



AlaFile E-Notice

01-CV-2009-901113.00

Judge: J SCOTT VOWELL

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

US BANK NA AS TRUSTEE v. ERICA CONGRESS
01-CV-2009-901113.00

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**IN THE CIRCUIT COURT OF JEFFERSON COUNTY
 CIVIL DIVISION**

U.S. BANK, NA, as trustee, etc.,)
)
PLAINTIFF,)
)
v.)
)
ERICA SUMPTER CONGRESS,)
)
DEFENDANT.)

**CIVIL ACTION NO.
 CV 09-901113 JSV**

FINAL JUDGMENT

This action for ejectment under Ala. Code (1975) § 6-6-280, was first heard at a bench trial on October 13, 2009. The case proceeded as a routine action for ejectment following a mortgage foreclosure sale. A Final Judgment was entered on November 16, 2009, in favor of the plaintiff and against the defendant, Erica Sumpter Congress. In the Final Judgment, the plaintiff, U. S. Bank, as trustee for that certain Pooling and Servicing Agreement, Series #2007-EMX1, Pool #40896, was granted possession of the defendant's former residence.¹

The defendant, Ms. Congress, filed a timely post-judgment Motion in which she contended that the plaintiff, U. S. Bank, was not entitled to a judgment of ejectment because it had no possessory interest in the property. The Court granted the defendant's Motion for New Trial and set aside the Final Judgment in order to provide the parties with the opportunity to perform further discovery and to have all of their positions heard. A Scheduling Order was entered and the case was eventually re-tried on June 1, 2 and 3, 2010. The parties stipulated that the Court could consider any

¹. Congress argued that there was some confusion about the correct name of the plaintiff. The Court concludes that "U. S. Bank, NA," is the correctly named plaintiff, and that the remainder of the description is simply intended to describe the specific "Pool" in which the Congress loan was held.

evidence presented at the first trial and the parties have submitted transcripts of the evidence presented at both trials. Counsel have filed trial and post-trial briefs and proposed orders.

Before, during and after the trial of this case, there has been extensive public discussion about the tidal wave of mortgage foreclosures that have followed the collapse of the United States real estate market. Those foreclosures have had a profound effect on the United States mortgage and banking industries.

The Alabama Courts, like other judicial systems around the country, have seen increased filings of cases which arise out of mortgage foreclosures. Alabama law allows mortgage foreclosure on defaulted loans without Court action and is classified as a “non-judicial state.” It is therefore likely that the increased numbers of mortgage foreclosures have not had the impact on our courts as upon the courts in “judicial states.” The Court judicially knows that both the number of mortgage delinquencies and the number of foreclosures continue to rise in Jefferson County and throughout the State of Alabama.

All of this is a matter of great concern and many Americans have lost their homes for reasons beyond their control. Those political and economic issues will be debated in the public forum and will play out over time. This Court’s responsibility is to address the unique facts of this particular litigation between U. S. Bank, as trustee, and Erica Sumpter Congress. The legal issues are difficult and the Court has read and considered the rulings from other jurisdictions in similar cases before issuing this ruling.

FINDINGS OF FACT

On July 26, 2006, Ms. Congress refinanced her single-family residence located at 414 23rd Avenue Northeast, Birmingham, Jefferson County, Alabama 35215. Ms. Congress refinanced the property through Mortgage Lenders Network USA, Inc., d/b/a Lenders Network (Lenders Network). The Mortgage (Plaintiff's Exhibit #2) identified Ms. Congress as the "Borrower;" Lenders Network was identified as the "Lender;" and the "Mortgagee" was identified as Mortgage Electronic Registration System, Inc., (MERS), as nominee for the Lender, its successors and assigns.

The real estate mortgage secured an Adjustable Rate Note (Plaintiff's Exhibit #1, "the Note") in the principal amount of \$104,400.00, with the initial monthly payments set at \$813.88. It was an "Adjustable Rate Note" with the interest being adjustable from the initial interest rate of 8.65% with a maximum interest rate of 11.65%. The "Lender" was again defined in the Note as "Mortgage Lenders Network USA, Inc., d/b/a Lenders Network."

In the Note, signed by Ms. Congress, she affirmed: "I understand that Lender may transfer this note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note, is called the 'Note Holder.'"

