SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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WELLS FARGO BANK, N.A.
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

-against-

TINA McNEE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, PEOPLE OF THE STATE OF NEW YORK, WELLS FARGO BANK, N.A., CHRISTINE EAGLES and JAMES EAGLES,

Defendants.

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DCM Part 4

Present:
HON. JOHN A. FUSCO

DECISION AND ORDER

Index No. 100566/08

Motion Nos. 1487-005
1753-006
2002-007

The following papers numbered 1 to 8 were fully submitted on the 23rd day of September, 2011:

	Papers Numbered
Notice of Cross Motion to Dismiss Complaint of Defendant Tina McNee (Attorney Affirmation in Support) (Dated June 13, 2011)	1
Notice of Motion for Summary Judgment of Plaintiff Wells Fargo Bank, N.A. (Affidavit of Kyle N. Campbell in Support; Affirmation of Chava Brandriss, Esq. in Support) (Dated July 11, 2011)	2
Wells Fargo Bank, N.A.'s Memorandum of Law (1) in Support of Summary Judgment and (2) in Opposition to Defendant Tina McNee's Motion to Dismiss (Dated July 11, 2011)	3
Affirmation of Chava Brandriss, Esq. (Dated July 11, 1011)	4
Notice of Cross Motion to Dismiss Complaint of Defendant Tina McNee (Affirmation in Opposition to Plaintiff's Motion for Summary Judgment) (Dated August 5, 2011)	5

WELLS FARGO BANK, N.A. v McNEE, et al.

The motion and cross motions are decided as follows.

This matter arises out of plaintiff's attempt to foreclose a residential mortgage.

It appears undisputed that on December 8, 2006, defendant Tina McNee (hereinafter "McNee") executed an adjustable rate note and mortgage in the amount of $572,400.00 in favor of plaintiff, Wells Fargo Bank, N.A. (hereinafter "Wells Fargo"), relative to her purchase of the premises located at 50 Ausable Avenue, Staten Island, New York (*see* Plaintiff's Exhibits A, B). It further appears that McNee failed to make her $3,665.14 monthly mortgage payment for October, 2007 and thereafter[1]. As a result of said default, Wells Fargo claims to have mailed McNee a default notification letter dated November 12, 2007 at the 50 Ausable Avenue address, advising her that in order to avoid acceleration of the mortgage, she would have to pay $11,982.99 by December 12, 2007 (*see* Plaintiff's Exhibit H). McNee never responded.[2]

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[1]The parties agree that no payments have been made in more than four years.

[2]In her October 15, 2009 affidavit in support of a prior cross motion to dismiss, McNee denied ever receiving the November 12, 2007 default letter.

Two months later, on February 8, 2008, plaintiff commenced this action to foreclose the mortgage by the filing of a Summons and Complaint and lis pendens by prior counsel, Steven J. Baum, P.C. (*see* Defendant's Exhibit B). When McNee failed to answer or otherwise move with respect to the complaint, this Court entered an order dated October 8, 2008 appointing a referee to compute the amount due on the note. On December 8, 2008, McNee filed a petition for Chapter 7 bankruptcy in the Eastern District of New York, but by April of 2009, the Bankruptcy Court had granted Wells Fargo's motion for relief from the automatic bankruptcy stay and allowed the foreclosure action to proceed. The amount due and owing under the mortgage note was calculated by the referee to be $644,565.69 as of June 11, 2009.

McNee first appeared in the action on October 15, 2009 via service of her original Notice of Cross Motion to dismiss the complaint for lack of standing (*see* Defendant's Exhibit D), which was interposed in apparent response to plaintiff's motion for a default Judgment of Foreclosure and Sale. In her affidavit in support of dismissal, McNee denied, *inter alia,* having been served with the Summons and Complaint (*see* Defendant's Exhibit D). She also denied having received the proper pre-closing "Truth-In-Lending" disclosures, an "Itemization of Amount Financed" and a "Good Faith Estimate" from Wells Fargo. This Court subsequently referred the issue of personal service to Referee Robert D'Oca who, after conducting a traverse hearing on April 15, 2010, determined that McNee had never been served with process, and allowing McNee to serve an Answer against Wells Fargo (*see* Defendant's Exhibit H). McNee served her Answer with affirmative defenses and counterclaims on July 30, 2010. To the extent relevant, plaintiff's alleged lack of standing was

asserted as her thirteenth affirmative defense (*see* Defendant's Exhibit I). Plaintiff replied to McNee's counterclaims on or about August 20, 2010 (*see* Defendant's Exhibit J).

