



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Deutsche Bank National Trust :
Company, as trustee for the registered : No. 26, 2014
holders of Morgan Stanley ABE :
Capital I Inc., trust 2007-NC# : Court Below:
mortgage pass-through certificates, :
series 2007-NC3, assignee of : Superior Court of the
Deutsche Bank Trust Company : State of Delaware, in and
Americas, f/k/a Bankers Trust : for New Castle County
Company, as trustee and custodian : (C.A. No. N11L-03-097-ALR)
for Morgan Stanley MSAC 2007- :
NC3, assignee of Mortgage :
Electronic Registration Systems, Inc., :
as nominee for New Century :
Mortgage Corporation, :
: :
: :
Plaintiff-Below, :
Appellant, :
: :
v. :
: :
Eugene Moss, :
: :
Defendant-Below, :
Appellee. :
: :
:

[SECOND CORRECTED] APPELLANT'S OPENING BRIEF

Dated: March 6, 2014

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NATURE OF PROCEEDINGS

The Defendant below, Appellee Eugene Moss (“Moss”), owns residential real property located at 210 Porky Oliver Drive, Middletown, Delaware 19709 (“Property”). Docket Item 62 at 1.¹ On January 10, 2007, Moss executed a note in favor of New Century Mortgage Corporation for the original principal amount of \$369,000.00 (“Note”). A336. On the same date, Moss executed and delivered a mortgage on the Property (as more fully described below, “Mortgage”) as security for the Note. A014-A036.

On March 9, 2011, as a result of certain payments defaults by Moss, the Plaintiff below, Appellant Deutsche Bank National Trust Company, as Trustee for the Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2007-NC3 Mortgage Pass-Through Certificates Series 2007-NC3 (“Deutsche Bank”) sought to foreclose on the Mortgage by filing a Complaint (“Complaint”) in the Superior Court of the State of Delaware in and for New Castle County (“Superior Court”). DI 1.

Moss answered the Complaint on April 12, 2011 (as subsequently amended, “Answer”). DI 5. Moss amended the Answer on April 18 and June 17, 2011. DI 6; DI 8. In the second amended Answer, Moss asserted counterclaims against

¹ All further references to the record below are made as “DI” followed by the appropriate docket item and page number. References to Appellant’s Appendix are made as “A” followed by the appropriate page number.

Deutsche Bank for collateral estoppel, breach of contract, common law fraud, equitable fraud, and alleged violations of the Fair Debt Collection Practices Act (collectively, “Counterclaims”). DI 8 at 2. Deutsche Bank answered the Counterclaims on July 7, 2011. DI 9.

On October 17, 2011, Moss moved for summary judgment (“First Summary Judgment Motion”). DI 12. Deutsche Bank responded to the First Summary Judgment Motion on January 4, 2012.² DI 41. Following a hearing, on May 16, 2012, the Superior Court entered an Order denying the First Summary Judgment Motion. DI 56.

On August 14, 2013, Moss filed a second motion for summary judgment (“Second Summary Judgment Motion”). DI 62. Deutsche Bank responded to the Second Summary Judgment Motion on September 24, 2013. DI 77. Moss filed a reply in support of the Second Summary Judgment Motion on September 24, 2013. DI 84. The Superior Court held a hearing on the Second Summary Judgment Motion on November 13, 2013. DI 89. Following the November 13, 2013 hearing, and at the invitation of the Superior Court, Deutsche Bank submitted a supplemental response to the Second Summary Judgment Motion on December 12, 2012. DI 90.

² Moss amended the First Summary Judgment Motion on May 8, 2012. DI 44. Deutsche Bank filed a response to the amended motion on May 9, 2012. DI 52.

On December 18, 2013, the Superior Court entered an Order granting the Second Summary Judgment Motion (“Summary Judgment Order”). DI 91. On December 23, 2013, Deutsche Bank filed a motion for reargument under Superior Court Rule 59(e) (“Reargument Motion”). DI 92. On December 30, 2013, the Superior Court entered an order denying Deutsche Bank’s Reargument Motion (“Reargument Order”). DI 93.

Deutsche Bank timely filed a Notice of Appeal of the Summary Judgment Order and the Reargument Order on January 16, 2014.

SUMMARY OF ARGUMENT

1. The Superior Court erred in granting summary judgment because it should not have allowed Moss to challenge the validity of the assignments from MERS to Deutsche Bank. Moss is not a party to, nor a third-party beneficiary of, the assignments. The assignments under attack were signed and notarized and are, therefore, valid and effective under 25 Del. C. § 2109(a). Only persons who are parties to, or third-party beneficiaries under, a contract have rights relating to the contract. Delaware courts have expressly held that a mortgagee lacks standing to challenge the validity of an assignment of a mortgage by a mortgagor, as the mortgagee is not a party to the assignment. Here, Moss failed to present any evidence that he was a party to or an intended beneficiary of any of the assignments.

