

U.S. Bank N.A. v Speller
2024 NY Slip Op 34981(U)
April 23, 2024
Supreme Court, Putnam County
Docket Number: Index No. 500088/2022
Judge: Victor G. Grossman
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SUPREME COURT – STATE OF NEW YORK
Present: HON. VICTOR G. GROSSMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

-----X
U.S. BANK NATIONAL ASSOCIATION not in its
Individual Capacity but Solely as Trustee for the
RMAC TRUST, SERIES 2016-CTT,

Plaintiff,

-against-

MICHAEL M. SPELLER, ELLEN M. FITZSIMMONS,
et al.,

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513[a]), you are advised
to serve a copy of this order, with
notice of entry, upon all parties.

Index No. 500088 / 2022

Mot. Seq. No. 7

-----X **SUPPLEMENTAL DECISION
AND ORDER**

Plaintiff U.S. Bank National Association (“U.S. Bank”) moved herein for summary
judgment in this residential mortgage foreclosure action. In its October 31, 2023 Decision and
Order upon the motion, the Court awarded U.S. Bank summary judgment on all issues except the
Bank’s standing to foreclose. On the issue of standing, the Court wrote:

The record shows that the Mortgage was assigned by written assignment dated May 31,
2016 to U.S Bank, and further, that U.S. Bank was in physical possession of the Note
together with an Allonge endorsed in blank by the original lender as of October 2016 and
at the time this action was commenced. Based on certain alleged discrepancies in the
appearance of the Note as produced at various stages of the proceedings over the years,
Mr. Speller contested U.S. Bank’s claim that it was in physical possession of the *original*
Note.

Accordingly, by Notice dated August 2, 2023, the Court directed U.S. Bank “to produce
the original Note and Allonge in court on [August 22, 2023], together with an affidavit or
affidavits accounting in detail for custody of the said original Note and Allonge during
the period October 22, 2019 through and including January 26, 2022, the date this action
was commenced.” The original Note was duly produced, and inspection thereof obvi-
ated any issue as to whether the Note in U.S. Bank’s possession is in fact the original.
However, U.S Bank did not produce the original Allonge. Instead, it produced (i) an
allonge bearing an endorsement from the original lender to HSBC Mortgage Services,
Inc. (the plaintiff in the 2009 and 2010 foreclosure actions), (ii) an allonge bearing an

endorsement from HSBC Mortgage Services, Inc. to the LSF8 Master Participation Trust (on whose behalf U.S. Bank Trust, N.A. commenced the 2015 foreclosure action), and (iii) an allonge bearing an endorsement in blank by the LSF8 Participation Trust. The accompanying affidavit of Anthony Younger does not account for the whereabouts of the Allonge endorsed in blank by the original lender, or for the provenance of the three different allonges produced in Court which, so far as appears from the record, were not in U.S. Bank's possession when this action was commenced.

"A plaintiff may demonstrate its standing in a foreclosure action through proof that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of commencement of the action." *Wells Fargo Bank, N.A. v. Mitselmakher*, 216 AD3d 1056, 1057 (2d Dept. 2023). U.S. Bank unquestionably possessed the original Note as well as an Allonge endorsed in blank when it commenced this action. However, the fact that the Allonge was not affixed to the Note annexed to the Complaint as well as the disparity between the Allonge proffered at the commencement of this action (and with the complaints in all three prior foreclosure actions) and the three allonges produced in court on August 22, 2023 gives rise to an unresolved question concerning U.S. Bank's standing herein.

Decision and Order dated October 31, 2023, pp. 5-7)

Accordingly, the Court permitted discovery and scheduled an immediate trial pursuant to CPLR §3212(c) on that portion of U.S. Bank's motion which was to strike the Defendants' affirmative defense of lack of standing. The bench trial took place on February 27, 2024. Ellen Brandt, an employee of mortgage servicer Nationstar Mortgage LLC, testified on behalf of U.S. Bank. Defendant Michael Speller testified on behalf of the defense. In post-trial submissions, U.S. Bank contends that it established standing to foreclose, and Defendants, in opposition, contend that (i) the action should be dismissed pursuant to CPLR §3012-b; (ii) the proffered power of attorney was insufficient to establish Ms. Brandt's authority to testify at the trial; (iii) U.S. Bank failed to demonstrate that the person who signed allonges on behalf of prior owners of the Note was an authorized signatory; and (iv) U.S. Bank's evidence failed to show that it was in possession of the original Note with the three Allonges affixed thereto as of January 26, 2022, the date of commencement of this action.

A. The Trial Evidence

Plaintiff's Exhibit 1 is Limited Power of Attorney dated July 20, 2023 whereby the RMAC Trust, Series 2016-CTT acting by and through U.S. Bank appointed Nationstar Mortgage LLC ("Nationstar"), mortgage servicer, as its attorney-in-fact in connection with *inter alia* the prosecution of this mortgage foreclosure action. Per Ms. Brandt, Nationstar had acquired Rushmore Loan Management Services ("Rushmore"), the mortgage servicer for Plaintiff at the time of the events in question. Defendant Speller adduced evidence of a notice of service transfer dated October 11, 2023 wherein RMAC Pass-Through Trust, Series 2016-D was identified as the owner of the Note. (Defendants' Exhibit A)

Plaintiff's Exhibit 2 is a document comprised of the following items, affixed together by a staple in the upper left corner:

- the original Note;
- the Prepayment Rider to Note;
- an Allonge, executed by Odra Hidalgo-Diaz on behalf of Wilmington Finance (the original lender), making the Note payable to the order of HSBC Mortgage Services, Inc.;
- an Allonge, executed by Roy Lacey on behalf of HSBC Mortgage Services, Inc., by Caliber Home Loans, Inc., as Attorney in Fact, making the Note payable to the order of LSF8 Master Participation Trust; and
- an Allonge, indorsed in blank by Roy Lacey on behalf of LSF8 Master Participation Trust, by its Trustee U.S. Bank Trust, N.A., through Caliber Home Loans, Inc., as Attorney in Fact for the Trustee.

Plaintiff's Exhibit 3 is a computer screen shot denominated by Ms. Brandt as the collateral tracking screen. Ms. Brandt testified that the computer report reflects Rushmore's possession of the original Note with the three (3) Allonges on October 22, 2019; that in accordance with standard practice the Allonges were firmly affixed to the Note at that time;

and that the document was on that date held in the collateral file in Rushmore's vault in Texas.

Ms. Brandt testified that she did not know if there was another custodian.

Defendant Speller thereafter introduced two affidavits by Rushmore employee Anthony Younger as admissions by Plaintiff. Defendants' Exhibit B, an affidavit sworn to on September 19, 2022, states *inter alia*:

4. I confirm that U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trst, Series 2016-CTT was in possession of the Promissory Note on October 22, 2019, prior to January 26, 2022. Staped to the Promissory Note is an allonge containing the final endorsement of the Promissory Note into "Blank". A copy of the Promissory Note is attached as Exhibit "1".

Defendants' Exhibit G, an affidavit sworn to on August 23, 2023, states *inter alia*:

4. On or about October 1, 2016, U.S. Bank National Association, Not In Its Individual Capacity But Solely As Trustee For The RMAC Trust, Series 2016-CTT acquired its interest in the Promissory Note. The original Promissory Note was in the possession of custodian Wells Fargo Bank, N.A. on or about October 1, 2016.
5. On May 13, 2019, the original Promissory Note was sent to counsel Stern & Eisenberg, PC. On October 22, 2019, the original Promissory Note was returned to Rushmore Loan Management Services LLC and then sent to the custodian Wells Fargo Bank, N.A. The original Promissory Note remains in the possession of custodian Wells Fargo Bank, N.A. A copy of the custodian log for the Promissory Note is attached hereto as Exhibit "3".

