JP Morgan Chase Bank, N.A. v George

2010 NY Slip Op 50786(U)
Decided on May 4, 2010

Supreme Court, Kings County
Schack, J.

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JP Morgan Chase Bank, N.A., AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-AR4, Plaintiff,

Against

Gertrude George, IVY MAY JOHNSON, **GMAC MORTGAGE CORPORATION**, DANIEL S. PERLMAN, et. al., Defendants.

10865/06

Plaintiff- JP Morgan Chase Bank
Steven J Baum, PC
Amherst NY

Defendant- Gertrude George
Edward Roberts, Esq.
Brooklyn NY

Defendant- Ivy Mae Johnson
Precious L. Williams, Esq.
Brooklyn NY

Arthur M. Schack, J.

In this mortgage foreclosure action for the premises located at 47 Rockaway Parkway, Brooklyn, New York (Block 4600, Lot 55, County of Kings), defendant IVY MAY JOHNSON (JOHNSON) moves by order to show cause to vacate the January 16, 2008 judgment of [*2]foreclosure and sale

for the subject premises, pursuant to CPLR Rule 5015 (a) (4), claiming that plaintiff JP MORGAN CHASE BANK, N.A., AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-AR4 (CHASE), lacked standing to commence the instant action and thus, the Court never had jurisdiction and the instant complaint should be dismissed.

I signed defendant JOHNSON's order to show cause on February 16, 2010, and set oral argument for April 30, 2010. Plaintiff CHASE failed to file and serve any opposition to defendant JOHNSON's order to show cause. After hearing oral arguments on April 30, 2010, and reviewing defendant JOHNSON's moving papers and recorded documents in the Automated City Register Information System (ACRIS) of the New York City Department of Finance for the subject block and lot, it is clear that plaintiff CHASE did not own the subject mortgage and note on April 7, 2006, the day the instant action commenced. Therefore, plaintiff CHASE did not have standing and the Court never had jurisdiction. Thus, the January 16, 2008 judgment of foreclosure and sale is vacated and the instant complaint is dismissed with prejudice.

Background

Defendant GERTRUDE GEORGE (GEORGE) purchased the subject premises from Derrick O'Connor for $545,000.00, by a deed dated September 17, 2004. The deed was recorded in the Office of the City Register of the City of New York, on April 11, 2005, at City Register File Number (CRFN) 2005000206826. At the September 17, 2004 closing, GEORGE executed two notes and mortgages. With respect to the subject note and mortgage in the instant action, GEORGE borrowed $381,500 from CAMBRIDGE HOME CAPITAL, LLC (CAMBRIDGE), and this mortgage was recorded on April 11, 2005, by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), as nominee for CAMBRIDGE.

Subsequently, defendant GEORGE conveyed, by a deed dated March 23, 2005, the subject premises to defendant JOHNSON and herself, as joint tenants with the right of survivorship. This deed was recorded the next day, March 24, 2005, in the Office of the City Register of the City of New York, at CRFN 2005000172921.

Then, plaintiff CHASE commenced the instant foreclosure action by filing the summons, complaint and notice of pendency with the Office of the Kings County Clerk on April 7, 2006. Plaintiff CHASE, in ¶ 1 of the instant complaint, alleges that it "is the holder of a mortgage bearing date the 17th day of September 2004 executed by GERTRUDE GEORGE to secure the sum of $381,500.00 and recorded at Instrument No. 2005000206826 in the Office of the Clerk of the County of KINGS, on the 11th day of April 2005; said mortgage is to be duly assigned by an Assignment to be recorded in the Office of the Clerk of KINGS County [sic] [Emphasis added]." Plaintiff's counsel, who has commenced thousands of foreclosures in Kings County, should be aware that mortgages in Kings

County are recorded in the City Register of the City of New York, not the Office of the Kings County Clerk.

Leaving aside the location of Kings County mortgage recordings, plaintiff's counsel obviously admitted in the complaint that plaintiff CHASE did not own the mortgage on the day the instant action commenced, April 7, 2006, because, as noted above, it states in ¶ 1 of the complaint that "said mortgage is to be duly assigned by an Assignment to be recorded [Emphasis added]" In fact, the assignment of the subject mortgage, from MERS, as nominee for CAMBRIDGE, to CHASE, was not executed until June 21, 2006, 75 days later. The June 21, [*3]2006 assignment states "[t]his assignment is effective as of March 21, 2006." The notary public who took the assignor's signature, in Fort Mill, South Carolina, states that Anita L. Antonelli, Assistant Secretary of MERS, appeared before the South Carolina notary public "[o]n the 21st day of June in the year 2006." The cover sheet for the recording of the assignment, in error, states that the document date is "03-21-06." This June 21, 2006 assignment was recorded in the Office of the City Register of the City of New York, at CRFN 2006000409470, on July 19, 2006.

Meanwhile, in the instant foreclosure action, I issued an order of reference on September 5, 2006 and a judgment of foreclosure and sale, on January 16, 2008, with $440,065.67 due to plaintiff CHASE as of June 29, 2007.

While defendant JOHNSON alleges in the instant order to show cause that she was never served with the complaint, her more important and first priority allegation is that plaintiff CHASE lacked standing to bring this action. If CHASE lacked standing, the Court did not have jurisdiction and the action is a nullity.

Plaintiff CHASE never submitted opposition papers to refute defendant JOHNSON's argument that it lacked standing and never submitted any evidence that it possessed the subject mortgage and note on April 7, 2006, the day the instant foreclosure action commenced. Plaintiff CHASE's clear lack of standing means the Court never had jurisdiction. Therefore, the Court grants the instant order to show cause and dismisses the subject foreclosure action with prejudice.

Plaintiff's lack of standing

Defendant JOHNSON's order to show, pursuant to CPLR Rule 50515 (a) (4), to vacate the instant judgment of foreclosure and sale "for lack of jurisdiction to render the judgment," because plaintiff CHASE lacks standing, is a motion that can be made at any time. This is unlike a motion to vacate an "excusable default," pursuant to CPLR Rule 5015 (a) (1), which must be made within one year of a default, and requires a defendant to demonstrate both a reasonable excuse for the default and a meritorious defense. (See Caba v Rai, 63 AD3d 578 [1d Dept 2009]; Siegel, Practice Commentaries McKinney's Cons Law of NY, Book 7B CPLR 5015:3). A claim for lack of jurisdiction is "a condition precedent to the maintenance of the claim." (Siegel, Practice Commentaries McKinney's Cons Law

of NY, Book 7B CPLR 5015:9). Moreover, "[i]f the Court lacked jurisdiction to render the judgment or order, the motion to vacate is based is based on paragraph 4 of CPLR 5015 (a)." (Siegel, NY Prac § 430, at 730 [4d ed]).

In the instant action, it is clear that plaintiff CHASE lacked "standing" and therefore the Court lacked jurisdiction. This mandates that the Court vacate the January 16, 2008 judgment of foreclosure and sale and dismissal of the instant action.

"Standing 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." (Saratoga County Chamber of Commerce, Inc. v Pataki, 100 NY2d 801 812 [2003], cert denied 540 US 1017 [2003]). Professor Siegel (NY Prac, § 136, at 232 [4d 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 [*4]

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.

"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]). If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. (Stark v Goldberg, 297 AD2d 203 [1st Dept 2002]).

Plaintiff CHASE lacked standing to foreclose on the instant mortgage and note when this action commenced on April 7, 2006, the day that CHASE filed the summons, complaint and notice of pendency with the Kings County Clerk, because it did not own the mortgage and note that day. The instant mortgage and note were assigned to CHASE, 75 days later, on June 21, 2006. The Court, in Campaign v Barba (23 AD3d 327 [2d Dept 2005]), 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]).

Assignments of mortgages and notes are made by either written instrument or the assignor physically delivering the mortgage and note to the assignee. “Our courts have repeatedly held that a bond and mortgage may be transferred by delivery without a written instrument of assignment.” (Flyer v Sullivan, 284 AD 697, 699 [1d Dept 1954]). The written June 21, 2006 assignment by MERS, as nominee for CAMBRIDGE to CHASE is clearly 75 days after the commencement of the action. Not only did plaintiff CHASE fail to submit evidence that it had physical possession of the note and mortgage on April 7, 2006, plaintiff CHASE admitted, in ¶ 1of the instant complaint, that “said mortgage is to be duly assigned by an Assignment to be recorded.”

The retroactive statement in the June 21, 2006 MERS, as nominee for CAMBRIDGE, to CHASE assignment, “[t]his assignment is effective as of March 21, 2006,” is unavailing. It demonstrates that plaintiff CHASE did not own the mortgage and note when the instant action commenced on April 7, 2006. “Thus, a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of an assignment.” (Wells Fargo Bank, N.A. v Marchione, 69 AD3d 204, 210 [2d Dept 2009]). The Marchione Court relied upon LaSalle Bank Natl. Assoc. v Ahearn (59 AD3d 911 [3d Dept 2009], which instructed, at 912, “[n]otably, foreclosure of a mortgage may not be brought by one who has no title to it’ (Kluge v Fugazy, 145 AD2d 537 [2d Dept 1988]) and an assignee of such a mortgage does not have standing unless the assignment is complete at the time the action is commenced).” (See U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept 2009]; Countrywide Home Loans, Inc. v Gress, 68 AD3d 709 [2d Dept 2009]; Citgroup Global Mkts. Realty Corp. v Randolph Bowling, [*5]25 Misc 3d 1244 [A] [Sup Ct, Kings County 2009]; Deutsche Bank Nat. Trust Company v Abbate, 25 Misc 3d 1216 [A] [Sup Ct, Richmond County 2009]; Indymac Bank FSB v Boyd, 22 Misc 3d 1119 [A] [Sup Ct, Kings County 2009]; Credit-Based Asset Management and Securitization, LLC v Akitoye,22 Misc 3d 1110 [A] [Sup Ct, Kings County Jan. 20, 2009]; Deutsche Bank Trust Co. Americas v Peabody, 20 Misc 3d 1108 [A] [Sup Ct, Saratoga County 2008]).

The Appellate Division, First Department, citing Kluge v Fugazy, in Katz v East-Ville Realty Co., (249 AD2d 243 [1st Dept 1998]), instructed 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.” Moreover, plaintiff CHASE “offers no evidence that it took physical possession of the note and mortgage before commencing this action, and again, the written assignment was signed after defendant was served.” (Deutsche Bank Trust Co. Americas v Peabody, supra). Therefore, with plaintiff CHASE not having

standing, the Court lacks jurisdiction in this foreclosure action. **The instant judgment of foreclosure and sale is vacated and the instant action is dismissed with prejudice.**

Conclusion

Accordingly, it is
ORDERED, that the order to show cause of defendant IVY MAE JOHNSON, to vacate the January 16, 2008 judgment of foreclosure and sale for the premises located at 47 Rockaway Parkway, Brooklyn, New York (Block 4600, Lot 55, County of Kings), pursuant to CPLR Rule 5015 (a) (4), because plaintiff, JP MORGAN CHASE BANK, N.A., AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-AR4, lacked standing to commence the instant action and thus, the Court never had jurisdiction, is granted; and it is further

ORDERED, the instant complaint of plaintiff JP MORGAN CHASE BANK, N.A., AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-AR4 for the foreclosure on the premises located at 47 Rockaway Parkway, Brooklyn, New York (Block 4600, Lot 55, County of Kings) is dismissed with prejudice.

This constitutes the Decision and Order of the Court.

ENTER

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Hon. Arthur M. SchackJ. S. C..