SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR MASTR SPECIALIZED LOAN TRUST 2007-01 MORTGAGE PASS-THROUGH CERTIFICATES,

Plaintiff,

-against-

CLAUDE FLEURIMOND, JULIE BLAINE A/K/A JULIE BLAIN and GF CAPITAL FUNDING CORP.,

Defendants.

DECISION / ORDER

Index No. 509893/15
Motion Seq. No. 1 & 2
Submitted: 2/11/16
RE: 929 East 92nd St.
Block 8125 Lot 17
(and part of 118)

HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for a Subpoena Duces Tecum and defendants' cross-motion for summary judgment dismissing the complaint

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	1-3
Notice of Cross-Motion, Affirmation and Exhibits Annexed	4-10
Affirmation in Opposition and Exhibits Annexed	11-20
Other:	

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

Plaintiff moves for a Subpoena Duces Tecum directing the New York City Department of Health to provide to plaintiff's counsel a copy of the death certificate for someone named Marie Milfort, who was the owner of 98 percent of the property at the time of her death in 1999. As this is an action to quiet title, and *inter alia*, for a

declaratory judgment that plaintiff has a valid first lien on the property, the court grants the motion and has signed the proposed Subpoena supplied therewith. The court notes that plaintiff's counsel specifically states in the motion that, upon receipt of the death certificate, he may need to move to amend the complaint.

Nonetheless, defendants cross-move to dismiss the complaint in its current iteration, instead of waiting to see if the plaintiff moves to amend the complaint. Oddly, both defendants who claim to be the current fee owners and defendant GF Capital Funding Corp. are represented by the same attorney. This seems even stranger when learning from the papers that defendant GF Capital has obtained a Judgment of Foreclosure and Sale in 2010 against defendant borrowers Fleurimond and Blaine (Ind. 28561/07). The court records also indicate that an auction was held by the court-appointed referee on October 7, 2010, and the plaintiff (defendant herein, GF Capital) was the purchaser. However the referee never issued a deed to GF Capital and it is unclear whether Claude Fleurimond and Julie Blaine are aware that they lost their ownership of the building in 2010. At this point, a closing cannot occur without a further order of the court. GF can be considered to have a valid judgment. Even more unusual is the assertion of a counterclaim in the Answer for slander of title on behalf of not only the defendants as alleged owners but also on behalf of GF Capital. There is a different law firm for plaintiff on this counterclaim, presumably hired by the title company that insured the mortgage to plaintiff's predecessor in interest.

Defendants state they bring this motion pursuant to CPLR 3212, that they are entitled to summary judgment dismissing the complaint, on the grounds that plaintiff has no standing to bring an action to quiet title or to obtain a declaratory judgment

with regard to the priority or validity of their mortgage. Presumably this is under the provisions in 3212(b) that permits a motion to dismiss if a cause of action has no merit. It is noted that there are seven affirmative defenses in the Answer, but only some of them are asserted in the motion. These are the affirmative defenses denoted First, Second and Fifth.

The First affirmative defense (incorrectly called second, as is the second one) alleges that plaintiff Deutsche Bank is not authorized to do business in New York and therefore cannot bring this proceeding. However, a nationally chartered bank does not need to be "authorized to do business" in New York in order to bring an action. Banking Law §200 authorizes foreign banks to loan money secured by mortgages on property in this State and to commence actions to enforce obligations under those mortgages (*see, First Wis. Trust Co. v Hakimian*, 237 AD2d 249 (2d Dept 1997); *Banque Arabe Et Internationale D'Investissement v One Times Sq. Assocs. Ltd. Partnership,* 193 AD2d 387; *Integra Bank N. v Gordon,* 164 Misc 2d 691, 695; *Skylake State Bank v Solar Heat & Insulation,* 148 Misc 2d 32).

The Second affirmative defense alleges that plaintiff lacks standing to bring the action due to a defective assignment of mortgage between Zurich Mortgage Solutions LLC and American Residential Equities, Inc. Defendants' attorney elaborates in his affirmation that "the assignment . . . from Zurich Mortgage Solutions LLC to American Residential Equities, Inc. [which] precedes any assignment to [plaintiff] Deutsche Bank . . . is fatally flawed and thus there is no valid chain of assignments to Deutsche Bank and it has no standing to sue." He concludes that since the notary failed to print the name of the Zurich person who signed it, and because it is "robo-signed," it is the "very death certificate of this case." The court

disagrees. If plaintiff is the holder of the note with a proper endorsement, plaintiff has standing to bring this action. In the complaint, it is alleged that plaintiff "is the owner of the note secured by the Zurich mortgage." An error in an assignment of mortgage can be corrected if necessary.

Plaintiff's counsel states in an affirmation in opposition (paragraph 23)that plaintiff has been in possession of the note since a date prior to the date this action was commenced. Annexed as Exhibit A is the note, with applicable allonges executed in blank and signed by Zurich and by Residential Equities. This is sufficient in response to a motion to dismiss, although an affidavit from the party would be necessary if plaintiff were moving for summary judgment.

As the Appellate Division, Second Department, states in Bank of N.Y. Mellon v Visconti, 2016 NY Slip Op 01276:

> "Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief" (*Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888, 934 N.Y.S.2d 182). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it was either the holder or assignee of the underlying note at the time the action was commenced (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627, 980 N.Y.S.2d 475, *affd* 25 NY3d 355, 12 N.Y.S.3d 612, 34 N.E.3d 363; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 N.Y.S.2d 532; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753, 890 N.Y.S.2d 578). "Either a written assignment of the underlying note or the physical delivery of the note prior to [*2] the commencement of the

foreclosure action 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 at 754; *see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108, 923 N.Y.S.2d 609). Here, in support of that branch of its motion which was for summary judgment on the complaint insofar as asserted against the defendant Katarzyna Visconti, the plaintiff demonstrated, prima facie, its standing as the holder of the note by submitting the affidavit of Seth Downing, an assistant vice president for the plaintiff's loan servicer, who established that the plaintiff had physical possession of the note prior to the commencement of the action."

The Fifth affirmative defense claims that, as the complaint fails to state the powers granted to the trustee, the action by Deutsche Bank as Trustee cannot be maintained, as the trust owns the note, not the trustee. Defendants are again incorrect.

There is no question that the trust at issue is a business trust, as it is managing mortgages. It has long been held that " The trustees of a true business trust are principals and not agents, and in contracting for the trust estate, in conducting its business, and in holding and managing its property, the trustees act as principals and not as agents or representatives of the shareholders. *Brown v Bedell*, 263 N.Y. 177, 188 N.E. 641 (1934). Business trusts differ from ordinary trusts in that the primary purpose of the business trust is to conduct a business for profit, while the object of the traditional trust is to hold and conserve particular property, and its powers are incidental to this purpose. (*See* 15A NY Jur Business Relationships §

1485).

In determining a motion to dismiss, the court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2nd Dept 2005]. *See also Leon v Martinez,* 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg,* 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens,* 273 AD2d 193 [2nd Dept 2000].

The standard of review 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." *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg,* 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC,* 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester,* 282 AD2d 561, 562. The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez, 84* NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally

construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

In this matter, plaintiff brought this action because its predecessor in interest, Zurich, did not obtain the co-owner's signature (Blaine) on the mortgage, and thus they wanted to obtain an order that, despite this omission, they still had a valid first lien. Subsequently, plaintiff's counsel claims it discovered that there is a problem with the chain of title, which the title company for Zurich did not discover in 2006 when they issued their mortgage. Thus, the plaintiff made a motion for a subpoena for the death certificate and stated that the complaint will probably have to be amended.

A quick look at ACRIS confirms plaintiff's claim. Title was not correctly transferred to defendants Blaine and Fleurimond, as the 1993 deed was to three individuals, Marie Milfort (formerly Fleurimond) as to 98%, and two others as to 1% each. The next deed, executed by someone named Jean Claude Lima in 2004 to three different people, merely says that Jean Claude Lima is the transferor (and one of the transferees) because Ms. Milfort is deceased. It doesn't say that he is the executor or the sole heir or in what capacity he signed the deed, nor does he account for the other two people who were in title, at least one of whom was also deceased by 2004 (Mathe Nicofaine[1]). Then, these three people who were the transferees executed a quit claim deed in 2005 to Julie Blaine and Claude Fleurimond prior to the issuance of either mortgage. Clearly, there needs to be some clarification and correction to the chain of title. At this point, the best way to accomplish this would seem to be by a court judgment quieting title once all the facts and relationships are ascertained and the proper parties notified.

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[1]According to the public online Social Security Death Registry.

The court has not addressed the problems with Lot 118, but feels it is necessary to note that both mortgages claim to encumber "part of Lot 118," which is an adjacent lot, but the documents that are recorded on Lot 17 are not all recorded on Lot 118.

For the reasons stated above, the defendants' motion is denied in its entirety.

This shall constitute the Decision and Order of the Court.

Dated: February 29, 2016

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court