

Arch Bay Holdings, LLC-Series 2010-B v Allam

2013 NY Slip Op 30541(U)

March 18, 2013

Supreme Court, Richmond County

Docket Number: 130205/11

Judge: Joseph J. Maltese

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

Index No.:130205/11
 Motion No.:003, 004

ARCH BAY HOLDINGS, LLC- SERIES 2010B,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**ALI ALLAM,
 AMIRA ALLAM,
 MORTGAGEIT, INC.,
 CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD,
 CITY WEST CONDOMINIUM I BOARD OF
 MANAGERS/OWNERS ASSOCIATION, and
 JOHN DOE # 1 THROUGH JOHN DOE #12, the last twelve names
 being fictitious and unknown to plaintiff, the person or parties
 intended being the tenants, occupants, persons or corporations,
 if any, having or claiming an interest in or lien upon the premises
 being foreclosed herein,**

Defendants

The following items were considered in the review of the following motion for summary judgment and cross-motion to lift the stay on discovery and conduct a preliminary conference.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Affidavit in Support of Motion	2
Attorney Affirmation in Support of Motion	3
Memorandum of Law in Support of Motion	4
Affirmation in Opposition to Motion	5
Notice of Cross-Motion and Affirmation Annexed	6
Affirmation in Reply	7
Memorandum of Law in Reply	8
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The plaintiff's motion for summary judgment is granted to the extent that: 1) a default shall be entered against The City of New York Environmental Control Board and City West Condominium Board of Managers/Owners' Association; 2) the caption shall be amended striking

the defendants John Doe #1 through John Doe #12. The motion is denied in all other respects. The cross-motion made by the defendants, Ali Allam and Amira Allam (“the Allams”), is granted to the extent that the discovery stay is lifted and the parties shall submit to a preliminary conference setting a discovery schedule.

Facts

This is an action to foreclose a mortgage on a property located at 492A Lisk Avenue, Staten Island, New York. On September 28, 2006 the Allams executed a note for \$180,000 and mortgage in favor of Mortgageit Inc. It is alleged that the Allams defaulted on January 1, 2010. On March 2, 2011 Mortgage Electronic Registrations Systems (“MERS”), as nominee for Mortgageit, Inc. assigned the mortgage on 492A Lisk Avenue, Staten Island, New York to Arch Bay Holdings, LLC-Seris 2010B, the plaintiff. The assignment was recorded in Richmond County Clerk’s Office on March 17, 2011.

This action was commenced by filing a summons and complaint with the Richmond County Clerk on March 17, 2011. According to the affidavit of Anthony Pollard, he served the defendant Amira Allam at the property on March 28, 2011. By a separate affidavit Pollard avers that he served the defendant Ali Allam by delivering a true copy of the summons and complaint to his wife Amira Allam at the property location. Subsequently, on March 30, 2011 Pollard mailed a copy of the summons and complaint to Ali Allam at 492A Lisk Avenue, Staten Island, New York. On April 11, 2011 the Allams filed a verified answer that issued a general denial and listed the following affirmative defenses: Lack of Standing to Sue; Improper Service; Partial or Full Payment; 90-Day Pre-Foreclosure Notices.

This matter appeared in the Foreclosure Conference Part on two occasions in 2011. After the second appearance it was determined that the parties were not eligible for a modification. Subsequent to the release from the Foreclosure Conference Part two motions were made in 2012, one to dismiss and another for summary judgment. Each motion was withdrawn and the parties

began settlement negotiations, but those discussions have broken down and these motions were made.

To support their motion for summary judgment the submits the affidavit of Rose Lara, Vice President, Default Management for Rushmore loan Management Services, LLC, authorized representative for the plaintiff. However, there is no statement from the plaintiff substantiating this statement. The affidavit from Lara states that the Allams default on their mortgage, and that the plaintiff commenced this action by filing on March 17, 2011.

The plaintiff's attorney also submits an affirmation in support of this motion for summary judgment. By attorney affirmation the plaintiff asserts that it had physical possession of the note since September 2006 when the original mortgage and loan closed. However, there is no statement from a representative of the plaintiff to substantiate that date. Additionally, appended at Exhibit G to the plaintiff's attorney affirmation is a copy of the Note executed by the Allams in favor of Mortgageit, Inc. in the amount of \$180,000. On the third page of the note beneath the signature of Ali Allam are the printed words that say: "Pay to the order of:." Handwritten below that phrase is "Arch Bay Holdings, LLC- Series 2010B." Below the handwritten entry is the following typed language: "Without Recourse: Mortgageit, Inc., by Raquel Rickaby Its: Assistant Secretary." The date of the transfer does not appear on the note. During the limited discovery period that took place the plaintiff disclosed a nearly identical note to the defendants. Unlike the note submitted in support of its motion for summary judgment, the note produced to the defendants in discovery was endorsed in blank, and lacked the name "Arch Bay Holdings, LLC- Series 2010B" anywhere on the document.

