Goldman Sachs Mtge. Co. v Mares
2017 NY Slip Op 30576(U)
March 28, 2017
Supreme Court, Tompkins County
Docket Number: 2014-0201
Judge: Eugene D. Faughnan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At a Trial Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 28th day of March, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

GOLDMAN SACHS MORTGAGE COMPANY

Plaintiff,

-vs-

JOHN F. MARES, ANN F. MARES, "JOHN DOE #1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

DECISION AND ORDER
AFTER TRIAL

Index No. 2014-0201

APPEARANCES:

COUNSEL FOR PLAINTIFFS:
LEOPOLD & ASSOCIATES, PLLC
BY: Henry P. DiStefano, Esq.
80 Business Park Drive, Suite 110
Armonk, NY 10504

COUNSEL FOR DEFENDANTS:
LEVENE GOULDIN & THOMPSON, LLP
BY: Richard P. Ruswick, Esq.
121 E. Buffalo Street
Ithaca, NY 14850

EUGENE D. FAUGHNAN, J.S.C.

This action seeks to foreclosure on certain real property located at 170 Buck Road in Lansing, New York. Following a non-jury trial, both sides submitted Post-trial briefs, which have been reviewed and considered. After due deliberation, this constitutes the Court's Decision and Order in this matter.

BACKGROUND FACTS

John F. Mares and Ann F. Mares ("Defendants") executed a Note and Mortgage on or about September 30, 2005 with respect to this residential property. The Note was given to Freestone Enterprises, Inc. ("Freestone"), the original lender, and the mortgage was given to Mortgage Electronic Registrations Systems, Inc. ("MERS"), as mortgagee and nominee for the lender. The Mortgage and Note were assigned to various entities over the course of several years. Goldman Sachs Mortgage Company ("Plaintiff") alleges that the loan documents were eventually assigned and transferred to it, and that, therefore, it has standing to bring this action. Defendants challenge Plaintiff's standing.

The Summons and Complaint were filed on March 4, 2014. The Complaint alleges that borrowers defaulted in payment in July, 2007. The complaint further alleges that "[t]he subject mortgage was ultimately assigned by written agreement... to [plaintiff] by assignment of mortgage executed on March 28, 2012" (Complaint at ¶6), and that the Plaintiff "is in possession of the original note with a proper endorsement and/or allonge and is therefore, the holder of both the note and mortgage, which passes as incident to the note." (Complaint at ¶7).

Defendants filed a Verified Answer with affirmative defenses and a counterclaim. The affirmative defenses included the statute of limitations, and that the Plaintiff lacked the standing or capacity to sue, because it was not the holder of the subject Note and Mortgage at the time the case was commenced.

PROCEDURAL HISTORY

Plaintiff filed a Motion for Summary Judgment and an Order of Reference in July, 2014. Defendants opposed the Motion, and made a Cross-Motion seeking Summary Judgment and dismissal of the Complaint, asserting, among other things, that the action was barred by the statute of limitations. By Decision and Order entered November 17, 2014, Plaintiff's Motion for Summary Judgment was denied without prejudice to renew; and Defendant's Cross-Motion to dismiss was denied. The Decision and Order also granted Defendant an opportunity to complete discovery. The Court found that Plaintiff had failed to establish that it had **physical possession** of the Note prior to the commencement of the action, because the affidavit in support "lack[ed] any details of a physical delivery of the note and thus faile[ed] to establish that plaintiff had physical possession of the note prior to the commencement of the action." *November 17, 2014 Decision and Order at p.3 (citations omitted)*. The Court also denied Defendant's Cross-Motion with regard to the Statute of Limitations, finding that the evidence did not support Defendant's claim in that regard. Defendants had argued that the loan had been accelerated more than six years prior to the commencement of this action, and therefore this claim was time-barred. The Defendant appealed the Court's determination regarding the Statute of Limitations, which resulted in a Decision from the Appellate Division, Third Department, affirming the November 17, 2014 Decision and Order. *Goldman Sachs Mtge Co. v. Mares*, 135 AD3d 1121 (3rd Dept. 2016).

