Wilmington Sav. Fund Socy., FSB v Zebrowski
2023 NY Slip Op 30830(U)
March 20, 2023
Supreme Court, Saratoga County
Docket Number: Index No. 2016966
Judge: Richard A. Kupferman
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STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR BCAT 2015-13ATT,

Plaintiff,

v.

DAVID M. ZEBROWSKI; MELINDA A. ZEBROWSKI; THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION, F/K/A THE BANK OF NEW YORK TRUST COMPANY, N.A., AS SUCCESSOR TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR RFMSII 2006·HI2; "JOHN DOE #1" through "JOHN DOE #10" inclusive the names of the ten last name Defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenants or persons in possession of, portions of the mortgaged premises described in the Complaint,

Defendants.

Decision & Order

Index No: 2016966

Appearances:

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KUPFERMAN, J.,

The plaintiff alleges that the defendant mortgagors executed and delivered a note in connection with a loan they obtained for $312,000 in August 2005, and that in connection with the loan they provided

a mortgage on their real property as collateral. The plaintiff alleges that the mortgagors defaulted on their payments starting in February 2014, and that the subject property should be sold to pay the balance due.

The original lender/mortgagee was SunTrust Mortgage, Inc. ("SunTrust").[1] The plaintiff asserts that SunTrust assigned the note and mortgage to Wells Fargo Bank, N.A. ("Wells Fargo") in July 2012, and that Wells Fargo later assigned the note and mortgage to it in September 2015. The complaint attaches copies of the mortgage assignments and the note.[2] The note's signature page contains two undated indorsements, one from SunTrust to Wells Fargo and the other from Wells Fargo with a blank indorsement.[3]

After the plaintiff commenced this action in April 2016, the mortgagors allegedly executed a quitclaim deed, dated June 29, 2016, which transferred their interest in the subject property to intervenor Robert Garrasi. In October 2016, Mr. Garrasi interposed an initial answer and later, in January 2017, an amended answer, in which he asserts, among other things, that the plaintiff lacks standing.

In 2018, the plaintiff and Mr. Garrasi each sought summary judgment in their favor. In June 2018, the Court (Chauvin, J.) denied both motions for summary judgment, but directed an "immediate trial" to be held on July 25, 2018, pursuant to CPLR 3212(c), concerning the authenticity of the documents being relied upon by the plaintiff and the issue of plaintiff's standing. Regarding Mr. Garrasi's motion, the Court concluded that Mr. Garrasi failed to present any material evidence in support of his motion and that he relied solely upon conclusory allegations. The Court held, as follows:

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1 The complaint attaches a copy of the subject note, dated August 2005, which is in the amount of $312,000 and made payable to SunTrust. The complaint also attaches a copy of the subject mortgage, which was recorded in August 2005 by Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for SunTrust.

2 The two attached mortgage assignments include one from MERS, as nominee for SunTrust, to Wells Fargo recorded in July 2012, and one from Wells Fargo to the plaintiff recorded in September 2015.

3 The parties' prior filings in this action indicate that the special indorsement to Wells Fargo was originally a blank indorsement, but that Wells Fargo's name was later added to the indorsement.

> "There is simply no proof, above and beyond the bare allegations set forth in the amended answer and the conclusory assertions in the defendant's affidavit, presented by the moving defendant by way of affidavit or properly certified or authenticated documents or other records, to establish any of the allegations set forth in the amended answer, affirmative defenses or counterclaims."

Regarding the plaintiff's motion, the Court held that the plaintiff failed to properly authenticate the documents upon which it relied, and that the proof submitted by the plaintiff on the motion was inadequate to establish its standing to maintain this action. The Court found that Mr. Garrasi had made repeated requests concerning the production of the original note and mortgage, yet the plaintiff did not produce the originals, nor made them available for inspection and, on the motion for summary judgment, the plaintiff further failed to properly authenticate the copies relied upon. The Court inferred that the evidence, taken as a whole, suggested that the note remained with Wells Fargo.

Since the decision, the trial has been adjourned for several reasons. The parties skirmished over evidentiary issues and Mr. Garrasi, who had been self-represented, retained counsel in June 2018 and then replaced that counsel with new counsel in February 2020. Then, the COVID-19 stay precluded the Court from going forward with the trial for several months. The plaintiff has also allegedly assigned its interest in the note and mortgage and retained new counsel. The parties have also engaged in settlement discussions.