By so-ordered stipulation dated November 8, 2010, McNee waived all objections to the service of process and personal jurisdiction, and the parties embarked upon a series of settlement conferences. When a loan modification agreement proved unfeasible and it was determined that the matter could not be settled, a discovery schedule was put in place, providing for the service of discovery responses by May 26, 2011, later extended by stipulation to August 25, 2011 (*see* Plaintiff's Exhibit 6).

Instead of pursuing discovery, plaintiff, on May 26, 2011, moved to discontinue its foreclosure action[3] and cancel the lis pendens, whereupon McNee filed her initial cross motion to dismiss the complaint, *e.g.*, on allegations of plaintiff's lack of standing. Plaintiff's motion (Motion Seq. No. 004) and McNee's cross motion (Motion Seq. No. 005) were subsequently adjourned on consent to July 29, 2011, by which time Wells Fargo had withdrawn its motion to discontinue (Motion Seq. No. 004) by submitting a "Notice of Withdrawal of Motion to Discontinue Action and Cancel Lis Pendens" dated June 8, 2011. Plaintiff then filed the pending motion, *inter alia*, for summary judgment (Motion Seq. No. 006) and McNee made a second cross motion to dismiss the complaint, *inter alia*, for lack of standing (Motion Seq. No. 007). In both cross motions, McNee also seeks sanctions and costs from plaintiff.

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[3] McNee speculates that plaintiff "voluntarily" sought to discontinue the foreclosure action due to its non-compliance with Administrative Order 548/10 of October 20, 2010, wherein Chief Judge Lippman directed plaintiff's counsel to file, in all residential foreclosure cases, an affirmation certifying that all reasonable steps had been taken to verify the accuracy of the documents filed in support. Here, it was not until July 7, 2011 that plaintiff's counsel purported to furnish the required affirmation, in which the language mandated by the November 8, 2010 revision to the October Administrative Order was altered to affirm that "...the papers filed or submitted to the Court in this matter contain no ***material*** [sic] false statements of fact or law" (*see* July 7, 2011 Affirmation of Chava Brandriss, Esq., para 3; emphasis supplied; *see also* Defendant's Exhibit E attached to cross motion 007). In any event, the motion to discontinue was later withdrawn by plaintiff.

WELLS FARGO BANK, N.A. v McNEE, et al.

Regarding Wells Fargo's motion for summary judgment, the Court notes at the outset that the motion was made prior to the commencement of discovery. Hence, the motion is premature. However, even if considered on the merits, the motion would be denied, the complaint dismissed and the notice of pendency cancelled and discharged of record due to plaintiff's lack of standing.

In the July 2, 2011 affidavit of its "Vice President of Loan Documentation", Kyle N. Campbell, plaintiff avers that following the execution of the December 8, 2006 note and mortgage, Wells Fargo sold the loan on March 1, 2007 to Barclays Bank (*see* Plaintiff's Exhibit C). Thereafter, *i.e.*, on May 31, 2007, Barclays transferred the note and mortgage to BCAP LLC Trust 2007-AA3, the trustee of which is claimed to be Deutsche Bank National Trust Company (*see* Plaintiff's Exhibits D, E). Subsequently, an "Assignment of Mortgage" dated February 19, 2009 was filed with the Richmond County Clerk reflecting the assignment of the mortgage from Wells Fargo to Deutsche Bank National Trust Company as Trustee for BCAP LLC 2007-AA3 (*see* Plaintiff's Exhibit F). The date of this filing was March 11, 2009.

In asserting its *prima facie* case for summary judgment in foreclosure, plaintiff submits copies of: (1)the unpaid note, apparently endorsed in blank[4], (2) the mortgage, (3) the November 12, 2007 default notice, and (4) the affidavit of Kyle N. Campbell. In opposing the cross motion to dismiss, plaintiff relies, *inter alia*, on those provisions of the Uniform Commercial Code which

[4]It is conceded that prior to the filing of this motion for summary judgment, Wells Fargo never attached copies of the note endorsed in blank. Thus, the note attached to the February 8, 2008 Summons and Complaint did not contain the blank endorsement, nor did the note supplied to the Bankruptcy Court for the Eastern District of New York. It was not until this motion was made that the endorsed note was furnished, along with an "explanatory" affidavit of Brandon L. Cannon, Vice President of Loan Documentation for Wells Fargo, claiming that the note had been endorsed by Wells Fargo on December 19, *2006*.

define "holder" as a person "in possession of a document of title" (UCC 1-201[20]) who "may transfer or negotiate [a note] and...enforce payment in its own name" (UCC 3-301). According to Wells Fargo, these provisions constitute further proof of its standing to bring the foreclosure action. Alternatively, plaintiff argues that its standing is grounded in its contractual obligation as the "servicer" of the mortgage loan under, *inter alia*, a March 1, 2007 "Servicing Agreement" with Barclays Bank (Plaintiff's Exhibit C). According to plaintiff, it is "contractually entitled to retain record title to the mortgage loan for servicing-related purposes, without regard to whether beneficial title had been transferred" (*see* Campbell Affidavit, para 13, Plaintiff's Exhibit C).

