

Vaughan v HSBC Mtge. Corp.

2013 NY Slip Op 33600(U)

December 18, 2013

Sup Ct, Putnam County

Docket Number: 1110/12

Judge: Lewis J. Lubell

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DISPO

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF PUTNAM

-----X KEVIN VAUGHAN and COLLEEN VAUGHAN,

Plaintiff,

-against -

HSBC MORTGAGE CORPORATION, MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR THE HIS ASSET LOAN OBLIGATION TRUST 2007-1, HIS ASSET SECURITIZATION CORPORATION, CITIMORTGAGE, INC., CITIBANK, N.A., WELLS FARGO BANK, N.A., AND "JOHN DOE" 1-5 and "JANE DOE" 1-5, the last ten names being fictitious, said parties intended being disclosed, unnamed and unknown investors, participants, corporate or other entities, conduits, trustee, servicers, custodians, and others, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

-----X LUBELL, J.

DECISION & ORDER

Index No.1110/12

Sequence No. 1-3

Motion Date:10/15/13

The following papers were considered in connection with this motion sequence #1 by defendants for an Order awarding Citimortgage, Inc., Citibank, NA, and Wells Fargo Bank, NA, summary judgment as to the complaint filed by the plaintiffs, dismissing the complaint against them; motion sequence #2 by defendants HSBC Mortgage Corporation (USA), sued herein as "HSBC Mortgage Corporation"; Mortgage Electronic Registration Systems, Inc.; Deutsche Bank National Trust Company, as trustee for the HSI Asset Loan Obligation Trust 2007-1; HSI Asset Securitization Corporation; and HSI Asset Loan Obligation Trust 2007-1 (collectively, "Defendants") for an Order granting defendants' motion for summary

judgment pursuant to CPLR 3212; and **motion sequence #3** by plaintiffs for an Order (1) granting plaintiffs' motion for summary judgment as to all the relief prayed for in their verified complaint dated May 12, 2102, and filed with the Clerk of this Court on May 23, 2012, as and against all defendants named herein or, in the alternative; (2) denying defendants' motions for summary judgment and allowing this action to proceed to trial; and (3) for such other and further relief as the Court deems just and proper.

| PAPERS | NUMBERED |
|--|-----------------|
| NOTICE OF MOTION/AFFIRMATION/AFFIDAVITS/EXHIBITS A-C | 1 |
| NOTICE OF MOTION | 2A |
| AFFIRMATION OF ANDREW J. WELLS | 2B |
| CLIENT AFFIDAVIT/EXHIBITS A-G | 2C |
| MEMORANDUM OF LAW | 3 |
| CROSS MOTION/AFFIRMATION/EXHIBITS A-C | 4 |
| MEMORANDUM OF LAW | 5 |
| AFFIDAVIT OF NILDA FELIZ/EXHIBIT A | 6 |
| CLIENT REPLY AFFIDAVIT/EXHIBIT A-B | 7 |
| AFFIRMATION IN REPLY/OPOSITION TO CROSS MOTION | 8 |

Plaintiffs bring this RPAPL Article 15 action to quiet title to the residential premises known as 24 First Street, Haverstraw, New York (the "Premises"). More specifically, plaintiffs seek judgment barring defendants from all claims to an estate, interest or encumbrance of any sort, in the Premises or, alternatively, directing a trial pursuant to CPLR 2218 on the issue of whether defendants are the actual owners of a certain underlying mortgage and promissory note or, in the alternative, granting plaintiffs a refund of all payments made to defendants and awarding plaintiffs attorney's fees, costs and disbursements for bringing this action and for such other and further relief as the Court deems just and proper.

Currently before the Court are the motions for summary judgment brought by (I) defendants HSBC Mortgage Corporation ("HSBC"), Mortgage Electronic Registration System, Inc. ("MERS"), Deutsche Bank National Trust Company ("Deutsche Bank") as Trustee for the HSI Asset Loan Obligation Trust 2007-1 (the "Trust"), and HSI Asset Securitization Corporation (collectively referred to as the "HSBC Defendants") and (II) defendants Citibank, N.A., Citimortgage, Inc., ("Citibank") and Wells Fargo Bank, N.A., ("Wells Fargo") and the cross-motion by plaintiffs for summary judgment in their favor.

Defendants' motions for summary judgment are granted and plaintiffs' cross-motion is denied. At the outset, the Court finds that defendants' have come forward with proof in admissible form

establishing their entitlement to judgement in their favor as a matter of law, including defendant Wells Fargo's physical possession of the underlying note and mortgage and entitlement to maintain a foreclosure action against plaintiffs, if they so choose.

