Brunner v Estate of Chaim Lax

2016 NY Slip Op 01782

Decided on March 15, 2016

Appellate Division, First Department

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Decided on March 15, 2016
Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

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[*1]Joseph Brunner, et al., Plaintiffs-Respondents,

v

The Estate of Chaim Lax, etc., et al., Defendants-Appellants, Tracy L. Klestadt, et al., Defendants.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

Herrick, Feinstein LLP, New York (William R. Fried of counsel), for respondents.

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 3, 2015 and April 6, 2015, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' (hereinafter defendants) motions to dismiss the first cause of action [FN1] pursuant to CPLR 3211(a)(3), unanimously affirmed, without

costs.

Defendants failed to meet their burden on this pre-answer motion to dismiss pursuant to CPLR 3211(a)(3) to establish prima facie that plaintiffs have no standing to sue on the promissory note (*see Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]). Defendants contend that the note had not been validly assigned to plaintiffs prior to the commencement of this action (*see Carlin v Jemal*, 68 AD3d 655 [1st Dept 2009]). However, an assignment need not be in writing, but can be effected by physical delivery (*see e.g. Fryer v Rockefeller*, 63 NY 268, 276 [1875]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 281 [2d Dept 2011]; *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911 [3d Dept 2009]; *see also OneWest Bank FSB v Carey*, 104 AD3d 444, 445 [1st Dept 2013]; *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). The complaint alleges, "As of March 2014, [plaintiff] JBAM [Realty LLC] is in physical possession of the Note." While this allegation could have been better phrased, construed liberally and in the light of "every possible favorable inference" (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]), it can be read as saying, "Since [*2]March 2014, JBAM has been in physical possession of the Note" — especially because plaintiffs' counsel represented at oral argument that his clients had physical possession of the note at the time they commenced their lawsuit. This action was commenced on or about March 31, 2014.

Defendants contend that discovery should be limited to standing. We leave that issue to the motion court's broad discretion (*CDR Créances S.A.S. v Cohen*, 77 AD3d 489, 491 [1st Dept 2010]).

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Footnotes

Footnote 1: Defendants claim they are appealing from the denial of their motions to dismiss the first three causes of action. However, the motion court dismissed the second and third causes of action.

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