellon commenced a foreclosure action (Index No. 707326/16), as a result of plaintiffs' default on a residential mortgage on premises known as 114-77 175th Place, in the County of Queens (the subject premises). Subsequent to, and in relation to the 2016 action, plaintiffs have now commenced the instant action to vacate and set aside the Judgment of Foreclosure and Sale obtained in that action that was dated June 12, 2019, and the subsequent sale of the subject premises. On or about September 20, 2019, the subject premises was sold and memorialized by a Referee Deed dated October 22, 2019, recorded in the County of Queens on November 22, 2019. Plaintiffs have alleged that they are the owners of the subject premises and that Bank of New York Mellon was a trustee.

Plaintiffs have further alleged that Roldan was a former Vice President of non-party Bank of America N.A., that MERS provided free public access to servicer information for registered home mortgages, and that Bayview was a sub-servicer for Bank of New York Mellon. Plaintiff has alleged that Tsang was the Vice President of non-party Bank of New York Corporate Trust, that Facendola was Bank of New York Mellon's Managing Director, and that Ahmed was a bona fide purchaser who purportedly purchased the subject premises. Plaintiff has further alleged that Corelogic was a business that disseminates or publishes documents created to facilitate a foreclosure, and that defendant CTC Abstract Services LLC, filed and recorded a Bargain and Sale Deed for the subject premises, between Bank of New York Mellon and Ahmed, on or about February 12, 2020.

As an initial matter, although Bank of New York Mellon, Roldan, MERS, Bayview, Tsang, Facendola, and Ahmed have moved to dismiss plaintiffs' complaint pursuant to CPLR § 3211 (a)(1), (5), (7), and (8), the court notes that since plaintiffs amended their complaint after the filing of this motion, the motion has been rendered moot. However, Bank of New York Mellon, MERS, Bayview, Tsang, and Facendola, have, nevertheless, separately moved to dismiss plaintiffs' amended complaint pursuant to CPLR § 3211 (a)(1) and (5), while Corelogic has moved to dismiss plaintiffs' amended complaint pursuant to CPLR § 3211 (a)(1), (3), and (7).

First, in support of their motion, Bank of New York Mellon, MERS, Bayview, Tsang, and Facendola have argued, among other things, that plaintiff's complaint is barred by documentary evidence consisting of the court's prior determinations in the underlying

foreclosure action bearing Index No. 707326/16, and is barred by the doctrines of res judicata and collateral estoppel.

CPLR § 3211 (a)(1), provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence...” “To successfully move to dismiss a complaint pursuant to CPLR § 3211 (a)(1), the movant must present documentary evidence that ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim’” (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2d Dept 2000]; see *Leon v Martinez*, 84 NY2d at 88; *Bonavita v Govt. Employees Ins. Co.*, 185 AD3d 892, 893 [2d Dept 2020]; *Lakhi Gen. Contractor, Inc. v N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]). “In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable” (*Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]; see *Ajaka v Mount Sinai Hosp.*, 189 AD3d 963 [2d Dept 2020]).

CPLR § 3211 (a)(5), provides that a party may move for dismissal on the ground that “the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.”

The record before the court contains, among other things, copies of the pleadings in the instant action, copies of the pleadings in the prior, underlying foreclosure action, a copy of the underlying promissory note, mortgage, and assignment, and copies of orders of the court in the underlying action dated July 9, 2018, March 15, 2019, June 12, 2019, and September 18, 2019. “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Bianco v Law Offices of Yuri Prakhin*, 189 AD3d at 1326, quoting *Fontanetta v Doe*, 73 AD3d 78, 84-85 [2d Dept 2010]; see *Attias v Costiera*, 120 AD3d 1281, 1283 [2d Dept 2014]; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]; see also *Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]).

