

Decided on June 5, 2008
Supreme Court, Kings County

Wells Fargo Bank, N.A., AS TRUSTEE C/O Litton Loan Servicing, LP, Plaintiff,

against

Hillary Farmer, Jr., et. al., Defendants.

27296/07

Appearances:

Plaintiff:

Steven J. Baum, PC
Buffalo NY

Defendant:

Arthur M. Schack, J.

In my February 4, 2008 decision and order in the instant matter I denied without prejudice the application of plaintiff WELLS FARGO BANK, N.A., AS TRUSTEE (WELLS FARGO) for an order of reference for the premises located at 363 Madison Street, Brooklyn, New York (Block 1820, Lot 76, County of Kings), with leave to renew upon providing the Court with: a copy of a valid assignment of the instant mortgage and note to plaintiff WELLS FARGO BANK, N.A., AS TRUSTEE (WELLS FARGO); a satisfactory explanation to questions with respect to the two December 8, 2004 assignments of the instant mortgage and note from ARGENT MORTGAGE COMPANY, LLC (ARGENT) to AMERIQUEST MORTGAGE COMPANY (AMERIQUEST), and then from AMERIQUEST to plaintiff WELLS FARGO; and satisfactorily answering certain questions regarding a May 5, 2005 limited power of attorney from WELLS FARGO, as Trustee, to LITTON LOAN SERVICING, LP (LITTON), as Servicer. [*2]

Plaintiff has renewed its application for an order of reference for the subject premises, but the papers submitted fail to cure the defects enumerated in my prior decision and order. The purported plaintiff, WELLS FARGO, does not own the instant mortgage loan. Therefore, the instant matter is dismissed with prejudice.

Background

Defendant HILLARY FARMER borrowed \$460,000.00 from ARGENT on December 3, 2004. The note and mortgage were recorded in the Office of the City Register, New York City Department of Finance on December 21, 2004, at City Register File Number (CRFN) 2004000781656. Five days subsequent, on December 8, 2004, two invalid assignments of the instant mortgage and note took place, with ARGENT assigning the note and mortgage to AMERIQUEST, and then AMERIQUEST assigning the note and mortgage to plaintiff WELLS FARGO. Both of these

assignments were not recorded for more than fourteen months, until February 21, 2006, when they were both recorded at that same time and sequentially, at CRFN 2006000100653 and CRFN 2006000100654.

While both assignments list the offices of ARGENT and AMERIQUEST at different locations in Orange, California, both assignments were executed by "Jose Burgos - Agent," before the same notary public, in Westchester County, New York. Both of these assignments failed to have a corporate resolution or a power of attorney attached, which authorized the "Agent" to act for his principal. Thus, these assignments are invalid and plaintiff WELLS FARGO lacks standing to bring the instant foreclosure action.

I allowed plaintiff an opportunity to cure the assignment defects, by explaining: by what authority did Mr. Burgos act as "Agent" for both ARGENT and AMERIQUEST; why Mr. Burgos acted on the same day as the assignor and the assignee of two mortgage behemoths; and, why corporations located in Orange, California executed assignments on the other side of the continent, in Westchester County, New York?

Then, assuming that WELLS FARGO could explain and cure the assignment defects, WELLS FARGO had to provide answers about LITTON, its alleged servicer. The instant application for an order of reference contains an "affidavit of merit and amount due" by Debra Lyman, Vice President of LITTON, attorney in fact for WELLS FARGO. The Limited Power of Attorney, dated May 5, 2005, attached to the instant application for an order of reference, states that WELLS FARGO: in its capacity as trustee under certain Servicing Agreements relating to Park Place Securities Inc. Asset Backed Pass through Certificates, Series 2005-WLL1 dated as of March 1, 2005 (the "Agreement") by and among Park Place Securities, Inc. as ("Depositor") and Litton Loan Servicing LP as ("Servicer") and Wells Fargo Bank, N.A. as Trustee hereby constitutes and appoints: LITTON LOAN SERVICING LP its true and lawful attorney-in-fact . . . to execute and deliver on behalf of [WELLS FARGO] any and all of the following instruments [documents with respect to foreclosures] to the extent consistent with the terms and conditions of the Agreement [sic].

