Supreme Court of the State of New York
Appellate Division: Second Judicial Department

WELLS FARGO BANK, N.A., AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-CP1 ASSET BACKED CERTIFICATES, SERIES 2007-CP1,

Plaintiff-Appellant,

- against -

EDWARD A. PARKER,

Defendant-Respondent,

NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, MICHAEL WINSLOW, MARK JACKSON, FREDERICK ALLEN, GEORGE VELEZ, DIANE ROBERTS,

Defendants.

To be argued by:
Renee Cadmus
15 Minutes

Appellate Division
Docket No.: 2013-00272

BRIEF FOR DEFENDANT-RESPONDENT

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*This unreported decision is attached to this brief for ease of reference.

Statutes

PRELIMINARY STATEMENT

Defendant-Respondent Edward A. Parker ("Respondent" or "Parker") opposes the appeal of Plaintiff-Appellant Wells Fargo Bank, N.A., as trustee for Option One Mortgage Loan Trust 2007-CP1 Asset Backed Certificates, Series 2007-CP1 ("Appellant" or "Wells Fargo"), and argues for affirmance of the September 4, 2012 Order of the Supreme Court, Kings County (Partnow, J.), which granted Respondent's motion to dismiss Appellant's foreclosure action for lack of standing and denied Appellant's cross-motion for summary judgment as moot.

Wells Fargo premised the underlying foreclosure action on an assignment of mortgage executed after it commenced the action. It continued to rely on the assignment in a series of motions. After Parker filed a motion to dismiss based upon lack of standing, Wells Fargo made an about-face and began to claim it had physical possession of the note prior to commencing the foreclosure.

Wells Fargo offered no admissible evidence that it possessed Parker's indorsed note on a date certain. Instead, Wells Fargo relied on the affidavit of Cindi Ellis, an employee of the current servicer, not the servicer at or around the time Wells Fargo claims Parker's note was transferred to it, as proof of its standing. Ms. Ellis's affidavit is inadmissible because neither she nor her employer could have personal knowledge of an alleged transfer of the note that occurred prior to Ms. Ellis's employer servicing the loan. Even if Ellis possessed

personal knowledge, her affidavit would nevertheless fail to prove standing because it does not set forth a date certain or any factual details surrounding the alleged physical delivery of the note.

Wells Fargo's failure to provide a valid assignment of mortgage or an affidavit by someone with personal knowledge stating the date and details regarding the alleged transfer of the note necessitates dismissal of the foreclosure action. The Supreme Court's Order dismissing the complaint and denying Appellant's cross-motion for summary judgment as moot must be affirmed.

COUNTERSTATEMENT OF FACTS AND NATURE OF THE CASE

Wells Fargo Files a Foreclosure Based on an Unexecuted Assignment.

On or about February 29, 2008, Appellant commenced a foreclosure action against Respondent by filing the summons and complaint. (R. at 9-57.) Appellant's summons and complaint specify that its standing to foreclose is based on a series of written assignments of mortgage. (R. at 11, 19.) An attachment to the summons explaining the "Nature and Object of Action" and an attachment incorporated into the complaint both state that Parker's mortgage would be "further assigned to Plaintiff by virtue of an Assignment of Mortgage to be recorded in the KINGS County Clerk's Office prior to the entry of judgment." (R. at 16, 19.) Appellant filed with the Kings County Clerk's Office an assignment of mortgage dated March 5, 2008, that purported to assign the mortgage to Appellant retroactively,

effective as of December 3, 2007. (R. at 77.)

Wells Fargo Continues to Base Standing on the Assignment Executed After it Filed the Foreclosure. On or about November 26, 2008, Appellant obtained an order of reference against Parker (R. at 59-62) and later obtained a judgment of foreclosure and sale. (R. at 63-71.) In or about June 2009, Parker moved to set aside the default judgment of foreclosure and sale and extend his time to answer the complaint. (R. at 72-73.) In opposition to Parker's motion, Appellant continued to base its standing claim on the assignment executed after it commenced the foreclosure. (R. at 334-347.)

Appellant touted the enforceability of retroactive assignments of mortgage, arguing that "the retroactivity of an assignment is widely accepted, except by a small minority of Courts." (R. at 334.) Nowhere in its opposition to Parker's motion to vacate did Appellant claim that it had standing based on physical possession of the note. (R. at 326-341.) The Supreme Court granted Parker's motion, vacated the default judgment lodged against him, and extended his time to answer the complaint. (R. at 74-76.) Wells Fargo has not appealed that order. Parker filed his verified answer with affirmative defenses and counterclaims on or about April 26, 2011. (R. at 287-295.)