On rebuttal, Ms. Brandt testified that additional entries on Plaintiff's Exhibit 3 reflect the fact that the Note with Allonges was Federal Expressed by Rushmore to Wells Fargo, who per Ms. Brandt "would have been the custodian" holding the Note on behalf of the RMAC Trust, Series 2016-CTT.

Plaintiff's Exhibit 4 is the Mortgage. Plaintiff's Exhibits 5 through 8 are a series of Assignments of Mortgage paralleling the Allonges whereby the Note was negotiated. By Assignment dated May 31, 2016, the Mortgage was assigned by U.S. Bank Trust, N.A. as Trustee for LSF8 Master Participation Trust to U.S. Bank National Association not in its

Individual Capacity but Solely as Trustee for the RMAC Trust, Series 2016-CTT, i.e., the Plaintiff herein.

Plaintiff's Exhibit 9 is the Summons and Complaint in this action, filed January 26, 2022. Plaintiff's Exhibits 10 and 11 are the CPLR §3012-b Certificate of Merit and the documents filed therewith. Those documents include a copy of the Note with a single Allonge indorsed in blank by Odra Hidalgo-Diaz on behalf of Wilmington Finance (the original lender). Plaintiff conceded at trial that a wrong copy of the Note was utilized by its attorneys throughout this action. Ms. Brandt testified that this copy was an electronic image, retained in the mortgage servicer's computer file, of the Note as it had existed at a previous point in time.

B. Dismissal Pursuant to CPLR §3012-b Is Not Warranted

CPLR §3012-b, entitled "Certificate of Merit in certain residential foreclosure actions", provides in pertinent part as follows:

- (a) ...the complaint shall be accompanied by a certificate, signed by the attorney for the plaintiff, certifying that the attorney has review the facts of the case and that, based on consultation with representatives of the plaintiff identified in the certificate and the attorney's review of pertinent documents, including the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including any modification, extension, and consolidation, to the best of such attorney's knowledge, information and belief there is a reasonable basis for the commencement of such action and that the plaintiff is currently the creditor entitled to enforce rights under such documents. If not attached to the summons and complaint in the action, a copy of the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including any modification, extension, and consolidation shall be attached to the certificate.
- (e) If a plaintiff willfully fails to provide copies of the papers and documents as required by subdivision (a) of this section and the court finds, upon the motion of any party or on its own motion on notice to the parties, that such papers and documents ought to have been provided, the court may dismiss the complaint or make such final or conditional order with regard to such failure as is just including but not limited to denial of the accrual of any interest, costs, attorneys' fees and other fees, relating to the underlying mortgage debt. Any such dismissal shall be without prejudice and shall not be on the merits.

In *Wilmington Savings Fund Society, FSB v. Matamoro*, 200 AD3d 79 (2d Dept. 2021), the Second Department denied the defendant mortgagor's motion to dismiss for lack of standing based on deficiencies in the plaintiff's CPLR §3012-b certificate. The Court observed that the purpose of Section 3012-b is "ethical, rather than evidentiary," placing "an initial responsibility upon attorneys for plaintiffs to undertake efforts assuring the factual and legal validity of the actions, prior to the filing of initiatory papers with the court." *Id.*, 200 AD3d at 87. "Counsel's reasonable beliefs contained in a certificate of merit are irrelevant to whether defendants, in moving to dismiss complaint [for lack of standing], establish their own defined burden of proof for the dispositive relief of dismissal. Indeed, the certificate of merit does not itself demonstrate the ultimate meritoriousness of a claim, but merely assures that counsel is satisfied that there is a reasonable basis for the commencement of an action [cit.om.]" *Id.*, at 88. While documents annexed to certificates of merit may be relevant to the issue of standing, "a deficiency in the certificate of merit will not, in and of itself, provide a basis for the dismissal of a complaint..." *Id.*, at 89.

