2008 NY Slip Op 51211(U)

WELLS FARGO BANK, NATIONAL ASSOCIATION As Trustee and Custodian for Morgan Stanley ABS Capital1 Inc., MSAC 2007-HE4, Plaintiff,
v.
JOHN REYES, ET AL., Defendants.

5516/08.

Supreme Court of the State of New York, Kings County.

Decided June 19, 2008.

Plaintiff: Mary McLoughlin, Esq., Plainview NY.

Defendant: No defendant answered in this foreclosure action.

ARTHUR M. SCHACK, J.

Plaintiff's *ex parte* motion, for service of a supplemental summons by publication upon defendant JOHN REYES and related relief, in a mortgage foreclosure action for the premises located at 379 Lincoln Avenue, Brooklyn, New York (Block 4173, Lot 6, County of Kings) is denied with prejudice. The complaint is dismissed. The notice of pendency filed against the above-named real property is cancelled. Plaintiff, WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE AND CUSTODIAN FOR MORGAN STANLEY ABS CAPITAL1 INC., MSAC 2007-HE4 (WELLS FARGO), lacks standing to prosecute this matter because, according to the Automated City Register Computer System (ACRIS) website of the Office of the City Register of the City of New York, it does not now, and has never owned the subject mortgage. My chambers received this motion on June 17, 2008. Yesterday and again today, I personally searched ACRIS and discovered that the subject mortgage is owned by MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC. (MERS), as nominee for WMC MORTGAGE CORP. (WMC). According to ACRIS, the instant MERS as nominee for WMC mortgage has never been assigned. Plaintiff's counsel, Mary McLoughlin, Esq., and her firm, Rosicki, Rosicki, & Associates, P.C., will be given an opportunity to be heard why this Court should not sanction them for making a "frivolous motion," pursuant to 22 NYCRR §130-1.1.

Background

According to both ACRIS and plaintiff's February 21, 2008 verified complaint, defendant JOHN REYES borrowed $617,500.00 on October 3, 2006 from lender WMC. This was secured by a mortgage recorded at the Office of the City Register of the City of New York, October 19, 2006 at City Register File Number (CRFN) XXXXXXXXXXX, by MERS, as nominee for WMC for purposes of recording the mortgage and acting as mortgagee of record. The verified complaint alleges that defendant REYES defaulted more than one year ago, by

failing to make his June 1, 2007 payment, and every subsequent monthly payment. MERS, according to my ACRIS check, never assigned the **REYES**' mortgage.

Plaintiff **WELLS FARGO** commenced the instant foreclosure action with the filing of the summons, complaint, and notice of pendency with the Kings County Clerk on February 21, 2008, even though it did not own the mortgage. **WELLS FARGO's** attorney, Ms. McLoughlin signed the Request for Judicial Intervention (RJI) on June 9, 2008, and the $95.00 RJI fee was paid to the Kings County Clerk on June 10, 2008. The instant motion seeks to serve defendant JOHN **REYES** by publication, pursuant to CPLR Rule 316, claiming that after a diligent search, Mr. **Reyes** cannot be found.

Ms. McLaughlin, whose client does not own the **REYES**' mortgage, in ¶ 12 of her June 9, 2008 affirmation, attacks the efficiency of the Office of the Kings County Clerk, and then has the *chutzpah* to request that the thirty-day period for the first publication of the supplemental summons, pursuant to CPLR Rule 316 ©, commence on the date of entry of the order for service of publication, not the day that the Court grants the order, in abrogation of the statutory requirement. She claims that orders of publications have to be resettled "due to delays" in the Office of the Kings County Clerk and "repetitious resettlement imposes an undue burden upon the Court's calendar and undermines judicial economy." Ms. McLoughlin needs to be cognizant that the making of a motion by an attorney who represents a client that alleges to be a plaintiff in a foreclosure action, and who in reality is not a plaintiff, imposes "an undue burden upon the Court's calendar and [the waste of the court's time] undermines judicial economy."

The Court is gravely concerned that it expended scarce resources on a motion by **WELLS FARGO**, which is not the owner and has never been the owner of the **REYES**' mortgage. **WELLS FARGO** has no standing in the instant action. Ms. McLaughlin and her firm, Rosicki, Rosicki & Associates, P.C., will have to explain to the Court why this Court should not sanction them for making a "frivolous motion," pursuant to 22 NYCRR §130-1.1.

Discussion

The Court of Appeals (*Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 NY2d 801, 812 [2003]), *cert denied* 540 US 1017 [2003]), declared 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." Professor David Siegel, in NY Prac, § 136, at 232 [4th ed] instructs that:

> [i]t is the law's policy to allow only an aggrieved person to bring a lawsuit . . . A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack "standing" is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.

In (*Caprer 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 [1st Dept 2002]).

It is clear that plaintiff **WELLS FARGO** lacks standing to foreclose on the instant **REYES**' mortgage. **WELLS FARGO** has failed to establish ownership of the mortgage. Therefore, **WELLS FARGO** may not seek judicial redress. There are no recorded assignments of the note from MERS as nominee of WMC to any other party, despite **WELLS FARGO's** allegation, in ¶ 4 of the February 21, 2008 verified complaint, that the MERS as nominee for WMC mortgage was "assigned to Plaintiff [**WELLS FARGO**] by assignment(s). Plaintiff is still the owner and holder of the aforementioned instrument(s) [the WMC mortgage]."

In *Campaign v. Barba* (23 AD3d 327 [2d Dept 2005]), the Court instructed 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 Witelson v. Jamaica Estates Holding Corp. I,* 40 AD3d 284 [1st Dept 2007]; *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 [2d Dept 2005]; *U.S. Bank Trust Nat. Ass'n Trustee v. Butti,* 16 AD3d 408 [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]).

With **WELLS FARGO's** failure to have ever owned the **REYES**' mortgage, the Court must not only deny the instant motion, but also dismiss the complaint and cancel the notice of pendency filed by **WELLS FARGO** with the Kings County Clerk on February 21, 2008. CPLR § 6501 provides that the filing of a notice of pendency against a property gives constructive notice to any purchaser of real property or encumbrancer against real property of an action that "would affect the title to, or the possession, use or enjoyment of real property, except in a summary proceeding brought to recover the possession of real property." Professor David Siegel, in NY Prac, § 334, at 535 [4th ed] observes about a notice of pendency that:

> The plaintiff files it with the county clerk of the real property county, putting the world on notice of the plaintiff's potential rights in the action and thereby warning all comers that if they then buy the property or lend on the strength of it or otherwise rely on the defendant's right, they do so subject to whatever the action may establish as the plaintiff's right.

The Court of Appeals, in *5303 Realty Corp. v. O & Y Equity Corp* (64 NY2d 313, 315 [1984]) commented that "[a] notice of pendency, commonly known as a "*lis pendens,*" can be a potent shield to litigants claiming an interest in real property." The Court, at 318-320, outlined the history of the doctrine of *lis pendens* back to 17th century England. It was formally recognized in New York courts in 1815 and first codified in the Code of Procedure [Field Code] enacted in 1848. At 319, the Court stated that "[t]he purpose of the doctrine was to assure that a court retained its ability to effect justice by preserving its power over the property, regardless of whether a purchaser had any notice of the pending suit," and, at 320, "the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review."

In *Israelson v. Bradley* (308 NY 511, 516 [1955]) the Court observed that with a notice of pendency a plaintiff who has an interest in real property has received from the State:

> an extraordinary privilege which . . . upon the mere filing of the notice of a pendency of action, a summons and a complaint and strict compliance with the requirements of section 120 [of the Civil Practice Act; now codified in CPLR §§ 6501, 6511 and 6512] is required. Proper administration of the law by the courts requires promptness on the part of a litigant so favored and that he accept the shield which has been given him upon the terms imposed and *that he not be permitted to so use the privilege granted that it becomes a sword usable against*

> *the owner or possessor of realty. If the terms imposed are not met, the privilege is at an end.*

[*Emphasis added*]

Article 65 of the CPLR outlines notice of pendency procedures. The Court, in *Da Silva v. Musso* (76 NY2d 436, 442 [1990]), held that "the specific statutorily prescribed mechanisms for implementing this provisional remedy . . . were designed with a view toward balancing the interests of the claimant in the preservation of the status quo against the equally legitimate interests of the property owner in the marketability of his title." The Court of Appeals, quoted Professor Siegel, in holding that "[t]he ability to file a notice of pendency is a privilege that can be lost if abused (Siegel, New York Practice § 336, at 512)." (*In Re Sakow*, 97 NY2d 436, 441 [2002]).

The instant case, with **WELLS FARGO** lacking standing to bring this action, and the complaint dismissed, meets the criteria for losing" a privilege that can be lost if abused." CPLR § 6514 (a) provides for the mandatory cancellation of a notice of pendency by:

> [t]he court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or *if the action has been* settled, discontinued or *abated*; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519. [*Emphasis added*]

The plain meaning of the word "abated," as used in CPLR § 6514 (a) is the ending of an action. Abatement is defined (Black's Law Dictionary 3 [7th ed 1999]) as "the act of eliminating or nullifying." "An action which has been abated is dead, and any further enforcement of the cause of action requires the bringing of a new action, provided that a cause of action remains' (2A Carmody-Wait 2d § 11.1)." (*Nastasi v. Nastasi*, 26 AD3d 32, 40 [2d Dept 2005]). Further, *Nastasi* at 36, held that "[c]ancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where its filing fails to comply with CPLR 6501 (*see 5303 Realty Corp. v. O & Y Equity Corp.* at 320-321; *Rose v. Montt Assets*, 250 AD2d 451, 451-452 [1st Dept 1998]; Siegel, NY Prac § 336 [4th ed])." As plaintiff **WELLS FARGO** lacks standing to sue, the dismissal of the instant complaint must result in the mandatory cancellation of **WELLS FARGO's** notice of pendency against the property "in the exercise of the inherent power of the Court."

The failure of Mary McLoughlin, Esq., and her firm, Rosicki, Rosicki, & Associates, P.C., to commence and prosecute the instant action for a plaintiff that fails to have standing appears to be "frivolous." 22 NYCRR § 130-1.1 (a) states that "the Court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart." Further, it states in 22 NYCRR § 130-1.1 (2), that "sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated."

22 NYCRR § 130-1.1 © states that:

> For purposes of this part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

It is clear that from its commencement, the action by **WELLS FARGO** to foreclose on a mortgage it doesn't own, and the instant motion for service by publication "is completely without merit in law" and it appears that the verified complain "asserts material factual statements that are false."

Several years before the drafting and implementation of the Part 130 Rules for costs and sanctions, the Court of Appeals (*A.G. Ship Maintenance Corp. v. Lezak,* 69 NY2d 1, 6 [1986]) observed that "frivolous litigation is so serious a problem affecting the proper administration of justice, the courts may proscribe such conduct and impose sanctions in this exercise of their rule-making powers, in the absence of legislation to the contrary (*see* NY Const, art VI, § 30, Judiciary Law § 211 [1] [b])."

Part 130 Rules were subsequently created, effective January 1, 1989, to give the courts an additional remedy to deal with frivolous conduct. These stand beside Appellate Division disciplinary case law against attorneys for abuse of process or malicious prosecution. The Court (*Gordon v. Marrone,* 202 AD2d 104, 110 [2d Dept 1994], *lv denied* 84 NY2d 813 [1995]) instructed that:

> Conduct is frivolous and can be sanctioned under the court rule if "it is completely without merit . . . and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; *or* . . . it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c] [1], [2] . . .).

In *Levy v. Carol Management Corporation* (260 AD2d 27, 33 [1st Dept 1999]) the Court stated that in determining if sanctions are appropriate the Court must look at the broad pattern of conduct by the offending attorneys or parties. Further, "22 NYCRR 130-1.1 allows us to exercise our discretion to impose costs and sanctions on an errant party . . ." *Levy* at 34, held that "[s]anctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the Bar at large."

The Court, in *Kernisan, M.D. v. Taylor* (171 AD2d 869 [2d Dept 1991]), noted that the intent of the Part 130 Rules "is to *prevent the waste of judicial resources* and to deter vexatious litigation and dilatory or malicious litigation tactics (*cf. Minister, Elders & Deacons of Refm. Prot. Church of City of New York v. 198 Broadway,* 76 NY2d 411; *see Steiner v. Bonhamer,* 146 Misc 2d 10) [*Emphasis added*]." The instant action, from its commencement on February 21, 2008, is "a waste of judicial resources." This conduct, as noted in *Levy,* must be deterred. In *Weinstock v. Weinstock* (253 AD2d 873 [2d Dept 1998]) the Court ordered the maximum sanction of $10,000.00 for an attorney who pursued an appeal "completely without merit," and holding, at 874, that "[w]e therefore award the maximum authorized amount as a sanction for this conduct (*see,* 22 NYCRR 130-1.1) calling to mind that *frivolous litigation causes a substantial waste of judicial resources* to the detriment of those litigants who come to the Court with real grievances [*Emphasis added*]." Citing *Weinstock,* the Appellate Division, Second Department, in *Bernadette Panzella, P.C. v. De Santis* (36 AD3d 734 [2d Dept 2007]) affirmed a Supreme Court, Richmond County $2,500.00 sanction, at 736, as "appropriate in view of the plaintiff's *waste of judicial resources* [*Emphasis added*]."