Parker Moves to Dismiss and Wells Fargo Argues for the First Time that Standing Is Based on Physical Possession of the Note. In or about July

2011, Parker filed a motion to dismiss the foreclosure complaint. (R. at 4-5.) In opposition to the motion, Appellant, with new counsel, claimed for the first time that it had physical possession of the note prior to commencing the foreclosure action. (R. at 209.) Appellant cross-moved for summary judgment against Parker and sought to dismiss his affirmative defenses and counterclaims. (R. at 203-204.) Appellant attached an affidavit of Cindi Ellis, an employee of the current servicer, American Home Mortgage Servicing, Inc. ("AHMSI"), to its opposition/cross-motion. (R. at 210-214.)

Ms. Ellis's affidavit hypothesizes that because the pooling and servicing agreement ("PSA") governing the trust that allegedly held Parker's loan states that all loans covered by the PSA must be in the trust by February 22, 2007, Appellant must have had the note on or before that date. (R. at 211-213.) Appellant admitted that Option One Mortgage Corporation ("Option One"), not AHMSI, was the servicer of the mortgage loan on February 22, 2007. (R. at 206.) Appellant also admitted that Option One serviced Parker's mortgage long after February 22, 2007, which is evidenced by Appellant's claim that Option One, not AHMSI, sent Parker the notice of default in January 2008. (R. at 206-207, 213, 281.) The PSA clearly lists the relevant parties to the PSA as Option One Mortgage Acceptance Corporation, as depositor, Option One Mortgage Corporation, as servicer, and Wells Fargo Bank, N.A., as trustee. (R. at 255.) Ms. Ellis's affidavit does not

identify a specific date that the note was allegedly transferred to Wells Fargo, nor does it provide any details regarding the alleged transfer to Wells Fargo. (R. at 210-214.)

The Order from which Appellant Appeals. On September 4, 2012, Justice Partnow granted Parker's motion to dismiss for lack of standing and denied Wells Fargo's cross-motion for summary judgment as moot. (R. at 3.)

ARGUMENT

I. THE SUPREME COURT'S DISMISSAL MUST BE UPHELD BECAUSE APPELLANT DOES NOT HAVE STANDING

A. The Assignment Executed after the Foreclosure Action Commenced Cannot Confer Standing on Appellant

A plaintiff has standing in a mortgage foreclosure action when it is the holder or assignee of both the subject mortgage and the subject note prior to the commencement of the foreclosure action. *Homecomings Fin., LLC v. Guldi*, 108 A.D.3d 506, 507, 969 N.Y.S.2d 470, 478 (App. Div. 2d Dep't 2013); *Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 279, 926 N.Y.S.2d 532, 537 (App. Div. 2d Dep't 2011). Because the note follows the mortgage, a valid transfer of the note will also transfer the rights under the mortgage. *Silverberg*, 86 A.D.3d at 280 ("the mortgage passes as an incident to the note"). When a defendant raises the issue of standing, the plaintiff must prove its standing to be entitled to relief. *Guldi*, 108 A.D.3d at 508; *Silverberg*, 86 A.D.3d at 279.

A plaintiff proves its standing by demonstrating either physical delivery or written assignment of the note prior to commencing the foreclosure. *Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888, 934 N.Y.S.2d 182, 183 (App. Div. 2d Dep't 2011); *Silverberg*, 86 A.D.3d at 281; *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 108, 923 N.Y.S.2d 609, 618 (App. Div. 2d Dep't 2011). Assignments must be executed prior to commencing the foreclosure. A "retroactive assignment cannot be used to confer standing upon the assignee." *Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 210, 887 N.Y.S.2d 615, 619 (App. Div. 2d Dep't 2009) (upholding the Supreme Court's dismissal of a foreclosure action where plaintiff based its standing on an assignment executed after it filed the action); *accord Countrywide Home Loans, Inc. v. Gress*, 68 A.D.3d 709, 710, 888 N.Y.S.2d 915, 914 (App. Div. 2d Dep't 2009) (same).

Here, the assignment to Appellant was not executed until March 5, 2008, after Appellant filed the foreclosure action on February 29, 2008. (R. at 77.) The assignment claimed to be retroactively effective to December 3, 2007. (*Id.*) Because the assignment was executed after Appellant filed the foreclosure action and retroactive assignments cannot confer standing upon the assignee, the assignment does not grant Appellant standing.

