

<b>Yonkus v MERS, Inc.</b>
2016 NY Slip Op 32117(U)
September 19, 2016
Supreme Court, Queens County
Docket Number: 703536/2016
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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JOHN YONKUS AND GINA YONKUS, Index No.: 703536/2016
Plaintiffs, Motion Date: 8/31/16
- against - Motion No.: 201

MERS, INC., COUNTRYWIDE HOME LOANS Motion Seq.: 1
INC. d/b/a AMERICA'S WHOLESALE LENDER,
Defendants.

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The following electronically filed documents read on this motion by defendants for an Order pursuant to CPLR 3211(a)(1), (7), and (10) dismissing the complaint; and on this cross-motion by plaintiff for an Order granting plaintiffs leave to add The Bank of New York Mellon aka The Bank of New York Alternative Loan Trust 2004-3T1, Mortgage Pass Through Certificates, Series 2004-3T1, as a defendant, and amending the caption:

Table with 2 columns: Document Name and Papers Numbered. Includes entries for Notice of Motion-Affidavits-Exhibits-Memo. of Law, Notice of Cross-Motion-Exhibits, Affirmation in Support of Cross-Motion-Exhibits, and Memo of Law in Opposition to Cross-Motion and in Further Support of Motion.

This action pertains to a mortgage encumbering the property located at 146-44 25th Road, Whitestone, N.Y. 11354.

Plaintiffs commenced this action by filing a summons and complaint on March 24, 2016, alleging that the subject loan was accelerated in July 2008, and as a result, the statute of limitations to commence a foreclosure action expired in July 2014. Thus, plaintiffs seek an Order cancelling and discharging the subject mortgage allegedly held by defendants.

Defendants now move to dismiss the complaint on the ground that it fails to state a cause of action against them as they no longer have any interest in the subject note or mortgage, and because The Bank of New York Mellon aka The Bank of New York Alternative Loan Trust 2004-3T1, Mortgage Pass Through Certificates, Series 2004-3T1 (BNY Mellon) is an indispensable party that plaintiffs failed to join.

In support of the motion, defendants submit an affidavit from Nichole Renee Williams, an officer of Countrywide Home Loans, Inc. f/d/b/a America's Wholesale Lender (Countrywide), dated June 23, 2006. Ms. Williams affirms that based on her personal knowledge, experiences, familiarity with Countrywide's practices and procedures, and her review of the custodial and business records relating to plaintiff's account, which are maintained by Countrywide in the regular course of its business, plaintiffs obtained a loan in the principal amount of \$440,000 from America's Wholesale Lender on December 12, 2003. The note was secured by a mortgage on the subject property in favor of MERS as nominee for America's Wholesale Lender. On or about March 23, 2004, by way of transfer and physical delivery of the note, BNY Mellon became the holder of the note. An assignment of mortgage from MERS as nominee for America's Wholesale Lender was executed on June 8, 2012 and recorded on June 29, 2012. A second assignment of mortgage from MERS as nominee for America's Wholesale Lender to BNY Mellon was executed on October 11, 2012 and recorded on October 31, 2012. She notes that other assignments, including gap assignments, were recorded, but does not identify such. Ms. Williams concludes that Countrywide and MERS currently have no interest in the note and mortgage as the current holder of the note and mortgage is BNY Mellon.

Based on the affidavit of merit and the assignments of mortgage, counsel for defendants, Christina A. Parlapiano, Esq., contends that defendants no longer have any interest in the subject note or mortgage. She affirms that defendants have had no interest in the property or subject mortgage for more than twelve years. As such, the complaint must be dismissed based on documentary evidence and for failure to state a cause of action. Additionally, counsel contends BNY Mellon, an indispensable party as the current holder of the note and mortgage, was not joined in this action, and thus, the court should not proceed.