2. The Superior Court erred in granting summary judgment because Moss admitted to the validity of the First Assignment and Deutsche Bank's standing to enforce the Mortgage. Moss even requested that the Superior Court enforce the parties' prior loan modification agreement against Deutsche Bank. Statements made in court documents are judicial admissions. Judicial admissions are conclusive and binding both upon the party against whom they operate, and upon the court. Thus, Moss's admission in his prior pleadings that he and Deutsche Bank agreed to modify the Mortgage removed the issue of whether

Deutsche Bank had standing to enforce the Mortgage from determination by the Superior Court.

3. The Superior Court erred in granting summary judgment because in doing so it imposed on Deutsche Bank an obligation that is not required under Delaware law: that it establish that it owned the Note before it could foreclose. An action based upon a *scire facias sur* mortgage is founded upon matters of record. Here, such a record is a mortgage and is an *in rem* action. The Superior Court should not have required Deutsche Bank to prove ownership of the Note.

4. The Superior Court erred in granting summary judgment because it ignored the evidence that MERS, as the nominee of New Century and its successor and assigns, had the authority to assign the Mortgage to Deutsche Bank. On April 23, 2007, the Bankruptcy Court entered an order approving the sale of all of New Century's mortgage servicing business pursuant to Sections 105, 363 and 365 of the Bankruptcy Code. Moss agrees, and it is thus undisputed, that the Mortgage was one of the mortgages that New Century sold in the sale of its loan servicing business. However, whether the beneficial rights under the Mortgage were transferred at that time is irrelevant. The Mortgage authorized MERS to act for New Century, its successors and assigns. The Superior Court ignored the evidence of this authorization, which was expressly stated in the Mortgage. This Court and other Delaware courts have expressly upheld mortgage assignments by MERS.

Moreover, courts have routinely upheld assignments by MERS even while the lender was subject to the jurisdiction of the bankruptcy court. Moss failed to cite any evidence or any legal authority suggesting that a MERS assignment is to be treated differently than any other assignment in Delaware.

STATEMENT OF FACTS

I. THE MORTGAGE

As described above, Moss owns residential real property located at 210 Porky Oliver Drive, Middletown, Delaware 19709 (defined above as "Property"). DI 62 at 1. On January 10, 2007, Moss executed and delivered the Mortgage with Mortgage Electronic Registration Systems ("MERS") as nominee for New Century Mortgage Corporation ("New Century"). *Id.* The Mortgage authorized MERS to act for the lender as follows:

(C) "MERS" is a Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successor and assigns. MERS is the mortgagee under this Security Instrument.

A015. Page three (3) of the Mortgage states:

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to the Lender: (i) the repayment of the Loan, and all renewals, extensions and modification of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successor and assigns of MERS the following described property located in this County of New Castle

A017.

The Mortgage was recorded in the office of the Recorder Of Deeds of New Castle County as Instrument Number 2007-0010804 on January 31, 2007. A015.

Moss breached the terms of the Mortgage by failing to make payments thereon since September 1, 2009. DI 1 at 1; A135.

II. NEW CENTURY'S BANKRUPTCY AND ASSIGNMENT OF THE MORTGAGE

On April 2, 2007, less than three months after the Mortgage was originally recorded, New Century, together with certain of its affiliates, filed a voluntary petition under chapter 11 of Title 11 United States Code §§ 101 *et seq.* (“Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (“Bankruptcy Court”).³ A314. On that same date, New Century stopped originating loans. *Id.*

On April 23, 2007, the Bankruptcy Court entered an Order approving the sale of New Century's loan servicing business to Carrington Capital Management, LLC and Carrington Mortgage Services, LLC (collectively, “Carrington”), pursuant to Sections 105, 363 and 365 of the Bankruptcy Code (“Sale Order”).⁴

³ An order directing the joint administration of the affiliated New Century debtors was entered on April 3, 2007. A422-A428. The jointly administered New Century bankruptcy proceeding is styled *In re New Century TRS Holdings, Inc.*, et al., Case No. 07-10416. *Id.*

⁴ The Order was entitled *Order Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure Approving (i) the Sale of Debtors' Servicing Business to Carrington Capital Management, LLC and Carrington Mortgage Services, LLC Pursuant to the Second Amended and Restate Asset Purchase Agreement, Dated as of May 21, 2007, Free and Clear of Liens, Claim, Encumbrances, and Interests, (ii) the Assumption and Assignment of Certain Executory Contracts and Unexpired*

Id.; A422-A428. This sale closed on June 29, 2007. *Id.* Moss agrees that the Mortgage was one of the mortgages that New Century sold in the sale of its loan servicing business. A314. After New Century's loan servicing business was acquired by Carrington, the beneficial interest in the Mortgage was assigned by MERS acting as nominee for New Century's successors and assigns. DI 1 at 2; DI 62 at 2. On January 17, 2008, MERS, acting as nominee on behalf of Carrington, as the successor and assign of New Century, executed an assignment of mortgage in favor of Deutsche Bank Trust Company Americas, f/k/a Banker's Trust Company, as Trustee and Custodian for Morgan Stanley, MSAC 2007-NC3 by Saxon Mortgage Services Inc., f/k/a Meritech Mortgage Services ("First Assignee"), as its attorney-in-fact its successor and assigns ("First Assignment"). A041-A042.

