

| |
|--|
| Wilmington Trust N.A. v Fife |
| 2020 NY Slip Op 30373(U) |
| January 29, 2020 |
| Supreme Court, New York County |
| Docket Number: 850003/2017 |
| Judge: Arlene P. Bluth |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

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

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X

INDEX NO. 850003/2017

WILMINGTON TRUST NATIONAL ASSOCIATION, AS
SUCCESSOR TRUSTEE TO CITIBANK, NA, AS TRUSTEE
FOR BNC MORTGAGE LOAN TRUST SERIES 2007-3,
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES
2007-3,

MOTION DATE N/A

MOTION SEQ. NO. 002

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

CHRISTINE FIFE, BOARD OF MANAGERS OF
COLUMBUS COMMON CONDOMINIUM, JOHN DOE #1
THROUGH JOHN DOE #12,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 75, 76, 77, 78, 79, 80

were read on this motion to/for SUMMARY JUDGMENT

The motion for summary judgment by defendant Fife is granted and this action is dismissed.

Background

This is the second foreclosure action commenced on property owned by defendant Fife located at 110 West 90th Street in Manhattan. The first foreclosure complaint filed August 3, 2010, states that "Plaintiff has elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal" (NYSCEF Doc. No. 58, ¶ 10). This action was later discontinued by plaintiff's predecessor in 2016.

Plaintiff commenced this action on January 6, 2017. Ms. Fife claims that this action is time barred because the instant action was started more than six years after the first foreclosure case began.

In opposition, plaintiff contends that there are three issues of fact regarding whether its predecessor had standing to commence the first action. First, plaintiff questions the assignment from the Mortgage Electronic Registration Systems Inc. (“MERS”) to Citibank (plaintiff’s predecessor). Second, plaintiff speculates that Citibank never affirmatively stated it had possession of the note in the first complaint. Third, plaintiff argues that MERS did not possess the authority to assign the note to Citibank. Plaintiff maintains that if Citibank did not have standing, then the prior acceleration was a nullity and the statute of limitations never began to run.

In reply, Ms. Fife contends that the submission of an attorney affirmation is not sufficient to raise a material issue of fact on a summary judgment motion. She also points out that plaintiff’s complaint here contends that it has standing based on the same note that was presented in the first foreclosure case and that this raises questions about plaintiff’s standing here.

Discussion

“In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the action was timely or [] raise an issue of fact as to whether the action was timely” (*MTGLQ Investors, LP v Wozencraft*, 172 AD3d 644, 644-45, 102 NYS3d 25 [1st Dept 2019] [internal

quotations and citations omitted]). “[A]ctions are time-barred [where] they were commenced more than six years from the date that all of the debt on the mortgages was accelerated” (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530, 48 NYS3d 597 (Mem) [1st Dept 2017]).

Where a plaintiff lacked standing to commence a prior action, “plaintiff’s purported acceleration of the note was a nullity, and thus the statute of limitations did not begin to run and the current action [is] not time-barred” (*Deutsche Bank Natl. Trust Co. v Bd. of Managers of the 225 East 86th St. Condominium*, 162 AD3d 547, 547, 75 NYS3d 424(Mem) [1st Dept 2018]). And with respect to standing, “the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law” (*Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 361, 12 NYS3d 612 [2015]).

Prior Foreclosure Complaint

Here, it is undisputed that there was a prior foreclosure complaint that sought to accelerate the note in 2010 and that the instant action was commenced more than six years later. The Court rejects plaintiff’s claim that the language in paragraph 4(a) of the 2010 complaint establishes that Citibank lacked standing. That paragraph states that “Plaintiff is the owner and holder of the subject mortgage and note or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note” (NYSCEF Doc. No. 58, ¶ 4[a]).

Ironically, paragraph 12 of the complaint filed for this case states in part that “Now, as the owner and/or holder of the Subject Note and owner of the Subject Mortgage, or having been delegated the requisite authority to commence a mortgage foreclosure action by the owner and/or holder of the Subject Note and Mortgage” (NYSCEF Doc. No. 1, ¶ 12). If this language raises an

issue of fact with respect to Citibank's standing, then plaintiff has effectively conceded that it is not entitled to summary judgment in this case or in the numerous other cases in which it uses this language. Surely, it is not plaintiff's intention to have a trial in every case in which this language is included.

Moreover, the paragraph is clearly an allegation that plaintiff has standing—it either possesses the note or has the authority to start a case by the owner of the note. While the Court questions why plaintiff does not know it if possesses the Note or is delegated the authority to start a case on behalf of the owner of the note, it does not change the fact that the intention of this allegation is to assert possession of the note.

Burden

This decision is about burdens. Plaintiff appears to suggest that it is Ms. Fife's burden to establish that plaintiff's predecessor had standing to prosecute the 2010 foreclosure case. But that is a misapplication of a motion based on statute of limitations. Here, Ms. Fife established her prima facie burden by attaching the prior foreclosure complaint and pointing out that the instant case was commenced more than six years later. The burden then shifted to plaintiff to raise an issue of fact.

It is not, contrary to plaintiff's arguments, Ms. Fife's role to investigate plaintiff's predecessor. And while plaintiff is correct that a lack of standing would nullify a prior acceleration (*Deutsche Bank Natl. Trust Co.*, 162 AD3d at 547), there was no finding that Citibank lacked standing when it started the 2010 foreclosure case. In other words, because that case was simply discontinued by Citibank, this Court cannot just assume that the 2010 acceleration was a nullity. And plaintiff has not submitted sufficient evidence to show that

Citibank lacked standing. For instance, there is no affidavit submitted from a Citibank employee asserting that it lacked standing when the 2010 case began.

Plaintiff's claim concerning the assignment between MERS and Citibank is inapposite because it involves assignment of the mortgage (see NYSCEF Doc. No. 76) and the note conveys standing in a foreclosure action rather than the mortgage (Aurora Loan Services, LLC, 25 NY3d at 361). Plaintiff also failed to submit any evidence in admissible form to raise an issue of fact about whether MERS had the authority to assign the note to Citibank—the affirmation from plaintiff's attorney is not enough.

Because plaintiff does not claim that it obtained the note from anyone other than Citibank, plaintiff presumably obtained the note from Citibank. Therefore, if plaintiff's unsupported allegations about Citibank were true, then it would effectively constitute an admission that it does not have standing to prosecute this case either.

Accordingly, it is hereby

ORDERED that the motion by defendant Fife for summary judgment is granted, this action is dismissed and the Clerk is directed to enter judgment with costs upon presentation of proper papers therefor and to cancel the notice of pendency filed in connection with this case.

1.29.2020

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE