| **Brooks-Smith v Washington Mut. Bank** |
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| 2012 NY Slip Op 32621(U) |
| October 12, 2012 |
| Supreme Court, New York County |
| Docket Number: 100308/12 |
| Judge: Carol R. Edmead |
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SCANNED ON 10/17/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~HON. CAROL EDMEAD~~ Justice

PART 35

Brooks-Smith, Derryck

INDEX NO. 100308/12

MOTION DATE 8/23/12

- v -

MOTION SEQ. NO. 001

Chase Bank

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☑ No

FILED
OCT 16 2012
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

Motion sequence 001 and motion sequence 002 are consolidated for joint disposition and decided herein.

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff Derryck Brooks-Smith's motion for summary judgment (seq. 001) based on the alleged default of defendant JP Morgan Chase Bank, N.A. as acquirer of assets and liabilities of Washington Mutual Bank is denied; and it is further

ORDERED that the motion by defendant JP Morgan Chase Bank, N.A. as acquirer of assets and liabilities of Washington Mutual Bank (seq. 002) is granted in its entirety and plaintiff Derryck Brooks-Smith's complaint hereby is dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that counsel for defendant JP Morgan Chase Bank, N.A. shall serve a copy of this order with notice of entry upon all parties within 20 days of this order.

This constitutes the decision and order of the court.

Dated: 10/12/12

J.S.C.

HON. CAROL EDMEAD

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
------------------------------------------------------------------X
DERRYCK BROOKS-SMITH,

Plaintiff,

-against-

WASHINGTON MUTUAL BANK, and CHASE BANK, N.A.,

Defendants.
------------------------------------------------------------------X

Index No. 100308/2012

**DECISION/ORDER**
Motions Seq. 001 and 002

FILED
OCT 16 2012
NEW YORK
COUNTY CLERK'S OFFICE

**HON. CAROL R. EDMEAD, J.S.C.**

MEMORANDUM DECISION[1]

Defendant JP Morgan Chase Bank, N.A., s/h/a Chase Bank, N.A. ("Chase") as acquirer of certain assets and liabilities of defendant Washington Mutual Bank ("WaMu"), moves pursuant to CPLR 3211 (a)(4) and (a)(7) to dismiss the complaint of the plaintiff Derryck Brooks-Smith ("plaintiff"). Plaintiff moves separately for summary judgment.

*Background Facts*

This matter arises from a foreclosure proceeding brought in 2008 by WaMu (Chase's predecessor) against plaintiff in this action[2] (the "2008 foreclosure action") to foreclose a mortgage on the real property located at 36 Hamilton Terrace, New York, New York (the "property"). After plaintiff failed to answer or otherwise move with respect to the complaint, this court entered an order dated December 23, 2008, appointing a referee to compute the amount due on the note and thereafter directed Chase/WaMu to move for a judgment of foreclosure (Orders dated October 25, 2011, and June 5, 2012).

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[1] Motion sequence 001 and motion sequence 002 are consolidated for joint disposition and decided herein.

[2] *See JPMorgan Chase Bank v Derryck Brooks-Smith*, Index No. 107773/2008.

In January 2012, four years after the commencement of the 2008 foreclosure action, plaintiff commenced this action against Chase and WaMu, alleging, in essence, that Chase (or WaMu) lacks standing to foreclose on the property as it is not the holder of the note or mortgage, and thus, not a real party in interest.[3] Plaintiff seeks the court's determination that the "deed is voided and the promissory note rescinded" and that he is "the fee simple title holder" of the property. Chase now moves to dismiss and plaintiff moves for summary judgment.

*Chase's Motion*

In its motion, Chase argues that plaintiff's complaint should be dismissed, first, because Robert Arthur King ("King"), appointed by plaintiff as his attorney-in-fact for purposes of real estate transactions, has no authority to file a complaint on behalf of plaintiff who appears *pro se.*

Further, dismissal is warranted pursuant to CPLR 3211 (a)(4), since the 2008 foreclosure action is currently pending between the same parties on the subject of the lender's right to foreclose upon the property. And, plaintiff's allegation in this action that Chase lacks of standing is essentially a counterclaim or defense that should have been asserted in the foreclosure action.