B. The Affidavit of Cindi Ellis Does Not Prove Physical Possession of the Note because It Does Not Provide a Date Certain or Details Regarding the Alleged Transfer of the Note

A plaintiff can establish standing through physical possession or assignment of the note. *Weisblum*, 85 A.D.3d at 108. When a plaintiff fails to submit any credible evidence to demonstrate valid assignment or physical delivery of the note, however, a defendant's motion to dismiss must be granted. *Stosel*, 89 A.D.3d at 888 (reversing grant of summary judgment to plaintiff and granting defendant's motion to dismiss because evidence offered by plaintiff failed to prove physical delivery or assignment of the note prior to commencing the foreclosure); *U.S. Bank, Nat. Ass'n v. Sharif*, 89 A.D.3d 723, 725, 933 N.Y.S.2d 293, 296 (App. Div. 2d Dep't 2011) (reversing grant of summary judgment to plaintiff and granting defendant's motion to dismiss because appellant offered no evidence of valid assignment or physical delivery of the note in response to defendant's motion to dismiss); *Weisblum*, 85 A.D.3d 109 (reversing grant of summary judgment to plaintiff and granting defendant's motion to dismiss because evidence offered by plaintiff failed to prove physical delivery or assignment of the note).

An employee affidavit must include details of the alleged delivery of the note in order to prove that plaintiff physically possessed it prior to commencement of the foreclosure action. *Aurora Loan Servs., LLC v. Taylor*, --- N.Y.S.2d--- , 2014 WL 443959, at *3 (App. Div. 2d Dep't Feb. 5, 2014) (holding that an

affidavit submitted by the plaintiff stating the exact date the note was transferred to it was enough to prove its standing); *Guldi*, 108 A.D.3d at 509 (reversing grant of summary judgment and searching the record to dismiss the foreclosure because, the employee affidavit "did not give factual details as to the physical delivery of the note and, thus, was insufficient to establish that the plaintiff had physical possession of the note at any time"); *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 844, 939 N.Y.S.2d 120, 122 (App. Div. 2d Dep't 2012) (upholding denial of summary judgment to plaintiff because employee affidavit alleging physical possession did not give any factual details regarding delivery of the note); *Weisblum*, 85 A.D.3d at 109 (dismissing the foreclosure action because the affidavit signed by a vice president of the plaintiff failed to provide any factual details of physical delivery of the note prior to the commencement of the action).

Despite arguing for more than a year in its summons, complaint, and opposition to Parker's motion to vacate that Appellant was the assignee of the note based on a retroactive assignment, Appellant changed its theory of standing after obtaining new counsel. *See supra* p. 4. After Parker filed his motion to dismiss, Appellant argued for the first time that Appellant had physical possession of the note prior to commencing the foreclosure action. *Id.* As proof of the physical delivery, Appellant attached an affidavit of Cindi Ellis, an employee of the current servicer, AHMSI. (R. at 210-214.)

The Ellis affidavit only states that Appellant physically possessed the note on or before February 22, 2007. (R. at 212.) The affidavit does not provide the exact date the note was allegedly transferred to Appellant. (R. at 210-214.) The affidavit also contains no details regarding the delivery of the note to Appellant. (R. at 210-214.) Instead, Ms. Ellis relies exclusively on the language of the PSA governing the securitization of Parker's mortgage loan as purported proof of the physical delivery of the note. The PSA, dated February 1, 2007, states that all the loans covered under the PSA should be placed into the trust by February 22, 2007. (R. at 261-263.) Ms. Ellis points to this aspirational statement in the PSA as conclusive proof that Appellant must have possessed the note on or prior to that date. (R. at 211-212.)

Appellant's assertion that it physically possessed the note on or before February 22, 2007 solely because the PSA says that needed to have happened must fail. Pooling and servicing agreements do not effectuate delivery of loan documents. *U.S. Bank Nat. Ass'n v Bresler*, 39 Misc.3d 1205(A), *6, 971 N.Y.S.2d 75 (Sup. Ct. Kings Cty. Apr. 3, 2013)[1] ("the execution of the PSA does not effectuate a transfer of the Note . . . . Execution of the PSA . . . merely demonstrates intent to indorse and physically deliver the notes and mortgages referred to."). The date contained in the PSA is merely aspirational; it is not a

[1] A copy of this unpublished decision is included in the Addendum to this brief.

statement of then-existing fact.

The PSA also provides very clear instructions of what the servicer should do if documents are missing from the mortgage file. (R. at 262.) The fact that the PSA itself contemplates that not all the loan documents will be transferred by the closing date completely undermines Appellant's argument that all of the documents must have been transferred by that date. By relying on the date typed into the PSA, which proves nothing, without identifying the exact date or any details regarding the alleged physical transfer of the note, the affidavit of Cindi Ellis fails to prove that Appellant had possession of the note prior to the commencement of the foreclosure action. Therefore, the Supreme Court's dismissal of Appellant's foreclosure complaint for lack of standing must be upheld.

