Wells Fargo Bank, N.A. v Levin
2018 NY Slip Op 30595(U)
March 16, 2018
Supreme Court, Nassau County
Docket Number: 2873/15
Judge: Jeffrey S. Brown
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AMENDED SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 13**
WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-1, ASSET BACKED CERTIFICATES, SERIES 2007-1,	**INDEX # 2873/15**
Plaintiff(s),	**Motion Seq. 3-7**
	Motion Dates 9.25 / 10.19/ 12.28/17 & 1.11.18
	Submit Date 1.23.18
-against-	
OFRA LEVIN, JP MORGAN CHASE BANK, N.A., JOHN DOE #1 THROUGH JOHN DOE #12,	
Defendant(s).	
----------X	

The following papers were read on this motion:

	Papers Numbered		
	MS 3,4	MS 5	MS6, 7
Notice of Motion	X	X	X
Cross Motion	X		X
Answering Affidavit	X		X
Reply	X		X
Sur Reply	XX		

Presently before the court are five discovery-related motions. By motion sequence 3, the Levin defendants (herein the defendants) seek the issuance of a commission pursuant to CPLR 3108 to take depositions of certain individuals located in Texas, New Jersey, California, and Florida. In cross-motion sequence 4, plaintiff moves pursuant to CPLR 3103(a) for a protective order precluding the defendants from taking discovery concerning the validity of assignment documents. By motion sequence 5, defendants ask the court to take judicial notice of a number of exhibits attached to the motion. In motion sequence 6, plaintiff seeks a further protective order concerning the defendants' May 22, 2017 notice to admit, which notice was the subject of a prior motion that was denied without prejudice. Finally, by cross-motion sequence 7, defendants seek an order pursuant to CPLR 3124 and 3126 striking plaintiff's complaint for failure to

provide duly noticed discovery. The central issue is the same throughout these motions, that is, whether the defendants are permitted to take discovery concerning the assignment of the mortgage.

The background of this action has been set forth in the court's prior orders. On August 14, 2006, defendant Ofra Levin executed a note secured by a mortgage in favor of Superior Home Mortgage in the sum of $380,000 encumbering certain real property located at 960 Cliffside Avenue, Valley Stream, New York. Counsel for plaintiff Wells Fargo states that on November 1, 2008 defendant Ofra Levin defaulted on her monthly payments. On March 30, 2015, the instant foreclosure action was commenced.

By its complaint and in support of its claim of standing, plaintiff alleges that it has possession of the note, which is secured by the mortgage, and that the note is duly endorsed having been delivered to the plaintiff or its agent prior to commencement of the action. Moreover, the complaint alleges that the mortgage has been transferred to the plaintiff and an assignment of mortgage was executed on November 11, 2010 and filed in the Office of the Nassau County Clerk on December 20, 2010.

By their answer, defendants contend that Wells Fargo has failed to show that the note was physically delivered to it and has failed to provide any factual details concerning when and how the plaintiff came into physical possession of the note. In addition, defendants contend that the note is neither endorsed in blank nor endorsed to the plaintiff, rather it is endorsed to Option One Mortgage Corporation. Accordingly, defendants maintain that possession of the note is not sufficient to confer standing on Wells Fargo to bring this action. Defendants also contend that Wells Fargo cannot establish standing by assignment as it failed to produce a valid assignment of the mortgage or the note.

Where a plaintiff's standing to commence a foreclosure action is placed in issue by the defendants' answer, "it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see Deutsche Bank Trust Co. Ams. v. Garrison*, 147 AD3d 725, 726; *Wells Fargo Bank, N.A. v. Arias*, 121 AD3d 973, 973–974). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note (*see Aurora Loan Servs., LLC v. Taylor*, 25 NY3d 355, 361–362; *Deutsche Bank Trust Co. Ams. v. Garrison*, 147 AD3d at 726). Either a written assignment of the underlying note or the physical delivery of the note is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident (*see Deutsche Bank Trust Co. Ams. v. Garrison*, 147 AD3d at 726; *U.S. Bank N.A. v. Saravanan*, 146 AD3d 1010, 1011; *Deutsche Bank Natl. Trust Co. v. Logan*, 146 AD3d 861, 862)." (*Wells Fargo Bank, N.A. v. Soskil*, 155 AD3d 923, 923-24 [2d Dept 2017]). Physical possession of the note at the time of commencement is sufficient to confer standing regardless of whether a later written assignment of the mortgage may be a falsified document. (*HSBC Bank USA, NA v. Sage*, 112 AD3d 1126 [3d Dept 2013]). However, where a plaintiff is unable to establish that it is holder of the note at the time of commencement of the action, standing will fail. (*See Wells Fargo Bank, NA v. Allen*,

154 AD3d 644 [2d Dept 2017] [plaintiff could not make a prima facie showing of standing where it did not attach a copy of the note to the summons and complaint and the copy produced on motion contained only an undated endorsement to the plaintiff]).