Furthermore, the complaint should be dismissed pursuant to CPLR 3211 (a)(7) for failure to state a cause of action. Plaintiff's allegations that he had never granted mortgage to a lender First Franklin Financial Corporation are irrelevant for purposes of this [or the 2008 foreclosure action], since plaintiff purchased the property from Robert Horsford after Horsford fully paid his mortgage held by First Franklin (exhibit A to complaint).

Plaintiff opposes the motion arguing that his newly executed power of attorney, dated

[3] Plaintiff's complaint alleges various wrongs and violations purportedly committed by WaMu and/or Chase, including improper transfer of the mortgage, securities fraud, embezzlement, violation of the "Service Performance Agreement due to its poor bookkeeping of accounts" and fraudulent concealment.

May 6, 2012, authorizes King to represent plaintiff concerning "claims and litigation"; the 2008 action is no longer pending, as it "lapsed" when Chase failed to mark it as a "related action" on the request for judicial intervention (RJI) form, filed on February 9, 2012 in connection with its instant motion to dismiss; the court should permit plaintiff to raise issues common to the entire mortgage industry, such as "robo-signing, fraud, misrepresentation, securities fraud"; and, Chase's notice of pendency dated June 2, 2008 has expired on June 2, 2011 and plaintiff has not moved for renewal pursuant to CPLR 6513.

Chase responds that plaintiff's new power of attorney does not cure the deficiency in plaintiff's initial filing since at the time of the filing the complaint, King did not have proper authority to commence this action against Chase. Further, Chase's failure to identify the 2008 action on the RJI form does not affect the status of such action.[4] And, plaintiff failed to raise his claims, either as counterclaims or affirmative defenses, in the related 2008 foreclosure action, when he defaulted in that action. Finally, CPLR 6516 (a) permits Chase to file another notice of pendency, even though the original notice has expired.

*Plaintiff's Motion*

Plaintiff seeks summary judgment on the ground that "defendants are in default based on [his] summons and complaint." (Plaintiff Affidavit, ¶2).

In opposition, Chase argues that it did not default in the instant action as it properly served its pre-answer motion to dismiss on February 9, 2012, 30 days after the service of the complaint on January 10, 2012, and plaintiff [does not dispute that he] received Chase's motion

[4] The court records reflect that after the filing of the instant motions in this action, a status conference was held on June 5, 2012 wherein this court directed Chase to move for a foreclosure of the property within 21 days of that date (*see* this court's Order dated June 5, 2012).

[* 5]

to dismiss. Furthermore, since there is another action pending between the same parties concerning the same matter, *i.e.*, the lender's standing to foreclose, adjudication of the instant action may result in inconsistent results.

Plaintiff responds, again, that King is authorized to litigate on plaintiff's behalf and the 2008 is not "pending" because Chase did not so indicate on the RJI sheet.

*Discussion*

*Plaintiff's Motion*

Plaintiff failed to establish his entitlement to summary judgment. Plaintiff submitted no evidence in support of his argument that "defendants are in default" (plaintiff Affidavit, ¶2). And in any event, the record shows that Chase properly served its pre-answer motion to dismiss on February 9, 2012, 30 days after the service of the complaint on January 10, 2012, and plaintiff does not dispute that he was served with Chase's motion. Thus, plaintiff's motion for summary judgment is denied.

*Chase's Motion*

As an initial matter, the court notes that King's signature on plaintiff's complaint does not warrant striking of the pleading. It is well settled that "generally an individual who exercises the right to act *pro se* cannot then appear through an attorney-in-fact or other person not authorized to practice law" (*see Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP,* 93 AD3d 452, 940 NYS2d 222 [1st Dept 2012], *citing Powerserve Intl., Inc. v Lavi*, 239 F.3d 508, 514 [2001]; *Whitehead,* at 370, 777 NYS2d 917). GOL 5-1502A, which confers general authority upon an agent with respect to "real estate transactions," and permits an attorney-in-fact to prosecute or defend an action arising from a real estate transaction on behalf of his or her principal (GOL 5-

1502A[10]), does not apply to representation as an attorney-at-law. Thus, it cannot be read to displace the provisions of Judiciary Law §478, which, with certain exceptions not relevant here, make it unlawful for anyone other than a person who has been admitted to practice law in New York and has taken the requisite oath, to appear in the courts of record of this state as an attorney-at-law (*see Whitehead v Town House Equities, Ltd.*, 8 AD3d 369, 777 NYS2d 917 [2d Dept 2004]).

