

U.S. Bank Trust, N.A. v Henderson

2023 NY Slip Op 33510(U)

September 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 3701/2010

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

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U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LSF11 MASTER PARTICIPATION TRUST,

Plaintiff,

-against-

Decision and Order
After Trial

HEATHER HENDERSON AIKJA HEATHER Q.
HENDERSON; FLEET NATIONAL BANK; BOARD
OF MANAGERS OF GRANTS MEWS
CONDOMINIUM; "JOHN DOE" AND "JANE DOE"
said names being fictitious, it being the intention of
Plaintiff to designate any and all occupants of premises
being foreclosed herein,

Index No. 3701/2010

Defendants.

-----X
MONTELIONE, RICHARD J., J.

The Court considered the following exhibits:

Plaintiff's Exhibit	Document Date/Recorded	Description
1A	8/4/2003	Certified Copy of document filed with City of New York, Department of Finance, Promissory note, deemed an original for purposes of trial after defendant's counsel compared the copy to the original, referencing 472 Warren Street, Brooklyn, NY 11217, with a principal amount of \$120,000.00. Lender is Skyline Mortgage I/L/T U.S. Mortgage Corp, A New Jersey Corporation.
2	8/4/2003	Certified Copy of document filed with City of New York, Department of Finance, Mortgage in the

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KINGS COUNTY CLERK
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Plaintiff's Exhibit	Document Date/Recorded	Description
		principal amount of \$120,000.00, referencing borrower Heather Henderson, 472 Warren Street, Brooklyn, NY 11217, Lender is Skyline Mortgage I/L/T U.S. Mortgage Corp.
3	UNDATED, Recorded 12/8/2004	Certified Copy of document filed with City of New York, Department of Finance, Assignment of Mortgage, loan no. 501500119, dated MERS as nominee for Skyline Mortgage I/L/T U.S. Mortgage Corporation to Indymac Bank, F.S.B., referencing 472 Warren Street, Brooklyn, NY 11217 (Document date listed on cover page is 9/12/2003).
4	4/16/2015, recorded 5/18/2015	Certified Copy of document filed with City of New York, Department of Finance, Corporate Assignment of Mortgage, MERS Assignor Skyline Mortgage I/L/T U.S. Mortgage Corporation to Indymack Bank, F.S.B., referencing Heather Henderson, 472 Warren Street, Brooklyn, NY 11217.
5	2-23-2004	Certified Copy of document filed with City of New York, Department of Finance, Assignment of Mortgage, loan number 501500119, dated February 23, 2004, MERS Assignor Skyline Mortgage I/L/T U.S. Mortgage Corporation to Indymac Bank, F.S.B., referencing 472 Warren Street, Brooklyn, NY 11217 (Document date listed on cover page is 7/13/2005).
6	10/1/2013 Recorded on 11/1/2013	Certified Copy of document filed with City of New York, Department of Finance Assignment of Mortgage, loan number (not indicated), MERS OneWest Bank, F.S.B., Assignor to Ocwen Loan Servicing, LLC, referencing Mortgage recorded on August 4, 2003 re Heather Henderson, property

Plaintiff's Exhibit	Document Date/Recorded	Description
		address 472 Warren Street-Apt.#3, Brooklyn, NY 11215, block 399/Lot 1018.
7	9/15/2009	Letter dated 9/15/2009 from Home Loan Servicing to Heather Henderson demanding payment of \$1,644.99 to cure the default on the mortgage with a loan number #####8247.
8	10/20/2009	Letter dated 10/20/2009 from Home Loan Servicing to Heather Henderson demanding payment of \$2,578.93 annexing information pertaining to HUD-Approved housing counseling agencies located in New York.
9	3/11/2021 recorded on 7/15/2021	Certified Copy of document filed with City of New York, Department of Finance, Power of Attorney dated 3/11/2021 from various trusts through U.S. Bank Trust National Association to Fay Servicing, LLC and various other entities.

