IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: Hon. Jeffrey D. Lebowitz
Part 16

WELLS FARGO BANK, N.A. dba Americas Servicing Company, Plaintiff, -against- [redacted] City of New York Environmental Control Board, "JOHN DOE", "RICHARD ROE", "JANE DOE", "CORA COE", "DICK MOE", and "RUBY POE" Defendant(s).	**INDEX NO**. [redacted] Motion Seq. No.: 1 **AFFIRMATION IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** (HEARING NOT REQUESTED)

ADAM DOLCE, an attorney duly licensed to practice law in the state of New York, affirms the following under penalty of perjury:

1. I am counsel and attorney for the Defendants, brother and sister [redacted].
2. I am familiar with the pleadings and proceedings in this matter and submit this affirmation in support of the [redacted] Motion for an Order Dismissing the Plaintiff's Causes of Action, with prejudice, for lack of standing.

RELEVANT FACTS

3. On or around November [redacted]th, [redacted] the Plaintiff, Wells Fargo Bank, N.A., dba Americas Servicing Company ("Wells Fargo"), initiated a foreclosure action against the [redacted] on the basis the latter two were in default on their mortgage obligations as of [redacted]. A true and accurate copy of Wells Fargo's Summons and Complaint is attached hereto as **Exhibit A**.

4. As part of Exhibit A, and in satisfaction of the requirements of Administrative Order 431/11 issued by the Chief Administrative Judge of the State of New York effective November 18, 2010 onward, Wells Fargo's counsel affirmed they had read the Complaint and attested to the truth of the allegations therein not based upon information and belief. (Exhibit A, at p. 11).
5. Soon after, Wells Fargo then filed a Request for Judicial Intervention whereupon a mandatory foreclosure settlement conference was promptly scheduled to be held on or around March [redacted].
6. On April [redacted], the [redacted] finally appeared by counsel and answered Wells Fargo's Complaint. A true and accurate copy of the [redacted] Appearance, Answer, and Affirmation of Service is provided hereto as **Exhibit B**.
7. Following this, and until December [redacted], the parties then attended several settlement conferences as required by the CPLR § 3408 and 22 NYCRR § 202.12-a, respectively. Each party was represented by counsel at these conferences.
8. Despite these conferences, a resolution could not be reached and the parties were released from the requirements of the CPLR § 3408 and 22 NYCRR § 202.12-a on or around the same date.

ARGUMENT

Wells Fargo Did Not Have Standing to Initiate the Foreclosure

9. In their Answer, the [redacted] raised three Affirmative Defenses opposing Wells Fargo's foreclosure complaint. Restated simply, the [redacted] alleged: 1. Wells Fargo lacked standing to prosecute the action; 2. Wells Fargo failed to state a cause of action upon which relief could be granted; and 3. Wells Fargo initiated the foreclosure with "unclean hands." *See* Exhibit B, [redacted] *Verified Answer*, at ¶¶ 18-20.
10. While this Answer was served and filed past the appropriate deadline, Wells Fargo, by counsel, accepted the Answer without objection thereby preserving the Affirmative Defenses therein. *See* CPLR § 2101(f) *cf. with* Liggoti v. Wilson, 287 AD2d 550 (2nd Dept. 2001). ("The plaintiff's acceptance of the answer, without objection, constituted a waiver of the late service and default (*see, Gonzalez v Gonzalez,*240 AD2d 630, 631;

*Ruppert v Ruppert,*192 AD2d 925; *Diamadopolis v Balfour,*152 AD2d 532, 534).”). *See also* Exhibit B, *Affirmation of Service* (dated from April [redacted]).

11. The [redacted] first Affirmative Defense raised the issue of standing – or lack thereof – on the part of Wells Fargo.
12. In “mortgage foreclosure action[s], a plaintiff has standing [to sue] where 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 Mortgage Elec. Registration Sys., Inc. v Coakley,* 41 AD3d 674 [2007]; *Federal Natl. Mtge. Assn. v Youkelsone,* 303 AD2d 546, 546-547 [2003]; *First Trust Natl. Assn. v Meisels,*234 AD2d 414 [1996]).” U.S. Bank, N.A. v. Collymore, 68 AD3d 752, at 753-754 (2nd Dept. 2009).
13. In addition, where/when “a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see US Bank N.A. v Madero,*80 AD3d 751, 752; *U.S. Bank, N.A. v Collymore,* 68 AD3d 752, 753). 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, “either by physical delivery or execution of a written assignment prior to the commencement of the action” (*Aurora Loan Servs., LLC v Weisblum,* 85 AD3d 95, 108).” Citimortgage, Inc. v. Stosel, 2011 NY Slip Op 8319 (2nd Dept. 2011).
14. With respect to these written assignments, “an assignment of the mortgage without assignment of the underlying note or bond is a nullity” (*U.S. Bank, N.A. v Collymore,* 68 AD3d at 754; *see Bank of N.Y. v Silverberg,* 86 AD3d 274, 280).” Id.
15. In this light, the [redacted] did in fact execute a promissory note (“Note”) and security agreement (“Mortgage”) in the amount of [redacted] payable to their lender, Mortgageit, Inc. on or around January [redacted]. A true and accurate copy of the Note and Mortgage are attached hereto as **Exhibit C.**
16. Worth noting, the copy of the Note evidenced at Exhibit C is a copy provided to the [redacted] upon request from the Plaintiff. A copy of the borrower's original Note could not be located by the [redacted] For purposes of this Motion, however, the language therein appears to be the same and true language of what was agreed to by the [redacted].