In addition, to support the motion for summary judgment the plaintiff points to the following language in the mortgage executed by the defendants to substantiate the transfer of the mortgage and right to foreclose to MERS:

I understand and agree that MERS holds legal title to the rights

granted by me in this Security Instrument , but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's assigns) has the right:

- (A) to exercise any or all of those rights, including, but not limited to, the right to foreclose and sell the Property; and
- (B) to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.

The plaintiff now seeks an order awarding it the following: 1) summary judgment against the Allams; 2) striking the answer interposed by Ali Allam and Amira Allam; 3) default judgments against the remaining defendants; 4) the appointment of a Referee to compute the sum due and owing; and 5) the amendment of the caption. The defendants cross-move for an order: 1) lifting the stay on discovery and 2) the issuance of a preliminary conference order.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

Here, the plaintiff has not demonstrated a prima facie entitlement to judgment as a matter of law. The Court of Appeals spoke of standing to foreclose a mortgage over one hundred years ago in the *Matter of Pirie*,⁶ where it stated that, “[t]he collateral lien of the mortgage could have no legal existence when separated from the note and transferred to others than the holder of the note, but so long as the two remain together, owned and possessed by the same person, they operate together and are obligations for the payment of the same indebtedness.”⁷ The Appellate Division, Second Department in the 1988 case of *Kluge v. Fugazy*, held that a foreclosure action, “. . . may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.”⁸ Essentially, the *Kluge* decision found that because the plaintiff did not have title to the mortgage and note, it lacked standing to bring the action in foreclosure.

The Appellate Division, Second Department has denied similarly situated plaintiffs motions for summary judgment where there is a question as to the whether the assignment of a note was properly effectuate. In *HSBC Bank USA v. Hernandez* the Appellate Division, Second Department set forth the following facts that it reasoned required the denial of a motion for summary judgment in a foreclosure action:

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁶ 198 NY 209 [1910].

⁷ *Id.*, citing, *Bergen v. Urbahn*, 83 NY 49, [1880].

⁸ 145 AD2d 537, [2d Dept 1988].

Here, the plaintiff failed to establish, prima facie, that it had standing to commence the action. The plaintiff's evidence did not demonstrate that the note was physically delivered to it prior to the commencement of the action. The affidavit from the plaintiff's servicing agent did not give any factual details of a physical delivery of the note and, thus failed to establish that the plaintiff had physical possession of the note prior to commencing this action.⁹

In a similar factual situation the Appellate Division, Second Department followed its precedent in *HSBC Bank USA* when it found that:

While the copy of the note submitted by the plaintiff in support of its motion included an endorsement to the plaintiff, the endorsement is undated, and it was not included in the copy of the note which was annexed to the plaintiff's complaint. Thus, it is not clear whether the endorsement was effectuated prior to the commencement of the action.¹⁰

However, in both instances the Appellate Division, Second Department stopped short of dismissing the plaintiffs' actions. Here, similar facts are present. The plaintiff produced two different copies of the purported note. Moreover, a copy of the note did not accompany the plaintiff's complaint. The plaintiff's contention that the recorded assignment of mortgage effectuated by MERS as nominee for Mortgageit, Inc. assigned the note as well is without merit.¹¹ Consequently, summary judgment is denied.

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion is granted to the extent that a default judgment shall be entered against The City of New York Environmental Control Board and City West

⁹ *HSBC Bank USA v. Hernandez*, 92 AD3d 843 [2d Dep't 2012].

¹⁰ *Deutsche Bank Natl. Trust Co. v. Haller*, 100 AD3d 860 [2d Dep't 2012].

¹¹ *See, Bank of New York v. Silverberg*, 86 AD3d 274 [2d Dep't 2011].

Condominium Board of Managers/Owners' Association; that the caption shall be amended striking the defendants John Doe #1 through John Doe #12; and it is further

ORDERED, that the plaintiff's motion for summary judgment against the defendants, Alli Allam and Amira Allam is denied; and it is further

ORDERED, that the defendants' cross-motion is granted and the stay of discovery is lifted; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Tuesday, April 2, 2013 at 9:30 a.m.** for a Preliminary Conference.

ENTER,

DATED: March 18, 2013

Joseph J. Maltese
Justice of the Supreme Court