In opposition, counsel for plaintiffs, Michael B. Doyle, Esq., contends that, inter alia, there is insufficient evidence to grant dismissal. Specifically, counsel argues that although opposing counsel contends that defendants have not had any interest in the property since 2004, defendants continued to

execute assignments after such. Moreover, on July 27, 2008, Countrywide commenced a prior foreclosure action in Queens County Supreme Court under Index No. 17891/2008. In its verified complaint, Countrywide affirmed that it was the owner and holder of the note and mortgage. The prior foreclosure action was dismissed on August 13, 2013 as plaintiff failed to comply with two prior orders of the Court. Counsel points out that sworn testimony and affidavits from the 2008 foreclosure action contradict the facts presented by defendants herein, and therefore, the motion is premature as discovery is necessary to remedy the discrepancies.

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Teitler v Pollack & Sons, 288 AD2d 302 [2d Dept. 2001]). "A motion to dismiss a complaint based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" Stein v Garfield Regency Condominium, 65 AD3d 1126 [2009], quoting Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002].

Here, this Court finds that the affidavit of merit submitted by Ms. Williams does not conclusively establish a defense as a matter of law as such contradicts with the verified complaint submitted by Countrywide in the 2008 foreclosure action. Moreover, although Ms. Williams contends that Countrywide delivered the subject note to BNY Mellon in 2004, Countrywide executed assignments of the mortgage thereafter. Thus, all factual issues have not been resolved as matter of law.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83 [1994]; Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679 [2d Dept. 2011]). A complaint must allege the material elements of the cause of action (see Lewis v Village of Deposit, 40 AD2d 730 [1972]; Kohler v Ford Motor Company, Inc., 93 AD2d 205 [3d Dept. 1983]). A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). When evidentiary material

is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]).

Here, according plaintiffs the benefit of every possible inference, including the allegation that defendants are the holder of the note and mortgage, this Court finds that plaintiffs has a cause of action. Moreover, dismissal is inappropriate where the existence of essential facts depend upon the knowledge and information which is in the sole and exclusive possession of defendants (see Baldasano v The Bank of New York, 199 AD2d 14 [1st Dept. 1993]). Thus, as defendants have contradicted themselves in court documents, this Court finds the motion to dismiss is premature.

Turning to the cross-motion, CPLR Section 3025(b) provides:

"Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

In the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given (see CPLR 3025[b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983]; Russo v Lapeer Contr. Co., Inc, 84 AD3d 1344 [2d Dept. 2011]), unless the proposed amendment is palpably insufficient or patently devoid of merit (see Bernardi v Spyrtatos, 79 AD3d 684 [2d Dept. 2010]; Martin v Village of Freeport, 71 AD3d 745 [2d Dept. 2010]; Malanga v Chamberlain, 71 AD3d 644 [2d Dept. 2010]; Uadi, Inc. v Stern, 67 AD3d 899 [2d Dept. 2009]); Lucido v Mancuso, 49 AD3d 220 [2d Dept. 2008]) and provided the amendment does not prejudice or surprise the opposing party (see Douglas Elliman, LLC v Bergere, 98 AD3d 642 [2012]).

Here, the proposed amendments are not palpably insufficient or devoid of merit, and there is no prejudice to any of the defendants in allowing plaintiffs to amend the complaint at this early stage of the proceedings. As the cross-motion to add BNY Mellon as a party defendant is granted, defendants' motion to dismiss pursuant to CPLR 3211(a)(10) is denied as moot.

Accordingly, and based on the above reasons, it is hereby

ORDERED, that defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED, that plaintiffs' cross-motion for leave to amend the complaint is granted, and the caption of the action shall be amended to reflect the foregoing, and all papers to be served and filed herein shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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JOHN YONKUS AND GINA YONKUS,

Plaintiffs,

Index No.: 703536/2016

- against -

MORTGAGE ELECTRONIC REGISTRATION SYSTEM  
INC. a/k/a MERS, INC.; COUNTRYWIDE HOME  
LOANS INC. d/b/a AMERICA'S WHOLESALE  
LENDER; and THE BANK OF NEW YORK MELLON  
AKA THE BANK OF NEW YORK ALTERNATIVE  
LOAN TRUST 2004-3T1, MORTGAGE PASS  
THROUGH CERTIFICATES, SERIES 2004-3T1,

Defendants.

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and it is further,

ORDERED, that the proposed supplemental summons and amended complaint in the proposed form annexed to the cross-moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED, that the defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

Dated: September 19, 2016  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**