Since the Court does not know for whom WELLS FARGO is the Trustee, the Court has no way [*3]to know if the above-named March 1, 2005 Agreement refers to the instant mortgage. Since a "trustee" is "one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary" (Black's Law Dictionary 1519 [7th ed 1999]), the Court needs to know for whom WELLS FARGO holds the mortgage loan in trust. Further, to determine if Ms. Lyman had the authority to execute her affidavit on behalf of plaintiff WELLS FARGO, the Court required an inspection of the March 1, 2005 Servicing Agreement. (EMC Mortg. Corp. v Batista, 15 Misc 3d 1143 (A), [Sup Ct, Kings County 2007]; Deutsche Bank Nat. Trust Co. v Lewis, 14 Misc 3d 1201 (A) [Sup Ct, Suffolk County 2006]).

Discussion

In my previous decision and order I determined that plaintiff WELLS FARGO lacked "standing" to bring the instant action. The Court of Appeals (Saratoga County Chamber of Commerce, Inc. v

Pataki, 100 NY2d, 901, 812 [2003]), cert denied 540 US 1017 [2003]) held that "[s]tanding to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress." In *Carper v Nussbaum*, 36 AD3d 176, 181 (2d Dept 2006), the Court held that "[s]tanding to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. (*Stark v Goldberg*, 297 AD2d 203 [1d Dept 2002]).

In the instant action, the two December 8, 2004 assignments - ARGENT to AMERIQUEST and AMERIQUEST to WELLS FARGO - are defective. This denies WELLS FARGO's standing to bring this action. The recorded assignments are both by "Jose Burgos - Agent." An "agent" is "one who is authorized to act for or in place of another; a representative" (Black's Law Dictionary 64 [7th ed 1999]). The assignments lack any power of attorney granted by either ARGENT or AMERIQUEST to Jose Burgos to act as their agents. Real Property Law (RPL) § 254 (9) states: Power of attorney to assignee. The word "assign" or other words of assignment, when contained in an assignment of a mortgage and bond or mortgage and note, must be construed as having included in their meaning that the assignor does thereby make, constitute and appoint the assignee the true and lawful attorney, irrevocable, of the assignor in the name of the assignor, or otherwise, but at the proper costs and charges of the assignee, to have, use and take all lawful ways and means for the recovery of the money and interest secured by the said mortgage and bond or mortgage and note, and in case of payment to discharge the same as fully as the assignor might or could do if the assignment were not made. [Emphasis added] "An attorney in fact is merely a special kind of agent." (*Etterle v Excelsior Ins. Co. of New York*, 74 AD2d 436, 441 [2d Dept 1980]). Further, the agent, who has a fiduciary relationship with the principal, "is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority." (*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1992]). Therefore, to have a proper assignment of a mortgage by an authorized agent, a power of attorney is necessary to demonstrate how the agent is vested with authority to assign the mortgage. "No special form or language is necessary to effect an assignment as long as the [*4]language shows the intention of the owner of a right to transfer it [Emphasis added]." (*Tawil v Finkelstein Bruckman Wohl Most & Rothman*, 223 AD2d 52, 55 [1d Dept 1996]; see *Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612<http://www.nycourts.gov/reporter/3dseries/2004/2004_09620.htm> [2d Dept 2004]).

In an attempt to explain why Mr. Burgos, the "agent," acted twice as an assignor and once as an assignee, on December 8, 2004, plaintiff's counsel has provided the Court with an affidavit of Diane E. Tiberend, dated March 28, 2008. Ms. Tiberend, as of the date of her affidavit is: General Counsel, Senior Vice President and Secretary of ACC Capital Holdings Corporation (ACH), the parent company of ARGENT and AMERIQUEST; Assistant Secretary of AMERIQUEST from September 21, 1999; and, was Assistant Secretary of ARGENT from July 2, 2001 until November 1, 2007, when she became the Secretary of ARGENT. Unmentioned by Ms. Tiberend and plaintiff's counsel are the August 31, 2007 CITIGROUP purchases of ARGENT and AMERIQUEST. Ms. Tiberend wears another hat, that of corporate functionary for CITIGROUP

subsidiaries.