Here, while King, as plaintiff's attorney-in-fact, has no authority to file a complaint on behalf of plaintiff who appears *pro se,* the complaint is also signed by plaintiff on his own behalf. Thus, the court declines to strike plaintiff's pleading on this ground.

Notwithstanding the foregoing, the court finds that plaintiff's complaint should be dismissed.

First, the dismissal is warranted under CPLR 3211 (a)(4). "Pursuant to CPLR 3211 (a)(4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action" (*Cherico, Cherico & Associates v Midollo*, 67 AD3d 622, 622 [2d Dept 2009], *citing Whitney v Whitney*, 57 NY2d 731, 732 [1982]).

Here, the 2008 foreclosure action, brought by WaMu as a predecessor of Chase against plaintiff, is essentially between the same parties. Furthermore, since plaintiff in this action challenges Chase's standing to foreclose the mortgage on the subject property, plaintiff's instant action arises from the 2008 foreclosure action. Therefore, the dismissal of this action is warranted on this ground alone.

Furthermore, plaintiff's complaint must be dismissed pursuant to CPLR 3211 (a)(7) for

failure to state a cause of action.

On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]; *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 558 NYS2d 917 [1st Dept 1990]).

It is well settled that foreclosure of a mortgage may be brought only by one who has legal or equitable interest in such mortgage (*see Katz v East-Ville Realty Co.*, 249 AD 2d 243, 672 NYS2d 308 [1st Dept 1998]). "Where standing is put into issue by a defendant's answer, a plaintiff must prove its standing if it is to be entitled to relief" (*Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). However, where a defendant in a foreclosure action does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief[5] (*id.*).

Here, it is undisputed that plaintiff failed to answer the complaint in the 2008 foreclosure

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[5] The Court of Appeals has held that an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e) (*Fossella v Dinkins*, 66 NY2d 162, 485 NE2d 1017 [1985]). Under CPLR 3211(e), any objection or defense based, *inter alia*, on lack of standing must be raised in an answer or in a motion made before the answer is due, or it is waived (*see Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo*, 42 AD3d 239; *Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006]).

[* 8]

action and the court appointed a referee (Order dated December 23, 2008) and thereafter directed that Chase move for a judgment of foreclosure and sale (Order dated June 5, 2012). Thus, plaintiff cannot now, four years after the commencement of the 2008 foreclosure action, challenge Chase's standing to foreclose in a separate action.

And in any event, plaintiff does not dispute that he executed and delivered to WaMu a note and a mortgage dated August 23, 2007. Chase has alleged that it is an acquirer of WaMu's assets and liabilities in a transaction that was facilitated by the Federal Deposit Insurance Corporation ("FDIC"), and thus, has legal and equitable interest in the foreclosure of the mortgage on the subject property. Since plaintiff failed to challenge this allegation in its answer to the complaint in the foreclosure action, Chase is relieved of its obligation to prove in *this action* that it is the proper party to seek the requested relief (*Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo*, 42 AD3d 239, *supra*).

Thus, even accepting the facts as alleged in plaintiff's complaint as true, and according plaintiff the benefit of every possible favorable inference, the court holds that plaintiff failed to state a cause of action based on lack of standing. And, "deeming the pleading to allege whatever can be reasonably implied from its statements," the court determines that no other cause of action is sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]).

Accordingly, Chase's motion is granted in its entirety and plaintiff's complaint is dismissed.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that plaintiff Derryck Brooks-Smith's motion for summary judgment (seq. 001) based on the alleged default of defendant JP Morgan Chase Bank, N.A. as acquirer of assets and liabilities of Washington Mutual Bank is denied; and it is further

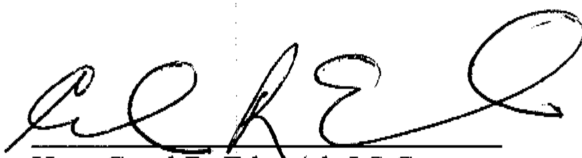
ORDERED that the motion by defendant JP Morgan Chase Bank, N.A. as acquirer of assets and liabilities of Washington Mutual Bank (seq. 002) is granted in its entirety and plaintiff Derryck Brooks-Smith's complaint hereby is dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that counsel for defendant JP Morgan Chase Bank, N.A. shall serve a copy of this order with notice of entry upon all parties within 20 days of this order.

This constitutes the decision and order of the court.

Dated: October 12, 2012



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

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