Decided on April 11, 2011
Supreme Court, Kings County

The Bank of New York, as Trustee for the Benefit of the Certificateholders, CWABS, Inc., Asset Backed Certificates, Series 2007-2, Plaintiff,

against

Sameeh Alderazi, Bank of America, NA, New York City Environmental Control Board, new York City Parking Violations Bureau, New York City Transit Adjudication Bureau, and "John Doe No.1" through "John Doe #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint, Defendants.

21739/2008

Plaintiff Attorney

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Wayne P. Saitta, J.

The Plaintiff renews its motion for an appointment of a referee in the underlying foreclosure action.

Upon reading the Notice of Motion and Affirmation of Charles C. Martorana Esq., of counsel to Hiscock and Barclay, LLP attorneys for Plaintiff, dated September 28 2010, and the exhibits annexed thereto; the Affirmation of Charles C. Martorana Esq., dated January 7, 2011; the Affirmation of Todd Falasco Esq., of counsel to Frenkel, Lambert, Weiss, Weisman, & Gordon, LLP,. Former attorneys for Plaintiff and the exhibits annexed thereto; the Affidavit of Jonathan Hyman sworn to February 10, 2011, and the exhibits annexed thereto; and upon all the proceedings heretofore had herein, and after hearing oral argument by Plaintiff's counsel on March 3, 2011, and after due deliberation thereon, the motion is denied for the reasons set forth below.

The underlying action is a residential foreclosure action on a property located at 639 East 91st St. In Brooklyn. Plaintiff's original application for the appointment of a referee to compute was denied by order of this court dated April 19, 2010. The Court denied the application because the Plaintiff, could not demonstrate that the original mortgagee, Countrywide Home Loans Inc., (doing business as America's Wholesale Lender), had authorized the assignment of the mortgage to the Plaintiff.

The assignment to Plaintiff was executed by Mortgage Electronic Reporting System (MERS) as nominee for America's Wholesale Lender.

Black's Law Dictionary defines a nominee as "[a] person designated to act in place of another, usually in a very limited way".

In its Memoranda to its original motion , Plaintiff quoted the Court in Schuh Trading Co., v. Commissioner of Internal Revenue, 95 F.2d 404, 411 (7th Cir. 1938), which defined a nominee as follows:

The word nominee ordinarily indicates one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, or as the grantee of another.. Id. (Emphasis added).

An assignment by an agent without authority from the principal is a nullity. Plaintiff failed to provide any evidence that Countrywide had authorized MERS to assign its mortgage to Plaintiff. The Court denied the application with leave to renew upon a showing that Countrywide had authorized MERS to assign its mortgage to Plaintiff.

Plaintiff has again moved for an order of reference, and submitted in addition to the MERS assignment, what it purports to be an endorsed note and a corporate resolution of MERS showing that MERS had appointed all officers of Countrywide Financial Corporation as assistant secretaries and vice presidents of MERS.

This present motion must fail for the same reason as the prior motion as Plaintiff has failed to provide documentation from the lender that it authorized the assignment.

[*2]The Endorsed NotePlaintiff submits an affidavit from Sharon Mason, a vice president of BAC Home Loan Servicing LP (BAC), a servicer of the loan, in which she asserts, based upon Plaintiff's, books and records, that at the time the action was commenced the original note bearing the endorsement of Countrywide was in Plaintiff's possession.

Plaintiff also submits an affidavit from Jonathan Hyman, an officer of BAC, based on BAC's records. Hyman asserts in his affidavit that the mortgage was assigned to Bank of New York and that "the original note was delivered and endorsed to the plaintiff with endorsement in the name of the plaintiff." Hyman appends to his affidavit a copy of what purports to be an endorsed note.

The note contains a stamped endorsement which states, "Pay to the Order of * * without recourse Countrywide Home Loans Inc., A New York Corporation Doing Business As America's Wholesale Lender By: Michele Sjolander Executive Vice President". Under the stamp is handwritten " * * The Bank of New York, as Trustee for the Benefit of the Certificate, CWABS, Inc. Asset Backed Certificates, Series 2007-2". The endorsement is undated.

However, the note that was appended to the summons and complaint filed in court on July 25, 2008 does not bear any endorsement. Plaintiff has offered no explanation, from anyone with knowledge, as to why, had the note had been endorsed and in its possession when it commenced the suit, that the note filed when the suit was commenced did not bear an endorsement.

Significantly, counsel for Plaintiff stated in oral argument before the Court on March 3 2011 that "There is nobody left to speak at to Countrywide".

The affidavits of Hyman and Mason, which were based on the books and records of the plaintiff and BAC, are insufficient to establish ownership of the note in light of the fact that the note originally submitted bore no endorsement, and the fact that purported endorsement is undated. The affidavits are based on books and records, not on personal knowledge. Yet the affiants did not produce any of the records on which they based their assertion that Plaintiff possessed an endorsed note at the time the action was commenced.

The Mortgage Assignment

In his affidavit Hyman also asserts that, Keri Selman, the person who signed the assignment, served as an officer of both Countrywide and MERS. He appended a copy of a MERS corporate resolution which appointed all officers of Countrywide Financial Corporation as assistant secretaries and vice presidents of MERS.

Even putting aside the fact that there is no evidence that Countrywide Financial Corporation and Countrywide Home Loans Inc., are the same entity, the fact that MERS authorized Countrywide officers to act on its behalf, is not evidence of the converse. It is no evidence that Countrywide authorized MERS officers to act as officers of Countrywide. Further, the fact that Selman may have been an officer of both Countrywide and MERS does not alter the fact that she executed the assignment on behalf of MERS.

The face of the assignment indicates that MERS is assigning the mortgage as nominee of America's Wholesale Lender (a trade name of Countrywide), and more [*3]importantly that Selman executed the assignment as assistant vice president of MERS.

Hyman's assertion that the assignment incorrectly lists Selman's title as assistant vice president of MERS, instead of assistant secretary and vice president of MERS, is of no relevance other than to demonstrate the casual and cavalier manner in which these transactions have been conducted.

While Hyman further asserts in his affidavit that Selman "under her authority as an Assistant Secretary and Vice president of MERS, expedited the Assignment of Mortgage process on behalf of MERS, with

the approval and for the benefit of Countrywide," he provides no evidence that Countrywide in fact approved or authorized the assignment.

Similarly, William C. Hultman, Secretary and Treasurer of MERS, states in a conclusory fashion in paragraph 8 of his affidavit that Countrywide "instructed MERS to assign the Mortgage to Bank of New York" without offering the basis for that assertion, other than it role as nominee.

Plaintiff claims, that by the terms of the mortgage MERS as nominee, was granted the right "(A) to 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 the Lender including, but not limited to, releasing and canceling this Security Instrument." However, this language is found on page two of the mortgage under the section "BORROWER'S TRANSFER TO LENDER OF RIGHTS IN THE PROPERTY" and therefore is facially an acknowledgment by the borrower. The fact that the borrower acknowledged and consented to MERS acting as nominee of the lender has no bearing on what specific powers and authority the lender granted MERS as nominee. The problem is not whether the borrower can object to the assignees' standing, but whether the original lender, who is not before the Court, actually transferred its rights to the Plaintiff.

Furthermore, while the mortgage grants some rights to MERS it does not grant MERS the specific right to assign the mortgage. The only specific rights enumerated in the mortgage are the right to foreclose and sell the Property. The 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.

The MERS Agreement

Plaintiff also argues that the agreement between MERs and its members grants MERS the authority to assign the mortgages of its members. However a reading of the MERS agreement reveals only that MERS can execute assignments on behalf of its members when directed to do so by the member or its servicer.

Plaintiff cites Rules of MERS membership, Rule 2 section 5. However what that rule requires is that a member to warrant to MERS that the mortgage either names MERS as mortgagee or that they prepare an assignment of mortgage naming MERs as mortgagee.

In this case MERS was named in paragraph (c) of the mortgage as Mortgagee of record for the purpose of recording the mortgage. Being the mortgagee of record for the [*4]purpose of recording the mortgage does not confer the right to assign the mortgage absent an instruction to do so from the lender. Paragraph 2 of the MERS terms and conditions provide that "MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee in an administrative capacity", and that "MERS agrees not to assert any rights (other than rights specified in the governing documents) with respect to such mortgage loans or mortgaged properties". Assigning or alienating a mortgage without an explicit instruction from a lender to do so, is not acting in an administrative capacity.

Further, paragraph 6 of the terms and conditions provides that, "the MERS system is not a vehicle for creating or transferring beneficial interests in mortgage loans." (emphasis added)

Lastly, Section 6 of the MERS agreement provides that MERS shall comply with the instructions from the holder of the notes and that in the absence of instructions from the holder may rely on instructions from the servicer with respect to transfers of beneficial ownership.

What the MERS agreements and terms and conditions provide, is that MERS may execute an assignment when instructed to do so by the lender or its servicer. This is nothing

more than saying that if granted authority by the lender, or its agent, to assign a mortgage, MERs can assign the mortgage on behalf of the lender.

To read the MERS agreement as granting MERS authority to assign any of the mortgages of its thousands of members, on its own volition, without the instruction or consent of the member would lead to a nonsensical result.

Plaintiff has failed to meet the very basic requirement that proof of an agent's authority must be shown from the mouth of the principal not from the agent. Lexow & Jenkins, P.C. v. Hertz Commercial Leasing Corp., 122 AD2d 25, 504 N.Y.S.2d 192 (2nd Dept 1986), Siegel v. Kentucky Fried Chicken of Long Island, Inc., 108 AD2d 218, 488 N.Y.S.2d 744 (2nd Dept 1985).

As Plaintiff has not shown that it owned the note and mortgage, it has no standing to maintain this foreclosure action. Therefore the renewed motion for an order of reference must be denied and the action dismissed.

The Court has raised the standing issue sua sponte because, in this case, it goes to the integrity of the entire proceeding. For the court to allow a purported assignee to foreclose, in the absence of some proof that the original lender authorized the assignment of the mortgage to them, would cast doubt upon the validity of the title of any subsequent purchasers, should the original lender or successor challenge the assignment at a future date.

WHEREFORE it is hereby Ordered that Plaintiff's motion for an Order of Reference is denied and the action is dismissed. This constitutes the decision and order of the Court.

[*5]

J.S.C.