

LPP Mtge. Ltd. v Sabine Props., LLC

2010 NY Slip Op 32367(U)

August 27, 2010

Supreme Court, New York County

Docket Number: 103648/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 1

Index Number : 103648/2010
LPP MORTGAGE LTD.
VS.
SABINE PROPERTIES, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 6/17/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the awarded Memorandum Decision on the

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SEP 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Dated: August 27, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
LPP MORTGAGE LTD. F/K/A LOAN
PARTICIPANT PARTNERS, LTD.
7195 Dallas Parkway
Plano, TX 75024

Index No.: 103648/10

Plaintiff,
-against-

SABINE PROPERTIES, LLC, BOARD OF
MANAGERS OF CIPRIANI CLUB RESIDENCES
AT 55 WALL CONDOMINIUM, CITIQUIET INC.,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., NEW YORK CITY DEPARTMENT
OF FINANCE, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY PARKING
VIOLATIONS BUREAU, NEW YORK STATE
COMMISSIONER OF JURORS, PEOPLE OF THE
STATE OF NEW YORK, WALL STREET MORTGAGE
BANKERS LTD D/B/A POWER EXPRESS,
JOHN DOES (Said name being fictitious it being the
Intention of Plaintiff to designate any and all occupants
Of premises being foreclose herein, and any parties,
Corporations or entities, if any, having or claiming an
Interest in or lien upon the mortgaged premises.),

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Defendants.

-----X
JOAN A. MADDEN, J.

Defendant Sabine Properties, LLC ("Sabine") moves to dismiss the complaint on the ground that Plaintiff does not have standing to sue and for failure to state a cause of action. Plaintiff LPP Mortgages Ltd. ("LPP) opposes the motion, which is granted for the reasons below.

This action seeks to foreclose on a mortgage on the property located at 55 Wall Street Unit 835, New York, NY, 10005, which is a condominium unit. The complaint further alleges that on October 31, 2006, Sabine executed and delivered an adjustable rate note in the amount of \$514,000 and that as security for payment of the note Sabine executed and delivered a mortgage

in the same amount, which was recorded on November 13, 2006. The complaint alleges that the mortgage was assigned to LPP, a Texas banking corporation. The complaint alleges that Sabine failed to make payments that came due on January 1, 2009, and based on this default, LPP seeks the entire amount secured by the mortgage. Significantly, the complaint fails to state the identity of the original mortgagee or of the person or entity that assigned the mortgage to LPP.

Sabine moves to dismiss the complaint on grounds that LPP has no standing to bring the action and for failure to state a cause of action. As to the standing issue, Sabine contends that the mortgagee is Wall Street Mortgage Banks, Ltd. and that the complaint fails to allege the basis of LPP's claims, that "on information and belief," it is the owner of a note and mortgage being foreclosed, and fails to provide any proof of ownership. In addition, Sabine contends that while the complaint alleges an assignment of the mortgage, there has been no demonstration that the mortgage was assigned properly to LPP or that such assignment was valid.

In support of its motion, Sabine attaches the note and mortgage document showing that Wall Street Bankers, Ltd. is the Lender and that Mortgage Electronic Registration Systems, Inc. ("MERS") "acting solely as the nominee for Wall Street Bankers LTD" is the Mortgagee of Record for the purpose of recording the mortgage. MERS was created in 1993 "by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages." MERSCORP, Inc. v. Romaine, 8 NY3d 90, 96 (2006).

Sabine further contends that the complaint must be dismissed for failure to state a cause of action as it fails to plead or demonstrate that LPP had sent a 30 day cure or breach letter, a condition precedent under the mortgage document for commencing an action seeking the full amount due under the note.

LPP opposes the motion, arguing that the mortgage had been assigned to it by MERS which, as nominee of Wall Street Bankers, Ltd., had the authority to assign the mortgage. LPP attaches a copy of the assignment document executed on December 19, 2008,¹ indicating that the mortgage was assigned by MERS to LPP pursuant to an Asset Purchase Agreement between two non-parties, DLJ Mortgage Capital, Inc. and Loan Acquisition Corporation.²

In support of its argument that MERS has the authority to assignment the mortgage to it, LPP also points to the second part of a paragraph in the mortgage document entitled "BORROWER'S TRANSFER TO LENDER OF RIGHTS IN THE PROPERTY" which provides:

I [i.e. Sabine] understand and agree that MERS holds only legal title to the rights granted by me in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: (A) to

¹The assignment from MERS to LPP provides, in relevant part, that:

THIS ASSIGNMENT WITNESSES THAT, in consideration of Ten Dollars (\$10.00) and other good and valuable consideration paid by Assignee, Assignor hereby assigns, transfers, sets over and conveys to Assignee and its successors and assigns, without recourse and without representations or warranty, whether express, implied or created by operation of law, except as expressly set forth in the Purchase Agreement, the following:

1. that certain Mortgage from Sabine Properties, LLC, dated October 31, 2006, and recorded November 13, 2006, in Book n/a, at Page n/a, as Instrument No. 2006000626979, in the Clerk's Office of the County of New York, State of New York, (the "Mortgage"), which Mortgage secures that certain Promissory Note dated October 31, 2006, in the original principal amount of \$514,500.00, executed by Sabine Properties, LLC By: Nooruddin Hussain Manager and payable to the order of Wall Street Mortgage Bankers LTD DBA Power Express, as modified or amended (the "Note");
2. such other documents, agreements, instruments and other collateral that evidence, secure or otherwise relate to Assignor's right, title or interest in and to the Mortgage and/or the Note and/or the loan evidenced by the Note, including without limitation the title insurance policies and hazard insurance policies relating thereto that are in effect.

