

HSBC Bank USA v Hagerman

2011 NY Slip Op 33344(U)

December 1, 2011

Supreme Court, Richmond County

Docket Number: 130010/10

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 130010/10
Motions No.: 2 & 3**

**HSBC BANK USA, NATIONAL ASSOCIATION as
TRUSTEE for WELLS FARGO ASSET SECURITIES
CORPORATION, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-8
3476 Stateview Blvd.
F. Mill, SC 29715**

Plaintiff

against

**ROBERT HAGERMAN,
ANMARIE HAGERMAN a/k/a ANMARIE HAGERMAN,
AMERICAN EXPRESS CENTURION BANK,
AMERICAN GENERAL HOME EQUITY,
BANK OF AMERICA, N.A.,
BOARD OF MANAGERS of WOODVALE ESTATES
HOMEOWNERS ASSOCIATIONS,
HSBC BANK USA, N.A.,
JOLEEN ARCHUL,
LEAF FUNDING INC. a/a/o FIVE POINT CAPITAL,
NEW YORK ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
RBS CITIZENS N.A.,
VICTORY STATE BANK, and
JOHN DOE (Said name being fictitious, it being the intention
of the plaintiff to designate any and all occupants of premises
being foreclosed herein, and any parties, corporations or
entities, if any, having or claiming an interest or lien upon the
mortgaged premises.**

DECISION & ORDER

HON. JOSEPH J. MALTESE

Defendants

The following items were considered in the review of the following motion for a protective order and counter-motion for summary judgment or dismissal

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits and Cross-Motion	2
Opposition to Cross-Motion	3
Replying Affidavits	4
Exhibits	Attached to Papers
Memoranda of Law	5 & 6

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The plaintiff, HSBC Bank USA moves for a protective order against the demand for discovery and inspection, request for admissions, interrogatories, depositions and demand for witnesses, made by the defendant, Annmarie Hagerman a/k/a Anmarie Hagerman's. The plaintiff's motion for a protective order is granted. The defendant cross-moves for dismissal or summary judgment against the plaintiff, to sever the defendant's counter-claims, to vacate the notice of pendency, and to quiet title. The defendant's cross-motions are denied.

Facts

This is an action based upon foreclosure on the real property commonly known as 47 Carol Court, Staten Island, New York 10309. Foreclosure followed upon non-payment of notes secured by a mortgage on the subject property by the defendant . The defendant has posed extensive demands for disclosure upon the plaintiff, against which the plaintiff seeks a protective order. The defendant counter-moves for summary judgment or dismissal; to sever the defendant's counter-claims, to vacate the notice of pendency, and to quiet title. The defendant's counter-claims are that the mortgages to Superior were voided when transferred to MERS without the note; that the notes were void and unenforceable, and that the plaintiff practiced champerty.

On June 1, 2006, both the defendant and Robert Hagerman executed and delivered a note promising to pay \$734,000.00 with interest on the unpaid balance. As security, the defendant alone executed a mortgage to the Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the lender Superior Mortgage Corp. ("Superior"), on the property commonly known as 47 Carol Court, Staten Island, New York 10309. Superior endorsed and transferred both the first note and mortgage to Wells Fargo Bank, N.A. ("Wells Fargo"). On January 29, 2007 a second note was signed both by the defendant and Robert Hagerman for \$123,824.93. As

security, only the defendant again executed a second mortgage for the same property with MERS again acting as the nominee for the lender Superior.

On January 29, 2007, the first and second mortgages were consolidated into one loan of \$839,000.00. A corrected second mortgage was filed on May 14, 2007 rectifying the amount of debt showing on the face of the document. The first, second and consolidated notes and mortgages were endorsed and physically transferred to Wells Fargo and the defendant was notified of the transfer in a letter dated February 26, 2007. On June 28, 2007, the first, the second and the consolidated mortgages and notes were physically delivered, endorsed in blank, to the plaintiff HSBC as part of the Loan Trust, a pool of mortgage loans. Servicing rights were retained by Wells Fargo. The defendant defaulted on the loan in March of 2009, and was notified of the default and acceleration in a letter dated April 12, 2009.