The First Assignment was signed on January 17, 2008, and recorded in the office of the Recorder of Deeds of New Castle County as Instrument Number 20080206-000730 on February 5, 2008. *Id.* On April 1, 2010, the First Assignee, assigned the Mortgage to Deutsche Bank ("Second Assignment). A043-A045. The Second Assignment was recorded in the office of the Recorder of Deeds of

Leases to Carrington as Part of Such Sale, and is listed on the Bankruptcy Court's docket in Case No. 07-10416 at docket number 844. A422-A428.

New Castle County as Instrument Number 20100413-0017712 on April 13, 2010. A043.

III. THE FORECLOSURE ACTION

On March 9, 2011, as a result of certain payment defaults by Moss, Deutsche Bank sought to foreclose on the Mortgage by filing the Complaint. DI 1. In his Answer, Moss admitted to execution of the Mortgage, and a loan modification agreement entered in 2009 with Deutsche Bank (“Modification Agreement”). A051. In his first amended Answer, Moss again admitted to entering into the Modification Agreement with Deutsche Bank and requested the Superior Court force Deutsche Bank to honor the Modification Agreement, thereby admitting that Deutsche Bank was the counter-party to the Mortgage. A061.

On October 17, 2011, Moss filed the First Summary Judgment Motion, wherein he admitted to executing and delivering the Mortgage. A085. Moreover, Moss admitted to modifying the terms of repayment of the Mortgage by way of the Modification Agreement. *Id.* The First Summary Judgment Motion was denied on May 16, 2012. DI 56.

IV. THE ORDERS ON APPEAL

On August 14, 2013, Moss filed his Second Summary Judgment Motion. DI 62. Despite Moss’s prior admissions in his First Summary Judgment Motion that he and Deutsche Bank had entered into the Modification Agreement, Moss’s claim

in his Second Summary Judgment Motion was that Deutsche Bank was not the real party in interest, and thus was not a proper party to pursue the foreclosure action.

A313.

In support of this contention, Moss argued, *inter alia*, that Deutsche Bank had not produced evidence that New Century, as a bankruptcy debtor, had authority to make the First Assignment. A314.

In its response to the Second Summary Judgment Motion, Deutsche Bank agreed that New Century did “sell substantially all of its servicing assets to Carrington Mortgage Services.” A552. Moreover, Deutsche Bank argued that it was the proper party in interest and that “Defendant [had] not provided any documentary evidence to buttress his conclusory allegations to the contrary.” *Id.* Deutsche Bank also argued and submitted supporting evidence that the Mortgage expressly provides MERS with the authority to assign the Mortgage and that Delaware and numerous other jurisdictions have validated the authority of MERS to assign a mortgage when named as the nominee for the lender and its successors and assigns. A557.

Prior to the November 13, 2013 hearing on the Second Summary Judgment Motion, Deutsche Bank retained Chase Miller, Esquire, as new counsel. DI 87. At the hearing, Mr. Miller advised the Superior Court that prior counsel, Sarah

Rutigliano, had submitted Deutsche Bank's response to the Second Summary Judgment Motion, but that he had, in fact, reviewed the response. A635.

Following brief discussion, the Superior Court admonished prior counsel for an apparent lack of evidence in support of Deutsche Bank's claims. A636-A639. However, in recognition of Mr. Miller's substitution, the Superior Court invited Deutsche Bank to submit a supplemental response and continued the hearing. A641-A642.⁵

In its supplemental response, Deutsche Bank argued that Moss was without standing to challenge the validity of any assignments of the Mortgage. A591-A592. Deutsche Bank asserted that Moss was neither a party to the First or Second Assignments, nor was he a third-party beneficiary. *Id.*

On December 18, 2013, the Superior Court entered the Summary Judgment Order. DI 91. In that Order, the Superior Court expressly relied upon Moss's assertion that New Century's bankruptcy filing precluded New Century from assigning the Mortgage to Deutsche Bank's predecessors in interest. *Id.* at 2.⁶

⁵ THE COURT: "Now, if you would like to bring in a witness, for example, the lawyer in bankruptcy, and put that witness on the stand and give [opposing counsel] the opportunity to cross-examine that witness or to present a supplement herself on behalf of Mr. Moss, for example, a bankruptcy presentation that was contrary to the plaintiff's bankruptcy presentation, then I'm open-minded as to how we should proceed."

⁶ Pursuant to this Court's Rule 14(b)(vii), copies of the Summary Judgment Order and the Reargument Order are attached to the end of Appellant's Opening Brief.

Despite recognizing that “Plaintiff now offers some legal support for its position”, the Superior Court concluded that “Plaintiff has not presented record evidence to defeat Moss’s claim that Plaintiff did not have authority to transfer the asset on January 17, 2008.” *Id.* at 4. The Superior Court ignored the express authorization for MERS to assign the Mortgage, which is set forth in the Mortgage. *Id.* As a result, the Superior Court determined that “Plaintiff has not offered competent evidence to show that a material issue of fact exists.” *Id.* at 3.

On December 23, 2012, Deutsche Bank filed its Reargument Motion. DI. 92. In the Reargument Motion, Deutsche Bank stated that it had been preparing to present witness testimony, but was precluded from doing so because it was surprised by the Superior Court’s entry of the Summary Judgment Order in light of the Superior Court’s statements that it would continue the hearing on the Second Summary Judgment Motion. A628-A629.

On December 30, 2013, the Superior Court entered the Reargument Order. DI 93. Deutsche Bank thereafter timely filed a Notice of Appeal of the Summary Judgment Order and the Reargument Order on January 16, 2014.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING THAT DEUTSCHE BANK WAS NOT THE PROPER ASSIGNEE OF THE MORTGAGE.

A. QUESTION PRESENTED.

Did the Superior Court err in holding that Deutsche Bank is not the proper assignee of the Mortgage and Note that were the subject of the *in rem scire facias sur* mortgage proceeding? The issue was presented in Deutsche Bank's Response to the Second Summary Judgment Motion, at pages 2 and 8-9. *See* A551, A557-A558.

B. STANDARD OF REVIEW.

This Court reviews an appeal of a Superior Court's decision on summary judgment *de novo*. *State Farm Mut. Auto. Ins., Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013); *GMG Capital Investments, LLC v. Athenian Venture Partners, L.P.*, 36 A.3d 776, 779 (Del. 2012). This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitled the movant to judgment as a matter of law." *State Farm Mut. Auto. Ins., Co. v. Davis*, 80 A.3d at 632 (internal citation omitted). Pursuant to this standard, this Court will undertake an independent review of the record and applicable legal principles "to determine whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and

it is entitled to judgment as a matter of law." *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

The Court may consider the entire record, including the pleadings and any issues such pleadings may raise, affidavits and other evidence in the record, as well as the trial court's order and opinion. *Pike Creek Chiropractic Ctr. v. Robinson*, 637 A.2d 418, 420 (Del. 1994). From this review the Court is free to draw its own conclusions with respect to the facts if the findings below are clearly wrong and if justice so requires, particularly where the findings arise from deductions, processes of reasoning or logical inferences. *Dutra de Amorim v. Norment*, 460 A.2d 511, 513 (Del. 1983).

C. MERITS OF ARGUMENT.

1. The Superior Court Erred by Giving Moss Standing to Contest the Validity of the Assignments.

The Superior Court should not have allowed Moss to challenge the validity of the assignments from MERS to Deutsche Bank because Moss is not a party to, nor a third-party beneficiary under, the assignments.

In his Second Summary Judgment Motion, Moss argued that the assignments were invalid for numerous reasons, including that the loan was assigned to a "non-existent trust", there was no evidence that New Century had the Bankruptcy Court's permission to transfer the Mortgage, it was unlikely that New Century was able to utilize the MERS system to transfer the loan, MERS did not

have the authority to assign the loan, and the loan was not transferred in accordance with the Pooling and Servicing Agreement. A314. Although these issues have already been determined by Delaware state courts, to support these contentions, Moss referred to case law from New York, Massachusetts, New Jersey and Texas, without reference to Delaware precedent. A314-A315.

The assignments under attack were signed and notarized and are, therefore, valid and effective under 25 Del. C. § 2109(a). This section provides, in pertinent part, that “[a]n assignment of a mortgage or any sealed instrument attested by 1 creditable witness is valid and effectual to convey all the right and interests of the assignor”. 25 Del. C. § 2109(a).

Previous decisions of this Court and other Delaware courts have found that only persons who are parties to, or third-party beneficiaries under, a contract have rights relating to the contract. *Browne v. Robb*, 583 A.2d 949, 954 (Del. 1990); *MetCap Securities, LLC v. Pearl Senior Care, Inc.*, 2007 Del. Ch. LEXIS 65, at *7 (Del. Ch. May 16, 2007); *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 434 (Del. Ch. 2007); *Thomas v. Harford Mut. Ins. Co.*, 2003 Del. Super. LEXIS 36, at *3 (Del. Super. Ct. Jan. 31, 2003). In order to qualify as a third-party beneficiary, a party must be an intended, and not an incidental, beneficiary. *MetCap Securities*, 2007 Del. Ch. LEXIS 65, at *7. If a third-party “happens to benefit from the performance of the contract either indirectly or

coincidentally, such third person has no rights under the contract.” *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531,534 (Del. Super. Ct. 1990)(citing *Insituform of North America v. Chandler*, 534 A.2d 257 (Del. Ch. 1987)). Moss was not an intended beneficiary of the assignments.

Further, courts in and outside of Delaware have expressly held that a mortgagee lacks the standing to challenge the validity of an assignment of a mortgage by a mortgagor, as the mortgagee is not a party to the assignment. *CitiMortgage, Inc. v. Bishop*, 2013 Del. Super. LEXIS 95, at *4 (Del. Super. Ct. March 4, 2013); *Branch Banking & Trust Co. v. Eid*, 2013 Del. Super. LEXIS 264, at *11 (Del. Super. Ct. June 13, 2013); *In re Perretta*, 2011 Bankr. LEXIS 4913 (Bankr. D. R.I. Dec. 16, 2011).

