

Onewest Bank, FSB v Burrell
2013 NY Slip Op 31274(U)
June 12, 2013
Sup Ct, Suffolk County
Docket Number: 001663-2013
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:

HON. EMILY PINES

J. S. C.

Motion Date: 03-15-2013

Submit Date: 03-21-2013

Motion No.: 001 MD

X

ONEWEST BANK, FSB,

Plaintiff,

- against -

MICHAEL C. BURRELL A/K/A MICHAEL BURRELL, HEATHER N. BURRELL A/K/A HEATHER BURRELL, RICHARD BAKER AND LISA BAKER, ALISON BURRELL BURRELL, BRIDGEHAMPTON NATIONAL BANK, AMERICAN EXPRESS CENTURION BANK, PEOPLE OF THE STATE OF NEW YORK c/o CLERK OF SUFFOLK COUNTY, CACHE, LLC., "JOHN DOE #1 - 5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

X

ORDERED, that the motion (Mot. Seq. 001) by defendant Michael C. Burrell for an order dismissing this action insofar as asserted against him on the ground that plaintiff lacks standing to foreclose upon the property at issue, is denied; and it is further

ORDERED that a conference before the Court is hereby scheduled for July 11,

2013, at 9:30 a.m.

Pursuant to a Note dated May 7, 2007, the defendants Heather N. Burrell and Michael C. Burrell (“Defendants”) borrowed the sum of \$325,000 from IndyMac Bank, F.S.B. (“IndyMac”). The Note was secured by a mortgage on residential real property in Southampton, New York (hereinafter “Property”). The mortgage refers to Mortgage Electronic Registration Systems, Inc. (hereinafter “MERS”) as the mortgagee for purposes of recording, and provides that the underlying promissory note is in favor of IndyMac. The section of the mortgage entitled “Borrower’s Transfer to Lender of Rights in the Property” provides:

“[The Borrowers] understand and agree that MERS holds only legal title to the rights granted by [the Borrowers] in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right:

“(A) to exercise any or all of those rights, including, but not limited to the right to foreclose and sell the Property; and

“(B) to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.”

The mortgage was recorded in the office of the Suffolk County Clerk on May 18, 2007.

The Defendants allegedly defaulted on the Note on July 1, 2009.

On November 3, 2009, by way of an “Assignment of Mortgage,” MERS, as IndyMac’s nominee, assigned the mortgage to Plaintiff One West Bank FSB (hereinafter “Plaintiff”).

On December 7, 2009, Plaintiff commenced a foreclosure action against Defendants and others in this Court under Index # 48131/09 (hereinafter “2009 Action”).

The Assignment of Mortgage was recorded in the office of the Suffolk County Clerk on December 15, 2009.

By order dated April 5, 2012, this Court granted the cross-motion by defendant Michael C. Burrell (hereinafter “Burrell”) to dismiss the 2009 Action on the ground that Plaintiff lacked standing to foreclose upon the Property. The Court found that in opposition to the cross-motion, the Plaintiff failed to demonstrate that it had standing to commence the foreclosure action, since it failed to establish how or when it became the lawful holder of the Note, either by physical delivery of the Note to it or by valid assignment. The Court rejected as insufficient the unsubstantiated assertions of Plaintiff’s counsel that Plaintiff had possession of the Note.

On January 15, 2013, Plaintiff commenced the instant foreclosure action in this Court regarding the same Property under Index # 1663/13. Burrell now moves to dismiss this action pursuant to CPLR 3211 on the grounds that Plaintiff lacks standing and because the action is barred by res judicata based upon this Court’s order dismissing the 2009 Action. Burrell argues, among other things, that Plaintiff continues to lack standing because it has not tender any proof as to how or when it became the lawful holder of the Note.

In opposition to Burrell’s motion, Plaintiff submits, among other things, an affidavit from Forrest McKnight, Assistant Secretary of Plaintiff. McKnight avers, in relevant part:

Plaintiff is the holder and is in possession of the original note dated May 7, 2007 executed by Defendants Michael C. Burrell and Heather N. Burrelly [sic] in favor of IndyMac Bank, F.S.B. in the amount of \$325,000.00 Plaintiff has been

in possession of said original note since at least the date of the U.S. government facilitated agreement dated March 9, 2009 between the FDIC as conservator for the IndyMac Federal Bank, F.S.B. and OneWest Bank, F.S.B. wherein the assets of the failed IndyMac Bank were transferred and/or otherwise conveyed to the Plaintiff herein. As such, Plaintiff has been in possession of the promissory note prior to the commencement of this proceeding on January 15, 2013.

Thus, Plaintiff argues that it has demonstrated that it has standing to maintain this action. Additionally, Plaintiff argues that this action is not barred by res judicata because this Court's order dated April 5, 2012, dismissing the 2009 Action was not a determination on the merits.

Discussion

As recently explained by the Appellate Division, Second Department in *HSBC Bank USA v Hernandez* (92 AD3d 843 [2d Dept 2012]):

In order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage. A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2011]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207 [2009]; *US Bank, N.A. v Collymore*, 68 SAD3d 752, 753 [2009]). An assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2011]; *Bank of N.Y. v Silverberg*, 86 AD3d at 280). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (*U.S. bank, N.A. v Collymore*, 68 AD3d at 754; *see Aurora Loan Servs., LLC v*

Weisblum, 85 AD3d at 108).

“As a general matter, once a promissory note is tendered and accepted by an assignee, the mortgage passes as an incident to the note” (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]).

Here, the uncontroverted evidence submitted by the Plaintiff in the form of the affidavit of its Assistant Secretary established that the original note was delivered to the Plaintiff no later than March 2009, and that it was in possession of it at the time this action was commenced in January 2013. As such the mortgage passed to the Plaintiff in March 2009 as an incident to the note. Additionally, Plaintiff has produced a subsequent Assignment of Mortgage dated November 3, 2009, whereby the mortgage was assigned to it. Based upon the foregoing, Burrell has failed to demonstrate that he is entitled to dismissal of the complaint insofar as asserted against him on the ground that the Plaintiff lacks standing (*see, US Bank Natl. Assoc. v Cange*, 96 AD3d 825 [2d Dept 2012]).

Contrary to Burrell’s contention, *res judicata* does not bar this action. As explained by the Court of Appeals in *Parker v Blauvelt Volunteer Fire Co.* (93 NY2d 343, 347-349 [1999]):

Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action (*Matter of Reilly v Reid*, 45 NY2d 24, 27; *see also, Schuylkill Fuel Corp. v B. & C. Nieberg Realty Corp.*, 250 NY 304, 306-307 [Cardozo, Ch. J.]). As a general rule, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O’Brien v City of Syracuse*, 54 NY2d 353, 357; *Matter of Reilly v Reid*, *supra*, at 30).

Since this Court’s dismissal of the 2009 Action for lack of standing was not a final

determination on the merits for res judicata purposes (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8 [2008]), Plaintiff is not precluded from reasserting the same foreclosure claim in this action.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: June 12, 2013
Riverhead, New York



EMILY PINES
J. S. C.

Final
 Non Final

To:

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