In *Navin v. Mosquera* (30 AD3d 883 [3d Dept 2006]) the Court instructed that when

considering if specific conduct is sanctionable as frivolous, "courts are required to examine whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent' (22 NYCRR 130-1.1 [c])." The Court, in *Sakow ex rel. Columbia Bagel, Inc. v. Columbia Bagel, Inc.* (6 Misc 3d 939, 943 [Sup Ct, New York County 2004]), held that "[i]n assessing whether to award sanctions, the Court must consider whether the attorney adhered to the standards of a reasonable attorney (*Principe v. Assay Partners,* 154 Misc 2d 702 [Sup Ct, NY County 1992])." In the instant action, plaintiff's attorney is responsible for keeping track of whether the mortgage was satisfied. In *Sakow* at 943, the Court observed that "[a]n attorney cannot safely delegate all duties to others."

This Court will examine the conduct of plaintiff's counsel, in a hearing, pursuant to 22 NYCRR § 130-1.1, to determine if plaintiff's counsel engaged in frivolous conduct, and to allow plaintiff's counsel a reasonable opportunity to be heard. (*See Mascia v. Maresco,* 39 AD3d 504 [2d Dept 2007]; *Yan v. Klein,* 35 AD3d 729 [2d Dept 2006]; *Greene v. Doral Conference Center Associates,* 18 AD3d 429 [2d Dept 2005]; *Kucker v. Kaminsky & Rich,* 7 AD3d 39 [2d Dept 2004]).

Conclusion

Accordingly, it is

ORDERED that the motion of plaintiff **WELLS FARGO** BANK, NATIONAL ASSOCIATION AS TRUSTEE AND CUSTODIAN FOR MORGAN STANLEY ABS CAPITAL1 INC., MSAC 2007-HE4, for service of a supplemental summons by publication upon defendant JOHN **REYES** and related relief, in a mortgage foreclosure action for the premises located at 379 Lincoln Avenue, Brooklyn, New York (Block 4173, Lot 6, County of Kings) is denied with prejudice; and it is further

ORDERED, that as plaintiff, **WELLS FARGO** BANK, NATIONAL ASSOCIATION AS TRUSTEE AND CUSTODIAN FOR MORGAN STANLEY ABS CAPITAL1 INC., MSAC 2007-HE4, lacks standing and has never been the mortgagee in this foreclosure action, the instant complaint, Index No. 5516/08, is dismissed with prejudice; and it is further

ORDERED, that the Notice of Pendency filed with the Kings County Clerk on February 21, 2008, by purported plaintiff, **WELLS FARGO** BANK, NATIONAL ASSOCIATION AS TRUSTEE AND CUSTODIAN FOR MORGAN STANLEY ABS CAPITAL1 INC., MSAC 2007-HE4, in an action to foreclose a mortgage for real property located at 379 Lincoln Avenue, Brooklyn New York (Block 4173, Lot 6, County of Kings), is cancelled; and it is further

ORDERED that it appearing that Mary McLoughlin, Esq., and Rosicki, Rosicki & Associates, P.C., engaged in "frivolous conduct," as defined in the Rules of the Chief Administrator, 22 NYCRR § 130-1 © and that pursuant to the Rules of the Chief Administrator, 22 NYCRR § 130.1.1 (d), "[a]n award of costs or the imposition of sanctions may be made . . . upon the court's own initiative, after a reasonable opportunity to be heard," this Court will conduct a hearing affording Ms. McLoughlin and Rosicki, Rosicki, & Associates, P.C, "a reasonable opportunity to be heard," before me in Part 27, on Friday, August 1, 2008, at 2:30 P.M., in Room 479, 360 Adams Street, Brooklyn, NY 11201; and it is further

ORDERED, that Ronald D. Bratt, Esq., my Principal Law Clerk, is directed to serve this order by first-class mail, upon Mary McLoughlin, Esq., and Rosicki, Rosicki & Associates, P.C., 51 East Bethpage Road, Plainview, New York 11803.

This constitutes the Decision and Order of the Court.