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JPMorgan Chase Bank v. Stewart Title Ins. Co., 8115/11

March 23, 2016

Cite as: JPMorgan Chase Bank v. Stewart Title Ins. Co., 8115/11, NYLJ 1202752743286, at *1 (Sup., NA, Decided March 14, 2016)

CASENAME

JPMorgan Chase Bank, National Association, As Trustee, Plaintiff v. Stewart Title Insurance Company, Defendant

8115/11

Justice Julianne Capetola

[Read Summary of Decision](#)

Decided: March 14, 2016

ATTORNEYS

For Plaintiff: Peter R. Bonchonsky, Esq.

For Defendant: Thomas G. Sherwood, Esq.

The following papers were read on this Motion:

Plaintiff's Notice of Motion and Supporting Documents

Defendant's Notice of Cross-Motion and Supporting Documents

Plaintiff's Affidavit in Opposition to Cross-Motion and Further Support of Motion

Defendant's Reply Affirmation

DECISION AND ORDER ON MOTION

*1

The Plaintiff in this action moves by notice of motion for an order pursuant to CPLR §1018 and §1021 joining an additional plaintiff, EMC Mortgage LLC f/k/a EMC Mortgage Corporation (hereinafter referred to as "EMC"). Defendant has opposed the motion and cross-moved for summary judgment dismissing the complaint. Plaintiff has opposed the cross-motion and submitted reply papers on their motion. Defendant submitted reply papers on their cross-motion. Oral argument was requested and granted. Oral argument was held and the motion was deemed submitted on March 7, 2016.

CPLR §1018 states that, "Upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action".

CPLR §1021 states, in relevant part, that, "A motion for substitution may be made by the successors or representatives of a party or by any party".

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The underlying action relates to title insurance provided by Defendant to Plaintiff to insure a mortgage held, at some point in time, by Plaintiff. The following facts are not disputed: The underlying insurance policy was issued by Defendant to "First Residential Mortgage Services Corporation" (hereinafter referred to as "First Residential"), its successors and/or assigns on or about January 4, 2006. The underlying mortgage was granted by Mohammad Zakir Hossain to First Residential against a parcel of real property as security for the indebtedness. Thereafter, First Residential endorsed the Adjustable Rate Note (hereinafter referred to as "the note") to EMC Mortgage Corporation.

On or about March 29, 2006 that note was sold to Bear Stearns ALT-A Trust. On or about August 22, 2006 a claim was submitted to Defendant regarding an alleged title defect which resulted in the mortgage in question being subordinate to another mortgage and, accordingly, significantly devalued. It was also undisputed that the purchaser, title company and counsel who participated in the real estate transaction from which this claim arose with respect to the purchase and insuring title of said premises were in fact duped into paying a "fictitious payee" rather than satisfying the mortgage of the seller at the closing resulting in the first mortgagor foreclosing on that debt, which in turn caused the insured's debt to become secondary. That claim was denied by the Defendant to EMC by letter dated January 22, 2008. A copy of the claim has not been produced herein.

On or about December 21, 2007, EMC purchased the note back from Bear Stearns ALT-A Trust but that purchase was never recorded. The documents from this transaction are alleged by Plaintiff to have been lost, misplaced, or destroyed, and accordingly, on March 27, 2015 a subsequent assignment was executed, and then recorded on May 4, 2015. Rather than there having been a subsequent assignment, it is the opinion of this Court that there should have been a duplicate original assignment executed reflecting the actual date of assignment and Plaintiff and EMC should have sought permission from the Court to file same nunc pro tunc in the event that the County Clerk did not accept such a late filing. Plaintiff now seeks to add EMC as a necessary party plaintiff predicated upon an assignment that was post-commencement of the underlying litigation and/or predicated on the unrecorded original assignment.

The underlying matter bears a 2011 index number and has been pending for over four years. It is not disputed by either party that while there was no timing issue at the time of the commencement of the action, presently, the statute of limitations regarding the underlying cause of action for breach of the title insurance contract has expired rendering the commencement of a new lawsuit by an alternate plaintiff time-barred.

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Both pending motions are predicated upon arguments regarding standing, to wit, at the time of the commencement of the underlying action did the Plaintiff herein have standing to commence the underlying action, and who is the appropriate plaintiff in this action based upon the alleged loss. Plaintiff seeks to join another plaintiff, and Defendant in turn has cross-moved to dismiss the complaint for lack of standing.

