

Wells Fargo Bank, N.A. v Sposato

2013 NY Slip Op 30034(U)

January 7, 2013

Sup Ct, Richmond County

Docket Number: 101504/08

Judge: Joseph J. Maltese

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Calendar No.: 2137-002
Index No.: 101504/08**

**WELLS FARGO BANK, N.A., as Trustee for Option One
Mortgage Loan Trust 2007-02, Asset-Backed Certificates,
Series 200702**

Plaintiff,

against

**DECISION
HON. JOSEPH J. MALTESE**

**JOYCE SPOSATO, CITY OF NEW YORK PARKING
VIOLATIONS BUREAU and JACK RIVERA,**

Defendants.

**The following papers numbered 1 to 3 were fully submitted on the 7th day of September,
2012:**

	Papers Numbered:
Order to Show Cause of Defendant Joyce Sposato (Affirmation, Affidavit in Support) (Dated July 12, 2012).....	1
Affirmation in Opposition of Plaintiff (Dated July 29, 2012).....	2
Reply Affirmation (Dated September 7, 2012).....	3

Upon the foregoing papers, the motion of defendant, Joyce Sposato is granted to the extent herein provided.

This is an action to foreclose a mortgage dated November 8, 2006, upon the property located at 99 Excelsior Avenue, Staten Island, New York. The mortgage was originated by Option One Mortgage Corporation (“Option One”) and was recorded in the Office of the Clerk of Richmond County on December 15, 2006 (*see* Defendant’s Exhibit 1). Plaintiff filed the Summons, Complaint, and Notice of Pendency on April 8, 2008 (*see* Defendant’ Exhibit 2). However, it was not until the

following day, April 9, 2008, that Option One executed the “Assignment of Mortgage” with note on the property to plaintiff Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2007-2, Asset-Backed Certificates, Series 2007-2 (“Wells Fargo”), which was recorded in the Office of the Clerk of Richmond County on April 18, 2008 (*see* Defendant’s Exhibit 4). Upon defendant’s default in appearing or answering, this Court granted a default Judgment of Foreclosure and Sale on October 14, 2008 (*see* Defendant’s Exhibit 12). The foreclosure sale, initially scheduled to be held on December 4, 2008, was cancelled upon defendant’s first order to show cause, dated December 1, 2008 (*see* Plaintiff’s Exhibit I), but was ultimately conducted on November 29, 2011, with the property being sold to plaintiff for the sum of \$443,634.00 (*see* Defendant’s Exhibit 13).

Defendant Joyce Sposato (hereinafter defendant) now moves by order to show cause to, *inter alia*, vacate the October 14, 2008 Judgment of Foreclosure and set aside the ensuing sale on numerous grounds, including plaintiff’s alleged lack of standing (*see* CPLR 5015[a][2], [3], [4]).

In support of her position that plaintiff lacked standing, defendant sets forth three arguments: (1) the Mortgage Assignment to Trust upon which plaintiff relies to show ownership of the note was executed after the commencement of the action; (2) The Mortgage Assignment to Trust is invalid since it was executed by a “robosigner”, Topako Love, who lacked capacity to act on behalf of the originating lender, Option One, and (3) plaintiff has failed to demonstrate that it duly acquired the mortgage and note in accordance with the terms of the “Pooling and Servicing Agreement for Option One Mortgage Loan Trust 2007-2, Asset-Backed Certificates, Series 2007-2.” According to defendant, said agreement prohibited plaintiff from accepting the note as a trust asset because, *inter alia*, pursuant to its terms, any transfer to the Trust must come from a depositor, rather than originator.