Annexed to the Section 3012-b certificate in this case was a copy of the Note with only a single Allonge endorsed in blank. However, inasmuch as the mortgage servicer's collateral tracking screen (Exhibit 3) coupled with the series of assignments of mortgage (Exhibits 5-8) convincingly demonstrates that the three (3) Allonges referenced above were in existence as of October 22, 2019, the Court credits Ms. Brandt's explanation that Plaintiff's attorneys must have been provided with the wrong version of the Note, to wit, an electronic image of the Note as it had existed at a previous point in time. Under the circumstances, the Court finds (a) that the deficiency of the certificate of merit and the documents annexed thereto do not show that U.S. Bank lacked standing to commence this foreclosure action, and (b) that counsel's failure to

annex the correct document to the certificate of merit was not willful within the meaning of CPLR §3012-b.

In view of the foregoing, dismissal of this action pursuant to CPLR §3012-b is not warranted.

C. The Limited Power of Attorney Established Ms. Brandt's Authority to Testify

The Limited Power of Attorney dated July 20, 2023 whereby the RMAC Trust, Series 2016-CTT acting by and through U.S. Bank appointed Nationstar as its attorney-in-fact in connection with the prosecution of this mortgage foreclosure action established the authority of Ms. Brandt, a Nationstar employee, to testify on its behalf at the February 27, 2024 bench trial. Defendants' evidence that ownership of the Note may thereafter have been transferred to RMAC Pass-Through Trust, Series 2016-D is irrelevant because, per CPLR §1018, "[u]pon any transfer of interest, the action may be continued by or against the original parties...", which is precisely what has occurred here.

D. Plaintiff Was Not Required To Demonstrate That The Person Executing The Allonges Was An Authorized Signatory

UCC §3-307(1) provides in pertinent part:

When the effectiveness of a signature is put in issue (a) the burden of establishing it is on the party claiming under the signature; but (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signed who has died or become incompetent before proof is required.

Here, then, the signatures on the Allonges are "presumed to be genuine or authorized", and U.S. Bank to meet its prima facie burden was not required to submit proof that the person who executed the Allonges was authorized to do so. *See, Citimortgage, Inc. v. McKinney*, 144 AD3d 1073, 1074 (2d Dept. 2016); *Goldman Sachs Mortgage Co. v. Mares*, 166 AD3d 1126, 1130

(3d Dept. 2018). Indeed, “the trier of fact [is] required to find them authorized unless and until defendants introduce[] evidence supporting a finding that they were not authorized (*see* UCC 1-206; McKinney’s Cons Law of NY, Book 62 1/2 , UCC 3-307, Official Comment at 227-228 [2013 ed]).” *Goldman Sachs Mortgage Co. v. Mares, supra*. The *Mares* Court concluded:

As defendants only speculated that Maxwell and Williams may not have been authorized to sign the allonges, their signatures are presumed authorized and plaintiff was not required to submit any proof of authorization (*see Citimortgage, Inc. v. McKinney*, 144 AD3d at 1074...).

Id. The same result obtains here. Accordingly, Defendants’ contention that U.S. Bank failed to demonstrate that the person who signed Allonges on behalf of prior owners of the Note was an authorized signatory is unavailing.

E. U.S. Bank’s Standing to Foreclose

In *JPMorgan Chase Bank, N.A. v. Caliguri*, 36 NY3d 953 (2020), the Court of Appeals wrote:

In this mortgage foreclosure action, defendant raised the affirmative defense of standing in his answer. Accordingly, to be entitled to summary judgment dismissing that defense, plaintiff bore the burden to demonstrate, as a matter of law, that it had standing to foreclose. There is no “checklist” of required proof to establish standing. Here, plaintiff satisfied its burden through evidence that it possessed the note when it commenced this action, including a copy of the original note endorsed in blank, and other supporting material, including an affidavit of possession based on an employee’s review of plaintiff’s business records (*see Aurora Loan Servs., LLC v. Taylor*, 25 NY3d 355, 361...).