Subsequently, Defendant made additional Motions; one for additional time for discovery, and another to preclude Plaintiff from offering certain evidence at trial, due to the fact that Plaintiff had not produced the original Note. With respect to the discovery motion, Defendant was granted an indefinite extension of time for discovery. With respect to the Motion to preclude, the Court made various findings and ultimately ruled that "unless the plaintiff produces the original Note at the office of defendant's attorney within 30 days of entry of this order, plaintiff is precluded from submitting any evidence in this matter to the effect that plaintiff was in possession of the original Note as of [the date of commencement]." *May 29, 2015 Decision and Order at pp. 5-6*. Plaintiff failed to produce the original Note as ordered by the Court.

Defendants subsequently moved for summary judgment dismissing the complaint on the ground that Plaintiff could not prove it had possession of the original Note, since it could not introduce evidence to that effect. In the December 23, 2015 Decision and Order, the Court denied Defendants' Motion for Summary Judgment, concluding that preclusion of proof of possession of the Note at the time of commencement would not completely prevent Plaintiff from proving standing. Specifically, the Court noted "[i]t may be that on the trial of this matter plaintiff may be able to establish, by testimony or documentary evidence, that at the time of commencement of this action it held the note and mortgage by validly executed assignments since plaintiff may demonstrate that it is the holder of the note by showing a written assignment of the note." (*December 23, 2015 Decision and Order at p.6 [citation omitted]*).

This matter then proceeded to trial in November, 2016. Plaintiff called one witness, Eric Hughes ("Hughes"), a Quality Assurance Specialist for Fay Services ("Fay"), which currently services the mortgage. Plaintiff introduced a limited Power of Attorney in favor of Fay, and an Assignment of Mortgage, which transferred the subject mortgage and underlying debt to the current owner of the loan.[1] Hughes testified that he reviewed all the records maintained by Fay in connection with this loan, and that these records were kept in the normal course of Fay's day to day business, in the ordinary course of its business, and created at or near the time of the events or transactions. Hughes also testified that all the records from the prior servicers of the loan were integrated into Fay's records, and are the type of records routinely relied upon. Hughes also gave testimony concerning the default on the loan in July, 2007 and the pre-commencement notices provided to the borrowers. Defendants' arguments primarily deal with the issues surrounding standing, and not on the pre-commencement notices.

Following the trial of this matter, the Court provided both parties with an opportunity to make post-trial submissions outlining their positions on the case. Both parties summarized the facts and their arguments in support of their respective positions.

---

[1]Subsequent to the commencement of this action, Goldman Sachs Mortgage Company has assigned its interests to Wilmington Trust. This Decision and Order refers to them collectively as Plaintiff.

DISCUSSION

A plaintiff in a foreclosure action "establishe[s] its prima facie entitlement to summary judgment by submitting the mortgage and unpaid note, along with evidence of defendant's default." *JP Morgan Chase Bank, N.A. v. Venture*, 2017 NY App. Div. LEXIS 1576, *2 (3rd Dept. March 2, 2017) *citing Nationstar Mtge., LLC v. Alling*, 141 AD3d 916, 917-918, 35 N.Y.S.3d 541 [2016]; *Bank of N.Y. Mellon v. McClintock*, 138 AD3d 1372, 1373, 31 N.Y.S.3d 252 [2016]; *Deutsche Bank Natl. Trust Co. v. Monica*, 131 AD3d 737, 738, 15 N.Y.S.3d 863 [2015]). Where defendant raises the issue of standing in the answer, plaintiff has "the additional burden of demonstrating that, at the time the action was commenced, it was the holder or assignee of the mortgage and the holder or assignee of the underlying note." *Wells Fargo Bank, N.A. v. Walker*, 141 AD3d 986, 987 (3rd Dept. 2016) [citations omitted]; *Citibank, N.A. v. Abrams*, 144 AD3d 1212 (3rd Dept. 2016); *Everhome Mtge. Co. v. Pettit*, 135 AD3d 1054, 1055 (3rd Dept. 2016). "'Either a written assignment of the underlying note or the physical delivery of the note prior to 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. Carnivale*, 138 AD3d 1220, 1221 (3rd Dept. 2016), *quoting Onewest Bank, F.S.B. v. Mazzone*, 130 AD3d 1399, 1400 (3rd Dept. 2015); *see Aurora Loan Servs, LLC v. Taylor,* 25 NY3d 355 (3rd Dept. 2015); *Deutsche Bank Natl Trust Co. v. Haller*, 100 AD3d 680 (2nd Dept. 2012). "[T]he note[,] and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law." *Deutsche Bank v. Monica,* 131 AD3d at 738; *Wells Fargo Bank v. Walker*, 141 AD3d at 987. In the present case, given the Court's prior Decision and Order dated December 23, 2015, the Plaintiff is precluded from establishing possession of the note at the time of commencement to prove its standing, but the Court stated that Plaintiff would have to "demonstrate its standing by showing valid written assignments of the note to the plaintiff prior to commencement." *December 23, 2015 Decision and Order at p.5 (citations omitted).* Thus, the only issue is whether Plaintiff has established that it has standing by written assignments of the underlying note.

