VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-00464

U.S. Bank, National Association v. Jonathan Draper

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment; Cross Motion for Summary Judgment ; (Motion: 6; 9)
Filer: Bozena Wysocki; Katherine W. Hope
Filed Date: April 07, 2022; May 20, 2022

The motion is GRANTED IN PART and DENIED IN PART.

This is a foreclosure action. Plaintiff, U.S. Bank, NA as Legal Title Trustee for Truman 2016 SC6 Title Trust ("US Bank") filed a motion summary judgment on the basis that it has good title to both the relevant promissory note and mortgage deed and that it is entitled to foreclose based on the deaths of the mortgagors.

In opposition, Defendant raises four objections. First, Defendant argues that Plaintiff has not established ownership of the promissory note and that the questions of title are fatal to Plaintiff's motion. *US Bank, NA v. Kimball*, 2011 VT 81, ¶¶ 14–20. Second, Defendant challenges US Bank's claim of ownership over the mortgage by raising questions about assignments of mortgage in US Bank's chain of title. Specifically, Defendant challenges whether the Attorneys-in-fact were validly established. Third, Defendant challenges the sufficiency of the evidence that the mergers involving Bank of America, Countrywide Bank, FSB, BAC Home Loan Servicing, LLC, Ditech, and Green Tree were validly established. Fourth and finally, Defendant challenges the sufficiency of the mortgage deed's description due to a missing property description.

In turn, Defendant seeks summary judgment against Plaintiff on its Count III, Deficiency Judgment claim based on the undisputed fact that neither Defendant, nor the late Margaret Mickel, whose estate Defendant represents, signed the underlying promissory note.

As stated in greater detail below, the Court finds that there are contested issues of fact with Plaintiff's motion, which make summary judgment inappropriate. Defendant's motion, however, is both timely and well established as a matter of law.

Standard of Review

In a motion for summary judgment, the Court will look to the parties' statement of undisputed material facts and supporting affidavits and exhibits. *Lyons v. Chittenden Cent. Supervisory Union*, 2018 VT 26, ¶ 12. Summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "In applying this standard, we give the nonmoving party the benefit of all reasonable doubts and inferences." *In re Miller Subdivision Final Plan*, 2008 VT 74, ¶ 8 (quotation omitted). The Court must not simply take a statement of material facts at face value. "Rule 56 allows a party to present affidavits in support of a motion for summary judgment, V.R.C.P. 56(e), but those affidavits must be made based on the personal knowledge of the affiant. Legal conclusions and opinions cannot be the proffered basis for rendering summary judgment." *Cassani v. Hale*, 2010 VT 8, ¶ 23.

Ownership of the Promissory Note

Defendant argues that the Vermont Supreme Court's prior decision in *US Bank v. Kimball*, 2011 VT 81 is dispositive regarding Plaintiff's case because it cannot show that it is in legal possession of the promissory note. The facts of the present case demonstrate that the issue of title is more nuanced than the issue *Kimball*. In *Kimball*, Plaintiff had difficulty establishing a chain of ownership for both the underlying promissory note and the mortgage deed. It supplied the trial court with conflicting and incomplete documentation throughout the case. *Id.* At ¶¶ 15–17. For example, rather than an indorsement in blank, the promissory note in *Kimball* had an allonge—an attached sheet for indorsements—that contained both an indorsement in blank and an undated indorsement purporting to give title to the plaintiff. *Id.* at ¶¶ 4, 6. The Supreme Court found that the confusing evidence and lack of affidavits demonstrating a personal knowledge about when and how the promissory note was transferred when the document had both indorsements in blank and special indorsements was fatal to plaintiff's efforts and affirmed the trial court's dismissal. *Id.* at ¶ 20.

Read plainly, *Kimball* stands for the proposition that if a foreclosure plaintiff cannot establish a chain of ownership over the promissory note, then it may be subject to a dismissal order. What *Kimball* does not stand for is a rejection of the practice of indorsement in blank for a promissory note. As defined under the Uniform Commercial Code, an indorsement in blank is a valid practice that allows the holder of an instrument to leave the name of the payee blank, which then makes possession the key to establishing ownership. 9A V.S.A. § 3-205(b) ("If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement." When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.") As Comment 2 to Section 3-205(b) states in greater detail:

> . . . An indorsement made by the holder is either a special or blank indorsement. If the indorsement is made by a holder and is not a special indorsement, it is a blank indorsement. For example, the holder of an instrument, intending to make a special indorsement, writes the words "Pay to the order of" without completing the indorsement by writing the name of the indorsee. The holder's signature appears under the quoted words. The indorsement is not a special indorsement because it does not identify a person to whom it makes the instrument payable. Since it is not a special indorsement it is a blank indorsement and the instrument is payable to bearer. The result is analogous to that of a check in which the name of the payee is left blank by the drawer. In that case the check is payable to bearer. See the last paragraphs of Comment 2 to Section 3-115.

This is precisely the type of indorsement at issue in the present case, Countrywide Bank, FSB, the original holder of the promissory note, executed an indorsement in blank on the promissory note. This undated indorsement states: "Pay to the Order of" followed by a blank and then the words, "Without Recourse Countrywide Bank, FSB" and then a signature of a Countrywide officer. Under section 3-205, such an indorsement is valid, and ownership is established by possessing the promissory note.

It is this last point where Plaintiff's motion for summary judgment falters. While the initial plaintiff in this action, US Bank Trust, NA presented the promissory note as part of its initial filing, the successor Plaintiff, US Bank has not presented a copy of the note, established that it has possession, or even presented evidence as to when a change in possession took place. While Plaintiff asserts that it has ownership, this assertion is unsupported by credible evidence of based on either personal knowledge or admissible material. The assertion is therefore lacking in foundation

for the Court to find for purposes of summary judgment that the current Plaintiff has possession of the Note and has established ownership and a right of payment. *Kimball*, 2011 VT 81 at ¶ 18. For this reason, Plaintiff's motion for summary judgment is denied.

Power of Attorney

Defendant's second objection centers on several assignments of the subject mortgage that occurred within Plaintiff's claimed chain of title. The first occurred on December 26, 2018 when Bank of America (as successor to Countrywide) issued a corrective assignment to Bank of America (as successor to BAC Home Loans Servicing, LLC) by Bank of America's attorney-in-fact, Ditech Financial, LLC. The second occurred on December 12, 2018, when the mortgage was assigned from Ditech Financial, LLC to US Bank Trust, NA by Ditech's attorney-in-fact, Mission Global, LLC. The third occurred on December 9, 2021, when US Bank Trust, NA assigned the mortgage to US Bank by its attorney-in-fact, Fay Servicing, LLC.

The creation of an attorney-in-fact relationship is one of agency that arises when the principal consents to have the agent act on its behalf and the agent consent to perform such acts. RESTATEMENT (SECOND) OF AGENCY § 15; see also Black's Law Dictionary 124 (7th ed. 1999) (defining an attorney-in-fact as "one who is designated to transact business for another; a legal agent"). When the attorney-in-fact relationship is created in Vermont, there is a presumption of validity under 14 V.S.A. § 3513.

In addition to the fact that Plaintiff does not state whether the attorney-in-fact relationships exist or whether they are entitled to a presumption of validity under 14 V.S.A. § 3515 or similar statute, there is another issue. Under 27 V.S.A. § 305(a), a transfer of an interest in real estate performed by an agent is not valid unless the authorizing agency agreement is also recorded in the same land records.

It is not apparent from either the statute or from the available caselaw if Section 305 applies to assignment of mortgage. Neither party has briefed this issue, nor provided legal support in one direction or the other. The Court is not aware of any Vermont case law on point, and without further evidence or briefing, it cannot determine whether Section 304 applies to Plaintiff's chain of title or whether Plaintiff could meet such a burden. Based on this lack of clarity of facts and law, Plaintiff's motion for summary judgment must be denied at this time.