This matter is an action for the foreclosure of a mortgage on real property, a condominium, located at 472 Warren Street, Brooklyn, NY 11217, Unit 472-3, block 399, Lot 1018, that was mortgaged by the defendant Heather Henderson to secure a loan which was obtained on August 4, 2003, in the amount of \$120,000.00 ("subject mortgage"). The action was commenced by filing a summons and complaint on February 11, 2010. Issue was joined by filing an answer on March 3,

2010. The ACRIS records¹ indicate that:

- A. The original subject mortgage is dated August 4, 2003 and filed with the County Clerk on February 3, 2004, from Heather Henderson, Assignor, to Skyline Mortgage I/L/T U.S. Mortgage Corp., Assignee, Block 399, Lot 1018, Unit 472-3, 472 Warren Street, Brooklyn, NY, CRFN 2004000064143.
- B. The subject mortgage was thereafter assigned by Assignment dated September 12, 2003 and filed on December 8, 2004, from Skyline Mortgage I/L/T U.S. Mortgage Corp., Assignor, to Indymac Bank, F.S.B., Assignee, CRFN 2004092202387001.
- C. The subject mortgage was thereafter re-recorded by Assignment dated February 23, 2004 and filed on May 10, 2006, from, Skyline Mortgage I/L/T U.S. Mortgage Corporation, Assignor, to Indymac Bank, F.S.B., Assignee, CRFN 2006013001491001.
- D. The subject mortgage was thereafter assigned by Assignment dated March 15, 2010 and filed on April 7, 2010, from Federal Deposit Insurance Corporation, As Receiver for Indymac Federal Bank, FSB, successor to Indymac Bank, F.S.B., Assignor, to OneWest Bank, FSB,

¹ The parties in a post-trial stipulation agreed that the court may take Judicial Notice of the Assignments involving the subject premises as found on ACRIS and attached assignment records to the agreement (NYSCEF#4).

Assignee, CRFN 2010000116535.

- E. The subject mortgage was thereafter assigned by Assignment dated October 1, 2013 and filed on November 1, 2013, from OneWest Bank, FSB, Assignor, to Ocwen Loan Servicing, LLC, Assignee, CRFN 2013000453073.
- F. The subject mortgage was thereafter assigned by Assignment dated April 16, 2015 and filed on May 18, 2015, from Skyline Mortgage I/L/T US Mortgage Corporation, Assignor to Indymac Bank, FSB, CRFN 2015000166321.
- G. The subject mortgage was thereafter assigned by Assignment dated September 15, 2015 and filed on September 21, 2015, from Ocwen Loan Servicing, LLC, Assignor, to Skyline Mortgage I/L/T US Mortgage Corp, Assignee, CRFN 2015000335248.
- H. The subject mortgage was thereafter assigned by Assignment dated March 4, 2019 and filed on March 5, 2019, from Federal National Mortgage Association, Assignor, to US Bank Trust, NA, As Trustee for LSF11 Master Participation Trust, Assignee, CRFN 2019000072239.

The trial commenced and concluded in this action on February 22, 2022.

The court heard testimony from one witness on behalf of the plaintiff, Janet Gioello, who works for Faye Servicing LLC which is currently servicing the

subject loan for plaintiff and deals with all aspects of loan processing, payments, and loss mitigation. Ms. Gioello holds the title “trial/mediation specialist” who manages a portfolio of loans. She previously worked for Bank of America for 17 years, seven years of which was as a litigation paralegal. Ms. Gioello is involved in all aspects of loan processing and loss mitigation. Ms. Gioello testified about the process of “boarding a loan.” Ms. Gioella testified there are no records of any payments since August 1, 2009, the date of default. Taxes and insurance have been paid by the lenders. No ledger or other business records were admitted into evidence detailing the amount due each month, accrued interest, taxes, water or other fees. Plaintiff’s counsel at the end of the case in chief requested that the court schedule a hearing for the determination of damages.

The original note was produced in court and both the defendant’s counsel and the court had an opportunity to view it. The parties stipulated to the admission of an exact copy of the note in evidence in lieu of the original.

The Answer, paragraphs 4, 9, and 11 specifically raises the following defense: “Plaintiff has either failed or refused to provide proof of legal standing and ownership of this debt.”