"A 'holder' is the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." (*U.S. Bank, NA for Citigroup Mortg. Loan Tr., Inc., 2006-NC2 v. Brody*, 156 AD3d 839 [2d Dept 2017] [citations omitted]; *see also* UCC 1–201[b][21]; *see also U.S. Bank, NA v. Zwisler*, 147 AD3d 804 [2d Dept 2017]). "Where an instrument is indorsed in blank, it may be negotiated by delivery." (*Zwisler*, 147 AD3d at 806). Accordingly, a plaintiff makes a *prima facie* demonstration of standing by attaching a note, endorsed in blank, to the summons and complaint. (*Soskil*, 155 AD3d at 924; *see also Countrywide Home Loans, Inc. v. Gibson*, No. 2015-cv-11683, 2018 WL 522966, at *3 [2d Dept Jan. 24, 2018]; *US Bank, NA v. Coppola*, 153 AD3d 934 [2d Dept 2017]).

"[T]here is no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it (*see Deutsche Bank Natl. Trust Co. v. Carlin*, 152 AD3d at 493; *Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d at 1313; *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d at 645, 37 N.Y.S.3d 286; UCC 3–204[2]). Further, where the note is affixed to the complaint, 'it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date' (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d at 645; *see Aurora Loan Servs., LLC v. Taylor*, 25 NY3d at 362; *Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d at 1313)." (*U.S. Bank Nat'l Ass'n v. Henry*, No. 12556-cv-13, 2018 WL 443828, at *2 [2d Dept Jan. 17, 2018]; *see also Coppola*, 156 AD3d at 934). However, where an endorsement is neither in blank nor payable to the plaintiff, it will be unable to establish standing by possession at the time of commencement. (*Zwisler*, 147 AD3d at 806).

To determine what amount of discovery is appropriate in this case, the court must determine what issues are properly in dispute with respect to plaintiff's standing in this action. Wells Fargo argues that it is relying on its physical possession of the note at the time of commencement of this action, and as such, any assignments of the mortgage are not at issue in this action. On this basis, Wells Fargo contends that defendants should be prohibited from pursuing discovery concerning the assignments.

Wells Fargo argues that an endorsement in blank, giving rise to its standing to enforce the note, is contained in an allonge thereto. By way of background, an allonge is "a slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." (Black's Law Dictionary, Seventh Edition). An allonge must be so firmly affixed to a note as to become a part thereof. (UCC 3-202[2] ["An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become part thereof."]).

In this case, attached to the summons and complaint was a copy of a mortgage to JP Morgan Chase Bank, NA, which was recorded by the Nassau County Clerk on or about March 22, 2006. JP Morgan was made a defendant to the action as a result of its lien, which was adverse to plaintiff's interest. However, the plaintiff attached neither the mortgage nor note that it sought to foreclose.

Wells Fargo attaches to its motion papers as an exhibit a certain pooling and servicing agreement dated January 1, 2007, between Option One Mortgage Corporation as servicer and Wells Fargo Bank, NA as trustee, which lists the instant loan as among those to be pooled. No affidavit of a person with knowledge is offered to explain the significance of the pooling and servicing agreement. Also attached is a certificate of merit, submitted pursuant to CPLR 3012-b, which includes a copy of the August 14, 2006 Note. On the last page thereof is a stamped endorsement signed by one Evelyn Ortiz as Post Closing Supervisor on behalf of Superior Home Mortgage. Also included is a purported allonge, on a page dated October 16, 2006 and signed by an unnamed individual with the title "Assistant Secretary." An additional allonge, on a page dated October 31, 2006, is signed by one Penny Garcia also with the title "Assistant Secretary." Both purported allonges indicate that they are "page 8 of 26." Wells Fargo contends that the allonge endorsements are in blank, rendering it the holder in due course of a negotiable note. Defendants contend that at least the first endorsement is specifically to Option One Mortgage Corporation and the allonge endorsements appeared under suspicious circumstances.