Plaintiff's arguments notwithstanding, this Court is not persuaded by Wells Fargo's laborious interpretation of the myriad of transfer documents or the breadth of the language employed therein to confer standing upon it. "[L]anguage cannot overcome the requirement that the foreclosing party be both the holder or assignee of the subject mortgage, and the holder or assignee of the underlying note at the time a foreclosure action is commenced" (Bank of NY v. Silverberg, 86 AD3d 274, 283). In this case, Wells Fargo has adduced no proof in opposition to McNee's cross motion(s) sufficient to demonstrate that it was either. Plaintiff at bar clearly divested itself of the note and mortgage as early as March of 2007, when it sold both to Barclays Bank. It is alleged that Barclays thereafter divested itself of the note and mortgage on or about May 31, 2007, but it does not appear whether or when either came back into the possession of Wells Fargo prior to the commencement of this action on February 8, 2008. Hence, plaintiff has failed to demonstrate, *prima facie* or otherwise that it was, in fact, the holder of the McNee note and mortgage at the time the action was commenced. Neither has plaintiff demonstrated "by a preponderance of the evidence" (*id.* at 281-282, *quoting*

Bank of N.Y. v. Alderazi, 28 Misc3d 376, 379-380 [Sup Ct, Kings Co 2010]), that it was acting in the capacity of, *e.g.*, an agent of Deutsche Bank[5].

It is well settled that "[s]tanding requires an inquiry into whether a litigant has an interest...in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (Carprer v. Nussbaum, 36 AD3d 176 [internal quotation marks omitted]; Wells Fargo Bank Minn., N.A. v. Mastropaolo, 42 AD3d 239). Where the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see* US Bank N.A. v. Collymore, 68 AD3d 752, 753; Wells Fargo Bank Minn., N.A. v. Mastropaolo, 42 AD3d at 242).

In an action, as here, to foreclose a mortgage, a plaintiff's standing is normally dependant on its status as 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* US Bank, N.A. v. Collymore, 68 AD3d at 753; *cf.* Bank of NY v. Silverberg, 86 AD3d at 283). As a general rule, once the promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (*see* Mortgage Elec. Registration Sys., Inc. v. Coakley, 41 AD3d 674); However, the opposite is not true. "[A] transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security cannot be separated from the debt and exist independently of it" (Merritt v. Bartholick, 36 NY 44, 45). Accordingly, a mortgage cannot be foreclosed by someone who has failed to demonstrate a right of recovery on the debt (*see* FGB Realty Advisors v. Parisi, 265 AD2d 297, 298;

[5] In "Paragraph First" of the complaint, plaintiff alleges that it is the holder of the Note and Mortgage. Nowhere does it identify any purported trustee as the holder, nor claim that it is acting in the capacity of "custodian" or "servicer" to non-party Deutsche Bank National Trust Company (*cf.* CWCapital Asset Mgt. LLC v. Charney-FPG 114 41st Street, LLC, 84 AD3d 506). In fact, plaintiff's only such claim appears in its motion papers and is limited to the claim that it became the "servicer" of the mortgage for *Barclays Bank* in March, 2007. However, plaintiff also alleges the latter divested itself of the mortgage loan two months later in May, 2007. In any event, as "servicer" of the mortgage plaintiff would not automatically have become the owner of the note (*see generally* Bank of NY v. Silverberg, 86 AD3d at 281).

Bergman on New York Mortgage Foreclosures §12.05[1][a][1991]). As the First Department held in Katz v. East-Ville Realty Co., (249 AD2d 243, 243), a "[p]laintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest [is] without foundation in law or fact" (*see* Kluge v. Fugazy, 145 AD2d 537). Hence, Wells Fargo's attempt to foreclose upon the subject mortgage must be denied, the complaint dismissed, and McNee's cross-motion(s) to dismiss for lack of standing pursuant to CPLR 3211(a)(3) granted.

In view of this finding, the remaining grounds for relief in plaintiff's motion have been rendered academic.

Defendant's application for costs and sanctions is denied.

Accordingly, it is

ORDERED, that plaintiff's application *inter alia* for summary judgment is denied; and it is further

ORDERED, that the cross motion(s) to dismiss the complaint are granted and the complaint dismissed; and it is further

ORDERED, that the Notice of Pendency filed in this action with the Richmond County Clerk on February 8, 2008 is hereby cancelled; and it is further

ORDERED, that the Clerk enter judgment and mark his records accordingly.

E N T E R,

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Hon. John A. Fusco, J.S.C.

Dated: November 28, 2011