

<b>Combs v U.S. Bank N.A.</b>
2013 NY Slip Op 33415(U)
December 9, 2013
Supreme Court, Queens County
Docket Number: 1664/2013
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IA Part 14

MARC D. COMBS AND  
MYSCHELLE COMBS,

Index  
No. 1664 2013

Plaintiffs,  
-against-

Motion  
Date August 23, 2013

U.S. BANK NATIONAL ASSOCIATION AS  
TRUSTEE FOR HOME EQUITY MORTGAGE  
ASSET-BACKED PASS-THROUGH  
CERTIFICATES SERIES 2006-EMX8, et al.,

Motion  
Seq. No. 2

Motion  
Cal. No. 34

Defendants.

The following numbered papers 1 to 5 read on this motion by defendants U.S. Bank National Association as Trustee for Home Equity Mortgage Asset-Backed Pass-Through Certificates Series 2006-EMX8 (U.S. Bank), Mortgage Electronic Registration Systems, Inc. (MERS) and Wells Fargo Bank, N.A. (Wells Fargo) (collectively "U.S. Bank defendants") pursuant to CPLR 2221 for leave to renew their motion to dismiss the complaint asserted against them, and upon renewal, to dismiss the complaint asserted against them pursuant to CPLR 3211(a) (1) and (7).

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits ..... 1-5

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action pursuant to RPAPL article 15, alleging that they are the owners of the real property known as 13-47 Beach Channel Drive, Far Rockaway, New

York, pursuant to a deed dated July 13, 2006 and recorded on October 31, 2006, and seeking to declare the mortgage recorded against the property on October 31, 2006, and assignments thereof, to be null and void, and an award of damages. In the complaint, plaintiffs assert five causes of action based, in essence, upon their claim that defendants Mortgage Lenders Network USA, Inc., the original lender, and MERS, with the participation of the other defendants, schemed to separate the mortgage from the underlying note, and assign the mortgage first to defendant Wells Fargo and then to defendant U.S. Bank. Plaintiffs also claim that defendant U.S. Bank nevertheless attempted to enforce the mortgage in a prior foreclosure action without proper standing to do so, and defendants are guilty of unclean hands and should be barred from enforcing the mortgage in the future. Plaintiffs further claim that defendants have been unjustly enriched at plaintiffs' expense, and that the mortgage should be declared null and void.

In lieu of serving an answer, the U.S. Bank defendants previously moved pursuant to CPLR 3211(a) (1) and (7) to dismiss the complaint insofar as asserted against them. By order dated July 10, 2013, the court marked the action as stayed pursuant to the automatic stay invoked under the Bankruptcy Code (11 USC § 362). The court also denied the motion to dismiss with leave to renew within 30 days of the lifting of the automatic stay.

That branch of the motion by the U.S. Bank defendants for leave to renew the prior motion to dismiss is granted. Pursuant to a stipulation and consent order dated May 14, 2013, of the United States Bankruptcy Court, the automatic stay was modified to permit plaintiffs herein to prosecute this action to the extent of seeking reformation of the deeds and mortgages relating to the property and to quiet title to the property in plaintiffs. The instant motion for leave to renew was made within 30 days of the filing of the July 10, 2013 order of this court.

With respect to the branch of the motion to dismiss the complaint insofar as asserted against the U.S. Bank defendants, plaintiffs oppose same.

In considering a motion to dismiss a complaint for failure to state a cause of action (*see* CPLR 3211[a] [7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept 2003]). The criterion is whether the proponent of the pleading has a cause of action, not whether it has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Furthermore, “ ‘[a] party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211 (a) (1) has the burden of submitting documentary evidence that “resolves

all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim” ’ ” (*Sullivan v State of New York*, 34 AD3d 443, 445 [2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2d Dept 2000]; see *Leon v Martinez*, 84 NY2d at 88)” (*Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928 [2d Dept 2010]).

To state a cause of action pursuant to article 15 of the RPAPL, the complaint must set forth facts showing the plaintiff's estate or interest in the real property and that the defendant “might claim an estate or interest in the real property, adverse to that of the plaintiff, and the particular nature of such estate or interest” (RPAPL § 1515 [1] [b]).

In this instance, plaintiffs allege that defendants U.S. Bank and MERS claim a “security interest” in the property “through a loan” secured by the mortgage and note, and Wells Fargo is the “assignee” of the mortgage from MERS, as well as the “custodian.” The mortgage names Mortgage Lenders Network USA, Inc. as the lender, and MERS as the nominee for the lender and the lender's successors and assigns, and the mortgagee of record for the purpose of recording the mortgage.

Plaintiffs make no factual allegations to show that the “interest in the real property,” *i.e.*, the mortgage debt has been paid in full or discharged, or that the mortgage itself is defective, invalid or inoperative. Under these circumstances, plaintiffs have failed to allege facts sufficient to show that any interest claimed by the U.S. Bank defendants in the mortgage is an improper or invalid cloud on their title (RPAPL § 1515; see *Branco v US Mortgage Corp.*, Sup Ct, Nassau County, January 30, 2013, McCormack, J., index No. 601134/2012; *Shui Fong Loo v HSBC Mtge. Corp. (USA)*, 36 Misc 3d 1223[A] [Sup Ct, Suffolk County 2012]; *cf. Piedra v Vanover*, 174 AD2d 191 [1992] [claim that a deed was fraudulent]; *Harris v Thompson*, 24 Misc.3d 1248(A) [2009] [claim by plaintiff that a mortgage against the property was the product of fraudulent inducement]; *3021 Corp. v Napoli*, 49 NYS2d 399 [NY Sup 1944] [claim that the second mortgage was not valid and subsisting lien against the premises, having been previously extinguished and discharged]).

In addition, in a mortgage foreclosure action, a plaintiff's standing is measured from the date of commencement (see *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *HSBC Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]). Thus, should plaintiffs be subject to another foreclosure action for default under the mortgage, the affirmative defense of lack of standing will be determined therein. But, for the purpose of this action to cure title of adverse claims and void the mortgage, the allegations of lack of standing by plaintiffs *vis-a-vis* the U.S. defendants are insufficient to establish the existence

of a justiciable controversy meriting declaratory relief<sup>1</sup> (*see Shui Fong Loo v HSBC Mtge. Corp. (USA)*, 36 Misc 3d 1223[A]; *contra Stasichin v U.S. Bank Natl. Assoc.*, Sup Ct, Suffolk County, September 20, 2013, LaSalle, J., index No. 18413/2012; *Honig v U.S. Bank N.A.*, 40 Misc 3d 1214[A] [Sup Ct Nassau County 2013]). The first, second and third causes of action in the complaint, therefore, fail to state a cause of action against the U.S. Bank defendants.

As a fourth cause of action, plaintiffs assert that defendants should be barred by the doctrines of unclean hands and estoppel from enforcing the mortgage. To state a claim for injunctive relief based upon the doctrine of unclean hands, a plaintiff must allege the defendant is guilty of immoral, unconscionable conduct, and it relied upon the conduct, and was injured thereby (*see National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12 [1966]). Plaintiffs allege that defendants prepared and caused assignments which violated their own pooling and servicing agreements, and came before the court knowing they had not properly transferred the mortgage and underlying note. Such allegation is insufficient to establish immoral and unconscionable conduct on the part of the U.S. Bank defendants, and in any event, plaintiffs have failed to allege any facts indicating it relied upon any conduct of the U.S. Bank defendants to their detriment.

To state a cause of action based upon an estoppel claim, a plaintiff must allege, “ ‘(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position’ (*Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82 [4<sup>th</sup> Dept 1980]; *see Matter of Benincasa v Garrubbo*, 141 AD2d 636, 638 [2d Dept 1988])” (*First Union Natl. Bank v Tecklenburg*, 2 AD3d 575 [2d Dept 2003]). Plaintiffs have made no allegation of any conduct by the U.S. Bank defendants which amounts to a false representation or concealment of material facts. They also have made no allegation of any reliance upon conduct of the U.S. Bank defendants to their detriment. Plaintiffs’ fourth cause of action insofar as asserted against the U.S. Bank defendants fails to state a cause of action.

To the extent plaintiffs also assert as a fifth cause of action that the U.S. Bank defendants have been unjustly enriched, the elements of an unjust enrichment claim are “that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity

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1. Indeed, assuming, *arguendo*, the U.S. Bank defendants could not demonstrate standing today, they may be able to do so tomorrow. Thus, any determination in this action may be rendered moot.

and good conscience to permit [the other party] to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]; see *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Plaintiffs have failed to allege the manner in which the U.S. Bank defendants were enriched at their expense. Plaintiffs’ only claim is that defendant Residential Funding Company collected payments. The fifth cause of action fails to state a cause of action against the U.S. Bank defendants.

Accordingly, the stay imposed herein is lifted. The motion by the U.S. Bank defendants to renew its prior motion and, upon such renewal, for an order dismissing the complaint insofar as asserted against them is granted. The complaint against these defendants is dismissed.

Dated: December 9, 2013

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J.S.C.