In particular, defendants contend that when plaintiff filed its first foreclosure action on June 15, 1009, it had no documents to demonstrate standing and later acknowledged that an assignment of the subject mortgage was infirm. Defendants contend that only after Ofra Levin's motion to dismiss the first action was fully briefed, and plaintiff filed a second sur-reply affidavit on April 19, 2012, did David J. Merrill submit an affidavit, together with a certification by one John J. Gable and the endorsed Note with the first "unidentified" allonge. Defendants further contend that the second allonge appeared for the first time on July 29, 2014. Defendants point out that as the Note itself is specifically endorsed to Option One, plaintiff must rely on either one or both allonges to establish standing, but it fails to indicate which one. In addition, defendants contend that Penny Garcia has stated elsewhere that she did not sign the allonge and that plaintiffs have failed to explain why the two allonges were signed two weeks apart and why the signor of the first allonge could not sign the second allonge two weeks later.

Motion Sequence 3 and Cross-Motion Sequence 4

Taking up first plaintiff's cross-motion for a protective order (motion sequence 4), on this record, it is not clear that the plaintiff will be able to establish that it was a holder of a note endorsed in blank upon commencement of this action. Accordingly, although defendant's allegations of fraud with respect to the assignments are obviated by the plaintiff's waiver as to this ground for standing, the court will not preclude defendants from pursuing appropriate discovery with respect to the endorsements and physical delivery of the Note.

Next, by motion sequence 3, defendants seek a commission to depose the following individuals:

- Roger Kistler, the alleged vice president of Sand Canyon, who executed a "corrected" assignment of mortgage.

- Stephen Cors, the former CEO of the originating lender Superior Home Mortgage Corp. on the grounds that as former CEO, he "would have information relevant to its business practices at the time the purported assignment(s) of the mortgage took place."

- David John Merill, who submitted an affidavit on behalf of the plaintiff as Assistant Secretary for American Home Mortgage Servicing, Inc. on the basis that his testimony is "essential to" defendants' assertion that plaintiff lacks the requisite standing to initiate and maintain a foreclosure action "based on fraudulent and robo-signed documents."

- Joyce Breuninger, as CEO of American Document Services, LLC, an entity that defendants allege to have worked in concert with the plaintiff and others to create fraudulent and robo-signed documents.

- Todd C. Johnson, as Executive Vice President, Secretary, and General Counsel of Lender Processing Services, Inc. and certain subsidiaries thereof, an entity that defendants allege also conspired with plaintiff to create fraudulent and robo-signed documents.

- Joachim Dent Vent, who was identified by plaintiff as a person with knowledge from 2013 on, and who notarized documents in favor of the plaintiff earlier than 2013.

With the exception of David J. Merrill, each of these individuals is named only in connection with defendants' allegations that the mortgage assignments were fraudulently created. As plaintiff has waived assignment as a basis of standing, the defendants' motion for a commission to depose these individuals is denied. However, given the potentially central role of David J. Merrill in support of plaintiff's current claim of standing based on his previous affidavit, the court will permit deposition of that individual.

Motion Sequence 5

With respect to defendants' motion to have the court take judicial notice of certain exhibits (motion sequence 5), judicial notice is appropriate where the item is reliably sourced and its accuracy cannot be contested. (*See Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 AD3d 13 [2d Dept 2009] ["[T]he test for judicial notice [has been defined in reference to] 'whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven.'"]; *see also Chateau Rive Corp. v. Enclave Development Assoc.*, 22 AD3d 445 [2d Dept 2005] [taking judicial notice of public documents envincing "indicia of authenticity and reliability"]). "The determination of whether to judicially notice a

court-generated document ultimately rests upon whether the document is reliable, the accuracy and veracity of which cannot be disputed. [For example,] Court-generated orders from the Chief Administrative Judge, designating a jurist of one court as an acting jurist in another court, satisfy the requisite reliability, accuracy, and veracity as to be uncontestable for judicial notice." (*Caffrey v. N. Arrow Abstract & Settlement Servs., Inc.*, No. 102525-cv-09, 2018 WL 846295, at *3 [2d Dept Feb. 14, 2018]).

The items attached to defendants' motion consist of (a) a document entitled "Wells Fargo Home Mortgage Foreclosure Attorney Procedure Manual, Version 1"; (b) deposition testimony and court orders and verdicts from unrelated actions; (c) affidavits submitted by various parties in the prior foreclosure action involving these parties; and (d) various assignment documents related to this mortgage and unrelated mortgages.

It is not clear, at this juncture, that these items are uncontestable or even relevant to the instant proceedings. Nothing will preclude this court, or a subsequent trial court, from taking judicial notice of appropriate items at a later phase of this action. Accordingly, defendants' motion to take judicial notice will be denied, without prejudice.

Motion Sequence 6 and Cross-Motion Sequence 7

The basis of motion sequence 6 is the Levin defendants' May 22, 2017 notice to admit. Wells Fargo contends that the requests to admit seek information challenging the plaintiff's standing to enforce the mortgage, which is a disputed issue at the heart of the case and is improper for a notice to admit. Moreover, plaintiff contends that many of the requests go to the irrelevant question of mortgage assignments. Plaintiff's prior motion on identical matters was denied without prejudice for failure to attach the actual notice to the motion.

As noted in the court's prior decision "'[t]he purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial' (*DeSilva v. Rosenberg*, 236 AD2d 508; *see Rosenfeld v. Vorsanger*, 5 AD3d 462)." (*Sagiv v. Gamache*, 26 AD3d 368, 369 [2d Dept 2006]). Thus, the notice to admit "is a vehicle for resolving and eliminating from contention matters which, though factually relevant, are not really in dispute." (*Villa v. New York City Housing Authority*, 107 AD2d 619 [1st Dept 1985]). It cannot be used to "seek admissions of material issues or ultimate or conclusory facts . . ., interpretations of law, questions already admitted in responsive pleadings, or questions clearly irrelevant to the case." (*Id.* at 620).

Here, defendants have propounded 29 requests for admission. The court strikes requests 4, 5, 7, 8, 11, 13, 14, 15, 17, 18, 19, 20, and 29 as seeking admissions of ultimate or disputed issues or bearing on matters that are irrelevant to this action.

Finally, defendants' cross-motion to strike the complaint pursuant to CPLR 3124 and 3126 (motion sequence 7) for willful and contumacious failure to comply with defendants' requests for production dated September 1, 2017 and November 19, 2017, as well as defendants' second set of interrogatories dated September 1, 2017 is denied. "'Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious' (*Zakhidov v. Boulevard Tenants Corp.*, 96 AD3d 737, 739; *see Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d at 210; *Commisso v. Orshan*, 85 AD3d 845)." (*Neenan v. Quinton*, 110 AD3d 967 [2d Dept 2013]). A litigant's willful and contumacious conduct "can be inferred from their repeated failures to comply with court orders directing disclosure (*see Espinal v. City of New York*, 264 AD2d 806 [1999) and the inadequate excuses offered to justify the defaults (*see Porreco v. Selway*, 225 AD2d 752, 753 [1996]; *DeGennaro v. Robinson Textiles*, 224 A.D.2d 574 [1996]).

In opposition to defendants' motion to strike, plaintiff attaches its previously served responses and objections to defendants' discovery requests. Accordingly, there is insufficient basis to find a willful and contumacious failure to comply with discovery requests, such that striking a pleading is called for.

As part of their cross-motion, defendants further request an order compelling the plaintiff to produce a witness with knowledge to appear for oral examination and to direct plaintiff to respond to defendants' notice to admit, or in the alternative, to deem all requests admitted. The court resolved the defendants' requests concerning their requests for admission as herein provided. In addition, any other particular outstanding discovery matters can be addressed at the next court conference.

For the foregoing reasons, it is hereby

ORDERED, that defendants' motion (MS 3) for a commission pursuant to CPLR 3108 is **granted** with respect to David J. Merrill and is otherwise **denied**; and it is further

ORDERED, that plaintiffs' motion (MS 4) for a protective order is **denied** with respect to the issue of the endorsements and physical delivery of the Note and is otherwise **granted**; and it is further

ORDERED, that defendants' motion (MS 5) to take judicial notice is **denied**, without prejudice; and it is further

ORDERED, that plaintiffs' motion (MS 6) to strike the notice to admit is **granted in part**, and the court strikes defendants' Requests for Admission numbers 4, 5, 7, 8, 11, 13, 14, 15, 17, 18, 19, 20, and 29. The plaintiff is directed to provide responses to the remaining requests

for admission within 14 days of service of a copy of this order with notice of entry; and it is further

ORDERED, that defendants' motion (MS 7) to strike the complaint is **denied**; and it is further

ORDERED, that the parties are directed to appear for a conference on **March 13, 2018 at 11:00 a.m.** Counsel for the plaintiff is directed to appear with the original "wet ink" note, together with any allonges and additional papers attached thereto. The parties should appear at the conference prepared to discuss any specific items of discovery they view as outstanding.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
March 16, 2018

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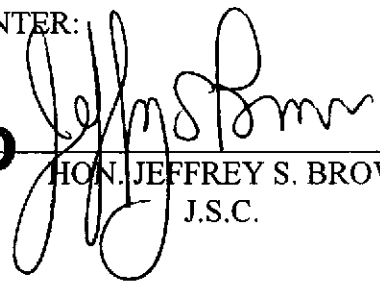

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