²However, Wall Street Mortgage Banks is not a party to the assignment, and there is no evidence it consented to it.

exercise any or all of those rights, including, but not limited to, the right to foreclose and sell the Property; and (B) to take any action required of Lender, including, but not limited to, releasing and canceling this Security Instrument.

LPP contends that this provision gives MERS, as the nominee of Wall Street Bankers, Ltd the right to assign the mortgage on behalf of Wall Street Bankers, Ltd, and, in particular, that the phrase “releasing and canceling this Security Instrument” grants MERS the authority to assign the mortgage.

LPP next argues that a condition precedent need not be pleaded and is a question of fact to be determined at trial and that, therefore, the action cannot be dismissed for LPP’s failure to plead that it had sent the 30-day cure or breach letter. LPP also attaches a copy of the demand letter it claims to have sent to Sabine.

In reply, Sabine argues that the assignment produced by LPP is insufficient to demonstrate it has standing as (1) MERS has no ownership rights in the note and thus cannot assign it; (2) the language of the assignment of the mortgage does not evidence an intent to assign the underlying note, (3) the assignment arises out of a purchase agreement with an entity who is not a party to this action, and (4) the provision of mortgage document relied on by LPP does not give MERS the authority to assign the mortgage or the note.

Sabine’s argument that MERS has not ownership rights in the note is dispositive here. It is well established that “[i]f a plaintiff lacks standing to sue, it may not proceed in the action.” HSBC Bank USA, N.A. v. Vasquez, 24 Misc3d 1239(A), 1239 (Sup Ct Kings Co. 2009), quoting, Stark v. Goldberg, 297 AD2d 203, 204 (1st Dept 2002). It has been held that only “the owner of the note and mortgage at the time of commencement of a foreclosure action may prosecute said action.” LaSalle Bank Nat. Ass’n v. Lamy, 12 Misc3d 1191(A), *3 (Sup Ct Suffolk Co. 2006), citing, Kluge v. Fugazy, 145 AD2d 537, 538 (2nd Dept 1988), see also Katz v. East-Ville Realty Co., 249 AD2d 243, 243 (1st Dept 1998); Cf MERSCORP, Inc. v. Romaine, 8

NY3d at 99 (concurrency)(stating the argument that MERS “violated the clear prohibition against separating a lien from its debt and that MERS does not have standing to bring foreclosure actions...remain issues for another day”).

Here, there are no allegations or evidence that MERS was the owner of the note such that it could assign it to LPP. Thus, the assignment from MERS was insufficient to confer ownership of the note to LPP and it has no standing to bring this action. Kluge v. Fugazy, 145 AD2d at 538 (holding that the assignment of a mortgage without transfer of the debt is a nullity); Johnson v. Melnikoff, 20 Misc3d 1142(A), *2 (Sup Ct Kings Co. 2008), n. 2, aff’d, 65 AD3d 519 (2d Dept 2010)(noting that assignments by MERS which did not include the underlying debt were a legal nullity); Mortgage Electronic Registration System v. Coakley, 41 AD3d 674 (2d Dept 2007)(holding that MERS had standing to bring foreclosure proceeding based on evidence that MERS was the lawful holder of the promissory note and the mortgage).

Thus, even assuming *arguendo* that the language of the assignment from MERS to LPP could be interpreted as purporting to assign not only the mortgage but also the note, such assignment is invalid since based on the record, MERS lacked an ownership interest in the note. See LaSalle Bank Nat. Ass’n v. Lamy, 12 Misc3d 1191(A), *3 (Sup Ct Suffolk Co. 2006) (noting that “the mortgage is merely an incident of and collateral security for the debt and an assignment of the mortgage does not pass ownership of the debt itself”); see also Federal National Mortgage Assocs. v. Youkelsone, 303 AD2d 546 (2nd Dept 2003).

As LPP lacks standing to bring this action to foreclose on the mortgage based on the failure of MERS to demonstrate an effective assignment of the note, the court need not reach the other issues raised herein including whether the mortgage documents give MERS the right to

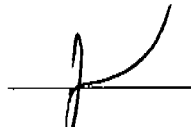
assign the mortgage,³ or if the complaint adequately alleges compliance with the notice of default provision of the mortgage document.

In view of the above, it is

ORDERED that defendant's motion to dismiss the complaint is granted, and the Clerk is directed to enter judgment dismissing the complaint.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: August 27, 2010


J.S.C.

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³The courts have come to different conclusions on this issue. See e.g. Bank of New York v. Alderazi, 28 Misc3d 376, 379 (Sup Ct Kings Co. 2010) (holding that “[t]he general language ‘to take any action required of the Lender including, but not limited to, releasing and canceling this Security Instrument’ is not sufficient to give the nominee authority to alienate or assign a mortgage without getting the mortgagee’s explicit authority for the particular assignment”); Bank of New York v. Trezza, 14 Misc3d 1201(A)(Sup Ct Suffolk Co.2006)(mortgage document conferring nominee status of MERS did not give MERS the authority to assign the mortgage); compare Fairbanks Capital Corp v. Nagel, 289 AD2d 99 (1st Dept 2001)(delegation of mortgage to service agent by mortgagee was sufficient to give service agent standing to sue); US Bank, N.A. v. Flynn, 27 Misc3d 802, 806 (Sup Ct Suffolk Co. 2010) (finding that language in the mortgage document conferring broad authority to act in all ways that the original lender could act, including “releasing... the mortgage” was sufficient to confer authority to MERS as nominee to assign the mortgage).