Corporate Mergers

Defendant's arguments in this area criticize the lack of information regarding the various mergers that have occurred to the prior owners of the subject mortgage. Indeed, the number of holders of the subject mortgage and the changes in corporate identity are one of the dizzying aspects of this case. Companies come to own other companies or take on new identities seemingly with each season. Defendant's arguments, however, do not cite to either credible factual disputes or legal authority that would draw Plaintiff's representations of merger into question.

While there are some foundational issues with Plaintiff's rebuttal exhibits on the issue of merger, specifically a lack or foundation or citation to exceptions under the Vermont Rules of Evidence, that would limit the Court's ability to consider the various letters, copies of corporate filings, and internet pages that Plaintiff offers in its July 7th reply, Defendants have not established that there is a factual dispute here. See *Gross v. Turner*, 2018 VT 80, ¶ 8 (nonmoving party may not rest upon the allegations but must come forward with admissible evidence to raise a dispute regarding the facts). In this case there is no credible evidence to dispute Plaintiff's representations that various mergers amongst previous assignors of the mortgage were not who they purported to be. As such, this issue would not, in and of itself, lead to a denial of summary judgment.

Lack of Deed Description

Defendant's last objection to the motion for summary judgment concerns the missing description of the subject parcel. In its original pleadings, Plaintiff sought in Count II to reform the mortgage. Such a process is available to Plaintiff under Vermont law, but Plaintiff has the burden "of establishing, beyond a reasonable doubt, the true agreement to which the contract in question is to be reformed." *George v. Goss*, 137 Vt. 6, 7 (1979).

In the present case, there is evidence in the mortgage regarding the property including the address and a tax parcel ID number, but Plaintiff has not made the argument or established through sufficient evidence that it is entitled to judgment on this issue as a matter of law. As such, the issue is not appropriate for summary judgment at this time, and Plaintiff's motion is similarly denied on these grounds as well.

Defendant's Cross Motion for Summary Judgment

In his cross motion for summary judgment on Plaintiff's claim for a deficiency judgment, Defendant notes that it is undisputed that neither he, nor Margaret Mickel, whose estate he represents as administrator, signed the underlying promissory note. This note was only signed by Ms. Mickel's late husband, Daniel Mickel, who also predeceased her.

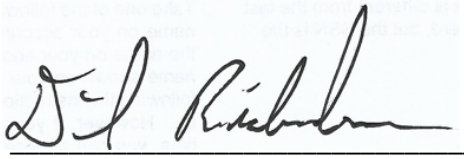
Ms. Mickel's only signature is on the mortgage deed, which is not in-and-of-itself a debt or obligation but rather a security instrument that can only be triggered by a valid, accompanying promissory note. *Kimball*, 2011 VT 81 at ¶ 13; 9A V.S.A. § 3–301.

While a deficiency judgment in this matter has not arisen under either 12 V.S.A. § 4954 or V.R.C.P. 80.1(j)(2), the matter is ripe for consideration as Plaintiff has pled the issue against Defendant. As Defendant correctly, notes, to be liable for a deficiency judgment, the debt itself must lie against the Defendant individually. *Chittenden Trust Co. v. Andre Noel Sports*, 159 Vt. 387, 396 (1992). In the present case, the liability of Ms. Meckel's estate is more akin to a limited guarantor who pledges a specific collateral but not personal liability. See *Bellows Falls Trust Co. v. Gibbs*, 148 Vt. 633 (1987) (mem.) ("In Vermont, tenants by the entirety are viewed as being individually vested, under a legal fiction, with title to the whole estate. Neither spouse has a share which can be disposed of or encumbered without the joinder of the other spouse.") (internal citation omitted). As such, there is no factual or legal basis to hold Defendant liable for any deficiency judgment. Therefore, Defendant is entitled to summary judgment on Count III, and the claim for a deficiency judgment is dismissed as a matter of law.

ORDER

Based on the foregoing, Plaintiff's motion for summary judgment is Denied. Defendant's cross-motion for partial summary judgment on Count III (Deficiency Judgment) is Granted as a matter of law.

Electronically signed on 7/9/2022 2:09 AM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge