IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 09-20548-CI-13

DEUTSCHE BANK NATIONAL TRUST COMPANY F/K/A BANKERS TRUST COMPANY OF CALIFORNIA, N.A., AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF MAY 1, 2001, MORGAN STANLEY DEAN WITTER CAPITAL, INC.,

Plaintiff,

Vs.

DONNIE J. DECKER, et al,

Defendants.
_____/

ORDER DISMISSING FIRST AMENDED COMPLAINT

THIS CAUSE came before the court upon the Defendant's Motion to Dismiss the First Amended Complaint for Foreclosure. The court heard arguments by counsel for both the Plaintiff Bank and Defendant Homeowner and now finds,

After the initial complaint was dismissed by this court the Plaintiff filed an amended pleading. The new complaint has eliminated some of the problems yet there are still deficiencies in its form and content.

The court notes that although the case started in 2009 the present complaint was filed after the Florida Supreme Court amended the rules to require verified complaints in all residential mortgage foreclosure cases. Plaintiff's counsel urges this court to allow the amended complaint to "relate back" to the initial filing date so that these new procedural verification requirements would not apply. As an alternative argument counsel asserts the February 11, 2010

opinion of the Supreme Court was "not final" until a subsequent rehearing date. The court has reviewed these arguments and finds the verification requirement is effective as of February 11, 2010. The court further finds there is no relation back theory which avoids the new rule.

In addition, the undersigned concludes that any verification of a foreclosure complaint must be in conformity with F.S. 92.525 as construed by Muss v. Lennar Florida Partners, 673 So.2d 84 (Fla. 4th DCA 1996). Because of this the court will reject verifications based on "information and belief" or using language indicating the declaration is only true and correct "to the best of my knowledge and belief". The undersigned judge also will reject a verified foreclosure complaint if it is demonstrated that the person who verified it is counsel of record or an employee of the law firm. The Supreme Court clearly indicates in its opinion that one of the primary purposes of the rule change is to have the Plaintiff appropriately investigate and verify its allegations. An attorney should not become a witness substituting for these essential client verifications.

With regard to the ongoing factual pleading problems in this cause, the mere allegation that the Plaintiff owns the note by virtue of an "equitable" assignment that occurred "prior to the filing of this complaint" is insufficient. In the initial complaint it was asserted that the original note was lost. A copy of a note was attached to the original complaint naming Maxwell Mortgage, Inc. as the lender but there was no assignment, allonge or other documentary evidence showing a chain of ownership leading to the present Plaintiff Deutsche Bank. These matters were discussed with counsel at the first dismissal hearing and the Plaintiff's lawyer said a written assignment would be filed with their planned amended pleading.

The amended complaint does eliminate the lost note allegations and includes a copy of a "new" assignment. This assignment is from New Century Mortgage Corporation to the Plaintiff

and coupled with another assignment attached to the complaint it supports the ownership chain. However, there remain two concerns.

The first is related to evidence that the Plaintiff had standing at the time the original complaint was initially filed. The "new" assignment does not solve this problem because it was executed on February 17, 2010 and thus does not demonstrate standing in 2009. The Plaintiffs lack of standing at the start of the case is not a defect that can be cured by the acquisition of standing after the case is filed. Progressive Exp. Ins. V. McGrath Community Chiropractic, 913 So.2d 1281, (Fla.2nd DCA 2005). If the Plaintiff fails to show that they owned the note before the lawsuit was filed they will need to commence a new action with a new filing fee and new original complaint. See: Marianna & B.R. Co. v. Maund, 56 So. 760 (Fla. 1911) and Jeff-Ray Corp. v. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990).

The court agrees that there can be circumstances presented which show an equitable transfer occurred prior to the filing date and that evidence of same would establish standing even absent any formal written assignment. The most often cited cases supporting this proposition are WM Specialty Mortgage, LLC v. Salomon, 874 So.2d 680 (Fla. 4th DCA 2004) and Johns v. Gillian, 184 So. 140 (Fla. 1938).

While these cases clearly provide that a purported owner of a debt can pursue his or her claim based upon an "equitable" transfer or an "equitable" interest neither case even remotely suggests that simply pleading these phrases is sufficient. The fact is that in the vast majority of foreclosure cases there will be documents that evidence the ownership of the note being transferred. It is the exceptional case where an owner will need to resort to proof of circumstances to support this essential element of the claim. Documentary evidence of the transfer of ownership is particularly important where the valuable asset, the note, happens to be a

negotiable instrument. This is true because the law controls who can enforce such instruments. See: F.S. 673.3011 as well as, Taylor v. Deutsche Bank Nat. Trust Co., 2010 WL 3056612 (5th DCA 2010) and BAC Funding Consortium, Inc. v. Jean-Jacques, 28 So.3d 536 (2nd DCA 2010).