The court by order dated June 9, 2023 and entered on June 13, 2023 substituted the plaintiff for US Bank Trust, NA, as Trustee for LSF11 Master Participation Trust and allowed the amendment of the caption to reflect the

substituted party.

Applicable Law

The court must first address the defendant's affirmative defense of lack of standing. *See Kondaur Cap. Corp. v. McCary*, 115 A.D.3d 649, 649–50, 981 N.Y.S.2d 547, 2014 N.Y. Slip Op. 01438, 2014 WL 840564 (2014),

‘Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief’ (*Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888, 934 N.Y.S.2d 182; *see Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279, 926 N.Y.S.2d 532; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 753, 890 N.Y.S.2d 578). A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that 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 (*see HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 939 N.Y.S.2d 120; *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 279, 926 N.Y.S.2d 532; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d at 753, 890 N.Y.S.2d 578). The plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing “[e]ither a written assignment of the underlying note or the physical delivery of the note” (*U.S. Bank, N.A. v. Collymore*, 68 A.D.3d at 754, 890 N.Y.S.2d 578;

The plaintiff claims standing, and the caption provides that plaintiff Onewest Bank, FSB, is a successor-in-interest to the FDIC Conservatorship of Indymac Bank. However, no documentary proof was ever presented at trial that Onewest Bank is actually a “successor-in-interest.” The complaint does not provide a date

when OneWest Bank became the Successor-in-interest. The assignment from Federal Deposit Insurance Corporation, as Receiver for Indymac Federal Bank, FSB, successor to Indymac Bank, FSB, assignor, to OneWest Bank, FSB, as assignee, occurred on March 15, 2010. (Paragraph “D” of ACRIS records). This is significant because the assignment occurred *after* the commencement of the action on February 11, 2010. “A plaintiff in a mortgage foreclosure action has standing where it is the holder or assignee of the underlying note *at the time the action is commenced* (see *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d at 361, 12 N.Y.S.3d 612, 34 N.E.3d 363; *U.S. Bank N.A. v. Handler*, 140 A.D.3d 948, 949, 34 N.Y.S.3d 463),” *OneWest Bank, FSB v Berino*, 158 AD3d 811, 812, 71 NYS3d 563, 565, 2018 NY Slip Op 01318, 2018 WL 1075715 [2d Dept 2018].

In other words, there is no documentary proof that OneWest Bank, FSB is either a successor-in-interest to the FDIC Conservatorship of Indymac Bank or that it was the successor-in-interest prior to the commencement of the action or it was assigned the note and mortgage prior to the commencement of the action. “Insofar as the Supreme Court reached its determination that OneWest had standing by, sua sponte, ‘independently tak(ing) judicial notice of the FDIC website,’ this Court has repeatedly cautioned against such independent Internet investigations, especially when conducted without providing notice or an opportunity for the parties to be heard (see *First United Mtg. Banking Corp. v. Lawani*, 147 A.D.3d 912, 913, 48

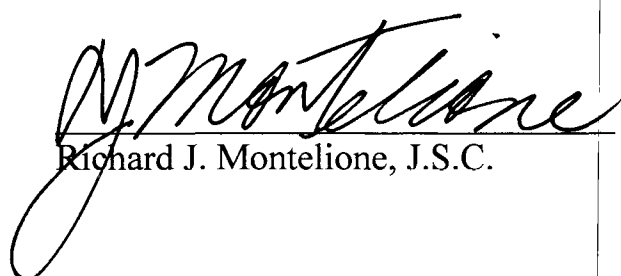
N.Y.S.3d 190; *HSBC Bank USA, N.A. v. Taher*, 104 A.D.3d 815, 818, 962

N.Y.S.2d 301),” *see OneWest Bank, FSB v Berino*, 158 AD3d 811, 813, 71 NYS3d

563, 565, 2018 NY Slip Op 01318, 2018 WL 1075715 (2d Dept 2018).

Based on the foregoing, the plaintiff has failed to prove standing, and the complaint is dismissed.

Dated: September 25, 2023


Richard J. Montelione, J.S.C.

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2023 SEP 27 AM 9:18