To correct a gap in the chain of title, MERS as nominee for Superior executed written assignments to Superior for the first mortgage on November 3, 2009, and for the second mortgage on November 23, 2009. Superior executed a document on December 15, 2009, memorializing the assignment that was made to the plaintiff on June 28, 2007. The plaintiff served the defendant with a summons and complaint, on the defendant on January 9, 2010, along with a debt validation letter and the notice required by Real Property Actions and Procedures Law Section 1303. A *lis pendens* on the property was filed on January 4, 2010. A verified answer was filed on February 23, 2010.

A request for discovery of expert witness information and combined demand for statements and witnesses; interrogatories, and a request for admissions were mailed to the plaintiff and dated May 10, 2011. The defendant moved to amend his answer on March 31, 2011. On April 6, 2011 the defendant filed a verified amended answer and counter-claims.

Discussion

The plaintiff’s motion for a protective order is granted.

The general standard of disclosure is “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.”¹ The scope of disclosure is limited by “usefulness and reason.”² However, the court may “make a protective order denying, limiting, conditioning or regulating the use of any disclosure device ... to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”³ Supervision of disclosure is within the discretion of the court.⁴ Here, the defendant’s demands for disclosure and for interrogatories employ broad and imprecise language, and include demands for documents and information that are not in the possession or control of the plaintiff. Among the defendant’s demands are the codes used in servicing and accounting software used by the plaintiff and by others, and letters under the control of the plaintiff’s attorney. The defendant’s interrogatories include inquiry into what investors may have known and what previous servicers or sub-servicers may have reported to the Internal Revenue Service. “The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one.”⁵ Therefore, this court will not prune the defendant’s demands and the plaintiff’s motion for a protective order is granted.

The defendant’s motion for summary judgment or dismissal is denied.

In a foreclosure action, “a plaintiff must prove its standing in order to be entitled to relief.”⁶ “[A]ssignment of a note and mortgage need not be in writing and can be effectuated by physical

¹CPLR § 3101 (a).

²*Lopez v. Huntington Autohaus Ltd.*, 150 AD 2d 351, 352 [2d Dept 1989]; *quoting Allen v. Crowell-Collier Pub. Co.*, 21 NY 2d 403, 406 [1968].

³CPLR § 3103 (a).

⁴*City of Mount Vernon v. Lexington Ins. Co.*, 232 AD 2d 358 [2d Dept 1996].

⁵*Bell v. Cobble Hill Health Ctr., Inc.*, 22 AD 3d 620, 621 [2d Dept 2008]; *quoting Lopez v. Huntington Autohaus Ltd.*, 150 AD 2d at 352.

⁶*Bank of New York v. Silverberg*, 86 AD 3d 274, 279 [2d Dept 2011].

delivery.”⁷ In opposition, the defendant cites an action in the Appellate Division, Second Department decided under Ohio’s version of the Uniform Commercial Code.⁸ Here, the plaintiff asserts that prior to delivery to the plaintiff, the instruments were endorsed in blank, and were therefore payable to the bearer.⁹ Because they were payable to bearer, they may be negotiated by delivery alone.¹⁰ Here, the plaintiff asserts in an affidavit that the properly executed first, second and consolidated mortgages and notes were physically delivered to the plaintiff by a predecessor holder in due course. Therefore, the plaintiff has met the *prima facie* burden of being entitled to relief, having been properly assigned the mortgages and notes.

The defendant moves for dismissal on the grounds that the plaintiff does not have legal capacity to sue because it is not the legal holder of the notes and mortgages. This is based upon the defendant’s assumption that MERS did not have authority to assign the mortgages. An affidavit submitted in favor of the plaintiff states that defects in the writings were corrected on December 15, 2009. Moreover, the plaintiff is also legal holder of the mortgages and notes in due course by physical possession. Additionally, this action was commenced after physical possession was given to the plaintiff by the predecessor holder of the mortgages and notes. As holder of both the mortgages and of the notes prior to commencement of this action, the plaintiff has both standing and the capacity to sue for foreclosure.

Having moved for summary judgment, the defendant bears the burden of showing sufficient evidence to demonstrate the absence of competing material issues of fact.¹¹ The defendant must

⁷*Bank of New York v. Silverberg*, 86 AD 3d at 281; *see also LaSalle Bank Natl. Assn. v. Ahearn*, 59 AD 3d 911, 912 [3d Dept 2009].

⁸*Education Resources Institute, Inc. v. Soren*, 85 AD 3d 848, 849 [2d Dept 2011].