The loan was almost immediately "securitized"² and pooled with other mortgage loans. Ms.

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The words "securitize" and "securitization" describe the practice of combining individual mortgages into a "pool" which the issuer can divide into smaller parts which are based on each individual mortgage's inherent risk of default. The smaller parts or "pieces" were then sold to investors.

Congress's loan was securitized into a trust identified as the "2007-EMX1 Trust" (the Trust), with the plaintiff, U.S. Bank, serving as the trustee. The securitization was accomplished through the use of a "Pooling and Servicing Agreement" (PSA), dated February 1, 2007, which defines the rights and obligations of those managing the loans on behalf of the certificate holders of the Trust. In the PSA, U.S. Bank acknowledged receiving the original Note, "showing an unbroken chain of endorsements from the originator thereof to the Person endorsing it to the trustee." Ms. Congress was not a party to the PSA.

An organization known as "Homecomings" was the original servicer of Ms. Congress's loan, and in 2008, Homecomings merged with GMAC Mortgage. As a result of the merger, GMAC Mortgage became the servicer of Ms. Congress' loan and it had a Power of Attorney to act for U.S. Bank in connection with the Trust.

Ms. Congress first defaulted on her monthly note payments in February 2007 and GMAC sent her a default letter. During the following year, she was sent five letters informing her of the delinquency in her payments and was given opportunities to make the loan current, but she failed to do so. A Final Notice was sent to Ms. Congress on May 5, 2008, which resulted in Ms. Congress's sending a check to make the payments current, but the check was returned because her bank account contained insufficient funds. Finally, the loan was approved for foreclosure on June 24, 2008, and was referred to Attorney Colleen McCullough at Sirote & Permutt, a Birmingham law firm, for foreclosure. At the time of the foreclosure sale, the Congress loan was four months behind with payments having been missed in March, April, May and June 2008. There is no dispute about

Ms. Congress' default on the payments required by the note. (Plaintiff's Exhibit #1, Ms. Congress's payment history).

When GMAC referred the note to Attorney McCullough, it informed her that the Trust was the current holder of the Note. MERS was still shown on the real estate records in the Probate Court of Jefferson County as being the mortgage holder at the time the title policy was issued. After reviewing a title report on the property, Ms. McCullough determined that there should be an assignment of the mortgage to the Trustee in order to secure title insurance for U. S. Bank. Ms. McCullough therefore executed an assignment of the Mortgage from MERS to U.S. Bank, pursuant to the authority granted to her by MERS and Homecomings.

Ms. McCullough testified at trial that the purpose of the mortgage assignment was to cause the Probate records to show the correct mortgagee. She said that the assignment was not intended to be a negotiation of the underlying Note, but that it was intended to be in the nature of a quitclaim deed, to correct any defects in the chain of title to the real estate.

Ms. McCullough further testified that she prepared the acceleration letter and sent it to Ms. Congress. Notice of the foreclosure sale was published in the Alabama Messenger as required by law. The foreclosure sale took place at the Jefferson County Courthouse on August 12, 2008, and the plaintiff bid for and purchased the property for \$49,600.00, while the fair market value of the property was estimated to be \$61,500.

Following the sale, U.S. Bank demanded possession of the property, but plaintiff failed to respond. The evidence is that Ms. Congress moved out of the house and that it sits vacate. The photographs which were received into evidence show that it is in a state of disrepair. When Ms.

Congress failed to deliver possession, this action in ejectment followed, being commenced on March 31, 2009.

Ms. Congress's step-mother, Henrietta Jackson, was originally named as a defendant because she happened to be at the Congress residence when there was an attempt to serve Ms. Congress with the summons and complaint. The evidence is undisputed that Ms. Jackson does not live at the residence in question and the claim against her is due to be dismissed.

THE PLAINTIFF'S EJECTMENT CLAIM

The Alabama Supreme Court has recently addressed the requirements a plaintiff must meet to prevail in an action for ejectment. *Steele v. Federal Nat. Mort. Ass'n*, 2010 WL 4910829 (Dec. 3, 2010):

“Actions in ejectment or actions in the nature of an action in ejectment are governed by § 6-6-289, and we are bound to interpret the language of that statute to mean exactly what it says. *Blue Cross & Blue Shield of Alabama, Inc., v. Nielson*, 714 So.2d 293, 297 (Ala. 1998), Section 6-6-280 provides:

(a) A plaintiff commencing an action for the recovery of lands or the possession thereof has an election to proceed by an action of ejectment or by an action in the nature of an action of ejectment as is provided in subsection (b) of this section.

(b) An action for the recovery of land or the possession thereof in the nature of an action in ejectment may be maintained without a statement of any lease or demise to the plaintiff or ouster by a casual or nominal ejector, and the complaint is sufficient if it alleges that the plaintiff was possessed of the premises or has the legal title thereto, properly designating or describing them, and that the defendant entered there upon and unlawfully withholds and detains the same. The action must be commenced in the name of the real owner of the land or in the name of the person entitled to the possession thereof, though the plaintiff may have obtained his title thereby by a conveyance made by a grantor who is not in possession of the land at the time of the execution of the conveyance thereof. The plaintiff may recover in this action mesne profits and damages for waste or an other injury to the lands, as the plaintiff's interests in the lands entitled him to recover, to be computed up to the time of the verdict.”

When an ejectment action arises from a foreclosure, as in this case, the plaintiff must prove each of these elements: (1) a valid foreclosure; (2) demand for possession; and (3) a further refusal of possession entitles the mortgagee-purchaser to recover the reasonable rental value during the detention without any accounting therefor. *Pridgen v. Elson*, 242 Ala. 230, 5 So.2d 477 (1941). If the mortgage and foreclosure deed are produced, as well as proof of both demand for and refusal to deliver possession, all of the necessary elements of ejectment are established. *Muller v. Seeds*, 919 So.2d 1174 (Ala. 2005).

DEFENDANT'S AFFIRMATIVE DEFENSES

BURDEN OF PROOF

The Court is reasonably satisfied from the evidence that the plaintiff, U. S. Bank, has proven the elements of an action for ejectment, as it was at the first trial. However, Ms. Congress says that the plaintiff is not entitled to possession of the property because the foreclosure was not valid and that U. S. Bank does not have the right to possession of the property. She says that the plaintiff is not the owner of the Note and that U. S. Bank failed to comply with the terms of the Pooling and Security Agreement, the PSA. She also claims that the Assignments and the allonge³ were forged.

Alabama law is clear that a party asserting an affirmative defense has the burden of proving the elements of that defense in order to prevail. *Ex parte Ramsey*, 829 So.2d 146 (Ala. 2002). "This court has defined an affirmative defense as a defense that raises a new matter and that would be a defense even if the relevant allegations in the plaintiff's complaint were true." *Bechtel v. Crown*

³ An allonge is defined as a piece of paper annexed to a negotiable instrument or promissory note on which to write endorsements.

Cent. Petroleum, 451 So.2d 793 (Ala. 1984). The defenses asserted by Ms. Congress are affirmative defenses and therefore she has the burden of proof in showing that the foreclosure was wrongful. *Hawkins v. LaSalle Bank*, 24 So.2d 1143 (Ala. Civ. App., 2009).

Ms. Congress says that without proof that U. S. Bank was the owner of the Note, it has no standing and therefore the trial court has no subject matter jurisdiction over the case. *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025 (Ala. 1999). The Court disagrees that this is an issue of “standing.” Since the trial of this case, the Alabama Court of Civil Appeals has addressed this issue in the case of *Berry v. Deutsche Bank*, 2010 WL 3377712 (Ala.Civ.App). In reversing the case of *Hawkins v. La Salle Bank*, 24 So.3d 1151 (Ala.Civ.App. 2009), cited above, the Court said:

In *Hawkins v. LaSalle Bank*, we stated that satisfactory proof at trial of facts establishing that a foreclosure sale and the resulting foreclosure deed were invalid would deprive an ejectment-action plaintiff who based his or her claim to legal title to the property on the foreclosure deed from having the necessary *standing* to prosecute the ejectment action. 24 So.3d at 1151. We should have stated that such proof would constitute an affirmative defense to such a plaintiff's claim rather than stating that it would deprive the ejectment-action plaintiff of standing, because such a plaintiff has standing to maintain the ejectment action by virtue of being named as the grantee in the foreclosure deed. *See Muller v. Seeds*, 919 So.2d 1174, 1177 (Ala.2005) (recognizing that an ejectment-action plaintiff who bases his or her claim to legal title to the property on a foreclosure deed establishes a prima facie case of ejectment by introducing the mortgage, the foreclosure deed naming the plaintiff as the grantee, a written demand for possession, and evidence establishing that the defendant failed to surrender possession of the property within 10 days after receiving the written demand). Therefore, insofar as we stated in *Hawkins v. LaSalle Bank* that proof that the foreclosure sale and resulting foreclosure deed were invalid would deprive an ejectment-action plaintiff who bases his or her claim to legal title to the property on a foreclosure deed from having “standing” to maintain the ejectment action we hereby overrule *Hawkins v. LaSalle*.