It is also critical to remember that where there are documents attached to the complaint (such as a note naming a lender other than the present purported owner, or an assignment that indicates a transfer to the plaintiff after filing) the documents control over the allegations to the extent they are inconsistent. See Fladell v. Palm Beach County Canvassing Bd. 772 So.2d 1240 (Fla. 2000). In this case the 2010 assignment represents the fact that the Plaintiff acquired the note after the action was commenced. The bald assertion of equitable ownership seems inconsistent particularly when the Plaintiff did not even have possession of the original note at the time of the initial filing, as evidenced by their previously plead lost note allegations.

Lawyers for lenders regularly argue that at a motion to dismiss hearing their allegations must be taken as true, suggesting it is enough to simply claim equitable ownership or transfer. These arguments miss the point. The rule is that all "well plead" allegations must be accepted. Winseman v. Travelodge Corp., 205 So.2d 315 (Fla. 2nd DCA 1967). In this regard it is clear that Florida is a fact pleading state. See: Deloitte & Touche v. Gencor Industries, Inc., 929 So.l2d 678 (Fla. 5th DCA 2006) where the opinion stated, "As we wearily continue to point out, Florida is a fact-pleading jurisdiction not a notice-pleading jurisdiction". Thus, it is insufficient to simply claim some unspecified equitable circumstances exist and to expect a defendant or the court to find the pleading adequate.

The undersigned judge believes that assertions of "equitable ownership", "equitable title" or "equitable transfer" are mere conclusions and do not constitute well plead ultimate facts sufficient to overcome a motion to dismiss. Equitable claims, like assertions of fraud, are based

upon very specific factual circumstances arising in each case. Examples of the unusual occurrences that might support equitable ownership of a note can be found in both Wm. Specialty Mortgage and Johns v. Gillian cases cited above.

Therefore, if a plaintiff in a note or foreclosure action finds it necessary to resort to an equitable claim in order to establish either ownership or standing the complaint must contain specific facts supporting such a conclusion. If the allegations fail to include sufficient particulars regarding the time, place and manner the ownership claim came about, then the complaint must be dismissed.

The court mentioned that there remained two "factual pleading" problems of which the equitable ownership was the first. The second problem is related to the ownership issue but is focused on the validity of the newly obtained assignment. At the hearing Defendant's counsel indicated concerns regarding this document based upon his assertion that the 2010 assignment was from a company that went bankrupt years ago.

An examination of this new assignment (which was attached to the amended complaint as an exhibit to support the Plaintiff's ownership claim) reveals the following:

1. It purports to assign the Decker's mortgage from New Century Mortgage Corporation to the Plaintiff Deutsche Bank.

2. It was executed on February 17, 2010 by Scott Anderson who is signing in his capacity as an Executive Vice President of Residential Loan Servicing for Ocwen Loan Servicing, LLC.

3. The assignment appears to be by Ocwen through its authority as an "Attorney-in-Fact" for New Century Mortgage Corporation.

4. There is a reference under the signature to a POA recorded on January 9, 2007 in Book 15575 at Page 451 (in some unspecific record somewhere).

There is nothing about this assignment which would support a determination at the pleading stage that it is invalid. On the other hand, should evidence be presented at a summary judgment hearing that New Century Mortgage Corporation, LLC became the subject of a bankruptcy proceeding which resulted in a liquidation order, the validity of this assignment would be called into question. Then, absent specific proof that Ocwen had authority from either the bankruptcy court or the liquidation trustee, this disposition of New Century's (the debtor in bankruptcy) asset there would be a disputed material fact precluding a summary judgment. These concerns however are not ripe at this time and unlike the standing issue addressed above, cannot form part of the basis for a dismissal.

Therefore, the Motion to Dismiss is granted. The First Amended Complaint for Foreclosure filed on June 28, 2010 is hereby DISMISSED without prejudice. The Plaintiff may file a Second Amended Complaint in this action or may elect to take a voluntary dismissal and avoid the standing issues by filing a new action after paying a new filing fee.

The court hereby places the Plaintiff and Plaintiff's counsel on notice that any complaint filed in this cause shall be verified as required by In Re: AMENDMENTS TO THE RUILES OF CIVIL PROCEDURE, 2010 WL 455295 (Fla. 2010), F.S. 92.525 and Muss v. Lennar Florida Partners, 673 So.2d 84 (Fla. 4th DCA 1996). If it is thereafter determined that the verification was not based upon an appropriate investigation or that the allegations were false, the Plaintiff and the person who signs the verified complaint will be subject to sanctions which may include; dismissal of the action with prejudice, assessment of fees and costs, monetary or

incarcerative sanctions and referral to the State Attorney for prosecution pursuant to F.S. 837.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this _____ day of October, 2010.

ORIGINAL SIGNED
OCT 21 2010
JUDGE ANTHONY RONDOLINO

ANTHONY RONDOLINO, Circuit Judge

Copy furnished to:

Alan Schwartzeid, Esq.
Mark P. Stopa, Esq.