⁹Uniform Commercial Code § 3-204 (2).

¹⁰*Id.*; Uniform Commercial Code 3-202 (1); *and Mortgage Electronic Registration System v. Coakley*, 41 AD 3d 674 [2d Dept 2007].

¹¹*Wasserman v. Carella*, 307 AD 2d 225, 226 [1st Dept 2003].

meet the burden of proof to move for summary judgment with proof in admissible form.¹² Conclusory assertions do not meet either party's burden for evidence.¹³ Here, the defendant asserts a conclusory opinion that the plaintiff is not the lawful owner and holder of the mortgages and of the notes, and that the plaintiff does not hold the original notes. The defendant's affidavit also states that "[t]he plaintiff and/or its predecessors were paid when the debt was sold to Wall Street investors." These statements are each merely conclusory. On the basis of failing to present admissible evidence that the plaintiff is not the lawful owner and holder of the mortgages and notes, the defendant's motion for summary judgment is denied.

Further, the defendant, in an affidavit, denies receipt of statutory or other forms of notices of foreclosure, notices of rights or "options to save the premises." However, the plaintiff's exhibits include a letter of default sent to the defendant and dated April 12, 2009. Therefore, the plaintiff has established an issue to be determined by a finder of fact, and summary judgment is denied on the issue of notice to the defendant.

The defendant moves to vacate the notice of pendency on the subject property. A notice of pendency may be cancelled if service of summons has not been completed; if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment has expired.¹⁴ The court may also cancel a notice of pendency if the underlying action was not begun or prosecuted in good faith.¹⁵ Additionally, a notice of pendency may be cancelled by stipulation of the parties,¹⁶ or cancelled by the filing of an affidavit by the claiming authority showing that there

¹²*Alvarez v Prospect Heights Hosp.*, 68 NY 2d 320, 324 [1986].

¹³*Parker v. Mobil Oil Corp.*, 7 NY 3d 434, 449 [2006].

¹⁴CPLR § 1347 (1).

¹⁵CPLR § 1347 (2).

¹⁶CPLR § 1347 (34).

have been no appearances and that the time to appear has expired for all the parties.¹⁷ Here, none of these conditions predicate have been met. Therefore, the defendant's motion to vacate the notice of pendency is denied.

The defendant's additional claims and counterclaims are denied.

The defendant asserts that the plaintiff fell into the trap of champerty, when it undertook to: "buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon..."¹⁸ However, the plaintiff took possession of the notes on June 28, 2007. Because the defendant did not default until March 2009, the plaintiff could not have acquired the mortgages and notes with the intent of commencing an action. Therefore, the defendant's assertion of champerty is spurious.

The defendant has moved for the severance of counter-claims. "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue."¹⁹ The defendant has not defined any inconvenience or prejudice that severance would cure. However, "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."²⁰ The factors to be weighed when uniting or severing a cause of action are efficiency of

¹⁷CPLR § 1347 (5).

¹⁸Judiciary Law § 489 (1).

¹⁹CPLR § 603.

²⁰CPLR § 602 (a).

the discovery process, delay of trial, possible jury confusion, and prejudice to one of the parties.²¹ Here, severance of counter-claims would add costs, delay proceedings and trial, and create inefficiency and jury confusion. Thus, the defendant's counter-claims should not be severed. The decision to sever an action is within the discretion of the court, and without a showing of prejudice to a significant right, the determination is rarely disturbed on appeal. Therefore, The combined weight of factors favors maintaining the union of the plaintiff's and the defendant's claims and counter-claims.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for a protective order precluding the defendant's demands for disclosure, for interrogatories is granted; and it is further

ORDERED, that the defendant's motions for dismissal or summary judgment, to sever the defendant's counter-claims, to vacate the notice of pendency, and to quiet title are denied; and it is further

ORDERED, that the parties return for a conference to **DCM Part 3, 130 Stuyvesant Place, Third Floor, Staten Island, New York on Tuesday, December 20, 2011 at 9:30 AM.**

ENTER,

DATED: December 1, 2011

²¹*Global Imports Outlet, Inc. v. Signature Group, LLC*, 85 AD 3d 662, 663 [1st Dept 2011].

Joseph J. Maltese
Justice of the Supreme Court