DAVID A. DEMERS
Senior Circuit Court Judge
545 First Avenue North, Room 312
St. Petersburg FL 33701
(727-582-7734)

September 27, 2016

Heather L. Fesnak, Esq
401 E. Jackson Street, Suite 1700
Tampa, FL 33602-5250

Michael P. Fuino, Esq
250 Mirror Lake Drive North
St. Petersburg, FL 33701

William P. Heller, Esq
Las Olas Centre II, Suite 1600
350 East Las Olas Blvd.,
Fort Lauderdale, FL 33301-2229

Re: Nationstar Mortgage LLC v. Sidney Pinho, et. al,
Pinellas County, Florida, Case No. 09-001248-CI

Counselors:

I have carefully reviewed all the written submissions, exhibits, and transcript and I am now ready to rule. At the conclusion of the final hearing in the above-styled cause, I was convinced that Plaintiff had proven by a preponderance of the evidence all the necessary elements to entitle it to a foreclosure judgment, except for standing. The problem that I had was the complexity arising from multiple transactions from the very beginning of the loan. Accordingly, I requested written submissions on standing.

The original Plaintiff was Aurora Lending Services. After the complaint was filed, Nationstar was substituted as the plaintiff. Thus, to prevail, Nationstar must prove that Aurora had standing at the time the complaint was filed and Nationstar had standing at the time of the Final Hearing. *Creadon v. U.S.Bank, N.A.*, 166 So.3d 952 (Fla. 2d DCA 2015).

Preliminarily, the court addresses the issue of the tale of two Auroras. During the trial an issue arose as to whether Aurora Loan Services, Inc. was in fact the same as Aurora Loan Services, LLC. The Plaintiff's only witness had

extensive experience with both Auroras and with Nationstar and she testified that the two Auroras were the same company. Defendant argued that such evidence was insufficient based on *Segall v. Wachovia Bank, N.A.*, 192 So.3d 1241 (Fla. 4th DCA 2016), dealing with mergers. Defendant's reliance on that authority is misplaced because there the court found that the evidence was insufficient to show that the involved merger encompassed the mortgage and note in dispute. The court observed that mergers may involve a variety of property exchanges and may or may not include documents in dispute. And in *Segall*, the testimony of the witness was insufficient to show that the mortgage and note was included in that merger. In the case at bar, there is no such issue. Nothing involves an exchange of property or the absorption of two companies into a new legal entity. Here the issue is whether the two companies are in fact the same and the witness had sufficient knowledge of the companies to establish that they were. So when the court refers to Aurora, I am referring to the original Plaintiff.

In an effort to establish that Aurora had standing at the time the original complaint was filed, Nationstar takes two paths. First, it attempts to show that Aurora secured the note and mortgage by assignment from the original lender. That position cannot succeed. It is true that MERS, as nominee for Lehman Brothers, assigned its interest to Aurora in 2009, but at that time Lehman Brothers had no interest; therefore, Aurora received nothing. That is so because long before that assignment, Lehman Brothers had already transferred its interest to Lehman Brothers Holding and ultimately into a trust. Thus, Lehman Brothers had nothing to transfer; consequently, its nominee had nothing to transfer and Nationstar cannot establish Aurora's standing that way.

The second path Nationstar travels is through the trust. The note and mortgage involved in this case were securitized by the creation of a pooling and servicing agreement, which is in evidence. While the agreement is not signed, the evidence is convincing that it is trustworthy and accurately states the terms of the agreement. Indeed, Defendant doesn't argue otherwise. The evidence establishes that Aurora became the servicer of the note and mortgage pursuant to a transaction with the trustee of the Pooling and Servicing agreement, J.P. Morgan. While it is true that Aurora had to be authorized to pursue this action, *Elston/Leetsdale, LLC v. CW Capital Asset Mgmt.* LLC, 87 So.3d 14 (Fla. 4th DCA 2012), the Pooling and Servicing Agreement provided that authorization. That transpired before the filing of the complaint in this cause. Thus, the court finds that Aurora had standing at the time the complaint was filed.

But Aurora's motion to substitute Nationstar as the Plaintiff was granted. Nationstar does not claim standing at the time the complaint was filed, but it claims standing at the time of the Final Hearing. It relies on two things in support of this contention. First, it received a limited power of attorney from Bank of New York as a successor trustee. The court finds that the evidence is insufficient to establish that Bank of New York was a successor trustee. The only thing that supports that contention is Exhibit 5, which on its face is ambiguous at best.

Plaintiff attempts to resolve that ambiguity by testimony as to a code that is used with that exhibit, but that is unclear and totally unconvincing. Of equal importance is the requirement in the Pooling and Servicing Agreement that any successor trustees be named in writing or by court order. There is no evidence of any such writing or court order.

Second, Plaintiff argues that it is in possession of the note. But the note was filed with the clerk before Plaintiff was substituted. In *Geweye v. Ventures Trust*, 189 So.3d 231 (Fla. 2d DCA 2016), the court held that substitution does not establish possession or standing and when the note is filed with the clerk, the substituted party is not in possession. Plaintiff attempts to distinguish that case by arguing that the court did not consider the claim of constructive possession and here Plaintiff has constructive possession. This is based on the proposition that the clerk is serving as an agent for Plaintiff who actually controls the filed note. That is a legal construct without any basis in law or evidence. The clerk is not an agent for the Plaintiff and once filed, the note is legally and factually under the control of the court and the clerk. Accordingly, the Plaintiff has failed to establish standing at the time of the Final Hearing and cannot prevail.

Based on these findings and conclusions, the court finds that this cause should be involuntarily dismissed without prejudice. Counsel for Defendant is directed to prepare the order for this court's signature and provide the original, sufficient copies, and envelopes to Judge Mark Shames' judicial assistant at the address listed on this letterhead. The order should be accompanied by a cover letter copied to opposing counsel assuring the court that there is no objection to the form of the order or advising the Court of any objection.

This letter may be treated as the court's findings and conclusions and may be incorporated by reference in the court's order. It will be filed with the clerk. Thank you for your assistance.

Sincerely,

David A. Demers
Senior Circuit Judge

cc: Court file