



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANCH BANKING AND TRUST)	
COMPANY, a bank organized under)	
the laws of the State of North)	
Carolina existing under the laws of)	
the State of North Carolina;)	
Assignee of Mortgage Electronic)	
Registration Systems, Inc. as)	No. 385, 2014
nominee, a corporation organized)	
and existing under the laws of the)	On Appeal From Superior Court,
State of Delaware,)	C.A. No. N11L-12-270-CEB
)	
Plaintiff Below,)	
Appellant,)	
v.)	
)	
HATEM G. EID A/K/A HATEM)	
EID; YVETTE EID,)	
)	
Defendants Below,)	
Appellees/Cross-Appellants)	
)	
)	

CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT ON REPLY1

III. BB&T DOES NOT HAVE STANDING TO BRING THIS ACTION.1

1. BB&T is Not the Valid Owner and Holder of the Note..... 1

2. BB&T is Not a Valid Assignee and Therefore, Does Not Have Standing to Bring this Action.....3

3. The Eids Have Standing to Challenge the Assignment.4

IV. THE COURT IMPROPERLY GRANTED SUMMARY JUDGMENT TO BB&T5

CONCLUSION.....9

TABLE OF AUTHORITIES

Albertson v. BAC Home Loan Servicing, LP, 2014 WL 4952362 (Del. Oct. 1, 2014)3

CitiMortgage, Inc. v. Bishop, 2013 WL 1143670 (Del. Sup. Ct. March 4, 2013)4

Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington R. Holdings, L.L.C., 717 F. Supp. 2d 724 (E.D. Mich. 2010).....4

In Re Lopez, 446 B.R. 12, 22 n. 34 (Bankr. D. Mass. 2011)3

Slorp v. Lerner, Sampson & Rothfuss, 2014 WL 4800100 (6th Cir. Sept. 29, 2014)4

Wilmington Trust Co. v. Jestice, 2012 WL 1414282 (Del. Super.)..... 1,2

ARGUMENT ON REPLY

III. BB&T DOES NOT HAVE STANDING TO BRING THIS ACTION.

1. BB&T is Not the Valid Owner and Holder of the Note.

To prevail on summary judgment, the burden lies with BB&T to show the non-existence of a material issue of fact. *Wilmington Trust Co. v. Jestice*, 2012 WL 1414282, at *2 (Del. Super.). BB&T not only failed to meet its burden, but failed to even address the alleged transfers of the Note and Mortgage between BB&T and Freddie Mac (the subject of BB&T's own Miller Affidavit). A genuine issue of material fact exists regarding whether the assignments purporting to make BB&T the owner and holder of the Note are valid. As argued before the Court below on its Motion for Summary Judgment, the Eids raised the issue regarding the validity of the assignments relied upon by BB&T to establish standing as an owner and holder of the Note. BB&T has ignored this argument and relies instead on an argument from the Uniform Commercial Code that was not raised until after argument and briefing on the Motion for Summary Judgment.

The only factual basis for BB&T's standing argument is derived from the flawed Miller Affidavit. As set forth fully in their Opening Brief on Cross-Appeal, the Eids dispute whether Mr. Miller had sufficient personal knowledge to support the averments in his affidavit. This dispute creates a

genuine issue of material fact and BB&T has the burden to show that a dispute does not exist. It has failed to meet its burden.

In the pleadings, the Eids denied the authenticity and authority of the signatures on the Assignment. BB&T has not met its burden to show the non-existence of a material issue of fact. Instead, BB&T alleges that the Eids “did not present any competent evidence to challenge BB&T’s status as note-holder” and “failed to produce evidence that the endorsement signatures are not authentic.” (Answering Brief, at 12, 13.) This argument confuses the burden. The Eids would only have the burden to show a material issue of fact exists if BB&T could meet its threshold burden that such a dispute did not exist. *Wilmington Trust Co. v. Jestice*, 2012 WL 1414282, at *2 (Del. Super.). The Eids had no such burden because BB&T did not carry its threshold burden. The Court below should have denied the Motion for Summary Judgment and permitted the matter to proceed to deposition discovery in view of the factual issues raised as to the authenticity of the signatures.

BB&T next takes the position that BB&T’s status as owner and holder of the Note under the UCC does not depend on a valid assignment of the Mortgage. This position is without support from Delaware case law, but relies upon decisions from Connecticut, Massachusetts, and Texas. The decision BB&T relies on from Massachusetts is inapposite because it

recognizes that the assignment language in that case attempted to assign both the mortgage and the note, but failed to have the legal effect of assigning the note because MERS lacked an assignable interest in the note. *In Re Lopez*, 446 B.R. 12, 22 n. 34 (Bankr. D. Mass. 2011) (cited at Answering Brief at page 14, n. 2).