The issue of standing often comes up in a motion for Summary Judgment, and the

question is whether there is *any issue of fact* as to the Plaintiff's possession, or assignment, of the Note. In the present situation, the question is brought forth in the context of the trial, and the question is whether Plaintiff *has proved*, by a preponderance of the evidence, that it has standing by virtue of written assignments of the Note.

EVIDENCE AT TRIAL

Admissibility

At the trial, Hughes testified regarding the records in Fay's possession concerning this loan. Defendants have maintained their objection to the admissibility of those records, contending that they constitute inadmissible hearsay. Plaintiff claims they fall within the business records exception to the hearsay rule.

As recognized by both parties, in *Deutsch Bank Nat'l Trust Co. v. Monica*, *supra*, the Third Department provided the standard for the admissibility of mortgage records held by the servicer of a loan, and provided a broader reach for the business records exception. In that case, the court stated:

> While "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records" (*People v Cratsley*, 86 NY2d 81, 90, 653 NE2d 1162, 629 NYS2d 992 [1995] [internal quotation marks and citation omitted]), such records are nonetheless admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" (*State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 1296, 956 NYS2d 196 [2012] , *lv denied* 20 NY3d 858, 984 NE2d 325, 960 NYS2d 350 [2013]). To be admissible, these documents should carry the indicia of reliability ordinarily associated with business records (*see People v Cratsley*, 86 NY2d at 91; *One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 11, 925 NYS2d 61 [2011]; *Corsi v Town of Bedford,* 58 AD3d 225, 231-232, 868 NYS2d 258 [2008], *lv denied* 12 NY3d 714, 911 NE2d 860, 883 NYS2d 797 [2009]). Given Acqura's agency status as servicer of the loan for plaintiff, we agree with plaintiff that the Acqura records qualify as business records (see CPLR 4518 [a]; *People v Cratsley*, 86 NY2d at

> 90; *Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc.*, 30 AD3d 336, 337, 819 NYS2d 223 [2006], *lv denied* 7 NY3d 715, 859 NE2d 920, 826 NYS2d 180 [2006]).

Monica, 131 AD3d at 739.

In the present case, Plaintiff presented evidence establishing Fay's authority, through a Limited Power of Attorney to appear on behalf of Plaintiff (Plaintiff's trial Exhibit "1"). Hughes also testified regarding the transfer of servicing rights from the prior servicers to Fay (Plaintiff's trial Exhibit "8"). His testimony also related that the loan documents were in Fay's records, had been given to Fay by the preceding servicer of the mortgage, continue to be maintained by Fay, and are routinely relied upon by Fay. Although Defendant argues that Hughes did not have knowledge of the execution of the underlying documents or the circumstances under which they became part of the records of the previous servicer of the loan, his testimony does establish Fays's agency status as servicer of the loan for plaintiff, and that Fay routinely relies upon these records in its business. In *Monica*, the Third Department held that the agency status of the servicer and the servicer's routine reliance upon the records in its business, qualified the servicer's records as business records. *See also Bank of NY Mellon v. McClintock*, 138 AD3d 1372 (3rd Dept. 2016); *See e.g. HSBC Bank USA, N.A. v. Corazzini*, 2017 NY App. Div. LEXIS 1721 (3rd Dept. 2017) (testimony from a loan analyst employed by the loan servicer's parent corporation that she relied upon the records of the servicer, which incorporated records of prior servicers used to establish Plaintiff's standing). Similarly, Plaintiff in this case seeks to utilize its servicer's records, which incorporated the records of prior servicers. The Court finds such use consistent with established precedent.

