

Wells Fargo Bank, N.A. v Mascara

2014 NY Slip Op 31538(U)

June 17, 2014

Supreme Court, Richmond County

Docket Number: 130497/11

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

**WELLS FARGO BANK, N.A. SUCCESSOR BY
MERGER TO WELLS FARGO HOME MORTGAGE,
INC.** **X**
TP 12

**3476 Stateview Boulevard
Ft. Mill, SC 29715**

Plaintiff,

-against-

**DOMINICK R. MASCARA, ADMINISTRATOR
AND HEIR TO THE ESTATE OF PHILIP
MASCARA a/k/a FILIPPO MASCARA, ERIC M.
MASCARA, HEIR TO THE ESTATE OF**

**PHILIP MASCARA a/k/a FILIPPO MASCARA,
BENEFICIAL HOMEOWNER SERVICE
CORPORATION, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, PEOPLE FO THE STATE OF NEW
YORK, RICHMOND COUNTY CLERK, SOVEREIGN
BANK SUCCESSOR BY MERGER TO
INDEPENDENCE COMMUNITY BANK, UNITED
STATE OF AMERICA ACTING THROUGH IRS,**

**JOHN DOE (said name being fictitious, it
being the intention of Plaintiff to designate any
and all occupants of premises being foreclosed
herein, and any parties, corporations or entities,
if any, having or claiming an interest or lien
upon the mortgaged premises.)**

Defendants.

X
The following papers numbered 1 to 3 were fully submitted on the 6th day of March, 2014.

| | Papers Numbered |
|---|--------------------|
| Plaintiff's Notice of Motion for Summary Judgment (with Supporting Papers and Exhibits)..... | 1 |
| Notice of Cross Motion of Defendants Dominick R. Mascara and Eric Mascara (with Supporting Papers and Exhibits)..... | 2 |
| Affirmation in Opposition to Cross Motion | 3 |

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Upon the foregoing papers, plaintiff's motion for summary judgment is granted and the cross motion is denied.

On or about December 16, 2002, Philip Mascara, a/k/a Filippo Mascara, executed a note and mortgage in favor Mortgageit, Inc. in the principal amount of \$167,475.00, secured by the premises located on 219 Chestnut Avenue, Staten Island, New York. As alleged in the affidavit of Joseph Aldrige, the Vice President of Loan Documentation of plaintiff Wells Fargo, Bank, NA, the successor by merger of Wells Fargo Home Mortgage, Inc. (*see*, Plaintiff's Exhibits "A, B, C"), the note and mortgage fell into default upon the mortgagor's failure to make the required payment due on August 1, 2010 and thereafter. Insofar as it appears, the borrower had died intestate on November 8, 2009 (*see* Cross-Moving Defendants' Exhibit "C")¹.

Letters of Administration for the Estate of the deceased borrower were subsequently issued by the Surrogate's Court of Richmond County on January 4, 2010, naming one of the decedent's two sons, Dominick Mascara, as Administrator (*see* Cross-Moving Defendants' Exhibit "D"). Filippo (Philip) Mascara's only other heir appears to be a second son by the name of Eric Mascara.

The note in question was subsequently endorsed by Mortgageit, Inc. to the order of Wells Fargo Home Mortgage, Inc., and then, in blank, by plaintiff's predecessor Wells Fargo Home Mortgage, Inc. (*see* Plaintiff's Exhibit "B"). However, neither endorsement is dated. As for the relevant mortgage, it was assigned in writing to plaintiff's predecessor on or about August 8, 2004, and recorded in Richmond County on August 17, 2004 (Plaintiff's Exhibit "D"). The date of the merger of Wells Bank, NA with Wells Fargo Home Mortgage, Inc. is not stated.

¹The identity of the payor of the intervening installments has not been disclosed.

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On or about June 23, 2011, plaintiff commenced this action to foreclose the mortgage in Richmond County, where the property is located, by the filing of summons and complaint and notice of pendency with the Richmond County Clerk. The named defendants were subsequently served, but only the two sons (named as Dominick Mascara, Administrator and Heir to the Estate of Philip Mascara a/k/a Filippo Mascara, and Eric M. Mascara, Heir to the Estate of Philip Mascara a/k/a Filippo Mascara [hereinafter defendants]) answered, denying the material allegations in the complaint and asserting several affirmative defenses, including plaintiff's purported lack of standing. In response to plaintiff's motion for summary judgment, defendants have cross-moved for dismissal of the complaint as against them in their individual capacities, and amending the caption to substitute "The Estate of Filippo Mascara a/k/a Philip Mascara" in their place.

It is well settled that on a motion for summary judgment in an action to foreclose a mortgage, a plaintiff/mortgagee, as here, establishes its prima facie right to judgment as a matter of law through the production of the relevant mortgage, the unpaid note and an affidavit attesting to the mortgagor's default (*see* Flagstar Bank v Bellafiore, 94 AD3d 1044, 1045 [2nd Dept 2012]; HSBC Bank USA, NA v Schwartz, 88 AD#D 961, 961 [2nd Dept 2011]; Coppa v Fabozzi, 5 AD3d 718 [2nd Dept 2004]). However, where standing has been drawn into question, it is incumbent upon a plaintiff to prove its standing in order to be entitled to any relief (*see* Citimortgage, Inc. v Stosel, 89 AD3d 887, 888 []; US Bank, NA v Collymore, 68 AD3d 752, 853 [2nd Dept 2009]). "[A] plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (Homecomings Fin. LLC v Guldi, 108 AD3d 506, 507 [internal quotation marks omitted]).

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In the case at bar, the primary affidavit in support of summary judgment is subscribed by Joseph Aldridge, a Vice President of Loan Documentation of Wells Fargo Bank, NA, who affirms, based on unstated sources of personal knowledge and a review of "the books and records maintained by Wells Fargo in the ordinary course of business in serving this loan ... [that] Wells Fargo Bank, NA is in possession of the promissory note ... indorsed in blank [and] ... confirm[s] that plaintiff was in possession of the promissory note prior to the commencement of this action on June 23, 2011" (Plaintiff's Exhibit "A", paras 2-3). While the foregoing, in and of itself, is lacking in sufficient factual detail to establish standing (*e.g.*, when, where and how Wells Fargo came into possession of the subject note) prior to the commencement of this action (*see* Deutsche Nat'l Trust Co. v Haller, 100 AD3d 680, 682-683); HSBC Bank v Hernandez, 92 AD3d 843, 844; Citimortgage, Inc. v Stosel, 89 AD3d 887, 888; Deutsche Nat'l Trust Co. v Barnett, 88 AD3d 636, 637-638), the various exhibits submitted therewith include a copy of the subject note (Plaintiff's Exhibit "B") indorsed by Mortgage, Inc. to the order of Wells Fargo Home Mortgage, Inc., and then, in blank, by the latter. Moreover, although neither indorsement is dated, these papers also contain a written assignment of the mortgage by the original lender (Mortgageit, Inc.) to Wells Fargo Home Mortgage, Inc. (Plaintiff's Exhibit "D"), executed on or about April 17 2004, and recorded in Richmond County on August 17, 2004, *i.e.*, well prior to the commencement of this action. More important, however, on the issue of standing is the fact that this assignment of mortgage also provides for an assignment of "the notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Real Estate Mortgage" (Plaintiff's Exhibit "D"). Since it is undisputed that Wells Fargo Bank, NA is the successor by merger of Wells Fargo Home Mortgage, Inc., these documents constitute prima

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facie evidence that plaintiff Wells Fargo, Bank, NA was the lawful owner of both the note and mortgage at the time that the action was commenced (*see* Mortgage Elec. Registration Sys, Inc. v Coakley, 41 AD3d 674; Matter of Stralem, 303 AD2d 120, 122-123; *cf.* Midland Mtge. Co. v Imtiaz, 110 AD3d 773, 774-775; Homecomings Fin., LLC v Guldi, 108 AD3d at 508-509).

In view of the foregoing, plaintiff has established its prima face right to judgment as a matter of law through the production of the relevant note and mortgage and the affidavit of plaintiff's Vice President of Loan Documentation attesting that the total amount due on the underlying note as of March 29, 2013 was \$183, 076.75 (*see* Plaintiff's Exhibit "A", para 9). In opposition, defendants' general denials and the articulation of unembellished legal principals asserted in the guise of affirmative defenses are insufficient to raise a triable issue of fact.

In the absence of any opposition thereto, the balance of plaintiff's motion is also granted.

As for defendants' cross motion, the RPAPL; pertinently provides that "[e]ach of the following persons whose interest [in realty] is claimed to be subject and subordinate to the plaintiff's lien shall be made a party defendant to the action Every person having an estate or interest in possession, or otherwise in the property as tenant in fee, for life, by the courtesy of for years, and every person entitled to the reversion, remainder or *inheritance* of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein" (emphasis supplied) (RPAPL 1311[1]; Salomon Bros. Realty Corp. v Alvarez, 22 AD23d 482; *see also* Safena

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v Giuliano, 53 AD3d 650). Accordingly, defendants are proper parties to the action, and their cross motion for summary judgment must be denied.

Submit Order.

E N T E R ,

/S/
HON. THOMAS P. ALIOTTA
J.S.C.

Dated: June 17 2014
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