Gin v Bank of Am., N.A.
2013 NY Slip Op 31628(U)
May 30, 2013
Sup Ct, New York County
Docket Number: 157378/12
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. PART 63
Justice

Susan F. Gin et al

INDEX NO. 157378/2012

-v-

MOTION DATE 4/3/13

Bank of America, N.A. et al

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1

Answering Affidavits — Exhibits ____ | No(s). 2

Replying Affidavits ____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

MOTION AND CROSS-MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/30/13

____, J.S.C.
ELLEN M. COIN J.S.C.

1. CHECK ONE: .... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63
---X

SUSAN F. GIN and JEFFREY W. BARK,

Plaintiffs,

Index No. 157378/12

-against-

BANK OF AMERICA, N.A., JOHN DOE 1 as the current REMIC Trustee and Investor; and JOHN DOES 2-10, representing any other REMIC trustees or trusts, or depositors, servicers, special servicers, master servicers, banks or other lenders claiming ownership of a promissory note dated April 22, 2005 in the principal amount of $964,035, signed by Jeffrey W. Bark and Susan F. Gin, the last known location of which note was in New York, New York,

Defendants.

---X

COIN, J.:

Defendant Bank of America, N.A. (BoA) moves, pursuant to CPLR 3211(a)(7), for an order dismissing the complaint for failure to state a cause of action. Plaintiffs Susan F. Gin (Gin) and Jeffrey W. Bark (together, Plaintiffs) cross-move, pursuant to CPLR 3025(b), for leave to file an amended complaint.

FACTS

Plaintiffs reside at 50 Miller Hill Woods Court, Carmel, New York, 10512-3311, in Putnam County (the Property). They executed a note in the amount of $964,035 (the Note) with GMAC Mortgage Corporation as the Lender, and a related mortgage (the Mortgage)

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on the Property on April 22, 2005. Since September 19, 2005, BoA has been the owner of the loan.

Plaintiffs are current on their loan payments, but anticipate being unable to continue making them. In their complaint, they assert that Gin spent much of June 14, 2012 on the telephone with three or four representatives of BoA, trying to ascertain how Plaintiffs' monthly payments could be reduced. She was allegedly told that she would not be able to obtain any relief. Gin further states that the representative told her that she was better off knowing that day that she could not obtain a loan modification agreement, because most of the people who applied for loan modification had false hope and would learn only six to nine months later that they would not get any modification. Complaint, ¶¶ 16-17. Plaintiffs contend that this demonstrates wrongdoing by BoA.

Plaintiffs filed the current action in New York County on October 18, 2012. The original complaint asserts six causes of action. Plaintiffs characterize the action as one "to determine whether [BoA] or any John Doe Defendants is the owner and in possession of the promissory note executed by the Plaintiffs ..." Complaint ¶ 1. Plaintiffs seek: a declaratory judgment that BoA and John Doe REMIC Trustee do not own or possess the Note (first cause of action); recovery of all mortgage payments that Plaintiffs have made as a result of BoA and John Doe REMIC

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Trustee's alleged violation of General Business Law (GBL) § 349, as well as a preliminary and permanent injunction against them to stop their unlawful practices, and attorneys' fees (second cause of action); reformation of the Note, including a reduction in the principal amount of the Note to reflect the reduction in value of Plaintiffs' property (third cause of action); a finding of breach of contract and a declaratory judgment that the lender and any successors have no right to sell the Property due to their failure to provide Plaintiffs with the option to retain ownership of the Property, that any attempt to collect monthly payments on the Note is invalid, that Plaintiffs are entitled to a preliminary and permanent injunction prohibiting the lender from transferring any interest in the Note, that Plaintiffs have been damaged in the amount of all of their payments to the lender as well as legal fees, that Plaintiffs are entitled to a cancellation of the lender's security interest in the Property, and that Plaintiffs are entitled to damages (fourth cause of action); a finding of unjust enrichment against BoA and John Doe REMIC Trustee (fifth cause of action); and a finding of an anticipatory breach of contract against BoA for its failure to reduce the Note by $125,000 pursuant to BoA's settlement agreement with the U.S. Justice Department and 49 State Attorneys General (sixth cause of action).

BoA served a demand for change of venue from the County of New York to the County of Putnam on December 17, 2012. BoA filed this pre-answer motion on December 21, 2012. In response, Plaintiffs cross-moved to amend their complaint. The proposed amended complaint (PAC) contains six causes of action: declaratory judgment that BoA and John Doe REMIC Trustee do not hold, own or possess the Note (first cause of action); unjust enrichment, restitution, breach of implied contract (second cause of action); declaratory judgment that defendants' insurance arrangements are invalid (third cause of action); violation of GBL § 349 (fourth cause of action); reformation of the Note (fifth cause of action); and declaratory judgment and breach of contract based on BoA's alleged failure to offer a note in a reduced principal amount and at present market interest rates (sixth cause of action).

DISCUSSION

Defendants point out that Plaintiffs could have amended the complaint as of right, since defendants have not yet answered, and the time within which to answer has not yet expired. CPLR 3025(a). Defendants contend that the arguments raised in the motion apply to both the complaint and the PAC. Therefore, defendants seek to have the court dismiss the entire action, whether based on the original complaint or the PAC.