Moreover, in his Second Summary Judgment Motion, Moss disputed the validity of the assignment to Deutsche Bank on the basis that the trust was “non-existent” and because the loan was not transferred in accordance with the Pooling and Servicing Agreement. A315. The consensus across the country, is that a borrower lacks standing to challenge an assignment when he is neither a party to, nor a third-party beneficiary of, a securitization agreement. *Eid*, 2013 Del. Super. LEXIS 264, at *11; *see also, In re Walker*, 466 B.R. 271, 285 (Bankr. E.D. Pa. 2012); *In re Edwards*, 2011 Bankr. LEXIS 5065, at *4 (Bankr. E.D. Wis. Dec. 23, 2011)(finding a debtor’s standing to be lacking where he was neither a party to the

pooling or servicing agreements nor a potential third party beneficiary of those agreements).

Here, Moss failed to present any evidence that he was an intended beneficiary of any of the assignments or securitization agreements. Nor did he prove that a party to the assignment challenged the validity of an assignment. Because Moss has no legally cognizable interest in the assignments, he is not in a position to assert any challenge thereto.

2. Moss's Judicial Admissions Barred Him from Challenging Deutsche Bank's Standing To Enforce the Mortgage.

In his Answer, amended Answer, second amended Answer, and First Summary Judgment Motion, Moss admitted to the validity of the First Assignment and Deutsche Bank's standing to enforce the Mortgage. A051; A061; A071; A085. In numerous pleadings, including the First Summary Judgment Motion, Moss stated that "[o]n April 14, 2009 loan was modified of said mortgage with New Century Mortgage which was accepted and agreed upon by Defendant and Plaintiff". *See, e.g.*, A085. Moss even asked the Superior Court to enforce the Modification Agreement against Deutsche Bank. A061; A071.

Thus, Moss admitted in documents filed in the Superior Court that a new investor, Deutsche Bank, was the counter-party to the Mortgage. He further admitted that he had negotiated modified mortgage terms with Deutsche Bank and had entered into the Modification Agreement. A071; A076-A080.

Statements made in court documents are judicial admissions. Judicial admissions are “[v]oluntary and knowing concessions of fact made by a party during judicial proceedings (e.g., statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; counsel’s statements to the court).” *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201 (Del. 2008). They “are limited to factual matters in issue and not to statements of legal theories or conceptions.” *Levinson v. Del. Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1186 (Del. 1992) (citations omitted). Thus, Moss’s statements are judicial admissions.

Judicial admissions “are traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court.” *Merritt*, 956 A.2d at 1201–02. A judicial admission is “not merely another layer of evidence, upon which the ... court can superimpose its own assessment of weight and validity. It is, to the contrary, an unassailable statement of fact that narrows the triable issues in the case.” *Id.* at 1202 n.18 (quoting *Airco Indus. Gases, Inc. Div. of the BOC Gp., Inc. v. Teamsters Health & Welfare Pension Fund of Phila. & Vicinity*, 850 F.2d 1028, 1037 (3d Cir. 1988)); see also, *Ervin v. Vesnaver*, 2000 Del. Super. LEXIS 312, at *2 (Del. Super. Ct. June 20, 2000) (“Judicial admissions are not a means of evidence but a waiver of all controversy and therefore are a limitation on the issues.”).

Moss's admission that he and Deutsche Bank entered into the Modification Agreement and his request to the Superior Court to enforce the Modification Agreement against Deutsche Bank was an admission that Deutsche Bank was the proper counter-party to the Mortgage. Moss also admitted to Deutsche Bank's ability to enforce the underlying obligations by entering into the Modification Agreement and by making payments thereon. A121-A122. Those admissions removed the issue of whether Deutsche Bank had standing to enforce the Mortgage and Modification Agreement from determination by the Superior Court. Moss's admissions are binding upon Moss, and it was an error of the Superior Court to disregard these admissions and enter judgment in Moss's favor.

3. Under Delaware Law, Deutsche Bank Should Not Have Been Required in a *Scire Facias* Foreclosure Action to Prove Ownership of the Note.

Moss argued that Deutsche Bank failed to demonstrate that it was the owner of the Note. A316. By doing so, Moss asked the Superior Court to impose an obligation on Deutsche Bank that is not required under Delaware law: that Deutsche Bank establish it owned the Note before Deutsche Bank could foreclose. The Superior Court erred in failing to reject such argument because Delaware law imposes no such requirement.

An action based upon a *scire facias sur* mortgage is one used in proceedings founded upon matters of record. 10 Del. C. § 5061(a). Here, such a record is a

mortgage and is an *in rem* action. Proving ownership of a note is not required in a Delaware foreclosure action. See *Davis v. 913 North Market Street Partnership*, 1996 Del. Super. LEXIS 579 (Del. Super. Ct. Dec. 12, 1996), *aff'd.*, 1997 Del. LEXIS 334 (Del. Sept. 19, 1997)(the note is a separate matter and is not part of a foreclosure action on the mortgage). To foreclose on a *scire facias sur* mortgage, Delaware requires only that a foreclosure complaint include “[a] statement of the debt remaining due and payable supported by an affidavit of the plaintiff or the mortgage holder or the agent or attorney of the plaintiff or mortgage holder.” 10 Del. C. § 5062D(b)(2). The statute does not require a plaintiff to prove that that it is the owner of the Note. *Id.*

Moreover, even if a note were required in a *scire facias* action, proving ownership of the note to enforce the underlying obligation is still unnecessary, because pursuant to 6 Del. C. § 3-301, a party seeking to enforce a mortgage and note must be only the holder, not necessarily the owner. 6 Del. C. § 3-301.

II. THE SUPERIOR COURT ERRED IN HOLDING THAT DEUTSCHE BANK HAD NOT SUBMITTED EVIDENCE THAT THE MORTGAGE COULD BE ASSIGNED TO DEUTSCHE BANK'S PREDECESSOR IN INTEREST.

A. QUESTION PRESENTED.

Did the Superior Court err in ignoring the evidence that MERS, as the nominee of New Century and its successors and assigns, had the authority to assign the Mortgage to Deutsche Bank? The issue was presented in Deutsche Bank's Response to the Second Summary Judgment Motion, at pages 4 through 8. *See* A552-A557.

B. STANDARD OF REVIEW.

As noted in Section I(B), *supra*, this Court reviews an appeal of a Superior Court's decision on summary judgment *de novo*. *State Farm Mut. Auto. Ins., Co. v. Davis*, 80 A.3d at 632. This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitled the movant to judgment as a matter of law." *Id.*

C. MERITS OF ARGUMENT.

1. The Mortgage Was Not Part of New Century's Bankruptcy Estate at the Time of Assignment.

On April 2, 2007, New Century filed for bankruptcy under chapter 11 of the Bankruptcy Code in the Bankruptcy Court. A314; A422-428. The filing of a bankruptcy petition creates a bankruptcy estate that is comprised of all of the property of a bankruptcy debtor. 11 U.S.C. § 541(a). When New Century filed for

bankruptcy, the Bankruptcy Court had exclusive jurisdiction over New Century's bankruptcy estate. 28 U.S.C. § 1334(e); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004).

On April 23, 2007, however, the Bankruptcy Court entered the Sale Order pursuant to Sections 105, 363 and 365 of the Bankruptcy Code. A314; A425-A426. This sale closed on June 29, 2007. *Id.* It is undisputed that the Mortgage was one of the mortgages that New Century sold in the sale of its loan servicing business. *Id.* Moreover, Moss contends that after that date New Century no longer had any interest in the Mortgage. A314. Inasmuch as that is the case, the Bankruptcy Court no longer had any jurisdiction with respect to the Mortgage or the First Assignment. *See Hood*, 541 U.S. at 448 (bankruptcy court jurisdiction is limited to the *res* of the bankruptcy estate). However, even if Moss is incorrect as to whether New Century retained beneficial rights under the Mortgage as of the date of the First Assignment, as discussed below, MERS had the right to assign the beneficial interest.

2. The Mortgage Expressly Authorizes MERS to Act For the Lender, its Successors and Assigns.

Deutsche Bank presented evidence on the record that MERS was authorized to assign the mortgage to Deutsche Bank's predecessor. The evidence that Delaware law authorized the First Assignment and Second Assignment was the Mortgage, and it was properly submitted to the Superior Court. A014-A045.

The Mortgage was submitted to the Superior Court as an exhibit to multiple pleadings, including, in the first instance, the Complaint as Exhibit A. *Id.* Moss admitted to signing the Mortgage dated January 10, 2007. A071; A121; A313. The Mortgage authorized MERS to act for the lender and its successor and assigns, as follows:

(C) "MERS" is a Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successor and assigns. MERS is the mortgagee under this Security Instrument.

A015. Page three (3) of the Mortgage states as follows:

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to the Lender: (i) the repayment of the Loan, and all renewals, extensions and modification of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successor and assigns of MERS the following described property located in this County of New Castle

A017. Deutsche Bank made this argument to the Superior Court but it was ignored. A553.

This provision of the Mortgage authorizes MERS to take any action required by New Century, and its successors and assigns. The Superior Court ignored this express authorization made by Moss to MERS, and erroneously credited Moss's

assertion that MERS was without authority to assign the mortgage, despite the lack of any contrary evidence. DI 91 at 2. This error alone warrants reversal.

Moss failed to cite any evidence or any legal authority suggesting that the MERS assignment is to be treated differently than any other assignment in Delaware. On the contrary, this Court and other Delaware courts have expressly upheld mortgage assignments by MERS. *See, e.g., Savage v. U.S. Nat. Bank Ass'n*, 19 A.3d 302 (Del. 2011)(upholding plaintiff's interest in defendant's mortgage acquired through an assignment from MERS); *Citimortgage, Inc. v. Trader*, 2011 Del. Super. LEXIS 648 (Del. Super. Ct. May 13, 2011)(finding plaintiff to be the proper party in interest after an assignment of a mortgage from MERS to plaintiff). The Court should uphold the First Assignment here.

3. MERS Can Assign the Mortgage Despite the Original Lender Being in Bankruptcy.

Moss's claim that the First Assignment and Second Assignment are invalid because New Century filed for chapter 11 bankruptcy protection is incorrect. As set forth above, Deutsche Bank provided the Superior Court with the evidence necessary to determine that there was a clear dispute of fact as to this issue.

In the Second Summary Judgment Motion, Moss asserted that New Century's bankruptcy invalidated the First Assignment. A314. However, assignments of mortgages by MERS while a lender is in bankruptcy without

bankruptcy court approval have been routinely upheld by courts around the country.

In *In re Marron*, the United States Bankruptcy Court for the District of Massachusetts stated:

A lender's bankruptcy does not affect the ability of MERS to assign a mortgage . . . [and that] because the language of the mortgage [] stated that MERS was acting as nominee for the lender and its 'successors and assigns' . . . bankruptcy and dissolution would not prevent the lender's successors and assigns from seeking transfer of the mortgage from MERS.

455 B.R. 1, 8 (Bankr. D. Mass. 2011) (internal quotation and alteration omitted).

Similarly, in *Long, et al. v. One West Bank, FSB, et al.*, the United States District Court for the Northern District of Illinois stated:

Plaintiffs argue that MERS could not execute a valid assignment of the power of sale in the Security Deed to Deutsche because TBW, the lender, had declared bankruptcy prior to the attempted assignment. However, the plain language of the Security Deed shows that TBW was not the grantee on the Security Deed. The Security Deed specifically states the following: "MERS is the grantee under this Security Instrument." The Security Deed provided that Long "understands and agrees that MERS holds only legal title to the interests granted by" Long, but that MERS has the right to exercise certain interests, such as "the right to foreclose and sell the Property The Security Deed also specifically anticipated a potential assignment of rights by MERS to another party.

2011 U.S. Dist. LEXIS 94675, at *8-9 (N.D. Ill. Aug. 24, 2011); *see also, Cooper v. Bank of New York, et al.*, 2011 U.S. Dist. LEXIS 94410 (D. Haw. Aug. 23, 2011) (same); *Pascual v. Aurora Loan Services, LLC*, 2012 U.S. Dist. LEXIS

84561 (D. Haw. June 19, 2012) (holding that defendant had produced no evidence that the assignment violated the bankruptcy stay, alleging only that the assignment occurred sometime after the original lender filed for bankruptcy); *Camat v. Fed. Nat'l Mortg. Ass'n*, 2012 U.S. Dist. LEXIS 87667, at *7 (D. Haw. June 22, 2012) (holding homeowner's contention that an assignment of a mortgage by a lender's nominee was invalid because the assignment occurred while lender was in bankruptcy was without a factual basis because the lender's "bankruptcy did not on its own affect the validity of the assignment. . . [the lender] transferred its beneficial interest in the mortgage to [the nominee] before instituting the bankruptcy proceedings.").

Here also, the beneficial interest in the Mortgage was transferred to the nominee, MERS, before New Century filed for bankruptcy. The Superior Court erroneously ignored the evidence of that transfer in the form of the Mortgage, which expressly anticipated an assignment of rights by MERS to another party. The Superior Court thus improperly concluded that Deutsche Bank had not provided the Superior Court with sufficient evidence to prove the validity of the assignment to Deutsche Bank.

While Moss asserts that the Mortgage was assigned sometime after New Century filed for bankruptcy, he also states that New Century sold all of its servicing assets to Carrington on June 29, 2007. A314. As discussed above, the

transfer to Carrington was approved by the Bankruptcy Court. Moreover, the record was void of any evidence that the transfer violated the Bankruptcy Code's automatic stay provisions or that New Century's bankruptcy prohibited MERS from assigning the loan to New Century's successors and assigns. The record could not include such evidence because the transfer was approved by the Bankruptcy Court.

Finally, to the extent that Moss is actually arguing that the assignment by MERS was a violation of the automatic stay, the Superior Court was without jurisdiction to hear such an argument. Exclusive jurisdiction over claims for violation of the automatic stay reside in the Bankruptcy Court. *Eastern Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120-121 (2d Cir. 2001); *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996); *Chadda v. Magady*, 2011 U.S. Dist. LEXIS 146006, 8-9 (E.D. Pa. Dec. 20, 2011); *In re Lucas*, 312 B.R. 559, 571 (Bankr. D. Md. 2004).

CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that the Superior Court's Summary Judgment Order and Reargument Order be reversed.

Dated: March 6, 2014

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Rule 14(b)(vii) Attachment 1

Order on Defendant's Motion for Summary Judgment



**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

**DEUTSCHE BANK NATIONAL TRUST)
COMPANY, as trustee for the registered holders)
of Morgan Stanley ABS Capital I Inc., trust)
2007-NC# mortgage pass-through certificates,)
series 2007-NC3, assignee of Deutsche Bank)
Trust Company Americas, f/k/a Bankers Trust)
Company, as trustee and custodian for Morgan)
Stanley MSAC 2007-NC3, assignee of Mortgage)
Electronic Registration Systems, Inc., as nominee)
for New Century Mortgage Corporation,)**

Plaintiffs,)

v.)

) C.A. No. N11L-03-097-ALR

EUGENE MOSS,)

Defendant.)

Submitted: December 12, 2013

Decided: December 20, 2013

**On Defendant's Motion for Summary Judgment
GRANTED**

Defendant Eugene Moss executed a mortgage on January 17, 2007 with New Century Mortgage Corporation. The mortgage relates to real property located in New Castle County, Delaware which is Moss' personal residence.

On April 2, 2007, New Century sought protection of Chapter 11 in the Delaware Bankruptcy Court. In its response to Defendant's Motion of Summary Judgment which was filed in September 2013, Plaintiff conceded that "New Century Mortgage Corporation did stop originating loans, and did enter bankruptcy and sell substantially all

of its servicing assets to Carrington Mortgage Services, but it doesn't then follow that the assignment of the Mortgage is invalid." In its September 2013 submission, Plaintiff also conceded, "While it is true that Plaintiff has not until now produced evidence that New Century had Bankruptcy Court permission to transfer a mortgage after commencement of the bankruptcy proceeding." Nevertheless, Plaintiff stated – without supporting law or supporting affidavit – "...New Century Bankruptcy Trust assured Plaintiff's counsel that this particular loan was actually transferred to the pooling trust prior to the filing of the bankruptcy."

Because counsel who submitted the response on behalf of Plaintiff is no longer counsel of record, the Court offered Plaintiff the opportunity to supplement the record and Plaintiff filed an additional submission on December 12, 2013. Plaintiff now offers some legal support for its position.

Plaintiff claims that the loan was assigned on January 17, 2008 even though New Century was in bankruptcy at the time. It is Plaintiff's claim that the Bankruptcy Court Order dated July 14, 2008 – more than six months after the alleged transfer – operates to allow the transfer of assets. There are two problems:

1. The Order was entered six months after the alleged transfer; and
2. The Order permits only continuation of foreclosing proceedings and is silent regarding transfer of assets.

Accordingly, Plaintiff has not presented record evidence to defeat the Defendant's claim that Plaintiff did not have authority to transfer the asset on January 17, 2008.

Summary judgment may be granted only where the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law.”¹ The moving party bears the initial burden of proof, and once that is met, the burden shifts to the non-moving party to show that a material issue of fact exists.² In reviewing the facts at the motion for summary judgment phase, the Court must view the facts “in the light most favorable to the non-moving party.”³

Defendant Eugene Moss has satisfied his initial burden of proof. Plaintiff has not offered competent evidence to show that a material issue of fact exists. Reviewing the facts in the light most favorable to Plaintiff, the non-moving party, the Court concludes that Defendant Eugene Moss is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED this 18th day of December, 2013, that JUDGMENT SHALL HEREBY ENTER in favor of Defendant Eugene Moss and against Plaintiff.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

¹ Super. Ct. R. Civ. P. 56.

² *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

³ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

Rule 14(b)(vii) Attachment 2

Order upon Plaintiff's Motion for Reargument



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DEUTSCHE BANK NATIONAL TRUST)
COMPANY, as trustee for the registered holders)
of Morgan Stanley ABS Capital I Inc., trust)
2007-NC# mortgage pass-through certificates,)
series 2007-NC3, assignee of Deutsche Bank)
Trust Company Americas, f/k/a Bankers Trust)
Company, as trustee and custodian for Morgan)
Stanley MSAC 2007-NC3, assignee of Mortgage)
Electronic Registration Systems, Inc., as nominee)
for New Century Mortgage Corporation,)
Plaintiffs,)

v.)

) C.A. No. N11L-03-097-ALR

EUGENE MOSS,)
Defendant.)

Upon Plaintiff's Motion for Reargument
Denied

The standard of review for a motion for reargument is well established. A motion for reargument will be granted only if the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision. A motion for reargument is not an opportunity for a party to rehash arguments already decided by the Court or to present new arguments not previously raised. There is no assertion that the Court has overlooked a controlling precedent or legal principle or misapprehended the law or facts such as would have changed the outcome of the underlying decision.

In its motion for reargument, defense counsel claims that it was unaware of concerns expressed by the Court at prior hearings. Counsel, although new to the case, is on notice of all prior submissions and rulings of the Court. Counsel should have been well aware of the specific concerns expressed by the Honorable Jerome O. Herlihy at the hearing on May 16, 2012. The transcript of that hearing is docketed as item 57.

NOW, THEREFORE, this 30th day of December 2013, the Motion for Argument is hereby DENIED.

IT IS SO ORDERED.

2013 DEC 30 AM 9:49

PROBATIONARY

The Honorable Andrea L. Rocanelli

CERTIFICATE OF SERVICE

I, Jarret P. Hitchings, Esq., do hereby certify that on this 17th day of March 2014, two true and correct copies of the foregoing documents were served via First-Class U.S. Mail and an electronic copy of the foregoing document was served via LexisNexis File & ServeXpress upon the following counsel of record:

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/s/ Jarret P. Hitchings
Jarret P. Hitchings (No. 5564)

CERTIFICATE OF SERVICE

I, Jarret P. Hitchings, Esq., do hereby certify that on this 17th day of March 2014, two true and correct copies of the foregoing document was served via LexisNexis File & ServeXpress upon the following counsel of record:

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