17. Per the Note found at Exhibit C, the [redacted] Lender was "Mortgageit, Inc." This Note also shows an endorsement *in blank* by Mortgageit, Inc. without recourse. (Exhibit C, *Note* at p.1 – *Borrower's Promise to Pay, Note*, at p.4*)*.
18. While this blank endorsement appears on the signature page, suggesting Wells Fargo took possession of the Note and became its lawful holder under New York's Uniform Commercial Code (§§ 3-202, 3-204), it's unclear how Wells Fargo could be in possession and holder of the original note – as required to initiate the present foreclosure – when the copy they retain contradicts itself as both a copy of the lender's original as well as certified copy of the same.
19. Presumably, either the Note is an original copy (as suggested by the stamp labeled "Lender's Original") or it's a certified copy (as suggested by the stamp labeled "Certified True Copy"). Even more mysteriously, it appears the original lender – Mortgageit, Inc. – signed the stamp deeming the Note found in Exhibit C a certified copy.
20. Worded simply, how can Wells Fargo claim standing to sue when the Note it retains is a certified true copy of a promissory note endorsed in blank? Either Mortgageit, Inc. provided a purported true copy of the original note, itself insufficient to establish standing, or Wells Fargo does not have the actual, original note in its possession and instead merely retains a certified copy.
21. In either of these events, Wells Fargo did not have standing to bring this action nor the capacity to thereafter maintain it.
22. Moreover, per the language of the accompanying Mortgage, Mortgageit, Inc. was also listed as the [redacted] Lender. However, *as a nominee for Mortgageit, Inc.*, the Mortgage Electronic Registration Systems, Inc. (MERS) was designated the Mortgagee-of-Record for purposes of recording the instrument. (*See* Exhibit C, p.1 of the Mortgage, *subsection (C) and (D)*).
23. Prior to initiating these the foreclosure proceedings, and one presumes to gain a legitimate interest in the [redacted] Security Instrument, an assignment was then executed between MERS, as assignor on behalf of Mortgageit, Inc., and Wells Fargo, the assignee ("Assignment").
24. While the Assignment was memorialized on November [redacted], it was later recorded,

under Doc Id. [redacted], on February [redacted]. A true and accurate copy of the cover page and Assignment is provided hereto as **Exhibit D**.[1]

25. The language of this Assignment provides the "Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the Mortgage." *Id*.
26. This Assignment makes no reference to the underlying Note and, as of the present date, no attempts to correct this Assignment have been taken.
27. Thus, even if the Assignment were considered valid – which, according to Citimortgage, Inc. v. Stosel, 2011 NY Slip Op 8319 (2nd Dept. 2011), it is not – it could only have transferred MERS' beneficial interest in the [redacted] Mortgage to Wells Fargo.
28. According to the Appellate Division, Second Department: "A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (*FGB Realty Advisors v Parisi,* 265 AD2d 297, 298 [1999]). Consequently, the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt (*id.*; *see* 1 Bergman on New York Mortgage Foreclosures § 12.05 [1] [a] [1991])." Bank of NY v. Silverberg, et al., 86AD3d 274 (2011).
29. As shown, Wells Fargo does not hold a demonstrated right to the [redacted] Note and, therefore, lacked standing, and continues to lack standing, to initiate and/or continue the present matter.

CONCLUSION

30. Not only does Wells Fargo not hold an interested right to the Note, the copy it currently has is insufficient to sustain its cause of actions. Moreover, because the Assignment was a nullity, Wells Fargo doesn't even have an interest in the [redacted] Mortgage. Such a situation should have precluded Wells Fargo from initiating this foreclosure and dismissal of the matter, with prejudice, is proper under the circumstances and according to the CPLR § 3211(a)(3).

WHEREFORE, it is respectfully requested:

1 Worth noting, but itself not central to this Motion, is the signatory to this Assignment, Ryan Amato. Based upon information and belief, Mr. Amato executed the Assignment on behalf of MERS in favor of Wells Fargo. But Mr. Amato was an employee of Wells Fargo at the time. Thus, the Assignment was effectuated by an agent of both the assignee and assignor. This itself may be a clear conflict of interest.

1. that the Court order dismissal of the Plaintiff's with prejudice;
2. that interest and late fees accrued against the Defendants be tolled from the date the matter was first initiated to the date of this dismissal order;
3. that costs and attorney fees be disbursed to the benefit of the Defendant- [redacted]; and
4. All other relief the Court deem just and proper.

Dated: [redacted]
New York, NY

Respectfully,

By:_____
Adam D. Dolce, Esq.
[redacted]
Attorney for the Defendant