In opposition to the application, plaintiff relies largely upon the representations made by Option One’s “Assistant Secretary”, Cindi Ellis, whose April 17, 2008 Affidavit of Merit and Amounts Due submitted in support of the Order of Reference states: “The plaintiff became the owner of the note and mortgage as a result of a purchase thereof for valuable consideration prior to the

commencement of this action.” It further states: “the assignment of Mortgage memorializing plaintiff’s interest has not yet been recorded¹; however, plaintiff has standing to prosecute the foreclosure action in its capacity as beneficial owner and holder of the note and mortgage” (*see* Defendant’s Exhibit 8, para 2). According to plaintiff, these representations settle the question of ownership of the note at the time of commencement of the action, and accordingly, the validity of plaintiff’s standing to foreclose. Plaintiff likewise relies on defendant’s concession (*see* Defendant’s Affirmation in Support, para 10), that her particular loan was included among the mortgages that were pooled into the trust filed with the SEC on March 1, 2007, and is listed in the Free Writing Prospectus relating thereto. However, plaintiff fails to counter defendant’s claim that the Mortgage Assignment to Trust was executed by a robo-signer employed by Lender Processing Services, Inc. of Dakota, MN, rather than by Option One. Nor does plaintiff provide details as to when, where, how and for what consideration it obtained transfer of the “beneficial owner[ship]...of the note” prior to the written assignment.

This Court is mindful that, while the use of its equitable power to set aside its own judicial sale should be exercised “sparingly and with great caution” (Guardian Loan Co. v. Early, 47 NY2d 515, 520), even in the absence of any demonstration of fraud, collusion, mistake or misconduct which casts suspicion on the fairness of the sale itself (*id.*, 520-521; Federal Natl. Mtge. Assn. v. New York Fin. & Mtge. Co., 222 AD2d 647), it is not powerless to act in order to prevent its own judgments and decrees from being made into “instrument[s] of injustice” (Guardian Loan Co. v. Early, 47 NY2d at 520; *see* Matter of Ziede v. Mei Ling Chow, 94 AD3d 771). Moreover, while this exercise of restraint is typically informed by the interests of persons other than the judgment creditor and debtor, who should normally be entitled to rely upon the regularity of the foreclosure sale, those interests will not be affected by a vacatur in this case, since plaintiff, the alleged wrongdoer, purchased the property itself. Under these circumstances, the element of “irreparable harm” which traditionally has barred relief based on allegations of presale acts of misconduct, *e.g.*, fraud or misrepresentation, simply is not implicated (*see* Manufacturers & Traders Trust Co. v. Fay, 79 AD3d 825, 826).

¹This document was recorded one day after Cindi Ellis’ affidavit was executed, on April 18, 2008.

It is well settled that in order to establish a *prima facie* case in an action to foreclose a mortgage, a plaintiff must establish its ownership or possession of the note, the relevant mortgage, and defendant's default in payment at the time the action is commenced (*see Mortgage Elec Registration Sys, Inc. v. Coakley*, 41 AD3d 674; *Household Fin. Realty Corp. of NY v. Winn*, 19 AD3d 545, 546). Thus, the assignee of a note and mortgage has no right or standing to foreclose upon same unless the assignment (which may be affected by physical delivery) is complete as of the time of commencement (*see LaSalle Bank Nat. Assn. v. Ahearn*, 59 AD3d 911, 912; *Bankers Trust Co. v. Hoovis*, 236 AD2d 937, 938). In this context, standing has long been defined as "an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Carprer v. Nussbaum*, 36 AD3d 176, 182). Accordingly, "if standing is denied, the pathway to the courthouse is blocked" (*Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 NY2d 801, 812).

As set forth above, however, defendant's challenge to the judgment pursuant to CPLR 5015(a)(2) and (3) may well have merit, since the moving papers contain some evidence of fraud and/or misrepresentation, while newly validated evidence of possible robo-signing of the Mortgage Assignment to Trust by Topako Love on behalf of Option One, whose signature was notarized in a state where the latter has no offices, and whose capacity to sign on behalf of Option One has been drawn into question, could provide defendant with a viable ground to seek vacatur of the judgment. Curiously, plaintiff has failed to offer any evidence in support of the efficacy of Love's signature.

In light of the foregoing, it appears that the judgment of foreclosure and ensuing sale should be vacated in the interest of justice pursuant to CPLR 5015(a)(2) and (3); that defendant's default be vacated; and that she be granted leave to serve and file a late answer within 20 days of the date of service upon her of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

The parties and their counsel are directed to appear for a conference on this matter in DCM Part 3 on **Friday, January 25, 2013 at 9:30 a.m.**

E N T E R,

DATED: January 7, 2013

Joseph J. Maltese
Justice of the Supreme Court