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U.S. Bank N.A. v Bresler
2013 NY Slip Op 50498(U)
Decided on April 3, 2013
Supreme Court, Kings County
Silber, J.
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Decided on April 3, 2013

Supreme Court, Kings County

U.S. Bank National Association, AS TRUSTEE FOR SG MORTGAGE SECURITIES ASSET BACKED CERTIFICATES, SERIES 2006-FRE2, Plaintiff,

against

Alan Bresler, CCU LLC, MERS, INC. ET AL, Defendants.

33920/08

Hogan Lovells US LLP

875 Third Avenue

New York, New York 10022

of Counsel to

Frenkel Lambert Weiss Weisman & Gordon, LLP

20 West Main Street

Bayshore, New York 11706

Attorneys for Plaintiff US Bank National Association

Moishe Silver, Esq.

245 West 17th Street, 5th Floor

New York, New York 10011

Attorney for Defendant Alan Bresler

Debra Silber, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for re-argument of the court's decision dated December 7, 2011 denying plaintiff's motion for summary judgment and the appointment of a Referee, and granting defendant's motion to dismiss, in this foreclosure action.

PapersNumbered

Notice of Motion, Affirmation, Exhibits Annexed and Memo.....*1-5,6*

Affirmation in Opposition and Exhibits Annexed.....*7-8*

Reply.....*9*

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff moves to reargue the denial of its motion for summary judgment and the appointment of a referee to compute, and the granting of defendant's motion to dismiss the action for lack of standing in this foreclosure action concerning 1477 East 32nd Street, Brooklyn, NY, 11234, Block 7694, Lot 85. It is noted that the court's order was never served by either party, so the timeliness of this motion is not an issue. Both sides have retained different counsel since the [*2]prior order was issued.

The court grants the motion to re-argue, and upon reargument adheres to its original decision.

On the original motion papers, the court found that the plaintiff had failed to make out a prima facie case for summary judgment, and that defendant had made out a prima facie case for dismissal on the grounds that plaintiff had not established it had standing to bring the action on the date the foreclosure action was commenced, which plaintiff did not overcome in its opposition papers. Plaintiff has failed to establish in this motion to reargue that the court either overlooked or misapprehended any matter of fact or law offered on the prior motion. CPLR 2221. It is noted that the plaintiff's motion primarily addresses the decision on defendant's motion, as the items plaintiff claims the court overlooked were not in plaintiff's motion, but were in plaintiff's opposition to defendant's motion, as is discussed in depth below.

Plaintiff claims the court erred in the Decision and Order dated December 7, 2011, in that the court "overlooked record evidence showing that the plaintiff was the assignee and holder of both the Note and the Mortgage". Plaintiff specifically states that this is not a motion to renew and that no new facts are contained in this motion.

In response to the plaintiff's original motion for summary judgment, defendant Alan Bresler, who had alleged in his Answer to the Complaint that the plaintiff lacked standing to bring this action, cross moved to dismiss the foreclosure action on the grounds that plaintiff lacked standing to bring the action. The court found that defendant was correct, and as such, the action was dismissed.

The mortgage in question was issued by Fremont Investment and Loan on May 4, 2006. The loan stated "for purposes of recording, MERS is the mortgagee of record." As the court previously noted, the tortured history of MERS is described in *Bank of NY v Silverberg*, 86 AD3d 274 [2nd Dept], and need not be repeated. On December 18, 2008, an Assignment of Mortgage was executed, and subsequently recorded, which assigned the mortgage and not the note, from MERS to plaintiff.

In the December 7, 2011 Decision, the court found the assignment of a mortgage without the note was defective, as the transfer of the mortgage without the debt (Note) is a nullity. *Citimortgage, Inc. v Stosel*, 2011 NY Slip Op 8319 [2nd Dept] citing *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2nd Dept 2009]; *Bank of NY v Silverberg*, 86 AD3d 274,

280. The court also found that the assignment from MERS to plaintiff was defective, as MERS had no right or authority to assign the mortgage or the note herein. *Bank of NY v Silverberg*, *supra*. In addition, the Assignment was signed by Elpiniki M. Bechakas, an attorney in the office of Stephen J. Baum PC, now defunct, a firm whose attorneys routinely and improperly signed mortgage assignments claiming to be officers of MERS. This practice was barred by the settlement agreement the firm signed with the U.S. Attorney's Office for the Southern District in October of 2011.[FN1]

As is noted in the New York Law Journal ("Baum Firm Reaches Settlement With Attorney General" 3/22/2012), in addition to the October of 2011 settlement with the US [*3] Attorney for the Southern District of New York wherein it agreed to pay a $2 million dollar fine and revamp its practices, the Baum firm reached a settlement with the New York State Attorney General pursuant to which it was required to pay $4 million. The article further notes that the firm subsequently closed its doors.

Plaintiff maintained in the original motion that the mortgage was properly transferred, asserting that MERS had the authority to execute the written assignment of the mortgage as the mortgagee of record. This argument was determined to be unavailing.

Of note, at oral argument of this motion to reargue, plaintiff admitted that MERS did not have authority to assign the Note (Transcript of Oral Argument p 14, line 19) when it assigned the mortgage in 2008 and admitted that the assignment of the mortgage cannot effectuate the assignment of the note (p. 9), but claimed the Note was transferred "Through the PSA and through a transfer of physical possession" which conferred standing on plaintiff from that point in time. This argument was not part of plaintiff's original motion for summary judgment, and it is not proper to move to reargue on a different basis and legal theory than that argued in the original motion. *DeSoignies v Cornasek House Tenants' Corp.*, 21 AD3d 715 (1st Dept 2005); *Frisenda v X Large Enters.*, 280 AD2d 514 (2nd Dept 2001). Thus, this admission by counsel constitutes an acknowledgment that the plaintiff's original motion for summary judgment did not make out a prima facie case for the relief requested.

Plaintiff now claims the court misapprehended the law, and that the note was properly transferred to plaintiff by "special indorsement." Therefore, plaintiff argues, as holder of the note, plaintiff had standing. Plaintiff argues that regardless of whether the assignment of the mortgage was invalid, they had actual possession of the note. Plaintiff maintains that

production of the note along with the affidavit saying they had physical possession of it on the date of commencement of the action is prima facie evidence that they had possession of the note and therefore standing, and that there is no evidence to the contrary. However, the "special indorsement," or "allonge" was not included in the original motion, nor was any statement about it in any affidavit included in the original motion papers.

A mortgage can be assigned in two ways - by the delivery of the bond (note) and mortgage by the assignor to the assignee with the intention that all ownership interest be thereby transferred or by a written instrument of assignment. *Deutsche Bank Trust Co. Ams. v Peabody*, 20 Misc 3d 1108[A] [Sup Ct, Saratoga County 2008]. Thus, "[e]ither a written assignment of the underlying note or the physical delivery of the note . . . 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; *Weaver Hardware Co. v Solomovitz*, 235 NY 321, 331-332 [1923]; *Payne v Wilson*, 74 NY 348, 354-355 [1878]; *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912, [3rd Dept 2009]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2nd Dept 2007]; *Flyer v Sullivan*, 284 App Div 697, 699 [1954]. However, the fact remains that plaintiff has proven neither assignment of, nor physical delivery of, the note before the commencement of the action.

To be clear, no allonge/indorsement of the Note was included in plaintiff's original motion papers, so the court did not misapprehend the facts. The affidavit of Jaime Walls in the original motion does not mention the transfer of possession of the Note *or* the allonge/indorsement. She relies on the assignment of mortgage which counsel now agrees is [*4]insufficient. Thus, on the original motion papers, plaintiff failed to make out a prima facie case for summary judgment. Defendant made out a prima facie case for dismissal, which plaintiff's opposition failed to overcome.

The indorsement plaintiff now points to was provided solely as an exhibit to the Jones Affidavit included in plaintiff's opposition to defendant's cross-motion. Additionally, plaintiff's sole evidence of this alleged indorsement is a photocopy of a document Ms. Jones claims is an assignment of the Note, which is merely a blank piece of paper, allegedly appended to the original note, which states "Pay to the order of US Bank National Association as Trustee, without recourse," and is undated and signed by "Michael Koch, Vice President, Fremont Investment and Loan." At oral argument, the court asked to see the original, and counsel did not have it. Nor did counsel offer to provide it, stating "It's in the

vault." Transcript page16 line 22.

In this motion, plaintiff has included a photocopy of an affidavit of Jessica Jones, Vice President for Loan Documentation for Wells Fargo Bank N.A. Counsel for plaintiff states on page nine of the transcript that "The Jones affidavit and the annexed exhibits were all part of the [original] summary judgment papers." However, Ms. Jones' affidavit of November 1, 2011 was *not* included in plaintiff's motion for summary judgment, but was in plaintiff's opposition to defendant's cross-motion to dismiss. Plaintiff's counsel urges the court to give great weight to Ms. Jones' affidavit, "as the sworn testimony by the custodian" that "they have physical possession of the original note."

Ms. Jones states "the loan was transferred" in July 2006, whatever that means, but as to the note, it only says "the Note was endorsed and was physically delivered to Wells Fargo/ASC as servicing agent and custodian for US Bank prior to the commencement of this action. Thus, Wells Fargo's records specifically reflect that it was in physical possession of the endorsed Note prior to the commencement of this action." Ms. Jones provides no date of the alleged delivery of the Note. This is not specific enough.

The court notes that this matter is further complicated by the fact that after the mortgage closed in 2006 and prior to the commencement of the action in 2008, the FDIC issued a Cease and Desist Order against the lender, Fremont Investment and Loan.[FN2] There was also litigation in several states brought by their Attorneys General against Fremont. Plaintiff now avers that "the loan" had already been transferred to the Trust (for which plaintiff serves as trustee) in 2006 pursuant to the PSA, so that any restrictions Fremont may have been under as a result of the Order were not relevant. In making this argument, plaintiff now avers that the MERS assignment in 2008 "merely memorialized the transfer of the mortgage and note which took place in 2006." The court finds that the plaintiff has not met its burden of proof in this regard, and further that this was not the gist of the original motion which plaintiff seeks to reargue. Many of the lender's assets were sold to Capital Source Bank in June of 2008 with the consent of the FDIC, after its Cease and Desist Order against Fremont in March 2007. Further, Fremont filed for Bankruptcy protection in 2008 in the USDC, Central District of California.

It is particularly troubling that Ms. Jones' affidavit is only dated on the signature page, by [*5]the notary, and her signature is on a page separate and apart from the aforesaid

affidavit, while the preceding page is blank on its lower half. The submission of a photocopy of an affidavit in a case where the allonge was not affixed to the Note, which has a signature page that doesn't follow the end of the affidavit is innately suspicious and raises a question of whether the signer read the affidavit. Here, the clear inference is that she did not read it. Thus, the court cannot give it any weight.

There is also no question that the alleged indorsement herein is on a separate page from the Note and is clearly undated. See, *Indy Mac Bank, F.S.B. v Garcia*, 28 Misc 3d 1202(A) [Sup Ct Suffolk Co. 2010]. New York UCC § 3-202 (1) states, in pertinent part, that "[i]f the instrument is payable to order it is negotiated *by delivery* with any necessary indorsement" (emphasis added). In addition, UCC § 3-202 (2) requires that "[a]n indorsement must be written by or on behalf of the holder and *on the instrument or on a paper so firmly affixed thereto as to become a part thereof* (emphasis added). Here, the purported indorsement is payable to plaintiff's order, but on a separate page.

In the Official Comment to UCC § 3-202(2) (McKinney's) it states "Subsection (2) follows decisions holding that a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not sufficient for negotiation. The indorsement must be on the instrument itself or on a paper intended for the purpose which is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge."

Although the court could not find any New York appellate cases addressing this issue, numerous trial courts throughout the Second Department have ruled that, a note secured by a mortgage is a negotiable instrument, and a transfer requires an indorsement on the instrument itself or on a paper so firmly affixed thereto as to become a part thereof, as per UCC § 3-202 (2), in order to effectuate a valid assignment of the instrument. See, *Deutsche Bank National Trust Company v Hossain,* 2013 NY Slip Op 30096 (U) [Sup Ct Suffolk Co 2013]; *Deutsche Bank Trust Company Americas v Thanhauser,* 2013 NY Slip Op 30565 (U) [Sup Ct Suffolk Co 2013]*; HSBC Bank USA v Picarelli,* 36 Misc 3d 1218 (A) [Sup Ct, Queens Co 2012]; *Deutsche Bank National Trust Company v Vasquez,* 2012 NY Slip Op 31395 (U) [Sup Ct Nassau Co 2012]; *HSBC Bank USA, National Association v Hagerman,* 2011 NY Slip Op 33344(U) [Sup Ct, Richmond Co]; *HSBC Bank USA, National Association v Coyo,* 934 NYS2d 792 [Sup Ct, Kings Co 2011]; *The Citi Group/Consumer Finance, Inc. v Platt,* 33 Misc 3d 1231 (A) [Sup Ct Queens Co 2011]; *IndyMac Bank, FSB v Garcia,* 28 Misc 3d 1202 (A) [Sup Ct Suffolk Co 2010]; *HSBC Bank USA, National Association v Miller*, 26 Misc 3d

407 [Sup Ct Sullivan Co 2009]; *LaSalle Bank National Association v Lamy*, 12 Misc 3d 1191 (A) [Sup Ct Suffolk Co 2006].

At oral argument on January 10, 2013, plaintiff's counsel insisted that the Note was delivered to plaintiff in July of 2006, concurrent with the Pooling and Servicing Agreement (PSA), and represented that said agreement was in the original motion papers. However, counsel then admitted that the Exhibits to the Agreement were omitted, both in the original motion and in this motion, so there is no way to reference this mortgage in said Agreement. When asked, counsel told the court the PSA is "a matter of public record because they are on file with the Securities and Exchange Commission" (transcript of 1/10/13, p 8). The court declines his [*6]invitation to look for it and see if it references this mortgage. It is also noted that while counsel claimed the delivery was made in July of 2006, there is no statement to that effect in the plaintiff's original motion papers from anyone with knowledge of the facts. Further, delivery was made to Wells Fargo as servicer, according plaintiff's counsel, who indicated Wells Fargo is also the "custodian for the Trust" (transcript of 1/10/13, p 3), so in his opinion, plaintiff Trustee did not have to be the recipient of the delivery, as delivery to plaintiff's agent was sufficient. For purposes of the decision, the court accepts that as true and correct.

The problem is that the execution of the PSA does not effectuate a transfer of the Note as contemplated by the applicable statutes and case decisions. The statutes and cases require *both* a proper indorsement *and* physical delivery of the Note. Execution of the PSA does not satisfy either requirement. It merely demonstrates intent to indorse and physically deliver the notes and mortgages referred to.

Paragraph 2.01, referenced by plaintiff, states, in relevant part:

"the Depositor [SG Mortgage securities, LLC], does hereby deliver . . . with respect to each Mortgage Loan so transferred and assigned . . . theoriginal Mortgage Note, endorsed either (A) in blank, in which case the Trustee *shall* cause the endorsement to be completed or (B) in the following form: "Pay to the order of U.S. Bank National Association, as Trustee, without Recourse" [emphasis added].

The quoted text makes it quite clear that delivery is anticipated, but it implicitly also makes it clear that delivery is yet to be accomplished.

Plaintiff's counsel asserted at oral argument that there are two case decisions which the

court should rely on, as they were correctly decided. One of these cases, *Hudson City Savings Bank v Roger Lanoue* (Sup Ct NY Co. 2012; Index No. 107305/09) is a trial court decision in a different Judicial Department, and is not binding on the court. However, the court must note that in the *Lanoue* case the plaintiff demonstrated that it was in possession of both the assigned note and mortgage at the time it commenced the action. This is not the case in the instant matter. The other case, *US Bank v Carlos Guzman* (Sup Ct Queens Co 2012; Index #4451/09) is also from a court of concurrent jurisdiction in the Second Department and also is not binding on this court. It is not reported either. However, the court notes this decision involves a similar PSA to that in the instant case, and not the same agreement. As such, it is possible that the language contained in the PSA in the *Guzman* case concerning the transfer of the notes might be different; which may be inferred from the decision's language.

There is no evidence of delivery of the Note prior to this action's commencement, other than the Jones affidavit, which is conclusory and does not say when the Note was delivered. As discussed above, it also is of limited weight.

Thus, the so-called "indorsement" is, at best, something prepared in compliance with the PSA and subsequent thereto, and fails to support plaintiff's claim that the Note and Mortgage were transferred to plaintiff by a properly indorsed Note prior to the commencement of this action. See, *Deutsche Bank Nat. Trust Co. v Haller*, 2012 NY Slip Op 7619 [2d Dept 2012]; *Deutsche Bank Nat'l Trust Co. v Barnett*, 88 AD3d 636 [2nd Dept 2011]; *Slutsky v Blooming Grove Inn, Inc*., 147 AD2d 208 [2d Dept 1989]; *Indy Mac Bank, F.S.B. v Garcia*, 28 Misc 3d 1202(A).

In conclusion, while the Jones affidavit avers that the original note was timely in the [*7]possession of the plaintiff, the affidavit does not state any factual details concerning when the plaintiff or its agents received physical possession of the note and, thus, does not establish that the plaintiff had physical possession of the note prior to commencing this action. See, *Deutsche Bank Nat'l Trust Co. v Barnett*, 88 AD3d 636; *Aurora Loan Servs LLC v Weisblum*, 85 AD3d 95,108 [2nd Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *HSBC Bank USA v Hernandez*, 92 AD3d 843, 844. Further, plaintiff has not proven that a valid transfer of the note was made to the plaintiff by an indorsement thereon as required by the UCC, or that plaintiff had physical possession thereof prior to commencing this action. See, *Deutsche Bank Nat. Trust Co. v Haller*, 2012 NY Slip Op 7619; *HSBC Bank USA v Hernandez, supra; Deutsche Bank Nat. Trust Co. v Barnett*, 88 AD3d 636. Moreover,

plaintiff's original motion papers make no mention of the indorsement whatsoever.

Without either proof of a proper written assignment of the underlying note or proof of the physical delivery of the note prior to the commencement of the foreclosure action, the plaintiff failed to sufficiently show either the proper transfer of the obligation, or that the mortgage passed as an inseparable incident to the debt. See, *U.S. Bank, N.A. v Collymore*, 68 AD3d 752; *Indy Mac Bank, F.S.B. v Garcia*, 28 Misc 3d 1202(A).

Therefore, upon reargument, the court adheres to its original decision.

This shall constitute the Decision and Order of the Court.

Dated: April 3, 2013

E N T E R:

Hon. Debra Silber A.J.S.C.

Footnotes

Footnote 1:*http://www.justice.gov/usao/nys/pressreleases/October11/stevenbaumpcagreementpr.pdf*

Footnote 2:http://www.fdic.gov/bank/individual/enforcement/2007-03-00.pdf

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