2. BB&T is Not a Valid Assignee and Therefore, Does Not Have Standing to Bring this Action.

The parties agree that the law as to MERS is unsettled. In its string cite in beginning at footnote 5 on page 18 of its Answering Brief, BB&T cites cases from other jurisdictions that reach different conclusions from the cases cited by the Eids. These cases are not on point because none of the non-Delaware MERS decisions cited by BB&T involve issues relating to the MERS Terms and Conditions. Additionally, in the body of its argument, BB&T relied upon *Albertson v. BAC Home Loan Servicing, LP*, 2014 WL 4952362 (Del. Oct. 1, 2014), which decision BB&T concedes never addresses the validity of the MERS assignment of the Albertson note and mortgage, which is the issue here.

BB&T has omitted any discussion as to the genuine issue of material fact related to the validity of the multiple transfers of the Note to and from Freddie Mac as alleged in BB&T's Miller Affidavit. By ignoring the issue completely and relying on case law that is not on point, BB&T has failed to

meet its burden to show that no dispute exists. For the reasons set forth in the Eids' Opening brief, the Court should reverse the trial court on this issue.

3. The Eids Have Standing to Challenge the Assignment.

The Eids have standing to challenge the Assignment. The rule set forth in *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington R. Holdings, L.L.C.*, 717 F. Supp. 2d 724 (E.D. Mich. 2010), and relied upon by BB&T that an individual who is not a party to an assignment lacks standing to challenge that assignment has been significantly limited by the Sixth Circuit Court of Appeals. *Slorp v. Lerner, Sampson & Rothfuss*, 2014 WL 4800100, at *4 (6th Cir. Sept. 29, 2014). In *Slorp*, the Sixth Circuit Court of Appeals held that the “*Livonia Properties* opinion quoted and endorsed that general statement, perhaps inartfully... But we quickly limited the scope of that rule, clarifying that a non-party homeowner may challenge the validity of an assignment to establish the assignee’s lack of title, among other defects.” *Id.* The *Slorp* decision recognizes that the decision in *Livonia Properties* “has confounded some courts and litigants” and sought to clarify the general rule. *Id.*

To the extent that the Delaware Superior Court’s decision in *CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670 (Del. Sup. Ct. March 4, 2013) relied on the general rule set forth in *Livonia Properties*, this Superior

Court decision is suspect in view of the Sixth Circuit's subsequent holding in *Slorp*, supra.

IV. THE COURT IMPROPERLY GRANTED SUMMARY JUDGMENT TO BB&T

The Eids have, in their Opening Brief, detailed the legal and factual reasons why the trial court erred in granting summary judgment, including the numerous infirmities within and issues raised by the Miller Affidavit. BB&T has chosen to ignore these genuine disputes and has not demonstrated the non-existence of such disputes either with Delaware law or other case law validly distinguishing the law argued by the Eids. BB&T has thus consented to the applicability of this law relating to the requirements for a summary judgment affidavit to be legally sufficient.

Based on the plain language of the Miller Affidavit (or the lack thereof), Miller is not a party to and did not create the Assignment. The Miller Affidavit does not support any factual finding that Miller created the Assignment or that he was employed by either the original lender or BB&T. The fact that he signed the document does not make him a party to the assignment. The parties are the assignor and the assignee. Miller is neither.

BB&T cannot have it both ways. It cannot make judicial admissions in other jurisdictions, yet continue to argue validity of assignments in other jurisdictions. BB&T cannot argue that MERS can bind others to its terms and

conditions and then violate the terms and conditions with its own actions. It cannot provide an affidavit without factual support and then claim no issue of material fact exists. It cannot ignore a controversy in order to prevail on summary judgment.

The trial court, on summary judgment, is to consider all of the facts, including those which BB&T chooses to ignore. The presence of the genuine issues of material fact precluded summary judgment as a matter of law, and it is for the fact finder, at trial, to sort out the issues and enter a judgment based on the proper evidentiary standards. The trial court erroneously played fact finder on summary judgment, mandating that the judgment appealed from be reversed.

CONCLUSION

Cross-Appellee BB&T has failed to demonstrate the absence of any genuine issue of material fact, and has instead (a) ignored certain facts which raise genuine issues of material fact and (b) ignored law which militates against BB&T's position. BB&T's request that this Court choose certain facts and non-Delaware law to the exclusion of other facts and law is without any support in either the Rules of Civil Procedure or the case law. BB&T failed to meet its initial burden on summary judgment, which thus did not shift the burden and did not require the Eids to "disprove" anything.

The final judgment must thus be reversed.

Dated: December 8, 2014

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