Ownership of Note

While Plaintiffs argue that BoA was not the owner of the Note at its inception or any time thereafter, the only fact that they point to is that GMAC Mortgage Corporation was the original lender. They do not, however, offer any factual allegations that the Note was not, thereafter, transferred to BoA. Defendants submit an affidavit attesting to the fact that BoA is the owner of the Note. Plaintiffs have not alleged any facts to support its conclusory assertion that there is any justiciable controversy regarding the ownership of the Note. They have not suggested that anyone else is claiming ownership, or any other factual allegation to suggest that BoA does not own it, or even that there is a question as to who owns it.

Plaintiffs claim that they must resort to litigation in order to ascertain who the owner of the Note is, because they have no other method of uncovering that information, and need to know that information before there is any possible foreclosure on their home. Defendants point out that federal law provides a mechanism for borrowers to obtain information from their mortgage loan servicers. Pursuant to 12 USC § 2605(e)(1)(A)-(B), they can submit a qualified written request to their loan servicer in order to obtain the information. Plaintiffs do not explain why they did not make use of this vehicle, nor do they suggest that it was, for some reason, inadequate for their needs. They merely

ignore it.

In the PAC, Plaintiffs also make a series of allegations, concluding that Mortgage Electronic Registration Systems Inc. (MERS) obfuscates ownership of mortgages and notes, which, they claim, interferes with their ability to defend against a future foreclosure action. However, in a foreclosure action, the party seeking foreclosure has the burden to show that it has standing to foreclose. Thus, Plaintiffs' alleged concern regarding ascertaining the owner of the Note in order to protect themselves is unavailing. In any event, such concern is premature, since the Property is not even in default, much less in foreclosure.

A court may issue a declaratory judgment only where there is a justiciable controversy. CPLR 3001; *Realtime Data, LLC v Melone*, 104 AD3d 748, 751 (2d Dept 2013). If the alleged controversy is with respect to a future event that may never occur, and is beyond the control of the parties, a request for a declaratory judgment is premature. *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 (1977). Here, any challenge to BoA's ownership of the Note would come from an entity who is not a party to this action, and may never occur. In view of defendants' evidence that BoA owns the Note, and in the absence of any allegation that any other specified party either owns it or is making any claim to it, there is no justiciable controversy regarding ownership of the Note. *See*

Matter of Cioci v Suffolk County Legislature, 212 AD2d 610 (2d Dept 1995).

GBL § 349

GBL § 349 is subject to a three-year statute of limitations. *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 (2001). Plaintiffs have alleged that they executed the loan documents in 2005. They did not bring this action until 2012. Plaintiffs do not deny those factual assertions, nor do they address the issue of how they can pursue their section 349 claim under such circumstances. Thus, the second cause of action in the complaint, and the fourth cause of action in the PAC, are time-barred.

In any event, those claims would have to be dismissed because Plaintiffs are pursuing an alleged grievance that is individual, and they have failed to allege that the specific actions complained of were directed at the public generally, as required under section 349. Further, Plaintiffs have not set forth sufficient allegations to conclude that banks and other lending companies were acting improperly as to them; Plaintiffs must allege facts to support a claim that the particular representations made to them when they obtained their mortgage were false or misleading, and that such representations were made to the public generally. Plaintiffs have failed to allege such supporting facts. Instead, they offer generalizations regarding

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the issues in foreclosures that are occurring around the country. *See Golub v Tanenbaum-Harber Co., Inc.*, 88 AD3d 622, 623 (1st Dept 2011) ("conclusory allegations about defendant's practices with other clients are insufficient"). None of those suffice to support Plaintiffs' claims under section 349.

Loan Modification

Plaintiffs base their sixth cause of action in both complaints, and the fifth cause of action in the PAC, on BoA's failure to offer them a loan modification. However, Plaintiffs have not cited any case law or statute that establishes such a requirement. In contrast, defendants have cited law to demonstrate that Plaintiffs are ineligible for loan modification due to the size of the principal amount of the Note, pursuant to the limits established by federal law under the Home Affordable Modification Program (HAMP). *See* Making Home Affordable Program, https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1203.pdf (accessed May 13, 2013). Further, as to Plaintiffs' assertion that they were being "tipped off" as to the futility of applying for loan modification because of improper practices, such a conclusion is unwarranted. It was likely that it was futile for Plaintiffs to apply for modification because their situation did not meet the guidelines under HAMP. That does not mean that such futility was indicative of wrongdoing by BoA, but only that BoA ascertained that Plaintiffs were not eligible for

such modification from a preliminary inquiry, so there was no point in going through a more in-depth inquiry.