Plaintiffs borrowed \$348,000.00 from HSBC, its successors and/or assigns, pursuant to a duly executed, acknowledged and delivered note dated February 22, 2007. As security for same, plaintiffs executed a mortgage to the Premises of same date in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for HSBC Mortgage and its successors in interest. HSBC Mortgage endorsed the Note in blank and the Note was physically transferred to defendant Wells Fargo, as custodian for the Trust, on March 14, 2007. On or about November 2, 2010, MERS, as nominee for HSBC Mortgage and its successors, assigned the Mortgage to Deutsche Bank, as trustee for the Trust.

Deutsche Bank commenced a foreclosure action on or about November 9, 2010. Following plaintiffs' motion to dismiss, Deutsche Bank moved to voluntarily withdraw the foreclosure action to allow counsel time to ensure that they were in possession of all documentation necessary to demonstrate Deutsche Bank's standing as plaintiff in the foreclosure action. The Court (Nicolai, J.) granted the motion on November 29, 2011, without prejudice. This RPAPL Article 15 action follows.

Currently, there is no dispute that monies are still owed on the Note and that the plaintiffs are otherwise in default. Among other things, plaintiffs argue, however, that "payments cannot be made to anyone because the true owner and holder of the note could be anyone in the world and could at any time come forward and demand payment" from them (Complaint ¶190). The Court disagrees.

Although perhaps an issue at the time of the since discontinued foreclosure action and even at the time this action was commenced, there is no dispute that, post-commencement of this Article 15 action and pre-motion, the HSBC Defendants, through counsel, produced the original Note and Mortgage for examination by the Court and plaintiffs' counsel during the Court's January 28, 2013, Status Conference. Further in that regard, there is no reason to doubt counsel's representation that he asked HSBC to request the original Note and Mortgage from Wells Fargo, the document custodian for the Trust, and that, in turn, counsel took delivery of same from HSBC, and that he is currently safeguarding same on behalf of defendants, including Deutsche Bank, as Trustee for the HSI Asset Loan Obligation Trust 2007-1 (the "Trust"), pending this litigation; (see, Affirmation of Andrew J. Wells,

Esq., dated July 1, 2013).

Contrary to plaintiffs' position as is articulated in their first cause of action, the Mortgage is not a nullity due to the "decoupling" of the Mortgage from the Note (see, Amherst Factors, Inc. v. Kochenburger, 4 NY2d 203, 207-08 [1958]; see also Shui Fong Loo v. HSBC Mortg. Corp. (USA), 36 Misc 3d 1223(A) [Sup Ct 2012]).

The Court also rejects plaintiffs' assertion that "MERS is a Nullity" (MERSCORP, Inc. v. Romaine, 8 NY3d 90, 94-95 [2006]), or that it lacked the authority to execute an assignment to Deutsche Bank. Among other things, authority for the latter is provided in the HSBC Mortgage itself (see St. Clair-Hougham Aff. dated June 24, 2013, Ex. B. p. "3 of 17").

Plaintiffs' reliance on Bank of New York v. Silverberg (86 AD3d 274, 275 [2d Dept 2011]) is misplaced. Among other reasons, there, ". . . because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage [was] a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff. Consequently, the plaintiff failed to show that it had standing to foreclose" (Bank of New York v. Silverberg, 86 AD3d 274, 283 [2d Dept 2011]). Here, in contrast, MERS is listed as mortgagee for recording purposes. As such, the lender remained "the holder of the mortgage and note from the outset and [] the mortgage confers no right to the note to MERS" (Fremont Inv. & Loan v. Laroc, 21 Misc 3d 1124(A) [Sup Ct 2008]). Therefore, "an assignment from [the lender] to itself, by means of the assignment by MERS, [can be regarded as] an effort by [the lender], as a matter of caution, to avoid any objection to the standing of MERS as a nominee for the lender to bring a foreclosure action [citations omitted]" (id.). In any event, Silverberg, supra, is a foreclosure action. While here, we are dealing with an action to quiet title where the original mortgage and has been produced.

Through their third cause of action, plaintiffs seek to challenge the underlying trust and securitization of the loan. However, such arguments are not properly before the Court since "[p]laintiffs lack standing to enforce the pooling and servicing agreement between defendant and the mortgagee as third-party beneficiaries" 767 Third Ave. LLC v. Orix Capital Markets, LLC, 26 AD3d 216, 218 [1st Dept 2006] citing 249 Holding Co., LLC v. Infante, 4 A.D.3d 184, 771 N.Y.S.2d 651 [2004]; see also Rajamin v. Deutsche Bank Nat. Trust Co., 10 CIV. 7531 LTS, 2013 WL 1285160 [SDNY Mar. 28, 2013]). Correspondingly, their fourth cause of action is also dismissed. Therein, plaintiffs argue that defendants are barred from claiming an interest in the Premises due to

"unclean hands and estoppel" based upon the terms of the Pooling and Serving Agreement.

Based upon the foregoing and there being no merit to any other contentions raised, it is hereby

ORDERED, that the complaint be and is hereby dismissed in all respects.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
December 18, 2013

S/

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