JPMorgan Chase Bank, N.A. v. Caliguri, supra, 36 NY3d at 954. *See also, Wells Fargo Bank, N.A. v. Mitselmakher, supra*, 216 AD3d 1056, 1057 (2d Dept. 2023).

The Second Department, in *U.S. Bank Trust, N.A. v. O’Driscoll*, 168 AD3d 783 (2d Dept. 2019), affirmed a determination that the plaintiff had established standing to foreclose on proof akin to that presented in this case. The Court wrote:

At a hearing to determine whether the plaintiff had standing to prosecute this action, the plaintiff presented the testimony of Jamar Harris, a default servicing officer for Caliber Home Loans..., the servicer of the loan at issue. **Harris testified that the plaintiff obtained the original note on December 3, 2013. Specifically, he testified that the original note had been sent to Wells Fargo as custodian for the plaintiff on that date.**

In a decision dated March 30, 2017, a Court Attorney Referee determined that the plaintiff had established standing. In the order appealed from, the Supreme Court granted the subject branch of the plaintiff's motion, and denied O'Driscoll's motion.

A plaintiff has standing to maintain a mortgage foreclosure action 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 AD3d 752, 753-754...)....[T]he physical delivery of the note prior to the commencement of the action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*Dyer Trust 2012-1 v. Global World Realty, Inc.*, 140 AD3d 827, 828...). "[A]n assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery" (*Bank of N.Y. v. Silverberg*, 86 AD3d 274, 280...; *see Aurora Loan Servs., LLC v. Taylor*, 25 NY3d 355, 361-362...). Testimony from the loan's servicer may be used to establish standing (*see U.S. Bank, N.A. v. Godwin*, 137 AD3d 1260, 1261-1262...).

We agree with Supreme Court's determination that the plaintiff had submitted evidence sufficient to establish standing [cit.om.]...

U.S. Bank Trust, N.A. v. O'Driscoll, supra, 168 AD3d at 784-785 (emphasis added).

However, subsequent decisions by the Second Department give the Court pause. In *HSBC Bank USA, N.A. v. Boursiquot*, 204 AD3d 980 (2d Dept. 2022), the Second Department wrote:

Here, the plaintiff failed to establish, prima facie, that it had standing to commence this action. In support of its motion, the plaintiff asserted that it was the holder of the note at the time the action was commenced. However, the plaintiff failed to present admissible evidence establishing that it was in possession of the note, endorsed in blank or specially to it, at the time the action was commenced in or about March 2010. The plaintiff relied upon the affidavit of Nichelle Jones, a senior loan analyst of Ocwen Financial Corporation whose indirect subsidiary is Ocwen Loan Services, LLC (hereinafter Ocwen), the plaintiff's loan servicer. Jones attested that she reviewed the servicing records maintained by Ocwen in its ordinary course of business, that a prior servicer's records were integrated into Ocwen's records and relied upon by Ocwen, and that, based upon her review, "**Ocwen's Servicing Records**" reflect that the note was physically delivered on April 28, 2006, to Wells Fargo Bank, N.A., which, Jones attested, serves as custodian on behalf of the plaintiff pursuant to a pooling and servicing agreement dated October 1, 2006. Jones further averred that the plaintiff "continues to be the owner and holder

of the Note.” Even if Jones’ affidavit were sufficient to lay a proper foundation for the admission of “Ocwen’s Servicing Records,” no records were submitted therewith which establish that the plaintiff was the holder of the note when this action was commenced (see Deutsche Bank Natl. Trust Co. v. Schmelzinger, 189 AD3d at 1175...). Although the foundation for the admission of a business record may be provided by the testimony of the custodian, “it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted” [cit.om.]. “Without submission of the business records, a witness’s testimony as to the contents of the records is inadmissible hearsay” [cit.om.].

