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Citigroup Global Mkts. Realty Corp. v Randolph Bowling
2009 NY Slip Op 52567(U) [25 Misc 3d 1244(A)]
Decided on December 18, 2009
Supreme Court, Kings County
Demarest, J.
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Decided on December 18, 2009

Supreme Court, Kings County

**Citigroup Global Markets Realty Corp., C/O GMAC
Mortgage Corporation 3451 Hammond Avenue Waterloo, IA
50704-5400, Plaintiff,**

against

**Randolph Bowling A/K/A R. Bowling, New York City
Environmental Control Board New York City Transit
Adjudication Bureau John Doe, Defendants.**

12817/07

Attorney for Plaintiff:

Steven J. Baum, PC

220 Northpointe Parkway Suite G

Amherst, NY 14228

716-204-2400

No Appearance by Defendants

Carolyn E. Demarest, J.

Plaintiff moves for an order of reference to ascertain and compute the amount due to the plaintiff in this action to foreclose a mortgage on real property situated in the County of Kings, State of New York, at 55 Rockaway Avenue, Brooklyn, NY 11233 ("55 Rockaway Avenue"). According to the complaint, defendant Randolph Bowling ("defendant") executed an adjustable rate note for \$630,000 and a mortgage on the 55 Rockaway Avenue property as security for the payment of the note on April 11, 2006. The initial interest rate of the adjustable rate note was 10.875% and was subject to increases up to 17.85%. According to the affidavit submitted in support of the motion, the defendant did not make one payment before defaulting on the note.

The affidavits for service of the summons and complaint on the defendant indicate that the process servers utilized "nail and mail" service at two separate addresses pursuant to [CPLR](#) 308 (4). The affidavit of service for the present motion also indicates service to the same addresses. The first address upon which service was attempted is 55 Rockaway Avenue, the property upon which the plaintiff seeks to foreclose. According to the affidavit of service, plaintiff unsuccessfully attempted to serve the summons and complaint on the defendant at 55 Rockaway Avenue on April 21st, 24th, 25th, 27th, and May 5th of 2007. The second address [*2] upon which service was attempted is 1609 Overing Street, 2nd floor, Bronx, NY ("1609 Overing Street"). According to the affidavit of service, plaintiff unsuccessfully attempted to serve the summons and complaint on the defendant at

1609 Overing Street on April 16th, 17th, 18th, and 19th of 2008, one year after the action was commenced. [\[FN1\]](#) The papers submitted in support of the motion do not indicate why plaintiff attempted service at 1609 Overing Street other than the mere inclusion of a list of violations from the parking violations bureau for "Randolph Bowling" which included the 1609 Overing Street address. However, this list of violations also includes other addresses for a "Randolph Bowling" where the plaintiff did not attempt to serve the summons and complaint. The affidavit of service notes that a "white male neighbor" confirmed that the defendant resides at 1609 Overing Street. However, the identity of the witness was not listed on the affidavit, there is no indication that the witness refused to give his name, and according to the affidavit, the witness indicated he was unaware of when the defendant routinely departed or arrived at the address. Although the mortgage lists the defendant's address as 1760 Bruckner Blvd. No.56, New York, NY ("1760 Bruckner Blvd."), plaintiff did not attempt service at this address and no explanation has been provided as to why service attempts were made at 1609 Overing Street but not at 1760 Bruckner Blvd..

Plaintiff's motion is denied as due diligence was not exercised in attempting to serve the defendant pursuant to [CPLR 308\(1\)](#) and (2) as is required under [CPLR 308\(4\)](#). "It is well settled that service pursuant to [CPLR 308\(4\)](#) may only be used in those instances where service under [CPLR 308\(1\)](#) and (2) cannot be made with due diligence" (*Gurevitch v Goodman*, 269 AD2d 355 [2d Dept 2000]). "The due diligence requirement of [CPLR 308\(4\)](#) should be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" (*McNeely v Harrison*, 208 AD2d 909, 910 [2d Dept 1994]; *see Gurevitch*, 269 AD2d at 355). There is no indication in the motion papers that the defendant ever represented that his personal address was located at 55 Rockaway Avenue or 1609 Overing Street. Further, the plaintiff did not serve the defendant at 1760 Bruckner Blvd. which was clearly listed on the front page of the mortgage as the defendant's address or provide any explanation as to why plaintiff did not attempt to serve the defendant at that address. Since due diligence was not exercised in attempting to serve the defendant at his dwelling address or usual place of abode pursuant to [CPLR 308\(1\)](#) and (2), resorting to [CPLR 308\(4\)](#) was improper (*see McNeely*, 208 AD2d at 910; *Gurevitch*, 269 AD2d at 355-356; *see also Contimortgage Corp. v Isler*, 48 AD3d 732 [2d Dept 2008] (holding service by publication "was not reasonably calculated under the circumstances to

apprise [the defendant] of the pendency of the [foreclosure] action" where the process server only attempted service on the defendant at the subject property, there was no evidence that the defendant resided at the subject property, and the defendant's address was available through a docketed judgment)).

Further, it is noted that the plaintiff did not have standing to bring the foreclosure action when it was commenced. It is critical for a plaintiff seeking judicial redress to have standing [*3] before this court. "If standing is denied, the pathway to the courthouse is blocked" (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* [540 US 1017](#) [2003]). "Standing 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" (*Caprer v Nussbaum*, [36 AD3d 176](#), 181 [2d Dept 2006]). According to the documents submitted in support of plaintiff's motion, the plaintiff's action is predicated upon rights it presumed to acquire by virtue of an assignment from Mortgage Electronic Registration System, Inc. ("MERS") as Nominee for BNC Mortgage, Inc. that was executed on April 24, 2007. The assignment indicates that is "effective" on April 7, 2007 and was filed with the County Clerk on May 7, 2007. This action was commenced by the filing of a summons and complaint on April 18, 2007, prior to the date of execution of the written assignment. The complaint identifies the plaintiff as "a banking corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and the holder of the mortgage being foreclosed." However, this claim is contradicted within the complaint by the assertion that the "mortgage is to be assigned by an Assignment to be recorded in the Office of the Clerk of KINGS County."

"Where the plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action" (*Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 546-547 [2d Dept 2003]; *see Nat'l Mtge. Consultants v Elizaitis*, [23 AD3d 630](#), 631 [2d Dept 2005]; *Wells Fargo Bank, N.A. v Marchione*, 2009 NY Slip Op 7624, *2 [2d Dept 2009]). A plaintiff may not foreclose on a mortgage where the plaintiff does not have title to the mortgage (*Kluge v Fugazy*, 145 AD2d 537, 538 [2d Dept 1988]). The written assignment in the present matter from MERS states that the effective date of the assignment is April 7, 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" (*Deutsche Bank Trust Co. Ams. v Peabody*, 20 Misc 3d 1108A [Sup Ct, Saratoga County 2008]). Here, plaintiff lacked standing to bring this foreclosure action at the time of filing because it was not the assignee of the mortgage on April 18, 2007, the day the action was commenced. Where an assignee of a note and mortgage commences a foreclosure action prior to the date of the execution of the assignment and a "written assignment claiming an earlier effective date" is not "accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated," such assignee has no standing (*Marchione*, 2009 NY Slip Op 7624, *3; *see Lasalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912 [3d Dept 2009]). "[A] retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment" (*Marchione*, 2009 NY Slip Op 7624 at *3). That the plaintiff had not received physical delivery of the note and mortgage prior to commencement of this action is suggested by the plain language of the complaint indicating that the mortgage was "to be assigned."

