

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

**KINGMAN HOLDINGS L.L.C**

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**Plaintiff,**

**v.**

**Case No. 4:11-cv-00033**

**BANK OF AMERICA, N.A.**

**Defendant.**

**BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF MOTION TO DISMISS**

Relying on an outdated and incorrect legal standard, Kingman invites this court to ignore judicially noticeable facts that contradict Kingman's allegations so it can pursue its meritless claims. The court should resist Kingman's invitation and dismiss the action with prejudice.

**A. Kingman's Defense of Its Claims Concerning the Validity of BANA's Lien Is as Meritless as the Underlying Claim.**

Kingman spends an inordinate amount of time arguing a point of lesser importance: that it is *capable* of stating a declaratory judgment claim.<sup>1</sup> Kingman provides no meaningful response, however, to BANA's arguments as to why Kingman's claim fails even if the court concludes Kingman has stated a claim under the Declaratory Judgments Act or to quiet or try title. Kingman instead attempts to avoid the inconvenience of facing BANA's *legal* arguments

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<sup>1</sup> The point is wholly without merit. The point of Kingman's suit is not to determine the priority of two competing liens, *but see* Response at 12, especially since Kingman concedes that it has no lien, *id.* Kingman's petition shows its purpose is to remove "a cloud upon the title to the Property now rightfully owned by Plaintiff." And one cannot use the Declaratory Judgment Act to adjudicate issue of title. *See, e.g., Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 117 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). On its face, *Kennesaw* applied to more than a mere issue of attorney's fees. The issue in *Kennesaw* was whether "the trial court abused its discretion in using the Declaratory Judgments Act to settle a title dispute and to order appellant to pay attorney's fees." *Id.* at 117. The court answered that issue—the whole issue—in the affirmative. *Id.* at 118.

by arguing that (1) the court must assume all of Kingman's contentions are true, and (2) the court is precluded from considering some of the attachments to BANA's motion—the ones that show Kingman's petition has no merit—because such attachments are not incorporated into Kingman's petition. Neither argument has merit.

First, the Supreme Court officially retired the "no set of facts" standard Kingman applies in its response.<sup>2</sup> See *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1968–69 (2007). And although Kingman correctly argues that the court must take all well-pleaded allegations as true, that standard does not help Kingman avoid dismissal. Well-pleaded facts are assumed true. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008). Legal conclusions masquerading as facts aren't. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002). And here, as BANA pointed out in its motion, Kingman's claims rest on several layers of legal conclusions.

Kingman's claim that BANA's lien is invalid or inferior is based on a general legal conclusion—that BANA never obtained a first lien on the property and was wiped out by the association's sale<sup>3</sup>—which is comprised on several other legal conclusions: (1) that despite the recorded release of lien executed by Mortgage Electronic Registration Systems, Inc. ("MERS"), the prior lien holder never executed a valid release of lien; (2) that the recorded release of lien MERS executed was invalid because MERS lacked authority to execute the release; (3) that the association's foreclosure extinguished BANA's lien because the association's lien was superior to BANA's lien.<sup>4</sup> Accordingly, because the of conclusory nature of these allegations, they cannot be presumed true and are susceptible to attack for the *legal* reasons explained in BANA's motion.

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<sup>2</sup> Resp. to Motion to Dismiss, Docket Entry No. 9, at 6.

<sup>3</sup> Pl. Orig. Pet. ¶¶ 24.

<sup>4</sup> *Id.* ¶¶ 8–11, 22–24.

Second, there is no merit to Kingman's "objections" to BANA's attachment of Exhibits 1 and 2 to its motion to dismiss. Kingman's own allegations show Exhibit 1, the First Deed of Trust, is central to Kingman's claims. *See Scanlan v. Tex. A & M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). At bottom, Kingman's claim concerning the superiority of its title rests mainly on whether MERS had authority to release the lien the First Deed of Trust secured.<sup>5</sup> And MERS' authority to release the lien, if any, is determined by the provisions of the First Deed of Trust. So how why the First Deed of Trust is not central to Kingman's claim remains to be seen.

Under the First Deed of Trust's plain language MERS had authority to release the lien to BANA,<sup>6</sup> meaning BANA's lien was superior to lien the association foreclosed, and thus Kingman's interest. Kingman musters no argument to the contrary.<sup>7</sup>

Nor does Kingman dispute that its interest would be subordinate to BANA's lien even if MERS' release of lien were invalid and BANA held a second lien. Kingman instead argues the court cannot consider Exhibit 2 (the Sunset Pointe Covenants and Restrictions), which defines the priority of the association's lien and Kingman's interest in the property.<sup>8</sup> But there is no merit to this argument. The court may take judicial notice of the undisputed content of publicly filed documents. *See, e.g., Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017–18 (5th Cir. 1996); *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994). What is more, the court is not required to presume as true allegations that contradict matters subject to judicial notice. *See Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002).

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<sup>5</sup> *See id.*

<sup>6</sup> Motion to Dismiss, **Ex. 1**, First Deed of Trust at p. 2.

<sup>7</sup> Kingman's argument concerning the redactions appearing in the First Deed of Trust attached to BANA's Motion to Dismiss are beyond frivolous. The explanation for the redactions is quite simple: the Federal Rules of Civil Procedure require it. *See, e.g., Fed. R. Civ. P. 5.2.*

<sup>8</sup> Motion to Dismiss, **Ex. 2**, ¶ 4.12(b).

Exhibit 2 is a publicly filed document, as acknowledged by the stamp appearing on the exhibit's last page.<sup>9</sup> And Kingman disputes none of its contents. The court may therefore take judicial notice of the fact that any lien the association foreclosed was subordinate to BANA's lien, regardless of its priority. *See Cinel*, 15 F.3d at 1343 n.6.

More importantly, Kingman makes no real effort to refute BANA's argument that even if the court ignores Exhibit 2, and assumes the association's lien could trump BANA's lien, the claim would still fail because—as Kingman's own allegations show<sup>10</sup>—the association's lien attached well after BANA's lien arose. Kingman's response therefore does little, if anything, to refute the conclusion that Kingman's effort to invalidate BANA's lien is legally meritless.

**B. There Is No Justiciable Controversy as to Whether Kingman Has an Equitable Right of Redeem.**

Kingman's petition seeks merely a declaration that Kingman has an equitable right to redeem, not to enforce such a right.<sup>11</sup> BANA concedes Kingman has that right.<sup>12</sup> So why there is a justiciable controversy remains to be seen. *Cf. Paulsen v. Tex. Equal Access to Justice Found.*, 23 S.W.3d 42, 46–47 (Tex. App.—Austin 1999, pet. denied).

If Kingman wants to bring a claim to *enforce* this right it is welcome to do so, and then plead the facts necessary to enforce that right, namely Kingman's ability to pay off BANA's lien. *See, e.g., Scott v. Schneider Estate Trust*, 783 S.W.2d 26, 28 (Tex. App.—Austin 1990, no writ). But Kingman hasn't raised such a claim or pleaded such facts *in its petition*. And allegations not made in Kingman's pleadings may not be considered to defeat a motion to dismiss. *See, e.g.,*

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<sup>9</sup> *Id.*

<sup>10</sup> Pl. Orig. Pet. ¶¶ 9–14.

<sup>11</sup> *Id.* ¶¶ 15–19.

<sup>12</sup> Motion to Dismiss at 10.

*Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (holding allegations made outside the complaint are not considered when determining whether a plaintiff stated a claim).

### CONCLUSION

Kingman makes no effort to explain why its claim as to the validity of BANA's lien have merit even if its several erroneous legal conclusions are assumed at true. Kingman's silence is a tacit concession that no matter the priority of BANA's lien, Kingman purchased its interest in the property subject to that lien and cannot now avoid paying BANA based on legally meritless assumptions. Moreover, Kingman's claim for a declaration establishing rights the law already recognizes—the equitable right to pay BANA the full amount of its lien, plus the costs of foreclosure—is not justiciable, as neither party disagrees that Kingman has such a right. BANA's motion should therefore be granted.

Dated: March 28, 2011

Respectfully submitted,

/s/ Joshua J. Bennett

C. Charles Townsend, SBN: 24028053  
Michael J. McKleroy, Jr., SBN: 24000095  
Joshua J. Bennett, SBN: 24059444  
AKERMAN SENTERFITT, LLP  
Plaza of the Americas, Suite S1900  
600 North Pearl Street  
Dallas, Texas 75201  
Telephone: 214.720.4300  
Facsimile: 214.981.9339

**ATTORNEYS FOR DEFENDANT  
BANK OF AMERICA, N.A.**