C. The Affidavit of Cindi Ellis Does Not Prove Physical Possession of the Note because Ms. Ellis Lacks Personal Knowledge

The fact that Ms. Ellis's affidavit contains no specific date or any facts regarding the alleged transfer alone is enough for this court to uphold the Supreme Court's dismissal of Appellant's foreclosure complaint. Ms. Ellis's affidavit also fails to prove standing, however, because she did not have personal knowledge of the alleged transfer of the note to Appellant. An affidavit by one who lacks personal knowledge of the underlying facts of the case is of no probative value or evidentiary significance. *Currie v. Wilhouski*, 93 A.D.3d 816, 817-18, 941 N.Y.S.2d 218, 220 (App. Div. 2d Dep't 2012) (affidavit of insurer's branch claims

manager did not have any probative or evidentiary value in insured's action against insurer alleging failure of insurer to cover property damage claim since it was not based on personal knowledge regarding the subject loss); *Shilkoff v. Longhitano*, 94 A.D.3d 974, 976-77, 943 N.Y.S.2d 144, 146 (App. Div. 2d Dep't 2012) (defendant's assertion in her affidavit that tree on disputed parcel was planted by predecessor in interest constituted inadmissible hearsay because no indication that defendant had personal knowledge that predecessor planted the tree); *Morales v. Coram Materials Corp.*, 51 A.D.3d 86, 95, 853 N.Y.S.2d 611, 619 (App. Div. 2d Dep't 2008) (affirmations of attorneys who have no personal knowledge of germane facts have no intrinsic evidentiary value).

Ms. Ellis's affidavit states that she is an employee of AHMSI. (R. at 210.) Wells Fargo admitted that Option One, not AHMSI, was the servicing agent for Parker's loan on February 22, 2007. (R. at 211.) Wells Fargo also admitted that Option One continued to service Parker's loan at least through January 2008. (R. at 213.) The PSA lists the relevant parties to the PSA as Option One Mortgage Acceptance Corporation, as depositor, Option One Mortgage Corporation, as servicer, and Wells Fargo Bank, N.A., as trustee. (R. at 255.) Notably, Ms. Ellis had no personal involvement with the PSA, nor did her employer, AHMSI. Because Option One was the servicing agent for Wells Fargo on or about February 22, 2007, neither AMSHI nor its employees could possibly have direct, personal

knowledge of what Wells Fargo did or did not possess at that time.

Although Ms. Ellis states that her employer is AHMSI in the first paragraph of her affidavit, she signed her affidavit as Assistant Vice President of Wells Fargo Bank, N.A. pursuant to a power of attorney. (R. at 210, 214, 215.) That power of attorney, however, does not vest Ms. Ellis with any knowledge, personal or otherwise, of whether Wells Fargo possessed Parker's note on or before the date Plaintiff commenced this foreclosure action, particularly because her employer, AHMSI, was not the servicing agent for Appellant at or around the time of the alleged transfer. Because Ms. Ellis had no personal knowledge of the alleged transfer the Supreme Court's dismissal of the Appellant's foreclosure complaint for lack of standing must be upheld.

II. RESPONDENT CHALLENGED APPELLANT'S PHYSICAL POSSESSION CLAIM BEFORE THE SUPREME COURT

Appellant argues that Parker did not oppose its physical possession claim because he did not offer any evidence refuting that claim and therefore he conceded that Appellant possessed the original note with allonges prior to initiating the foreclosure action. (Appellant's Br. p. 12, *citing Kuehne & Nagel v. Baiden*, 36 N.Y.2d 539, 544, 369 N.Y.S.2d 667 (1975); *McNamee Const. Corp. v. City of New Rochelle*, 29 A.D.3d 544,545, 817 N.Y.S.2d 295, 297 (App. Div. 2d Dep't 2006)). The argument that Respondent did not oppose and therefore conceded Appellant's physical possession claim is sheer sophistry.

First, as discussed in section I.A, *supra*, because Parker filed an answer that contained a standing defense and because he moved to dismiss the complaint for lack of standing, Appellant had the burden to prove its standing to foreclose. As discussed in section I.A-C, *supra*, Plaintiff failed to prove it had standing because it could not produce a valid assignment or an affidavit by someone with personal knowledge stating the exact date and details regarding the alleged transfer of the note. Appellant's failure to produce any valid evidence of standing necessitates dismissal of the foreclosure.

Second, Parker thoroughly opposed Appellant's claim of physical possession of the note in his reply memorandum of law, served upon counsel for Appellant on June 5, 2012.[2] Parker's reply memorandum demonstrated the fatal deficiencies in Ms. Ellis's affidavit, and therefore Wells Fargo's physical possession claim, raised for the first time in Wells Fargo's memorandum in opposition to Parker's motion to dismiss. Parker did not need to submit any additional evidence that Appellant lacked standing, because, as argued in the reply memorandum and section I, *supra*,

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[2] This memorandum of law was not included by Appellant in the Record on Appeal ("record") and therefore cannot be cited as proof by Respondent. On January 23, 2014, Respondent filed an order to show cause with the Second Department requesting that Appellant be ordered to enlarge the record to include the referenced memorandum of law so that the proof Respondent refuted Appellant's claim of physical possession would be included in the record. Respondent's order to show cause also requested that if the Respondent's answering brief is already filed by the time the court reaches a decision on the order to show cause and the brief is not in accordance with that decision, to allow Respondent to file an answering brief in accordance with the court's decision. As of the date and time this brief was signed, this court has not reached a decision on Respondent's order to show cause.

the evidence supplied by Appellant, the affidavit of Cindi Ellis, was insufficient to prove standing. The Supreme Court's dismissal of the foreclosure action, therefore, must be upheld.

III. THE SUPREME COURT'S DENIAL OF SUMMARY JUDGMENT TO APPELLANT MUST BE UPHELD

A. Appellant Is Not Entitled to Summary Judgment on Standing

As discussed in section I.A, *supra*, when, as here, a defendant has raised the issue of standing, a plaintiff has the burden of proving either physical delivery or written assignment of the note prior to commencing the foreclosure. When a plaintiff fails to offer valid evidence of standing once the issue has been raised by the defendant, the complaint must be dismissed. *See supra* pp. 5-12. Contrary to Appellant's claim that Parker has the burden "to demonstrate the existence of a triable issue of fact" regarding standing (Appellant's Br. pp. 10-11), Appellant has the burden of proving standing because Appellant's complaint based standing on an invalid retroactive assignment and Parker raised the issue of standing in his answer and his motion to dismiss. Appellant's evidence in response to the motion to dismiss was insufficient to prove standing. *See supra* pp. 5-12. The Supreme Court therefore correctly granted Respondent's motion to dismiss the complaint and denied Appellant's cross-motion for summary judgment as moot.

B. Appellant Is Not Entitled to Summary Judgment on Respondent's GBL § 349 Claim

To prevail on a motion for summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Rozz v. Village Auto Body Works, Inc.*, 35 Misc.3d 13, 15, 942 N.Y.S.2d 310, 312 (App. Div. 2d Dep't 2012) (*quoting Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985)). In deciding the motion, "the court must view the evidence in the light most favorable to the nonmoving party." *Stukas v. Streiter*, 83 A.D.2d 18, 22, 918 N.Y.S.2d 176, 180 (App. Div. 2d Dep't 2011). "Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Id.* at 23.

To state a claim under the New York General Business Law § 349 (the "Deceptive Practices Act"), a party must plead "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 611 (2000). Respondent has met this three-part standard in its pleadings. First, Respondent pled that the alleged deceptive practices were consumer-oriented, explicitly pleading both alleged deceptive practices by Appellant's predecessor in interest, and pleading that these practices "have had and may continue to have a broad

impact on consumers throughout New York State." (R. at 291-292.)

Appellant argues that Respondent's claims are not consumer-oriented because the claims involve a single private contract. (Appellant's Br. pp. 15-17). To properly plead the claim as consumer-oriented, a party must allege that "the acts or practices have a broader impact on consumers at large." It need not allege, as Appellant suggests, that the party "committed the complained-of acts repeatedly—either to the same plaintiff or to other consumers." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 744 (1995). In this instance, the transaction in which these alleged deceptions took place—the origination of residential mortgages—is clearly not a unique private contract, but instead a frequent and standard transaction that affects New York consumers at large. *See id.* at 25 (finding that opening bank accounts is consumer-oriented because the account openings were not unique to these two parties and could affect similarly situated consumers).

Second, Respondent's pleadings also alleged that the actions of Appellant's predecessor in interest were misleading in a material way. Appellant suggests that the instant matter is comparable to *Patterson*, where evidence "demonstrated that the terms of the subject mortgage loan were fully set forth in the loan documents, *and that no deceptive act or practice occurred*," (emphasis added) and *Fitzpatrick*, where Plaintiff "failed to proffer any evidence . . . as to whether the plaintiff made

any materially misleading statements or committed any misconduct with respect to the subject loan." (Appellant's Br. pp. 15-17, *citing Patterson v. Somerset Investors Corp.*, 96 A.D.3d 817, 946 N.Y.S.2d 217 (2012); *Emigrant Mortgage Co., Inc. v. Fitzpatrick*, 95 A.D.3d 1169, 1172, 945 N.Y.S.2d 697, 701 (2012)).

Respondent clearly alleged in his verified answer that Appellant's predecessor in interest committed serious misconduct associated with the issuance of his loan. The misconduct alleged includes—but is not limited to—"falsifying Mr. Parker's loan application," "engaging in high pressure and deceptive sales tactics," and "exploiting Mr. Parker's mental disability, lack of education, and lack of understanding of financial matters." (R. at 291-292.)

Finally, Respondent adequately pled that the actions of Appellant's predecessor in interest caused him to suffer an injury. Appellant mistakenly relies on *Baron* and *Gale* to support its claim that Respondent failed to adequately allege how he was harmed. (Appellant's Br. p. 15). In *Baron*, plaintiff failed to allege an actual harm, and in *Gale* plaintiff did not establish any "connection between the deceptive act and the plaintiff's injury." *Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 629, 840 N.Y.S.2d 445, 448 (App. Div. 3d Dep't 2007); *Gale v. Int'l Bus. Mach. Corp.*, 9 A.D.3d 446, 447, 781 N.Y.S.2d 45, 47 (App. Div. 2d Dep't 2004).

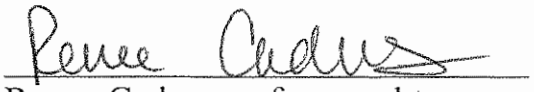
Respondent here, however, has stated clearly that he suffered serious injury as a result of the actions of Appellant's predecessor in interest. Respondent

specifically claimed that he was induc[ed] into a loan that "was entirely unaffordable by any industry standards," and that "put him at clear and obvious risk of losing his longtime family home" because Appellant's predecessor in interest, among other things, "falsified Mr. Parker's loan application," "engag[ed] in high pressure and deceptive sales tactics," and "exploit[ed] Mr. Parker's mental disability, lack of education, and lack of understanding of financial matters." (R. at 291-292.) Respondent's verified answer included specific allegations that Appellant's predecessor in interest engaged in deceptive, consumer-oriented acts that resulted in putting him at risk of losing his home. Therefore Respondent properly pled his Deceptive Practices Act claim and the Supreme Court's refusal to grant the drastic remedy of summary judgment to Appellant on that claim must be upheld.

CONCLUSION

For the foregoing reasons, the Supreme Court's Order should be affirmed.

Respectfully submitted,

By: 

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Date: March 6, 2014
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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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ADDENDUM

To be clear, no allonge/indorsement of the Note was included in plaintiff's original motion papers, so the court did not misapprehend the facts. The affidavit of Jaime Walls in the original motion does not mention the transfer of possession of the Note *or* the allonge/indorsement. She relies on the assignment of mortgage which counsel now agrees is insufficient. Thus, on the original motion papers, plaintiff failed to make out a prima facie case for summary judgment. Defendant made out a prima facie case for dismissal, which plaintiff's opposition failed to overcome.

The indorsement plaintiff now points to was provided solely as an exhibit to the Jones Affidavit included in plaintiff's opposition to defendant's cross-motion. Additionally, plaintiff's sole evidence of this alleged indorsement is a photocopy of a document Ms. Jones claims is an assignment of the Note, which is merely a blank piece of paper, allegedly appended to the original note, which states "Pay to the order of U.S. Bank National Association as Trustee, without recourse," and is undated and signed by "Michael Koch, Vice President, Fremont Investment and Loan." At oral argument, the court asked to see the original, and counsel did not have it. Nor did counsel offer to provide it, stating "It's in the vault." Transcript page16 line 22.

In this motion, plaintiff has included a photocopy of an affidavit of Jessica Jones, Vice President for Loan Documentation for Wells Fargo Bank N.A. Counsel for plaintiff states on page nine of the transcript that "The Jones affidavit and the annexed exhibits were all part of the [original] summary judgment papers." However, Ms. Jones' affidavit of November 1, 2011 was *not* included in plaintiff's motion for summary judgment, but was in plaintiff's opposition to defendant's cross-motion to dismiss. Plaintiff's counsel urges the court to give great weight to Ms. Jones' affidavit, "as the sworn testimony by the custodian" that "they have physical possession of the original note."

***4** Ms. Jones states "the loan was transferred" in July 2006, whatever that means, but as to the note, it only says "the Note was endorsed and was physically delivered to Wells Fargo/ASC as servicing agent and custodian for U.S. Bank prior to the commencement of this action. Thus, Wells Fargo's records specifically reflect that it was in physical possession of the endorsed Note prior to the commencement of this action." Ms. Jones provides no date of the alleged delivery of the Note. This is not specific enough.

The court notes that this matter is further complicated by the fact that after the mortgage closed in 2006 and prior to the commencement of the action in 2008, the FDIC issued a Cease and Desist Order against the lender, Fremont Investment and Loan.[2] There was also litigation in several states brought by their Attorneys General against Fremont. Plaintiff now avers that "the loan" had already been transferred to the Trust (for which plaintiff serves as trustee) in 2006 pursuant to the PSA, so that any restrictions Fremont may have been under as a result of the Order were not relevant. In making this argument, plaintiff now avers that the MERS assignment in 2008 "merely memorialized the transfer of the mortgage and note which took place in 2006." The court finds that the plaintiff has not met its burden of proof in this regard, and further that this was not the gist of the original motion which plaintiff seeks to reargue. Many of the lender's assets were sold to Capital Source Bank in June of 2008 with the consent of the FDIC, after its Cease and Desist Order against Fremont in March 2007. Further, Fremont filed for Bankruptcy protection in 2008 in the USDC, Central District of California.

It is particularly troubling that Ms. Jones' affidavit is only dated on the signature page, by the notary, and her signature is on a page separate and apart from the aforesaid affidavit, while the preceding page is blank on its lower half. The submission of a photocopy of an affidavit in a case where the allonge was not affixed to the Note, which has a signature page that doesn't follow the end of the affidavit is innately suspicious and raises a question of whether the signer read the affidavit. Here, the clear inference is that she did not read it. Thus, the court cannot give it any weight.

There is also no question that the alleged indorsement herein is on a separate page from the Note and is clearly undated. See, *Indy Mac Bank, F.S.B. v. Garcia*, 28 Misc.3d 1202(A) [Sup Ct Suffolk Co.2010]. New York UCC § 3–202(1) states, in pertinent part, that "[i]f the instrument is payable to order it is negotiated *by delivery* with any necessary indorsement" (emphasis added). In addition, UCC § 3–202(2) requires that "[a]n 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 a part thereof* (emphasis added). Here, the purported indorsement is payable to plaintiff's order, but on a separate page.

***5** In the Official Comment to UCC § 3–202(2) (McKinney's) it states "Subsection (2) follows decisions holding that a purported indorsement on a mortgage or other

separate paper pinned or clipped to an instrument is not sufficient for negotiation. The indorsement must be on the instrument itself or on a paper intended for the purpose which is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge."

Although the court could not find any New York appellate cases addressing this issue, numerous trial courts throughout the Second Department have ruled that, a note secured by a mortgage is a negotiable instrument, and a transfer requires an indorsement on the instrument itself or on a paper so firmly affixed thereto as to become a part thereof, as per UCC § 3–202(2), in order to effectuate a valid assignment of the instrument. See, *Deutsche Bank National Trust Company v. Hossain*, 2013 N.Y. Slip Op 30096(U) [Sup Ct Suffolk Co 2013]; *Deutsche Bank Trust Company Americas v. Thanhauser*, 2013 N.Y. Slip Op 30565(U) [Sup Ct Suffolk Co 2013]; *HSBC Bank USA v.. Picarelli*, 36 Misc.3d 1218(A) [Sup Ct, Queens Co 2012]; *Deutsche Bank National Trust Company v. Vasquez*, 2012 N.Y. Slip Op 31395(U) [Sup Ct Nassau Co 2012]; *HSBC Bank USA, National Association v. Hagerman*, 2011 N.Y. Slip Op 33344(U) [Sup Ct, Richmond Co]; *HSBC Bank USA, National Association v. Coyo*, 934 N.Y.S.2d 792 [Sup Ct, Kings Co 2011]; *The Citi Group/ Consumer Finance, Inc. v. Platt*, 33 Misc.3d 1231(A) [Sup Ct Queens Co 2011]; *IndyMac Bank, FSB v. Garcia*, 28 Misc.3d 1202(A) [Sup Ct Suffolk Co 2010]; *HSBC Bank USA, National Association v. Miller*, 26 Misc.3d 407 [Sup Ct Sullivan Co 2009]; *LaSalle Bank National Association v. Lamy*, 12 Misc.3d 1191(A) [Sup Ct Suffolk Co 2006].

At oral argument on January 10, 2013, plaintiff's counsel insisted that the Note was delivered to plaintiff in July of 2006, concurrent with the Pooling and Servicing Agreement (PSA), and represented that said agreement was in the original motion papers. However, counsel then admitted that the Exhibits to the Agreement were omitted, both in the original motion and in this motion, so there is no way to reference this mortgage in said Agreement. When asked, counsel told the court the PSA is "a matter of public record because they are on file with the Securities and Exchange Commission" (transcript of 1/10/13, p 8). The court declines his invitation to look for it and see if it references this mortgage. It is also noted that while counsel claimed the delivery was made in July of 2006, there is no statement to that effect in the plaintiff's original motion papers from anyone with knowledge of the facts. Further, delivery was made to Wells Fargo as servicer, according plaintiff's counsel, who indicated Wells Fargo is also the "custodian for the Trust" (transcript of 1/10/13, p 3), so in his opinion, plaintiff Trustee did not have to be the recipient of the delivery, as delivery to plaintiff's agent was sufficient. For purposes of the decision, the court accepts that as true and correct.

***6** The problem is that the execution of the PSA does not effectuate a transfer of the Note as contemplated by the applicable statutes and case decisions. The statutes and cases require *both* a proper indorsement *and* physical delivery of the Note. Execution of the PSA does not satisfy either requirement. It merely demonstrates intent to indorse and physically deliver the notes and mortgages referred to.

Paragraph 2.01, referenced by plaintiff, states, in relevant part:

"the Depositor [SG Mortgage securities, LLC], does hereby deliver ... with respect to each Mortgage Loan so transferred and assigned ... the original Mortgage Note, endorsed either (A) in blank, in which case the Trustee *shall* cause the endorsement to be completed or (B) in the following form: "Pay to the order of U.S. Bank National Association, as Trustee, without Recourse" [emphasis added].

The quoted text makes it quite clear that delivery is anticipated, but it implicitly also makes it clear that delivery is yet to be accomplished.

Plaintiff's counsel asserted at oral argument that there are two case decisions which the court should rely on, as they were correctly decided. One of these cases, *Hudson City Savings Bank v.. Roger Lanoue* (Sup Ct N.Y. Co.2012; Index No. 107305/09) is a trial court decision in a different Judicial Department, and is not binding on the court. However, the court must note that in the *Lanoue* case the plaintiff demonstrated that it was in possession of both the assigned note and mortgage at the time it commenced the action. This is not the case in the instant matter. The other case, *US Bank v. Carlos Guzman* (Sup Ct Queens Co 2012; Index # 4451/09) is also from a court of concurrent jurisdiction in the Second Department and also is not binding on this court. It is not reported either. However, the court notes this decision involves a similar PSA to that in the instant case, and not the same agreement. As such, it is possible that the language contained in the PSA in the *Guzman* case concerning the transfer of the notes might be different; which may be inferred from the decision's language.

There is no evidence of delivery of the Note prior to this action's commencement, other than the Jones affidavit, which is conclusory and does not say when the Note was delivered. As discussed above, it also is of limited weight.

Thus, the so-called "indorsement" is, at best, something prepared in compliance with the PSA and subsequent thereto, and fails to support plaintiff's claim that the Note and Mortgage were transferred to plaintiff by a properly indorsed Note prior to the commencement of this action. See, *Deutsche Bank Nat. Trust Co. v. Haller,* 2012 N.Y. Slip Op 7619 [2d Dept 2012]; *Deutsche Bank Nat'l Trust Co. v. Barnett,* 88 AD3d 636 [2nd Dept 2011]; *Slutsky v. Blooming Grove Inn, Inc.,* 147 A.D.2d 208 [2d Dept 1989]; *Indy Mac Bank, F.S.B. v. Garcia,* 28 Misc.3d 1202(A).

*7 In conclusion, while the Jones affidavit avers that the original note was timely in the possession of the plaintiff, the affidavit does not state any factual details concerning when the plaintiff or its agents received physical possession of the note and, thus, does not establish that the plaintiff had physical possession of the note prior to commencing this action. See, *Deutsche Bank Nat'l Trust Co. v. Barnett,* 88 AD3d 636; *Aurora Loan Servs LLC v. Weisblum,* 85 AD3d 95,108 [2nd Dept 2011]; *U.S. Bank, N.A. v. Collymore,* 68 AD3d at 754; *HSBC Bank USA v. Hernandez,* 92 AD3d 843, 844. Further, plaintiff has not proven that a valid transfer of the note was made to the plaintiff by an indorsement thereon as required by the UCC, or that plaintiff had physical possession thereof prior to commencing this action. See, *Deutsche Bank Nat. Trust Co. v. Haller,* 2012 N.Y. Slip Op 7619; *HSBC Bank USA v. Hernandez, supra; Deutsche Bank Nat. Trust Co. v. Barnett,* 88 AD3d 636. Moreover, plaintiff's original motion papers make no mention of the indorsement whatsoever.

Without either proof of a proper written assignment of the underlying note or proof of the physical delivery of the note prior to the commencement of the foreclosure action, the plaintiff failed to sufficiently show either the proper transfer of the obligation, or that the mortgage passed as an inseparable incident to the debt. See, *U.S. Bank, N.A. v. Collymore,* 68 AD3d 752; *Indy Mac Bank, F.S.B. v. Garcia,* 28 Misc.3d 1202(A).

Therefore, upon reargument, the court adheres to its original decision.

This shall constitute the Decision and Order of the Court.

Parallel Citations

39 Misc.3d 1205(A), 971 N.Y.S.2d 75 (Table), 2013 WL 1339550 (N.Y.Sup.), 2013 N.Y. Slip Op. 50498(U)

Footnotes

1 http://www.justice.gov/usao/nys/pressreleases/October11/ stevenbaumpcagreementpr.pdf

2 http://www.fdic.gov/bank/individual/enforcement/2007-03-00.pdf

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