When settlement attempts failed, the plaintiff requested that the Court set a date for the trial. Prior to scheduling the trial, however, Mr. Garrasi sought leave to file and serve a second amended answer to the complaint, pursuant to CPLR 3025(b). That motion is the subject of this decision. Mr. Garrasi is seeking to add a counterclaim against the plaintiff, and its successors and assigns, pursuant to Real Property Law § 329.[4] The proposed counterclaim seeks to cancel all the assignments of the subject note

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4 Real Property Law § 329 provides that an owner of real property "may maintain an action to have any recorded instrument in writing relating to such real property ... other than those required by law to be

and mortgage to and from the plaintiff, including two assignments allegedly made by the plaintiff after the commencement of this action.

"A party may amend his or her pleading ... at any time by leave of court" (CPLR 3025[b]). "The movant need not establish the merits of the proposed amendment and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (Lilley v Greene Cent. Sch. Dist., 187 AD3d 1384, 1388 [3d Dept 2020] [internal quotation marks and citation omitted]). Further "[a]ny motion to amend ... pleadings shall be accompanied by the proposed amended ... pleading *clearly showing the changes or additions to be made to the pleading*" (CPLR 3025 [b] [emphasis added]).

Here, the proposed amendment provided to the Court does not clearly show the changes or additions made to the pleading. This alone is grounds for denial (see CPLR 3025[b]; Matter of Demetriou, 196 AD3d 568, 570 [2d Dept 2021]). In addition, Mr. Garrasi has also known the facts upon which the proposed amendment is based since August 2019. Nonetheless, he elected to wait several years prior to making this motion to amend. This too justifies denying the motion to amend (see Simpson v Browning-Ferris Industries Chemical Services, Inc., 146 AD2d 769, 769 [2d Dept 1989]).

Nevertheless, even if the Court were to overlook these defects, it would find that the proposed amendment is prejudicial (see Reus v ETC Hous. Corp., 203 AD3d 1281, 1283-1284 [3d Dept 2022]). The "immediate trial" directed in June 2018 has been delayed for far too long. The amendment would delay the trial even longer. The amendment would require time for the plaintiff to submit a reply to the counterclaim. The parties would also likely require additional time for motion practice (e.g., a motion to dismiss and/or a motion to add parties). The Court would also have to afford the plaintiff's assignees the opportunity to intervene in this action to protect their interests, given that the proposed counterclaim is

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recorded ... declared void or invalid, or to have the same canceled of record as to said real property[.]"

being asserted against their interests as well. Mr. Garrasi would also likely require additional time for discovery, considering the large gaps in his proof, thereby delaying the trial even further.

Aside from prejudice, the proposed amendment also suffers from serious substantive defects. As the factual basis for the proposed counterclaim, Mr. Garrasi alleges that the subject loan was sold by SunTrust to Freddie Mac in November 2005, and that Freddie Mac later sold the subject loan to GCAT Management Services 2015-13, LLC ("GCAT") in May 2015. Based on the alleged sale of the loan in November 2005, Mr. Garrasi concludes that the assignments from SunTrust to Wells Fargo were legally impossible, and that Wells Fargo similarly did not have any authority to assign or indorse the note to the plaintiff.

However, even assuming as true that SunTrust had previously sold the same loan to Freddie Mac, this allegation alone does not state a claim to cancel or invalidate the subsequent assignments made by SunTrust and then Wells Fargo. Indeed, the rules on successive assignments are much more complex, factually and legally, than the first-in-time rule advocated by Mr. Garrasi (see e.g. Green Tree Servicing LLC v Bormann, 157 AD3d 1109, 1111 [3d Dept 2018] [allowing the foreclosure to proceed based on the plaintiff's physical possession of the original note]; Finn v Wells, 135 Misc 53 [Sup Ct, Tioga County 1929] [where a mortgagee assigned the same bond and mortgage to two different parties, the court held that because the plaintiff recorded his assignment first, the assignment to the defendant was void under Real Property Law § 291]; Provident Bank v Cmty. Home Mortg. Corp., 498 F Supp 2d 558 [EDNY 2007] [determining priority under UCC Articles 3 & 9 where a mortgage broker engaged in fraud and sold one original note and assignment to one entity, and duplicate original documents to another entity]).

In the Green Tree case, for example, the Third Department concluded on the plaintiff's summary judgment motion that the defendant failed to raise a triable issue of fact based on its proof that the lender assigned the mortgage to two different entities, before the mortgage was ultimately assigned to the plaintiff

(157 AD3d at 1111-1112). The Third Department emphasized that the plaintiff established that it had physical possession of the note and, as such, the plaintiff "was not required to prove that the mortgage 'had been validly assigned to it, and any issues concerning assignments were irrelevant'" (id. [citation omitted]; see also Aurora Loan Servs., LLC v Taylor, 25 NY3d 355, 362 [2015] ["The validity of the August 2009 assignment of the mortgage is irrelevant to [the plaintiff's] standing."]).

While there are certainly circumstances under which a prior assignment may prevail over a subsequent assignment, the bare bone allegations in the proposed counterclaim are devoid of sufficient factual allegations upon which one could infer that such circumstances exist in this case. In addition to this defect, the allegations supporting the proposed counterclaim rest on speculation and incomplete documents. The allegation of a prior sale of the loan, for instance, is taken from a statement in a cover page from a subpoena response.[5] Critically, Mr. Garrasi has not provided the Court with a copy of the subpoena, the subject screen shot upon which the statement was based, or any of the certified business records provided in response to the subpoena.

Similarly, Mr. Garrasi relies on a heavily redacted document that contains the words "settle date."[6] Based on this document, Mr. Garrasi speculates that this is when payment was made for the securities. In addition, Mr. Garrasi concludes that "Freddie Mac sold the Zebrowski mortgage and note to GCAT Management Services 2015-13, LLC ("GCAT") on or about May 14, 2015." The basis for this conclusion, however, again rests on his speculation. Indeed, he relies upon a cover page and two signature pages from a mortgage loan purchase and sale agreement, which do not support this conclusion.

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5 The cover page from the subpoena response states, as follows: "The loan was sold as part of a loan pool (pool # 0029812458) to Freddie Mac on November 2, 2005. A screen shot from out loan sales system Embtrust is attached hereto."

6 Mr. Garrasi alleges that he first learned of this document at a CASP conference in November 2018. However, this document was also apparently attached to the plaintiff's moving papers on the summary judgment motion (see NYSCEF Document No. 91, page 20 of 950).

He also relies on two pages from an Internet website that discuss generally GCAT's large scale purchase of loans from Freddie Mac.

There are in fact too many gaps and missing pages in the proof relied upon by Mr. Garrasi for the proposed counterclaim and, at this point, allowing him to proceed with the amendment would be tantamount to authorizing a fishing expedition (see Izmirligil v Steven J. Baum, P.C., 180 AD3d 767, 770 [2d Dept 2020] [holding that a party may not rely solely upon conclusory allegations to state a cause of action]; see also Matter of Demetriou, 196 AD3d at 570). Accordingly, given the speculative nature of the allegations, as well as the omission of critical facts discussed above, the proposed counterclaim fails to state a claim and therefore should not be interjected into this action (see Matter of Demetriou, 196 AD3d at 570).

Further, the denial of the motion to amend will not prejudice Mr. Garrasi. To the extent any of these "new facts" are relevant to the issue of standing, he may raise them at the upcoming trial. In fact, if he prevails at the trial, he might be able to assert his proposed claim in a subsequent proceeding (see CPLR 3025[c]; Silverberg v Bank of N.Y. Mellon, 165 AD3d 1193 [2d Dept 2018]). On the other hand, if he loses at the trial and the property is ultimately foreclosed upon, his claim to cancel the assignments will be rendered moot based on his lack of standing.

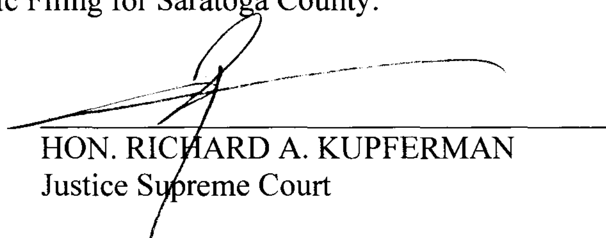
It is therefore,

ORDERED, that the motion of the defendant-intervenor, Robert Garrasi, seeking permission to file and serve a second amended answer to the complaint, is **DENIED**; and it is further

ORDERED, that the parties' attorneys are directed to appear for an in-person conference at the Saratoga County Supreme Court, 30 McMaster Street, Ballston Spa, New York 12020, on **March 31, 2023, at 10:00 a.m.**, for the purpose of selecting trial dates. The parties and/or their representatives should appear with their counsel in person at the courthouse. No later than 5:00 p.m. on March 27, 2023,

the parties' attorneys are also directed to provide the Court with an exhibit list and a witness list. The lists may be e-filed on NYSCEF or alternatively, e-mailed to the Court, with a copy e-mailed to their adversary.

This constitutes the Decision and Order of the court. No costs are awarded to either party. The Court is hereby uploading the original Decision & Order into the NYSCEF system for filing and entry by the County Clerk. Counsel is still responsible for serving notice of entry of this Decision & Order in accordance with the Local Protocols for Electronic Filing for Saratoga County.



Dated: March 20, 2023
at Ballston Spa, New York

HON. RICHARD A. KUPFERMAN
Justice Supreme Court

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