Accordingly, the Court concludes that the testimony of Mr. Hughes concerning the records in Fay's files, and the documents submitted by the Plaintiff at the trial, are admissible evidence in support of Plaintiff's case.

Standing

The question of Plaintiff's standing to bring the action is somewhat interwoven with the admissibility discussion above. Inasmuch as Plaintiff seeks to show the reliability of the records in the servicer's file to qualify them as business records, Plaintiff also seeks to use those records to establish its standing to bring the claim.

Defendants argue that Plaintiff has not established its standing to bring this action because of infirmities in showing a valid chain of assignments from the original execution of the loan documents to the Plaintiff. Defendants also contend that reliance upon the Certificate of Merit, and its attachments, which include the Note, with allonges, is impermissible based upon the prior Decisions of this Court. Defendants point to the Decision and Order of November 14, 2014 which found Plaintiff had failed to prove that it had possession of the original Note and Mortgage at the time of commencement of this action. The Certificate of Merit and attachments were part of the evidence considered at that point. Thus, Defendants contend it was insufficient to establish Plaintiff' standing then, and should be insufficient now.

However, the Court's Decision in November 14, 2014 pertained to a Motion for summary judgment, and whether Plaintiff had established its right to judgment at that time. Moreover, the Decision was focused on the possession, not the assignments, and ultimately the Court precluded evidence as to possession, but not as to assignments. The records concerning the assignments continue to be a part of Fay's files, and are entitled to consideration. Moreover, the Court's decision that Plaintiff could not produce evidence to establish its possession of the Note (with allonges), did not preclude Plaintiff from demonstrating it is the holder of the Note by showing a written assignment. It also did not preclude Plaintiff from providing evidence as to the existence of the Note, and any allonges thereto. In order to establish the chain of assignments, the Plaintiff would have to first of all show that there was a Note (with or without allonges). Otherwise, there would be nothing to transfer. The certificate of merit and attachments fall within proof of the existence of the Note and allonges, not possession. Therefore, the Note and allonges are properly considered by the Court.

The Note and Mortgage were originally given to Freestone, and according to Plaintiff,

were then transferred to Ohio Savings Bank, which then assigned them to MTGLQ Investors, L.P. ("MTGLQ"), and then they were transferred to Plaintiff (who has since transferred them to Wilmington). Defendants assert that Plaintiff has failed to establish a power of attorney, or other evidence, showing the authority of the entities to make the transfers. *See e.g. Deutsche Bank Nat'l Trust Co. v. Haller*, *supra*. In *Haller*, Plaintiff argued that the Note and Mortgage had been assigned to it by the prior holder of the mortgage, with the assignment having been done by an agent, in that case, an attorney-in-fact. In denying Summary Judgment, the Second Department observed that the Plaintiff had failed to establish the authority of the attorney-in-fact to make such an assignment.

Defendants argue that the assignments in this case are insufficient. The first assignment was to Ohio Savings Bank, who then purportedly assigned it to MTGLQ by an assignment signed by a Robert P. Maxwell. Defendants point out that there is no evidence as to Mr. Maxwell's authority to sign on behalf of Ohio Savings Bank. The next assignment was from MTGLQ to Plaintiff, and that assignment lists Litton Loan Servicing LP ("Litton Loan") as Attorney in Fact for MTGLQ Investors L.P. Defendants point out that there is no evidence establishing Litton Loan as agent for MTGLQ .

Plaintiff, on the other hand, points to its evidence in support of its claim for standing. That includes testimony from Hughes as to the Note and allonges, as well as the 3 assignments of the mortgage in this case, which show the assignment of the subject mortgage and underlying debt to the Plaintiff. Said mortgages were all duly filed in the County Clerk's office. Hughes further testified that Fay's records contain an Attorney Bailee letter from May, 2013. That correspondence details that a prior loan servicer forwarded the original Note and allonges to a law firm in May, 2013 for purposes of commencing a foreclosure action. The allonges and entities involved in the letter are consistent with the allonges attached to the Certificate of Merit, and describe three transfers of the mortgage, with the last being to the Plaintiff. Therefore, according to Plaintiff, the letter serves as evidence of possession of the original loan documents a year prior to commencement of this action.

In ,*HSBC Bank USA, N.A. v. Corazzini*, *supra*, the Third Department, recently gave consideration to a Plaintiff's standing following a non-jury trial. Although that case dealt with a

claim of possession of the Note prior to commencement, the court's reasoning is instructive. In that case, a note was executed in favor of Freemont Investment and Loan and following default on the loan, a foreclosure action was commenced. Defendant raised lack of standing, and the Supreme Court ordered a trial on the issue, and ultimately ruled that Plaintiff was in possession of the Note at the time of commencement and therefore had standing. Plaintiff had offered testimony from a senior loan analyst, who was familiar with the loan servicer's records and confirmed that they were prepared in the regular course of business (seemingly satisfying the Court as to the admissibility of the records). The loan analyst also testified that the subject loan and many others were placed in trust with Plaintiff as trustee, and that the original documents were in a "collateral file in the physical care of the trust's custodian. She relied upon the records of the servicer, which incorporated records of prior servicers, to state that the trust received the note and other documents in the collateral file [one month after it was executed]." *Corazzini, supra* at *4. She also provided testimony about a pooling agreement confirming the trust obtained the note prior to the commencement, and the original note from the collateral file, which was indorsed in blank by the original holder. Despite the fact that there was no testimony as to how the Note came into Plaintiff's possession, "that information was not required in light of the extensive proof showing that plaintiff possessed the original note by the time that this action was commenced [citations omitted]" *Id.* The court deferred to the supreme court's credibility determination and concluded that "review of the proof leaves us confident that the plaintiff was in possession of the note before commencing this action and had standing to pursue it [citations omitted]." *Id.*

Although *Corazzini* involved a claim of possession of the note to support standing, the Third Department's analysis of the type of proof required to prove that is important to the instant case, and the evidence in this case is quite the same. Similarly, in *Bank of NY Mellon v. McClintock supra* the Third Department also analyzed the type of proof needed to prove standing in the context of a summary judgment motion. In *McClintock*, the note was indorsed in blank without recourse, and therefore did not aid in determining plaintiff's possessory interest, so the plaintiff offered affidavits to support that. The affidavits were from individuals working for loan servicers, and included a statement from one individual that the plaintiff had taken physical

possession prior to the action being commenced. Defendant did not produce any evidence to contradict the affidavits or any other evidence that plaintiff was not in possession of the note. Therefore, the majority concluded that the plaintiff had shown possession and was entitled to summary judgment.

Plaintiff's evidence in this case includes the testimony from Hughes; the Certificate of Merit with attachments, including two allonges that transfer the note to the Plaintiff; assignments of the mortgage which transfer the mortgage and underlying debt to the Plaintiff (notwithstanding Defendant's arguments that the agency status is unproven); an attorney bailee letter forwarding the original note and allonges to its counsel to commence an action on its behalf approximately one year prior to commencement of this action, which identify this loan and borrower, and contain a description of the allonges consistent with the information in the Certificate of Merit. Defendant has not produced any evidence which would tend to dispute Plaintiff's evidence, or provide any other explanation. Thus, the Court concludes that Plaintiff has established its standing to commence the action

DEFAULT AND ORDER OF REFERENCE

The testimony and documentary evidence submitted by Plaintiff also establish a prima facie case for summary judgment in that Plaintiff has produced evidence of the mortgage, the unpaid note and the Defendant's default. Hughes testified as to the default starting in July, 2007 which has not been cured, and as to the pre-commencement notices. Defendant has not produced any evidence to dispute or call into question those allegations, and has not raised them in the post-trial memorandum.

Accordingly, the Court concludes that Plaintiff has established the Defendant's default and Plaintiff's entitlement to Summary Judgment and an Order of Reference.

CONCLUSION

Accordingly, the Court finds and concludes that Plaintiff has established its standing to maintain this action and that Plaintiff has further established its entitlement to the relief sought in its complaint, and the Court hereby rules in favor of the Plaintiff.

Plaintiff is directed to submit a Proposed Order/Judgment consistent with the findings herein, and making provision for the appointment of a Referee and change of caption, on notice to the Defendants, within 20 days of the filing of this Decision and Order.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: March 28, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice