Deutsche Bank Trust Co. Ams. v Peabody

[*1] Deutsche Bank Trust Co. Ams. v Peabody 2008 NY Slip Op 51286(U) [20 Misc 3d 1108(A)] Decided on June 26, 2008 Supreme Court, Saratoga County Nolan, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 26, 2008
Supreme Court, Saratoga County

Deutsche Bank Trust Company Americas, Plaintiff,

against

Patricia Peabody, Defendant.

2007-2065

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Thomas D. Nolan, J.

In June 2006, defendant Patricia Peabody borrowed from EquiFirst Corp. $320,000.00 and signed a promissory note providing for monthly payments over 30 years to EquiFirst and executed a mortgage on defendant's single-family residence defendant owned in the Town of Malta, in favor of Mortgage Electronic Registration Systems, Inc. (MERS), nominee for EquiFirst. Defendant failed to make the payments due in March 2007 and thereafter, and on July 18, 2007, plaintiff commenced this foreclosure action by filing a summons and complaint in which it alleges that it is the owner and holder, by assignment, of the mortgage (complaint, paragraph 4). Defendant was personally served with process on July 25, 2007, and in her answer to the complaint, she, then self-represented, did not deny the complaint's material allegations, yet

asserted, as defenses, that EquiFirst, when making the loan, violated Regulation Z of the Federal Truth in Lending Act (15 USC § 1601 et seq) and the Fair Debt Collections Practices Act (15 USC § 1692 et seq); that EquiFirst failed to properly credit and apply payments she made and "intentionally created fraud in the factum" and withheld from plaintiff "vital information concerning said debt and all of the matrix involved in making the loan". [*2]

In support of its motion for summary judgment, plaintiff offers a copy of the pleadings, a copy of the note and mortgage, and an affidavit from one of its officers detailing the loan transaction and the nature of defendant's default. Also included in the motion is a writing dated August 23, 2007 assigning the mortgage from MERS to plaintiff stating "[t]his assignment is effective on or before June 16, 2007".

Now represented by counsel, defendant opposes the motion and cross-moves to dismiss the action on the ground that, on the date of its commencement, plaintiff did not have an interest in the mortgage and thus lacked standing to initiate this action.

First, the cross motion. A mortgage can be assigned in two ways - by the delivery of the bond and mortgage by the assignor to the assignee with the intention that all ownership interest be thereby transferred, Fryer v Rockefeller, 63 NY 268 (1875); Curtis v Moore, 152 NY 159 (1897); see generally 78 NY Jur 2d Mortgages and Deeds of Trust § 272, or by a written instrument of assignment. Here, plaintiff produces no evidence that the note and mortgage were physically transferred to it before the action was commenced.[FN1]

It is axiomatic that plaintiff has standing to sue if it was the lawful holder of the note and mortgage when the action was commenced. Mortgage Electronic Registration Systems, Inc. v Coakley, 41 AD3d 674 (2nd Dept 2007). The crucial issue then is whether the written assignment, dated after the commencement of the action but stated to be effective on a date before the commencement, was effective to give plaintiff the requisite interest in the mortgage and thus standing to commence an action to foreclose it. Recently, finding such post-commencement dated assignments ineffective, several trial level courts have said "no". Countrywide Home Loans, Inc. v Taylor, 17 Misc 3d 595 (Sup Ct, Suffolk County 2007) [Foreclosure action commenced by filing February 6, 2007 - assignment of mortgage executed March 6, 2007]; Countrywide Home Loans, Inc. v Hovanec, 15 Misc 3d 1115 (A) (Sup Ct, Suffolk County 2007) [Foreclosure action commenced by filing July 5, 2006 - assignment of mortgage dated August 4, 2006]. In response, plaintiff relies on Bankers Trust Co. v Hoovis, 262 AD2d 937 (3rd Dept 1999) which held that a post-commencement assignment had retroactive effect. The facts of Bankers Trust Co. are similar but not identical to the facts here.[FN2] In Banks v Trust Co., in 1989, Olympia Mortgage Corp (Olympia) loaned $64,000.00 to defendant and, as security, took a mortgage on defendant's property. On the same day the loan closed, Olympia [*3]assigned the mortgage to Comfed Savings Bank (Comfed). In 1997, defendant fell behind in his payments, and on June 19, 1997, commenced a foreclosure action. On July 15, 1997, Comfed executed to plaintiff a written assignment of the mortgage providing that the assignment "shall be deemed effective May 1, 1997". On August 4, 1997, defendant was served in the action, and in his answer raised the defense that plaintiff lacked standing to bring a foreclosure action because it had not obtained an assignment until after the action had been commenced. The court concluded "[w]here plaintiff is the assignee of a mortgage at the time of

service of the complaint, plaintiff has standing and is entitled to commence a proceeding in its own name". The court explained "[d]efendant has not submitted any proof to contradict plaintiff's documentation in support of its proposition that the assignment, including the delivery of the note and mortgage, occurred prior to initiation of the action". 263 AD2d at 938. That documentation established that the note and mortgage had been physically delivered to the plaintiff prior to its commencement of the foreclosure action. In this court's analysis, in Bankers Trust Co. stands for the proposition of a "retroactive" effective date for a written mortgage assignment is valid provided, as was the case there, the note and mortgage were previously physically delivered to the assignee.

Again, here, plaintiff offers no evidence that it took physical delivery of the note and mortgage before commencing this action, and again, the written assignment was signed after defendant was served. The assignment's language purporting to give it retroactive effect, absent a prior or contemporary delivery of the note and mortgage, is insufficient to grant it standing.

Defendant's second argument, addressed for judicial economy, that the assignment is invalid because a MERS officer signed the document in Minnesota before a notary public while in the original mortgage, MERS was identified as having a business address in Michigan, lacks merit absent a proffer of evidence that the assignment indeed had not been signed by a duly authorized corporate officer.

Defendant's cross motion is granted, without costs and the action is dismissed, without costs.

The plaintiff's motion seeking summary judgment is denied as moot.

This memorandum shall constitute the decision and order of the court. All papers, including this decision, are being returned to defendant's counsel. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

DATED: June 26, 2008

Ballston Spa, New York

HON. THOMAS D. NOLAN, JR.

Supreme Court Justice Footnotes

Footnote 1:Plaintiff's vice-president in an affidavit signed before the written assignment was given, in fact, states the contrary, namely that "[t]he aforementioned instruments [note and mortgage signed by defendant] were thereafter assigned to plaintiff by assignments(s)". [Affidavit of Laura Hescott sworn to July 17, 2007, paragraph 6]. In an affidavit submitted in opposition to defendant's cross motion, one of plaintiff's attorneys states "...the original note and mortgage were delivered to plaintiff and plaintiff began exercising dominion and control over the mortgage debt at issue, on or before June 16, 2007". [Affirmation of Nancy G. Burlingame dated April 4, 2008, paragraph 13]. Since there is no showing the attorney has personal knowledge of

such facts, the affidavit is valueless. Morales v Coram Corp., 51 AD3d 86, 96 (2nd Dept 2008); Hasbrouck v City of Gloversville, 102 AD2d 905 (3rd Dept 1984), affd 63 NY2d 916 (1984).

Footnote 2:The court reviewed the Record on Appeal.