As this foreclosure action was commenced by a party that did not yet at the time have an interest in the mortgage and note, the complaint is dismissed without prejudice, *sua sponte*, for lack of standing (*see Marchione*, 2009 NY Slip Op 7624 at *3; *Stark v Goldberg*, 297 AD2d 203, 204 [1st Dept 2002]; *see also Axelrod v New York State Teachers' Retirement System*, 154 AD2d 827, 828 [3d Dept 1989]; *HSBC Bank USA, N.A. v Vasquez*, 2009 NY Slip Op 51814U, * 3-4 [*4][Sup Ct, Kings County 2009]). Although recent decisions by the Second Department have held that a defendant waives the standing defense where it is not raised in the answer or pre-answer motion to dismiss (*see Wells Fargo Bank Minn. v Mastropaolo*, 42 AD3d 239, 244 [2d Dept 2007]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 680 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 625 [2d Dept 2009]), those cases are distinguishable from the present matter. In both *Wells Fargo v Mastropaolo* and *Countrywide v Delphonse*, the defendant filed answers containing either counterclaims or affirmative defenses without asserting a standing defense (*see Mastropaolo*, 42 AD3d at 240; *Delphonse* 64 AD3d at 625). In so doing, those defendants tacitly acknowledged that the plaintiff was a proper party for the prosecution of those foreclosure actions. In the present action, defendant has

not appeared or filed an answer and has therefore not waived the right to challenge plaintiff's standing. ^[FN2] Particularly significant is the observation in *Dammond* that it was "undisputed that the respondent was personally served" and the defendant did not raise the standing defense until "immediately prior to the date scheduled for the sale of the property" (*Dammond*, 59 AD3d at 680). In the present action, the defendant has not been personally served and, as discussed *supra*, it is unlikely the defendant even had notice of this foreclosure action as the plaintiff did not serve the summons, complaint, or the present motion on the defendant at his address as listed on the face of the mortgage. Further, the waiver issue is not being raised as a last minute effort to prevent a foreclosure sale.

This action is dismissed without prejudice, *sua sponte*, as this court cannot foreclose a mortgage upon a complaint that acknowledges on its face that, at the commencement of suit, the plaintiff had not suffered any injury and had no interest in the controversy it was seeking to litigate (*see Deutsche Bank Natl. Trust Co. v Abbate*, 2009 NY Slip Op 52154U, *5 [Sup Ct, Richmond County 2009] (dismissing foreclosure action where assignment of note and mortgage occurred after filing of the complaint noting that the "[l]ack of plaintiff's interest at the beginning of the action strip[ped] the court's power to adjudicate over the action"); *see Marchione*, 2009 NY Slip Op 7624, *2 (affirming the dismissal of foreclosure action where the assignee of the mortgage "lacked standing to bring [the] foreclosure action because it was not the assignee of the mortgage on . . . the day the action was commenced"); *see also Lasalle*, 59 AD3d at 912-913). Allowing this case to proceed on behalf of a plaintiff without standing at the commencement of the action would open the door to potential fraud and place in jeopardy the integrity of title to the property to be foreclosed.

As the plaintiff had not suffered any injury and had no interest in the controversy between the mortgagor and the mortgagee at the time this action was commenced, and plaintiff did not conduct due diligence in serving the defendant with the complaint, plaintiff's motion is denied and this action is dismissed without prejudice to the plaintiff's right to refile within the time provided by the statute of limitations (*see Abbate*, 2009 NY Slip Op 52154U at *5; *Lasalle*, 59 AD3d at 912-913; *Gurevitch*, 269 AD2d at 355).

The foregoing constitutes the decision and order of the court. [*5]

ENTER :

J.S.C

Footnotes

Footnote 1: It is noted that this service was clearly in violation of [CPLR](#) 306-b which requires, service of the summons and complaint within 120 days of April 18, 2007, the date the summons and complaint were filed. However, this court is unable to dismiss the action *sua sponte* on this ground ([see Daniels v King Chicken & Stuff, Inc., 35 AD3d 345](#) [2d Dept 2006]).

Footnote 2: This decision is also distinguished from *Mastropaolo* as the court is dismissing the case without prejudice which will allow plaintiff, should it still hold the note and mortgage, to refile their action (*see Mastropaolo*, 42 AD3d at 241; *Deutsche Bank Natl. Trust Co. v Abbate*, 2009 NY Slip Op 52154U, *4 [Sup Ct, Richmond County 2009]).

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