In the PAC, Plaintiffs rely on the debt collection law in to support their claim. However, the Property is not in foreclosure, and the Fair Debt Collection Practices Act (FDCPA) is not, therefore, implicated. BoA is not foreclosing on a loan; it is merely servicing the loan. 15 USC §1692a(6)(F)(iii); *Glazer v Chase Home Finance LLC,* 704 F3d 453, 455, 457 (6th Cir 2013) ("mortgage foreclosure is debt collection," but the term "debt collector" does not include a person attempting to collect a debt which is not in default). Additionally, BoA is not an independent debt collector. Even if it were trying to collect on a mortgage debt that was in default, it would be attempting to collect its own debt, not that of another creditor. Therefore, the FDCPA would still not be implicated. 15 USC §1692a(6)(F)(iii); *Larsen v JBC Legal Group, P.C.*, 533 F Supp 2d 290, 300 (ED NY 2008); *Shevach v American Fitness Franchise Corp.*, 2001 WL 274121, *3, 2001 US Dist LEXIS 2899, *7 (SD NY Mar. 19, 2001, No. 98-Civ-2938 RWS). Thus, with respect to Plaintiffs' contentions that defendants have engaged in unfair collection practices, or to the extent that Plaintiffs seek the protection of the FDCPA, Plaintiffs have not stated a cause of action.

In the PAC, Plaintiffs contend that it is against public policy to deny them modification of their loan agreement.

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However, rather than seeking to find a provision of a contract void for public policy reasons, here Plaintiffs seek to add a provision to the contract, giving them rights not included in their contract. Plaintiffs' supposed authority for their position is singular. They quote Wikipedia. Since Wikipedia is an online reference cite that permits anyone to upload any article, without any review of its accuracy, it cannot be used as reliable authority for virtually any proposition. *See Badasa v Mukasey*, 540 F3d 909, 910 (8th Cir 2008); *Campbell v Secretary of Health & Human Servs.*, 69 Fed Cl 775, 781 (2006).

In any event, Plaintiffs are bound by the statutes of the State of New York regarding any mortgage foreclosure, and by federal law regarding any modification of their mortgage loan. Plaintiffs have failed to demonstrate under either that they have any cause of action at this point. There has been no foreclosure, nor threat of foreclosure. The Note is not in default. The amount of the Note makes it ineligible for relief under HAMP. Therefore, Plaintiffs are not entitled to make use of the safeguards for those who are facing foreclosure. Further, regardless of the many problems facing many residential mortgagors, Plaintiffs have not alleged facts to demonstrate that they are in the same category, nor have they alleged facts to support their position that they have any basis upon which to press those complaints.

Plaintiffs did not include in the PAC their claim based upon BoA's alleged failure to comply with the settlement agreement with the US Justice Department and 49 Attorneys General. This was, no doubt, in recognition that they have no standing to seek enforcement of that agreement, since they are not parties to it. *Blue Chip Stamps v Manor Drug Stores*, 421 US 723, 750 (1975); *see also State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 (2000).

Securitization

Plaintiffs challenge the alleged securitization of their loan. However, they do not offer any factual allegations to support their claim that there was any securitization. Even if there were evidence of securitization, the claim would have to be dismissed. The mortgage provides: "The Note, or an interest in the Note, together with this Security Instrument, may be sold one or more times. I might not receive any prior notice of these sales." Mortgage, ¶ 20. Consequently, by entering into the mortgage agreement, Plaintiffs consented to future assignment and securitization, and cannot now challenge such events. Daugherty aff., exhibit 1, ¶ 20. Further, courts have rejected the argument that securitization of a mortgage loan provides a mortgagor with a cause of action. *Rodenhurst v Bank of Am.*, 773 F Supp 2d 886, 898-99 (D HI 2011) and cases cited therein.

Consequently, any claim based upon the securitization of the loan is dismissed.

Unjust Enrichment

Plaintiffs assert claims for unjust enrichment. However, their mortgage and Note are governed by express agreements between the parties. Where an express agreement governs, there is no cause of action in quasi contract, such as unjust enrichment. *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005). Thus, even if Plaintiffs had alleged facts to support a finding that, in the abstract, BoA should be precluded from keeping the mortgage payments that they collected, any cause of action based upon unjust enrichment would be dismissed.

Insurance Arrangement

In the PAC, Plaintiffs set forth a new cause of action seeking a declaratory judgment that the insurance arrangements made by defendants are invalid. However, they do not set forth any factual assertions stating that such insurance was acquired, what the terms were, or by whom it was acquired. Rather, they state, on information and belief, that defendants or one or more of their predecessors bought such insurance, and then state in conclusory terms that it is illegal and unenforceable, without stating what law was violated. Even if their vague allegations of wrongdoing were specific enough to allege a cause of action, they fail to set forth a viable legal theory upon which the

alleged insurance arrangements would be void. Once again, they support their claim based on public policy arguments, without citing any statutory or case law as authority. Thus, this claim is also devoid of merit.

Leave to Amend

In general, leave to amend a complaint is given freely. CPLR 3025 (b). However, if the proposed amended complaint contains the same defects as the original complaint, and is palpably deficient, leave should not be granted. *"J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 216 (1st Dept 2005).

Here, most of the PAC contains the same defects as the complaint. To the extent that there are new causes of action, they are palpably insufficient. Therefore, leave to amend is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted and the complaint and proposed amended complaint are both dismissed, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiffs' cross-motion for leave to amend their complaint is denied.

Dated: May 30, 2013

ENTER:

Ellen M. Coin, A.J.S.C.