

D.N. FST-CV-08-5006306-S

SUPERIOR COURT

TERWIN ADVISORS, LLC

J.D. OF STAMFORD/NORWALK

VS.

AT STAMFORD

ANGELA HARRISON

JULY 10, 2008

OBJECTION TO MOTION FOR SUMMARY JUDGMENT

The Defendant objects to the Plaintiff's Motion for Summary Judgment. The Defendant claims that, contrary to the Plaintiff's assertions, there is a genuine issue as to any material fact and that the Plaintiff is not entitled to judgment as a matter of law.

In support of the Defendant's objection, a Memorandum of Law is filed together herewith.

ORAL ARGUMENT IS REQUESTED
TESTIMONY IS NOT REQUIRED

WHEREFORE, the Plaintiff has failed to establish the absence of a genuine issue with regard to all material facts regarding liability. The Plaintiff's Motion for Summary Judgment should be denied and the Defendant's Objection should be sustained.

THE DEFENDANT

By: _____

Peter W. Shafran
LAW OFFICES OF PETER W. SHAFRAN
Her Attorneys
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Stamford, CT 06901
(203) 327-4142
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Juris Number: 102551

ORDER

The foregoing Objection having been considered by the court, it is hereby ORDERED:

SUSTAINED - OVERRULED

BY THE COURT

Judge/Asst. Clerk

CERTIFICATION

This is to certify that the foregoing was this date mailed to all counsel and/or parties of record, by first class United States mail, postage prepaid, electronic mail and/or facsimile, as follows:

HUNT LEIBERT JACOBSON, P.C.
50 WESTON STREET
HARTFORD, CT 06120

PETER W. SHAFRAN, ESQ.
COMMISSIONER OF THE SUPERIOR COURT

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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT’S OBJECTION TO MOTION FOR SUMMARY JUDGMENT**

The Defendant objects to the Plaintiff’s Motion for Summary Judgment. The law is well settled that summary judgment should only be issued “if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Practice Book §17-49; Burns v. Hartford Hospital, 192 Conn. 451, 455 (1984).

In this case, not only is a material fact in dispute but, even if that was not the case, the Plaintiff would not be entitled to judgment as a matter of law.

I. **MATERIAL FACTS ARE IN DISPUTE**

Two critical issues of material fact are in dispute: the validity of the purported assignment of the mortgage to the Plaintiff and the timeliness of its recording. The Plaintiff asserts that it is the holder of the Note and Mortgage, which it seeks to foreclose. In Paragraphs 4 and 5 of its Complaint, as well as in the Facts and Procedural History section of its Memorandum of Law in Support of its Motion for Summary

Judgment, the Plaintiff alleges that it is the holder of the Mortgage by virtue of an assignment. The purported assignment is attached to the Plaintiff's Motion for Summary Judgment as Exhibit C.

The writ is therefore defective as the purported assignment was recorded only **after** the commencement of the case, and actually not even recorded before the date of the Plaintiff's Motion for Summary Judgment. See Exhibit C. An assignment of a mortgage is a conveyance of land. Family Financial Services, Inc. v. Spencer, 41 Conn. App. 754, 677 A.2d 479 (1996). As such, the Plaintiff was not the holder of the mortgage at the time of the commencement of the action and therefore cannot enforce it through this foreclosure action.

II. THE PLAINTIFF IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

Even if there were no issues of material fact, the Plaintiff would not be entitled to judgment as a matter of law.

A. The Plaintiff Had No Standing to Bring the Action

The Plaintiff's own allegations defeat its claim: it alleges, in its Complaint, and in its Motion for Summary Judgment, that the assignment of mortgage is "to be"

recorded. The Plaintiff does not assert that the assignment was subsequently recorded. A party has standing only if that party is statutorily or classically aggrieved (i.e., a personal legal interest has been injured by the defendant). See Carrubba v. Moskowitz, 274 Conn. 533, 551 (2005). In Carrubba, the Connecticut Supreme Court articulated the test for aggrievement, and therefore standing, as follows:

The fundamental test for determining aggrievement encompasses a well-settled two-fold determination: [f]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action].... Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected. See Id. (Citation omitted; ellipses in original.)