In the instant action, based upon on the court’s determinations that have been set forth in the prior orders annexed to the record, Bank of New York Mellon, MERS, Bayview, Tsang, and Facendola have satisfied their burden as to these branches of their motion. By submitting the judgment of foreclosure and sale and other orders and documentation from the prior, underlying foreclosure action, including but not limited to the court’s denial of vacatur of the judgment of foreclosure and sale, and the court’s declination to stay the sale

of the subject premises, Bank of New York Mellon, MERS, Bayview, Tsang, and Facendola have established that they have a defense founded upon documentary evidence which conclusively disposed of plaintiffs' claims as a matter of law (CPLR § 3211 [a][1]; *see Carbone v US Bank N.A.*, 156 AD3d 678, 679-80 [2d Dept 2017]; *Carbone v Deutsche Bank Nat. Tr. Co.*, 145 AD3d 848, 849-50 [2d Dept 2016]).

Moreover, inasmuch as Bank of New York Mellon, MERS, Bayview, Tsang, and Facendola have argued that the instant action is barred by the doctrines of res judicata and collateral estoppel, based upon a careful review of the evidence in the record, they have sufficiently demonstrated that there exists "a prior judgment on the merits between the same parties involving the same subject matter" (*U.S. Bank N.A. v Friedman*, 175 AD3d 1341, 1342 [2d Dept 2019]; *see In re Hunter*, 4 NY3d 260, 269 [2005]; *Ricatto v Mapliedi*, 133 AD3d 737, 738 [2d Dept 2015]), and "that the identical issue was necessarily decided in the prior action and is determinative in the present action" (*Schwarz v Schwarz*, 150 AD3d 915, 917 [2d Dept 2017], quoting *Hoffer v Bank of Am., N.A.*, 136 AD3d 750, 752 [2D Dept 2016]).

In opposition, plaintiffs have failed to sufficiently refute, undermine, or otherwise raise an issue as to the documentary evidence. Plaintiffs have also "failed to demonstrate the absence of a full and fair opportunity to contest the prior determination" (*Schwarz v Schwarz*, 150 AD3d 915, 917 [2d Dept 2017], quoting *Nappy v Nappy*, 100 AD3d 843, 845 [2d Dept 2012]; *see 77 Water St., Inc. v JTC Painting & Decorating Corp.*, 148 AD3d 1092, 1095 [2d Dept 2017]). Based upon the above determinations, Bank of New York Mellon, MERS, Bayview, Tsang, and Facendola have demonstrated prima facie that they are entitled to dismissal of the complaint pursuant to CPLR § 3211 (a)(1) and (5).

Lastly, in support of its motion, Corelogic has argued, among other things, that the complaint has failed to state a viable cause against Corelogic since CoreLogic had no interest in the subject premises, and that the complaint is conclusory and not substantiated by any statements of fact. CPLR § 3013 provides that: "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

CPLR § 3211 (a)(7), provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "In reviewing a motion pursuant to CPLR § 3211(a)(7) to dismiss the complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Benitez v Bolla Operating LI Corp.*,

189 AD3d 970 [2d Dept 2020], quoting *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; see *Bianco v Law Offices of Yuri Prakhin*, 189 AD3d at 1326; *Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]).

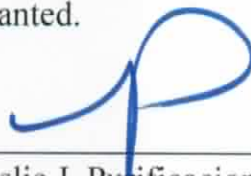
After a careful review of the allegations contained in the complaint, the court has determined that the allegations contained therein were conclusory and not sufficiently particular to give the court and Corelogic notice of the grounds for the claims, as seen by plaintiffs, as to each cause of action, per the requirements of CPLR § 3013. Thus, the complaint does not state a cause of action against Corelogic and Corelogic is, therefore, entitled to dismissal of the complaint.

In light of the above determinations, the court need not reach the remaining branches of Corelogic's motion as they have been rendered academic.

Accordingly, Bank of New York Mellon's, Roldan's, MERS', Bayview's, Tsang's, Facendola's, and Ahmed's motion to dismiss plaintiffs' complaint pursuant to CPLR § 3211(a)(1), (5), (7), and (8), is denied as moot. Corelogic's motion to dismiss plaintiffs' complaint is granted. Bank of New York Mellon's, MERS', Bayview's, Tsang's, and Facendola's motion to dismiss plaintiffs' complaint is granted.

Dated:

2/24/21



Hon. Leslie J. Purificacion, J.S.C.

FILED

2/25/2021  
10:00 AM

COUNTY CLERK  
QUEENS COUNTY