

HSBC Bank USA, N.A. v Chul Seung Shin
2015 NY Slip Op 31132(U)
June 5, 2015
Supreme Court, Queens County
Docket Number: 705092/2014
Judge: Carmen R. Velasquez
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Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action by filing a copy of the summons and complaint on July 22, 2014. Plaintiff seeks to foreclose on a mortgage, as modified, on the subject real property known as 120-27 Rivera Court, College Point, New York given by defendant Chul Seung Shin. Plaintiff alleges in its complaint that it is the holder of the mortgage and underlying note and that defendant Chul Seung Shin defaulted under the terms of the mortgage and note, as modified, by failing to make the monthly installment payment of principal and interest due on February 1, 2014. Plaintiff additionally alleges that as a consequence, it elected to accelerate the entire mortgage debt. Plaintiff also seeks, pursuant to RPAPL article 15, to declare an assignment of mortgage, dated June 28, 2013, and recorded on November 8, 2013 (CRFN 2013000462622), between Bank of America, N.A. (Bank of America) and Nationstar to be a nullity. Plaintiff alleges that Bank of America was not the holder of the mortgage at the time the assignment was executed.

Defendant Chul Seung Shin served an answer to the complaint, asserting various affirmative defenses, including lack of standing, and seeking to rescind the mortgage transaction and void the subject mortgage. It is unclear whether plaintiff served a reply to the counterclaim asserted by defendant Chul Seung Shin.

Plaintiff caused “Mrs. Shin,” sued herein as “John Doe #1,” to be served with process. Plaintiff has determined that there are no other tenants or occupants residing at the subject premises.

Defendants JP Morgan Chase Bank, NA, the Board of Managers of the Villas at Riverview Condominium, Colorado Capital Investments, Inc., New York City Parking Violations Bureau, Bank of America, NA, Nationstar Mortgage, LLC and Mrs. Shin are in default in appearing or answering.

A residential foreclosure conference has not been held because the subject property is not owner occupied (*see* CPLR 3408).

That branch of the motion by plaintiff for leave to amend the caption substituting “Mrs. Shin” as a party defendant for defendant “John Doe #1” is granted solely to the extent that “Jane” Shin, the first name being fictitious and unknown to plaintiff, the person intended being the tenant, occupant or person having or claiming an interest in or lien upon the premises described in the complaint, shall be substituted in the place and stead of “John Doe #1.” The branch of the motion for an order deleting reference to those defendants sued herein as “John Doe #2” through “John Doe #12” is granted.

It is ORDERED that the caption shall now read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

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HSBC BANK USA, NATIONAL ASSOCIATION, AS
TRUSTEE FOR STRUCTURED ADJUSTABLE RATE
MORTGAGE LOAN TRUST 2007-9,

Plaintiff

Index No. 705092/2014

-against-

CHUL SEUNG SHIN; JP MORGAN CHASE BANK, N.A.;
THE BOARD OF MANAGERS OF THE VILLAS AT
RIVERVIEW CONDOMINIUM; COLORADO CAPITAL
INVESTMENTS, INC.; NEW YORK CITY PARKING
VIOLATIONS BUREAU, BANK OF AMERICA, NA;
NATIONSTAR MORTGAGE, LLC; “JANE” SHIN,
THE FIRST NAME BEING FICTITIOUS AND
UNKNOWN TO PLAINTIFF, THE PERSON INTENDED
BEING THE TENANT, OCCUPANT OR PERSON HAVING
OR CLAIMING AN INTEREST IN OR LIEN UPON THE
PREMISES DESCRIBED IN THE COMPLAINT,

Defendants

-----X.