Eric Dash in his September 1, 2007 New York Times article, "Citigroup Buys Parts of a Troubled Mortgage Lender," wrote: Citigroup's investment banking arm scooped up the assets of the troubled subprime mortgage lender ACC Capital Holdings yesterday, the same day that the struggling company announced that it was closing. Citigroup bought the remnants of ACC's Argent wholesale mortgage origination division as well as the servicing rights to collect on more than \$45 billion in home loans. Terms of the deal were not disclosed. ACC said that it was shutting its only other holding, its Ameriquest retail mortgage unit, which once billed itself as the sponsor of the American dream but was tarnished by scandal. "ACC Capital Holdings is going to maintain operations as it prepares for the orderly wind-down of our retail mortgage business, which is no longer accepting applications," the company said. ACC Capital is the latest of at least 15 subprime lenders to be closed as Wall Street stopped pouring capital into the industry after rising homeowner delinquencies and defaults. The closing is the end of a long-challenged company, founded by the billionaire Roland E. Arnall, who last year was named United States ambassador to the Netherlands. [*5]" The whole Ameriquest and Argent businesses have been in limbo for at least a year," said Guy Cecala, publisher of Inside Mortgage Finance. "They were one of the first subprime lenders to show problems: they had regulatory concerns, volume going down and problems with loan quality."

In 2006, the company agreed to pay \$325 million to settle federal and state regulators' claims of deceptive lending practices. Citigroup said yesterday that it would pick up the remnants of Argent, ACC Capital's wholesale mortgage origination business, whose nationwide broker network was once under fire for abusive practices. Its operations have all but shut down. Citigroup executives said that they planned to overhaul the unit's management team and lending practices, change its name to Citi Residential Lending and broaden its product lines. They plan to restart loan origination operations slowly.

In paragraph 6 of her affidavit, Ms. Tiberend refers to the "dual assignment process," stating that "[t]o secure funds to lend a complete chain of assignments had to be provided to the related lender." Further, in paragraph 6, she refers to unnamed "related warehouse lenders." A "warehouse lender" provides a line of credit to a loan originator to fund a mortgage until it is sold into the secondary market, directly or through securitization. Defendant FARMER executed the instant mortgage with ARGENT on December 3, 2004. The assignments took place five days later on December 8, 2004. Thus, it appears that ARGENT borrowed the funds from a "warehouse lender(s)" to originate the FARMER loan, anticipating paying the loan back to the "warehouse lender(s)" after the mortgage loan was securitized into a collateralized debt obligation (CDO) with WELLS FARGO as the Trustee. However, the Court still cannot understand the necessity for the "dual assignment process." Why couldn't an officer of ARGENT have assigned the FARMER mortgage to WELLS FARGO, as Trustee for a designated beneficiary, a named CDO?

Ms. Tiberend also claims, in ¶ 6 of her affidavit, that since ARGENT and AMERIQUEST were located in separate locations and to avoid the loss or destruction of original loan documents

while in transit, "the dual assignment process" was conceived and when approved by the related warehouse lenders was implemented. I was instrumental in spearheading the dual assignment process in my position as Senior Counsel of ACH." [*6] She claims, in ¶ 7, that both ARGENT and AMERIQUEST authorized by corporate resolution the same personnel to execute both assignments. "This insured that the warehouse lender receive the loan documents in a timely fashion and eliminated the risk posed by transit of the loan documents to a location other than the warehouse lender's office." She alleges that Mr. Burgos as an employee of ARGENT was appointed as a limited signing officer of both ARGENT and AMERIQUEST by corporate resolutions.

However, she states, in ¶ 10: A diligent search of corporate records for the specific corporate resolutions cannot currently be found. In lieu thereof, and based on my actual knowledge and officer's position at both argent and Ameriquest in December 2004 and continuously since that date I have attached an Officer's Certificate memorializing Mr. Burgos' appointment on behalf of each of the companies. (See Exhibit 6 and 7). [Emphasis added]

Exhibits 6 and 7 are her attempt at nunc pro tunc corporate appointments of Mr. Burgos, more than three years after his execution of the assignments as "Agent." These Officer's Certificates are unrecorded and lack merit. This is not acceptable to the Court. It is clear that Mr. Burgos in acting as "Agent" needed authority for his actions, either by corporate resolution or by power of attorney. Since none were recorded with the December 8, 2008 assignments, the Court's approval of Ms. Tiberend's March 28, 2008 appointments of Mr. Burgos would be a legal miscarriage, despite Ms. Tiberend's claim that the "dual assignment system" was "conceived and when approved by the related warehouse lenders was implemented. "

Further, the second December 8, 2008 assignment, from AMERIQUEST to "Wells Fargo Bank, N.A., as Trustee," fails to name a beneficiary for the Trustee. The failure to name a beneficiary for the Trustee renders the assignment without merit. It is axiomatic that "[t]here are four essential elements of a trust: (1) a designated beneficiary; (2) a designated trustee; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) actual delivery or legal assignment of the property to the trustee, with the intention of passing legal title to such property to the trustee (Brown v Spohr, 180 NY 201, 209)." (In re Mannara, 5 Misc 3d 556, 558 [Sur Ct, New York County 2004]). (See In re Marcus Trusts, 2 AD3d 640, 641 [2d Dept 2003]; Orentreich v Prudential Ins. Co. of America, 275 AD2d 675 [1d Dept 2000]).

Plaintiff's counsel has provided the Court with an affidavit, dated March 28, 2008, by Kim M. Miller, "Vice President of Bankruptcy, Litigation, Default Documents and Foreclosures of WELLS FARGO BANK, N.A." She alleges that WELLS FARGO is Trustee for a CDO, "Park Place Securities Inc. Asset-Backed Pass-Through Certificates, Series 2005-WLL1, pursuant to a Pooling and Servicing Agreement between Park Place Securities, Wells Fargo, N.A. and Litton Loan Servicing LP as dated March 1, 2005." I conducted an in-camera review of the March 1, 2005 Pooling and Servicing Agreement and [*7]cannot find

any reference in it to the instant FARMER mortgage loan.

Therefore, since the AMERIQUEST to WELLS FARGO assignment is silent as to for whom WELLS FARGO is the Trustee, plaintiff has failed to demonstrate how the May 5, 2005 limited power of attorney from WELLS FARGO to LITTON authorizes an "affidavit of merit and amount due" by Debra Lyman, Vice President of LITTON. All of the defendants in the instant action have defaulted. CPLR § 3215 (f) requires that in an application for default judgment, "the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party.[Emphasis added]." Plaintiffs have failed to submit "proof of the facts" in "an affidavit made by the party." The "affidavit of facts" was submitted by Debra Lyman, Vice President of LITTON, the alleged servicing agent for WELLS FARGO and its unknown beneficiary. As discussed above, the Court cannot determine if Ms. Lyman is the servicing agent for this loan.

Both December 8, 2004 defective assignments - ARGENT to AMERIQUEST and AMERIQUEST to WELLS FARGO - are voided and cancelled. ARGENT is the owner of the FARMER mortgage loan. Therefore, plaintiff WELLS FARGO's application for an order of reference is dismissed with prejudice. WELLS FARGO does not have title to the instant mortgage and lacks standing to proceed in the instant action. The Appellate Division, Second Department (Kluge v Fugazy, 145 AD2d 537, 538 [2d Dept 1988]), held that a "foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity." Citing Kluge v Fugazy, the Court (Katz v East-Ville Realty Co., 249 AD2d 243 [1st Dept 1998]), held that "[p]laintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact." The Court, in Campaign v Barba, 23 AD3d 327 <http://www.nycourts.gov/reporter/3dseries/2005/2005_08266.htm> [2d Dept 2005], held that "[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, ownership of the mortgage, and the defendant's default in payment [Emphasis added]." (See Household Finance Realty Corp. of New York v Wynn, 19 AD3d 545 [2d Dept 2005]; Sears Mortgage Corp. v Yahhobi, 19 AD3d 402 [2d Dept 2005]; Ocwen Federal Bank FSB v Miller, 18 AD3d 527 <http://www.nycourts.gov/reporter/3dseries/2005/2005_03829.htm> [2d Dept 2005]; U.S. Bank Trust Nat. Ass'n v Butti, 16 AD3d 408 <http://www.nycourts.gov/reporter/3dseries/2005/2005_01707.htm> [2d Dept 2005]; First Union Mortgage Corp. v Fern, 298 AD2d 490 [2d Dept 2002]; Village Bank v Wild Oaks Holding, Inc., 196 AD2d 812 [2d Dept 1993].

Conclusion

Accordingly, it is ORDERED that the renewed application of plaintiff WELLS FARGO BANK, N.A., AS TRUSTEE, for an order of reference for the premises located at 363 Madison Street, Brooklyn, New York (Block 1820, Lot 76, County of Kings) is denied with prejudice; and it is further

ORDERED that the following real estate transactions for 363 Madison Street, Brooklyn, New York (Block 1820, Lot 76, County of Kings) are voided and cancelled: the Assignment of

Mortgage dated December 8, 2004 and recorded on February 21, 2006, at City Register File Number 2006000100653; and, the Assignment of Mortgage dated December 8, 2004 and recorded on February 21, 2006, at City Register File Number 2006000100654; and it is further ORDERED that the Office of the City Register of the New York City Department of [*8]Finance is directed to amend its records in accordance with this Decision and Order.

This constitutes the Decision and Order of the Court.

HON. ARTHUR M. SCHACK
J. S. C.