In the instant matter, Terwin Advisors, LLC was not, and could not have been, aggrieved by defendant's conduct. Terwin Advisors, LLC instituted this action on or about January 18, 2008, with a return date of February 5, 2008. See Complaint dated January 18, 2008. On or about June 24, 2008, Terwin Advisors, LLC moved for summary judgment. In its Memorandum of Law in Support of its Motion for Summary Judgment, Terwin Advisors, LLC, by its attorneys, stated that it, "is the owner and

holder of the Note and Mortgage.” See Memorandum of Law In Support of Plaintiff’s Motion for Summary Judgment dated June 24, 2008.

In fact, Terwin Advisors, LLC had not yet recorded the purported assignment of the mortgage from Geneva Mortgage Corp., the mortgagee named in the Note and Mortgage. The Assignment of Mortgage appended to the Motion for Summary Judgment is dated and executed the “4 day of March, 2008,” which date is AFTER the commencement of the action.

The foregoing facts are found in the court’s file and apparent from the face of the record. The Defendant is not required to submit any affidavits in support of this motion. See Practice Book § 10-31 (“This motion [to dismiss] shall always be filed with a supporting memorandum of law, and where appropriate, with supporting affidavits as to facts not apparent on the record.”)(Emphasis added.)

At the time Terwin Advisors, LLC initiated this action, it had absolutely no interest whatsoever in the subject Note and Mortgage. Thus, Terwin Advisors, LLC Bank could not possibly have been “aggrieved” by defendant’s alleged conduct and could not possibly have had standing to initiate this action. Accordingly, the court lacks, and has lacked, subject matter over this action.

As the purported holder of an unrecorded assignment of mortgage, the Plaintiff does not have standing to bring a foreclosure action. At least two Connecticut Superior courts, following Family Financial Services, found that a plaintiff holding an unrecorded mortgage lacked standing to commence or maintain a foreclosure action, thereby depriving the court of subject matter jurisdiction. Electronic Mortgage v. Dorcely, 33 Conn. L. Rptr. 133 (2002)(Hickey,J.); Wells Fargo Bank v. Hubyk, 33 Conn. L. Rptr. 218 (2002)(Curran,J.)(copies of unpublished superior court opinions are attached).

B. This case should be dismissed for Lack of Subject Matter Jurisdiction

This matter should be dismissed for lack of subject matter jurisdiction. Although this matter is presently before this court on the Plaintiff's Motion for Summary Judgment, the issue of subject matter jurisdiction may be raised at any time. Section 10-32 of the Connecticut Practice Book states as follows:

Any claim of lack of jurisdiction over the subject matter cannot be waived; and whenever it is found after suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the judicial authority shall dismiss the action.

In a case involving a challenge to a special defense of lack of standing due to plaintiff's failure to record an assignment of mortgage, the Superior Court cited the Appellate Court ruling: "[O]nce the question of lack of jurisdiction of a court is raised,

[it] must be disposed of no matter in what form it is presented ... and the court must fully resolve it before proceeding further with the case. (Internal quotation marks omitted) Community Collaborative of Bridgeport, Inc. v. Ganim, 241 Conn. 546, 552, 698 A.2d 245 (1997); Electronic Mortgage v. Dorcely, supra at p. 2.

III. CONCLUSION

The Plaintiff's Motion for Summary Judgment should be denied in that there is a material issue of material fact and the Plaintiff has not demonstrated it is entitled to summary judgment as a matter of law. Furthermore, the Plaintiff's Complaint for foreclosure of a mortgage, which it purports to hold by an unrecorded assignment, or a purported assignment recorded after the commencement of the action and after the filing of the Plaintiff's Motion for Summary Judgment, should be dismissed.

THE DEFENDANT

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