Therefore, the questions raised by Ms. Congress are affirmative defenses upon which she has the burden of proof; they are not questions of standing.

CHOICE OF LAW

In addressing Ms. Congress's affirmative defenses, the Court must first decide whether the transactions in question are governed by Alabama substantive law or by New York substantive law. This is action for ejectment from Alabama real property, brought against an Alabama resident, in an Alabama Court. Generally, the law of the *situs* of secured property governs foreclosure proceedings. "The method for the foreclosure of a mortgage on land and the interest in the land resulting from the foreclosure are determined by the local law of the situs." Restatement (2nd, of Conflicts of Law, § 229 n(1971).

"Alabama law follows the traditional conflict-of-law principles of *lex loci contractus* and *lex loci delicti*. See *Liberty Mut. Ins. Co. v. Wheelwright*, 851 So.2d 466 (Ala.2002). Under the principles of *lex loci contractus*, a contract is governed by the law of the jurisdiction within which the contract is made. *Cherry, Bekaert & Holland v. Brown*, 582 So.2d 502 (Ala.1991).^{FN3} Under the principle of *lex loci delicti*, an Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred. *Fitts v. Minnesota Mining & Mfg. Co.*, 581 So.2d 819 (Ala.1991)." *Lifestar Response of Alabama v. Admiral Insurance Co.*, 17 So.3d 200, 213 (Ala. 2009).

Here Ms. Congress contends that New York law should be used by the Court because of a choice of law provision in the PSA:

"Section 11.04. Governing Law. This agreement and the Certificates shall be governed by and construed in accordance with the laws of the State of New York, without regard to the conflict of law principles thereof, other than Sections 5-1401 and 5-1402 of the New York General Obligations Law, and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws."

The plaintiff points out that Ms. Congress is not a party to the PSA and therefore she has no standing to invoke its provisions. The language of the choice of law provision clearly states that it addresses the "obligations, rights and remedies of the *parties* hereunder." Ms. Congress is not a party

to the PSA. If this were a legal dispute between the parties to the PSA, then that dispute would be controlled by New York law. That is not the case before the Court in this litigation.

Ms. Congress did sign the mortgage which provides that it is “governed by federal law and the law of the jurisdiction where the property is located. Since Ms. Congress is not a party to the PSA, she did not agree for this case to be tried under New York substantive law and therefore, the Court will apply Alabama law in this case.

At the trial of the case, Ms. Congress called two expert witnesses from New York to testify about New York securitization practices. Thomas J. Adams is a New York attorney with considerable experience in working with insurers of mortgage-backed securities. Mr. Adams testified that he could not say that U. S. Bank, as Trustee, was the owner of the Note and he concluded that the documents he reviewed did not comply with the PSA. He also objected to the way in which the Note was endorsed.

Ms. Congress also called Ira Mark Bloom, a professor at Albany Law School, as an expert on New York trust and estate law. He testified that New York law holds that when a trustee’s action exceeds its authority, such actions are void. He testified that the way in which the allonge was attached to the Note, by rubber band, violated New York law. Therefore, he concluded that the endorsements were not sufficient to transfer ownership of the Note to U. S. Bank. In his opinion, EMAX, is the current owner of the Note. Bloom agreed that the Note and Mortgage in this case are controlled by Alabama law and that the one who has the Note can sue on the mortgage and that the holder of the note can foreclose.

COULD U. S. BANK FORECLOSE ON THE CONGRESS NOTE?

Ms. Congress contends that the foreclosure was invalid because U.S. Bank lacked the authority to own the Note at the time of the foreclosure. Plaintiff contends that it is not necessary for it to be the “owner” in order to demand payment, but it was the “holder” of the Note and that gave it the right to foreclose.

It is undisputed that the Note is a negotiable instrument under the Alabama version of the U.C.C. It is an unconditional promise to pay a fixed amount, \$104,400.00, to Mortgage Lenders Network USA, Inc., d/b/a Lenders Network or the subsequent holder of the Note. Ala. Code (1975) § 7-3-104(a).

“Holder” is defined at § 7-1-201(21) as, “The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.”

The U.C.C. further provides at Ala. Code (1975) § 7-3-301:

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 7-3-309 or 7-3-418(d). A person may be a person entitled to enforce the instrument *even though the person is not the owner of the instrument* or is in wrongful possession of the instrument.”
(emph.added)

Therefore it is clear that the party entitled to enforce the Note does not have to be the owner of that note. U.S. Bank was the “holder” of the Congress note and therefore it had the legal right to foreclose on the Congress property.

THE ALLONGE

The Note and Allonge are plaintiff's Exhibit # 15. The Note consists of four printed letter sized pages, eight and one-half by eleven. On the fourth page of the Note, there appears the signature of defendant, "Erica Sumpter Congress, Borrower." Just opposite her signature is a stamp: "Pay to the order of: EMAX Financial Group, LLC., without recourse, By: Mortgage Lenders Network USA, Inc, d/b/a Lenders Network, /s/ Tammy Gilson, Operation Manager."

The fifth page of the Exhibit is entitled, "Allonge to Promissory Note." It further states: "For purposes of further endorsement of the following described note, this allonge is affixed and becomes a permanent part of said note." There is a stamp lower on the page which states: "Without recourse pay to the order of Residential Funding Company, LLC., EMAX Financial Group, LLC, By: /s/ John Hagebock; Name: John Hagebock; Title: Assistant Vice President, Residential Funding Company, LLC, as Attorney in Fact for EMAX Financial Group, LLC.

Below that stamp is another stamp which reads: "Pay to the Order of U.S Bank National Association as Trustee; without recourse; Residential Funding Company, LLC; by /s/ Judy Faber, Judy Faber, Vice President."

A copy of the note and allonge are attached to this Final Judgment.

The evidence is undisputed that the Note was signed by Ms. Congress. The Note contained this statement, "I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is

called the 'Note Holder.'" The Lender is identified in Item One of the Note as "Mortgage Lenders Network USA, Inc., d/b/a Lenders Network." Page four of the note shows that the Lender endorsed the Note "Pay to the Order of EMAX Financial Group, LLC., without recourse." The allonge shows that EMAX Financial Group endorsed the note without recourse to Residential Funding Company, LLC. The final endorsement is from Residential Funding Company, LLC, to U. S. Bank National Association as Trustee, again without recourse. This evidence reasonable satisfies the Court that the plaintiff is the holder of the Note.

In addition, in the P.S.A., U. S. Bank acknowledges that it had received the Note and that the it had an unbroken chain of endorsements on it, from Congress, the originator, to the person endorsing it to U. S. Bank.

Ms. Congress says that the signatures on the allonge should not be considered because the separate paper was not properly attached to the note. The Alabama law does not require such an attachment and the rubber band which held it to the note is sufficient.

The first mention of an allonge which this court can locate was in a decision of the Alabama Supreme Court, in *Crutchfield v. Easton*, 13 Ala. 337 (1848): "An endorsement is generally made, by writing the name of him, in whom is vested the legal title to the note or bill, on the back thereof; but an indorsement on the face of the bill, has been held good; and indorsements made on a piece of paper, attached to the bill, called an allonge, are frequent and will pass the legal title to the indorsee." See *Chitty on Bills*, 226; 16 East, 12; *Yarborough v. The Bank of England*."

Ala. Code (1975) § 7-3-204(a) states, “For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.” Earlier versions of the statute contained the language that the paper on which the endorsement appeared must be “firmly affixed” to the note. The current version of the statute became effective in 2005 and the more restrictive language was removed. This indicates to the Court a legislative intent to relax the “firmly affixed” requirement. While this interpretation of the statute could lead to abuses, the important issue is that the endorsement was intended to effect a transfer of the note.

In this case the allonge was attached to the note by means of a rubber band and the instruments were together in a file folder. The court finds that the allonge in this case was adequately “affixed” to the note and that the signature on the allonge constitutes a valid endorsement of the note.

The endorsement on the allonge constitutes a valid transfer to U. S. Bank and is in compliance with the requirements of the PSA. Therefore the note is payable to the plaintiff, U. S. Bank, and it is entitled to enforce the note.

ALLEGATIONS OF FRAUD

Ms. Congress claims that plaintiff has attempted to commit a fraud upon this Court. The allegation is based upon the late production of the allonge to the Note. She says that Defendant had requested all such documents during pre-trial discovery and U. S. Bank did not produce the original note and the allonge until three days prior to trial. Defendant takes this late production of the allonge, along with the fact that the allonge was not adequately affixed

to the Note, as evidence that someone⁴ forged the endorsements which appear on the allonge.

The defendant presented testimony from Chase Greene, an employee of Staples Copy Center. He was not presented as an expert witness, but he testified that it was possible that the signatures on the allonge were fabricated. He said that one signature was digital and that the other signature on the allonge appeared to have been from a rubber stamp. Greene testified that he reached his conclusion because it would have been easy for him to reproduce the allonge with anyone's signature on it.

Congress says that "someone at GMAC or someone acting at the behest of GMAC prepared this allonge and inserted it into the collateral file on the eve of trial in an attempt to defeat Congress' claims." This is obviously a very serious charge and, as such, must be proven by Congress by clear and convincing evidence.

"Clear and convincing evidence" means "evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion." Ala. Code (1975) § 6-11-20(4).

The Alabama Rules of Evidence, Rule 902, provides: Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (9). Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law."

⁴. Congress is clear that she does not accuse plaintiff's counsel of misconduct, but believes that the forgeries were done by GMAC, the loan servicer.

The signatures on the allonge and the note are presumed to be admissible. Ala. Code (1975) § 7-3-308 further provides:

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.

In this case, the signatures are presumed to be valid since this case is not an action to enforce the liability of any purported signer.

The Court has carefully examined the allonge and the endorsement appearing on it. It is clear to the Court that the signatures are either rubber stamps or are digital signatures. Even if the digital signature has been altered to fit in the space, that does not make it invalid.

Ala. Code (1975) § 7-1-201 contains general definitions for terms use in the UCC. Section 7-1-201(37) provides: “‘Signed’ includes using any symbol executed or adopted with present intention to adopt or accept a writing.”

The comments say: “This provision also makes it clear that, as the term ‘signed’ is used in the Uniform Commercial Code, a complete signature is not necessary. The symbol may be printed, stamped or written. It may be by initial or by thumbprint. . . . No catalogue of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing.”

Many of the lawyers' signatures on pleadings and motions and the judges' signatures on judgments and orders are placed on the documents by rubber stamp or, increasingly, by electronic means. The Court agrees with Greene that there is a great potential for wrongdoing under these circumstances and that forgeries are a risk since mechanical or electronic signatures can easily be fabricated. Still, the law is clear that a "signature" may be a word, a mark or symbol. It may be handwritten, typed, printed or made in any other manner, so long as it was made with a present intention to endorse the note. There is no evidence before the Court to the contrary.

There was confusion about the custody of the original file, including the Note and allonge. It was thought to have been in the custody of Wells Fargo in Minneapolis. Wells Fargo was plaintiff's document custodian. The defendant showed that the file was actually in a GMAC document storage facility in Cedar Rapids, Iowa. It became clear that the files had not been kept under laboratory conditions and that there had been an opportunity for the documents to be altered or manipulated.

Upon consideration, the defendant has failed to carry the burden of presenting clear and convincing evidence to rebut the presumption that the signatures on the endorsements were valid.

AMOUNT OF BID AT FORECLOSURE SALE

Congress contends that the price realized at the foreclosure sale was so inconsistent with the value of the property that the deficiency should shock the conscience of the Court.

U. S. Bank bought the property for \$49,600.00. It is claimed that the Fair Market Value was \$61,500.00.

There was no evidence presented as to the Fair Market Value of the Congress property at the time of the foreclosure. Assuming that the fair market value was \$61,500, the bid price of \$49,600 is low, but not so low as to be unconscionable.

AGREEMENT NOT TO FORECLOSE

Ms. Congress claims that some unidentified person at GMAC told her that the foreclosure sale would not go forward because she was working with their loss mitigation department. Ms. Congress could not identify the person she talked to, only some “guy.” There is no evidence to support her testimony. There is no written evidence of such an agreement. Ms. Congress did not communicate with the foreclosure attorney to inform her of the alleged agreement. Under the circumstances, the Court is not reasonably satisfied from the evidence that there was an agreement between Ms. Congress and GMAC to suspend the foreclosure proceedings.

NOTICE OF DEFAULT

There is no evidence that the default notice or the acceleration notice provisions in the mortgage were not complied with. Plaintiffs' Exhibits 5 through 9 are the default letters and they were all mailed to Ms. Congress's residence, to the address set out in the Mortgage. The notice requirements, including publication in the Alabama Messenger, were met.

OTHER ISSUES

Ms. Congress contends that some other trust may attempt to collect her debt. There was a contention that the Congress loan was listed as an asset in another Trust, 2006-EMX9. The evidence shows that this was merely a preliminary document and there is no evidence that any trust other than the one named as the plaintiff in this case, has an interest in the mortgage loan before the Court. Ms. Congress testified that she has heard from no one else about this debt. There is no evidence that anyone other than the Trust named in this case, through the Trustee, U. S. Bank, owns any interest in the Note. In the remote possibility that some other entity should someday claim an interest in the Note, such a claim could be thwarted by the Judgment in this case.

Ms. Congress contends that her mortgage loan was not a part of the Trust because it was not transferred prior to the Trust closing date. The evidence is that each mortgage loan listed on the Mortgage Loan Schedule was transferred into the Trust no later than March 12, 2007. The Congress loan was included. It is clear that Ms. Congress mortgage was conveyed to the Trust administered by the plaintiff, U. S. Bank.

CONCLUSION

Congress has done an excellent job in questioning every aspect of the plaintiff's claim. In summary, this Court finds that the plaintiff, U. S. Bank, as Trustee of that certain pooling and servicing agreement, Series #2007-EMX1, Pool #40896, proved the elements for ejection. The defendant has failed to satisfy her several affirmative defenses to the ejection action. Alabama substantive law applies to the transactions addressed in this case.

The plaintiff legally foreclosed on Ms. Congress's residence. U. S. Bank, through its agent, Wells Fargo, had physical possession of the Note at the time of the foreclosure. The endorsements on the Note, along with the allonge, show the transfers from the date the Note was executed by Ms. Congress and ultimately to U. S. Bank. There was no evidence that fraud was committed upon this Court. The notice of foreclosure and acceleration was adequate. The bid at the foreclosure sale was not so low as to require the Court to set it aside. The loan was transferred to the plaintiff within the time allowed by law. Counsel for the plaintiff complied with the statutory requirements for foreclosure.

Laying sympathy aside, the truth of the case is that Ms. Congress borrowed \$104,400.00 and put up her residence as security for the repayment of the loan. She failed to make the required payments. Plaintiff is entitled to possession of the security in lieu of repayment of the debt.

The plaintiff, U. S. Bank, has carried its burden of proof. The defendant has failed to carry her burden of proof as to her affirmative defenses.

FINAL JUDGMENT

Upon consideration, it is **Ordered and Adjudged** as follows:

1. Final Judgment is hereby entered in favor of the plaintiff, U. S. Bank, as Trustee of that certain pooling and servicing agreement, Series #2007-EMX1, Pool #40896, and against the defendant, Erica Sumpter Congress, regarding possession of the property described below.

2. Possession of the real property described herein, is hereby awarded to the plaintiff, U. S. Bank, and any lawful sheriff of the Jefferson County is hereby ordered to restore possession of the real property to U. S. Bank.:

Lot 2, according to the amended map of Third Addition to Morningside, as same is recorded in the Office of the Judge of Probate of Jefferson County, Alabama, in Map Book 52, page 97.

The address of said property is **414 23rd Avenue Northeast, Birmingham Jefferson County, Alabama 35215.**

3. Because of her failure to vacate the property, she has forfeited her right of redemption.

4. All claims against the defendant, Henrietta Jackson are dismissed.

5. Costs are taxed to the defendant.

Done and ordered, this the 22nd day of February, 2011.



J. SCOTT VOWELL, PRESIDING JUDGE