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

With respect to a cause of action for foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Erobo*, 127 AD3d 1176, 1176 [2d Dept 2015]; *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 1080 [2d Dept 2010]). Where the

plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2d Dept 2014]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2d Dept 2014]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, the mortgage, the note, an assignment dated December 27, 2011, a letter of acknowledgment dated August 10, 2013, and a loan modification agreement dated August 20, 2013, the affirmation of its counsel, and an affidavit of Eboney Jones, assistant secretary, on behalf of Nationstar Mortgage LLC (Nationstar), as servicer for plaintiff. The note bears an undated endorsement in blank, by Michele Sjolander, in her capacity as executive vice president of Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender (Countrywide), and indicates it is payable without recourse. The mortgage names Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Countrywide (and its successors and assigns) and indicates that, for the purposes of recording the mortgage, MERS is the mortgagee of record. The December 27, 2011 assignment is between MERS, as nominee for Countrywide, and HSBC Bank USA, N.A., as trustee on behalf of the trust fund "SARM 2007-9 0." The loan modification agreement is between Chul Seung Shin, as borrower, and Nationstar, as lender, and amends and supplements the mortgage and note. The August 10, 2013 letter of acknowledgment is executed by defendant Chul Seung Shin and provides, among other things, that the servicing of the subject mortgage would be performed by Nationstar.

To the extent plaintiff relies upon the December 27, 2011 assignment to establish standing, the assignment to plaintiff of the mortgage states that the mortgage was assigned together with the note. Such an assignment of a note is effective only if the party assigning the note has authority to do so (*see Bank of N.Y. v Silverberg*, 86 AD3d at 280-283; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 109). The subject mortgage, however, does not specifically give MERS the authority to assign the note, and plaintiff has presented no evidence that MERS was actually in possession of the note at the time of that assignment. Therefore, in the absence of any proof that MERS had the authority to assign the note on behalf of Countrywide, and there being no other proof that the note was assigned to plaintiff, the December 27, 2011 assignment, at the most, effected an assignment of the mortgage without the underlying note. Because an assignment of a mortgage without the underlying debt is a nullity (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept 2009]; *Bank of N.Y. v Silverberg*, 86 AD3d at 280), plaintiff's standing has not been established by virtue of the December 27, 2011 assignment.

To the extent plaintiff asserts that it had physical possession of the note at the time of the commencement of this action, the affidavit of Ms. Jones does not give any factual details as to when plaintiff received physical possession of the note (*see US Bank Nat. Assn. v Faruque*, 120 AD3d 575 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept 2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 108; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]) and by whom physical delivery of the note was made (*see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *cf. Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627). In addition, there has been no showing that Nationstar, the purported servicer of the subject mortgage loan, has authority to submit such affidavit on behalf of plaintiff (*see HSBC Bank USA, N.A. v Betts*, 67 AD3d 735 [2d Dept 2009]). That defendant Chul Seung Shin previously recognized, in connection with the loan modification agreement, the authority of Nationstar to service the subject mortgage loan does not prove Nationstar can act on behalf of plaintiff in connection with prosecution of this foreclosure case.

Under such circumstances, plaintiff has failed to establish, prima facie, that it had standing to commence the action. Those branches of the motion by plaintiff for summary judgment on the cause of action for foreclosure and to strike the affirmative defense asserted by defendant Chul Seung Shin based upon lack of standing are denied.

That branch of the motion by plaintiff for summary judgment on its claim pursuant to RPAPL article 15 is denied. Plaintiff has failed to establish its prima facie entitlement to judgment as a matter of law on the cause of action to declare the assignment of mortgage, dated June 28, 2013, and recorded on November 8, 2013 to be a nullity (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). In addition, the existence of the June 28, 2013 assignment raises an issue of fact as to whether plaintiff has standing to bring this action.

In view of the open question of whether plaintiff has standing to bring this action, the remaining branches of the motion, to strike the affirmative defenses of defendant Chul Seung Shin, for leave to enter a default judgment with respect to defendants JP Morgan Chase Bank, NA, the Board of Managers of the Villas at Riverview Condominium, Colorado Capital Investments, Inc., New York City Parking Violations Bureau, Bank of America, NA, Nationstar Mortgage, LLC and Mrs. Shin, and for leave to appoint a referee are denied at this juncture.

Dated: June 5, 2015

CARMEN R. VELASQUEZ, J.S.C.