"A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (see *Kondaur Capital Corp. v. McCary*, 115 A.D.3d 649, 650, 981 N.Y.S.2d 547; see *HSBC Bank USA v. Hernandez*, 92 A.D.3d at 843, 939 N.Y.S.2d 120; *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 279, 926 N.Y.S.2d 532). Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation (see *Aurora Loan Serv., LLC v. Taylor*, 114 A.D.3d 627, 980 N.Y.S.2d 475; *HSBC Bank USA v. Hernandez*, 92 A.D.3d at 844, 939 N.Y.S.2d 120; *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d at 754, 890 N.Y.S.2d 578). As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (see *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 280, 926 N.Y.S.2d 532). However, the transfer of the mortgage without the debt is a nullity, and no interest is acquired by it (see *Bank of N.Y. Mellon v. Gales*, 116 A.D.3d 723, 982 N.Y.S.2d 911; *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 280, 926 N.Y.S.2d 532), because a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation (see *Deutsche Bank Natl. Trust Co. v. Spanos*, 102 A.D.3d 909, 911, 961 N.Y.S.2d 200)." *U.S. Bank Nat. Ass'n v. Faruque*, 120 A.D.3d 575 (2d. Dept. 2014).

Although the instant matter does not involve a mortgage foreclosure, the inquiry regarding standing is the same here. The question before the Court is twofold, i.e., who has an insurable interest and if so, did that party sustain any damages?

The title insurance contract at issue reads, in relevant part:

"(a) 'insured': the insured named in Schedule A. The term 'insured' also includes:

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness...

(b) 'insured claimant': an insured claiming loss or damage".

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Plaintiff argued during oral argument that the underlying suit was commenced by Plaintiff because this Plaintiff was the record titleholder. Plaintiff stated "We sued in the name of the record titleholder because the policy essentially told us to. It said we were the primary first-named insured, the assignee. So to be careful, we said, let's sue in the name of the assignee. We were concerned about suing in the name of a secondary or second-named insured, the owner of the indebtedness". (Transcript p. 29, Lines 19-25)

While at first glance it may appear that Plaintiff was the insured, upon further scrutiny, and in light of Plaintiff's representations made during oral argument, it is clear that inasmuch as EMC is admittedly the owner of the indebtedness, they were the insured.

The case at bar presents several enigmatic questions. Query, would the failure to record an instrument that should have been recorded void the purchase ab initio? Does seller therefore retain an ownership interest or an equitable interest? It would clearly result in unjust enrichment for Plaintiff to retain any interest as Plaintiff received consideration for the sale of the mortgage in excess of what was paid by Plaintiff to obtain it, and now seeks damages for its diminished value when EMC is clearly the entity who suffered the loss. Furthermore, EMC presumably filed the claim which was denied by Defendant, which begs the question: If Plaintiff believed itself to be the "insured" why didn't it file its own claim with the Defendant? Conversely, EMC should have instituted its own litigation upon the receipt of the aforesaid denial.

Plaintiff argues that, because the December 21, 2007 transfer of the mortgage was not recorded as of the date of the commencement of the underlying action, Plaintiff was the record titleholder to the mortgage and, therefore, the appropriate Plaintiff. However, as stated above, "once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note", and "the transfer of the mortgage without the debt is a nullity *and no interest is acquired by it*". U.S. Bank, *supra* (emphasis added). In the instant matter it is not disputed that the note was transferred from Plaintiff to EMC on or about December 21, 2007 and that, since that time, EMC has been in continuous possession of the note. The fact that the transfer was not recorded at that time is not explained. A transfer was recorded transferring the mortgage from Plaintiff to EMC on May

4, 2015. The purpose of that May 4, 2015 transfer is elucidated by the affidavit of Jessica Dunn, authorized signer for Plaintiff with access to all relevant business records and personal knowledge of how said records are kept and maintained, who states in paragraphs 7-8, "In or about December 2007, EMC repurchased the beneficial interest in the Mortgage (and underlying indebtedness) from the Trust. (EMC is a subsidiary of

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JPMorgan Chase & Co.) *As a result of the repurchase*, by New York Assignment of Mortgage executed on March 27, 2015, JPMorgan Chase Bank National Association as Trustee assigned the Mortgage (and underlying indebtedness) to EMC Mortgage LLC f/k/a EMC Mortgage Corporation which New York Assignment of Mortgage was recorded on May 4, 2015 in the Office of the City Register of the City of New York". (emphasis added).

Parenthetically speaking, this repurchase was without true consideration, and as previously stated herein, a duplicate original assignment would have been the better way to evidence the 2007 conveyance.

Accordingly, it is can be deduced that the note was actually transferred to EMC in 2007, along with the mortgage which passes as incident thereto, which was the intent of the parties at the time as clearly stated in the affidavit of Jessica Dunn. The lack of recording of that transfer is of no moment as Plaintiff, from the time of the physical transfer of the note and the accompanying effectual transfer of the mortgage, had no remaining equitable interest in the mortgage in question.

Plaintiff attempts to argue that, inasmuch as the December 21, 2007 transfer was never recorded, they are the legal title holder of the mortgage, however, that argument is without merit. "When an insured mortgagee does assign the subject note and mortgage, the assignee becomes the insured and the assignor loses its status as an insured under the policy". Joyce D. Palomar, 1 Title Ins. Law §4.9. Though the assignor would retain an interest to the extent of being able to recover under the policy in the event that they did sustain some loss during the course of their ownership of the mortgage, such is not the case here. "[I]f an insured mortgagee did sustain a loss while it held the subject note and mortgage...[t]he insured mortgagee whose property interest lost value because of a title defect does not lose the ability to assert a claim on the basis that its subsequent assignment of the note and mortgage made its successor the insured". Palomar, *supra*. There is no claim in the instant matter that an actual loss was sustained by Plaintiff who concedes that the note and mortgage were sold back to EMC.

In addition to the fact that Plaintiff had no interest in the mortgage in question at the time of the commencement of the action and, therefore, lacked standing to bring the suit, Plaintiff also fails to state a cause of action for breach of the insurance contract inasmuch as they have failed to sufficiently plead the damages requirement. "[A] policy of title insurance is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title". *Smirlock Realty v. Title Guar. Co.*, 52 N.Y.2d 179

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(1981). In the instant matter Plaintiff bought and then sold the mortgage in question resulting in a profit. Plaintiff has filed suit claiming that the mortgage's junior position relative a superior mortgage significantly decreased its value and seeks damages in the amount of the total coverage limit plus interest. However, Plaintiff was not damaged and doesn't stand to be damaged. EMC holds the note and the mortgage and has since December 21, 2007 and, therefore, are the only entity that can be damaged by the resulting loss in value of an asset the beneficial interest in which they hold.

Plaintiff argues that, pursuant to the relation-back doctrine, they should be permitted to join EMC to the action.

The Appellate Division Second Department addressed a similar fact pattern as it relates to this issue in *Key Intern. Mfg., Inc. v. Morse/Diesel, Inc.* 142 A.D.2d 448 (2d. Dept. 1988). In that case, plaintiff "Key" sought to join additional plaintiff "Key Land". Key Land was a wholly-owned subsidiary of Key, and was the entity which entered into the contracts in question with the defendants. *Key Intern, supra*. The Court therein held,

"[T]he rule permitting the claim of a newly joined plaintiff to relate back to the earlier claim of a preexisting plaintiff, does not necessarily extend beyond those situations, such as this case, where the substance of the claims of the newly joined plaintiff and those of existing plaintiff are virtually identical, where the ad damnum clause is thus the same in the proposed amended complaint as in the original complaint, and where the newly joined plaintiff is closely related to the original plaintiff. *We do not suggest that an entirely separate plaintiff may be joined in a pending action, in order to assert an otherwise time-barred claim pursuant to the relation back provisions of CPLR 203(e) where to do so would increase the measure of liability to which the defendants are exposed.* Thus, the respondents may have a viable Statute of Limitations defense to the extent that Key Land attempts, at trial, to prove damages which it may have suffered independently of the damages suffered by Key. We need not pass on this issue unless and until Key Land attempts to impose liability on the respondents for damages which were incurred by it, rather than by Key. For this reason, while leave to amend the complaint so as to add Key Land as an additional plaintiff should be granted, this is without prejudice to the assertion by the respondents in their answer to the amended complaint of Statute of Limitations defenses with respect to any new claims asserted by Key Land on its own behalf". *Key Intern, supra*. (internal citations omitted, emphasis added)

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In the instant matter, EMC is essentially an entirely separate plaintiff, despite Plaintiff's counsel's revelation at the time of oral argument on these motions that he represents both

entities. Clearly, the sole purpose of joining EMC as a plaintiff at this juncture is in order to assert an otherwise, undisputedly, time-barred claim. As in Key Intern, Defendant herein has a valid and indisputable defense to the claims asserted by EMC as they are time-barred. While Plaintiff seeks damages for the loss of the value of the mortgage, as explained above, they have no insurable interest for the reasons heretofore stated. Moreover, they have suffered no economic loss nor have they been damaged (as per the Defendant's contractual terms) and, accordingly, have no claim. EMC's claim would be for losses incurred by EMC and not by Plaintiff. EMC is the entity who suffered actual loss as a result of the title defect and resulting decreased value of the mortgage, of which it is the holder of the beneficial interest. Therefore, EMC's claims as a de novo plaintiff are time-barred. Additionally, the inclusion of EMC as a plaintiff for this sole purpose is not permissible under the relation-back doctrine inasmuch as Plaintiff has no standing to bring the instant action, so there is no viable claim to relate back to, coupled with the reasons details above. Key Intern, supra.

In accordance with the foregoing, it is hereby:

ORDERED, that the Plaintiff's motion for leave to join an additional plaintiff is denied in its entirety; and it is further

ORDERED, that the Defendant's motion for summary judgment and dismissal of the complaint filed under Index #8115/2011 is hereby granted in its entirety.

This constitutes the decision and order of the Court.

ENTER

Dated: 3/14/16

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