HSBC Bank USA, N.A. v. Boursiquot, supra, 204 AD3d at 982-983 (emphasis added). See also,

Bank of New York Mellon Trust Co., N.A. v. Andersen, 209 AD3d 817, 820 (2d Dept. 2022)

(“although Verdooren stated that Wells Fargo had possession of the note on the plaintiff’s behalf at the time the action was commenced, the documents attached to Verdooren’s affidavit failed to establish this fact”).

The evidence at trial, coupled with U.S. Bank’s ability to produce the original Note (in the form referenced in the collateral tracking screen as of October 22, 2019) pursuant to Court order in August 2023 and again at trial in February 2024, tells heavily in favor of U.S. Bank’s standing to prosecute this foreclosure action. Nevertheless, under the authorities cited above the Bank’s evidence of standing is technically defective.

Inasmuch as U.S. Bank’s standing is predicated on its claim to be the holder of a Note endorsed in blank, its standing herein depends on proof of its physical possession of the Note as of the date of commencement – January 26, 2022. As U.S. Bank observes in its post-trial submission, it established through its mortgage servicer’s business records and the testimony of Ms. Brandt that the Note was in the possession of Rushmore as U.S. Bank’s agent on October 22, 2019. However:

- The collateral tracking screen (Exhibit 3) shows that the Note was thereafter Federal Expressed to Wells Fargo.

- There is no documentary evidence that (a) Wells Fargo was holding the Note as custodian for Rushmore, for U.S. Bank or for the RMAC Trust, Series 2016-CTT, or (b) that Wells Fargo continued to hold the Note until January 26, 2022.
- Since Ms. Brandt initially testified to a lack of knowledge whether there was a custodian other than Rushmore, her subsequent testimony that Wells Fargo “would have been the custodian” is unreliable and in any event constitutes inadmissible hearsay in the absence of a supporting business record.
- The August 23, 2023 affidavit of Anthony Younger (Defendants’ Exhibit G) to the effect that the Note was “sent to the custodian Wells Fargo Bank, N.A.” and “remains in the possession of custodian Wells Fargo Bank, N.A.” is incompetent to prove the facts asserted. As an admission by Plaintiff, the affidavit constitutes evidence admissible against Plaintiff but inadmissible hearsay if offered on Plaintiff’s behalf. *See, Reed v. McCord*, 160 NY 330, 341 (1899); *Secor v. Kohl*, 67 AD2d 358, 363 (2d Dept. 1979).

“A trial court, in the exercise of its discretion and for sufficient reasons, may allow a party to reopen and supply defects in evidence which have inadvertently occurred.” *Commonwealth Land Title Ins. Co. v. Islam*, 220 AD3d 739, 741 (2d Dept. 2023). *See also, MRI Enterprises, Inc. v. Comprehensive Medical Care of New York, PC*, 122 AD3d 595, 596 (2d Dept. 2014); *Fischer v. RWSP Realty, LLC*, 63 AD3d 878 (2d Dept. 2009); *Kay Foundation v. S & F Towing Service of Staten Island, Inc.*, 31 AD3d 499, 501 (2d Dept. 2006). There is ample justification for allowing U.S. Bank the opportunity to reopen to cure the technical defects in its evidence on the issue of standing. In the interest of justice, cases should be resolved on the merits, and there is good reason here to believe that U.S. Bank, acting on behalf of the RMAC Trust, Series 2016-CTT -- and no one else -- possessed standing to commence this foreclosure action on January 26, 2022. There is no discernible prejudice to Defendants, who will be afforded a fair opportunity to contest the evidence, if any, that U.S. Bank produces upon reopening. Finally, the resultant delay will be minimal.

It is therefore

ORDERED, that the Plaintiff is granted leave to reopen its case on the issue of standing consistent with this opinion, and it is further

ORDERED, that the bench trial on the issue of standing shall continue on June 3, 2024 at 10:00 a.m. / p.m. in Courtroom 201 at the Putnam County Courthouse.

The foregoing constitutes the decision and order of the Court.

Dated: April 23, 2024
Carmel, New York

ENTER



HON. VICTOR G. GROSSMAN, J.S.C.