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IN THE SUPREME COURT OF THE STATE OF DELAWARE

J.M. SHREWSBURY, a/k/a J. MICHAEL SHREWSBURY, and KATHY SHREWSBURY, Defendants Below, Appellants. v. THE BANK OF NEW YORK MELLON, f/k/a THE BANK OF NEW YORK, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9, Plaintiff Below, Appellee	Case NO. 306,2016 On appeal from the Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15L-03-108-CLS

APPELLANTS' CORRECTED OPENING BRIEF

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Dated: August 12, 2015

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NATURE OF PROCEEDINGS

On March 20, 2015, the Plaintiff/Appellee, The Bank of New York Mellon, f/k/a, The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9 ("the Appellee") instituted these foreclosure proceedings in Superior Court against the Defendants/Appellants, J. M. Shrewsbury a/k/a J. Michael Shrewsbury and Kathy Shrewsbury ("the Shrewsburys"). DI#1, A6.[1] The parties participated in Court-ordered Mediation, which ended on June 5, 2015 without a loan modification offer.

On June 4, 2015, the Defendants filed an Answer to Complaint and New Matter. *See* A73. The Plaintiff filed its Answer to the Defendant's Counterclaim on June 12, 2015. A88. No trial scheduling order has been issued by the Superior Court, and no discovery conducted. On September 18, 2015, the Appellee filed its Motion for Summary Judgment. *See* A91. On November 2, 2015, the Shrewsburys filed their Response to the Motion for Summary Judgment, which was amended on November 16, 2015. *See* A128. On February 17, 2016, the Superior Court entered its Order Granting the Plaintiff's Motion for Summary Judgment. *See* A191.

[1] All further references to the record below are made as "DI" followed by the appropriate docket item and page number. References to Appellants' Appendix are made as "A" followed by the appropriate page number.

The Appellants filed their Motion for Reargument on February 24, 2016. *See* A197. On March 1, 2016, the Plaintiff filed its Response to the Defendant's Motion for Reargument. *See* A240. The Court entered its Order denying the Defendants' Motion for Reargument on May 18, 2016. *See* A256. The Defendants filed their Notice of Appeal to this Court on June 17, 2016.

SUMMARY OF ARGUMENT

1. The Superior Court erred in granting summary judgment to the Plaintiff, pursuant to Super. Ct. Civ. R. 56. The Plaintiff failed to satisfy its threshold evidentiary burden of showing that it has standing, and is a real party in interest to foreclose on the Defendants' home, as required by Super. Ct. Civ. R. 17. In response to the Plaintiff's Motion of Summary Judgment, the Defendant produced a copy of a promissory note payable to the originator, without any indorsements whatsoever; nor any permanently-affixed allonges. The Plaintiff failed to counteract this evidence.

2. In order to foreclose, the Plaintiff must not only be the assignee of the mortgage, but also the party entitled to enfore the promissory note in accordance with 6 *Del. C.* Section 3-301. The Superior Court erred when it determined that MERS transferred a promissory note to the Plaintiff through an alleged assignment of mortgage, because the Defendants' evidence demonstrates that MERS has no beneficial interests in promissory notes, and thus could not transfer an interest it does not have. Also, negotiable instruments must be transferred in accordance with the Uniform Commercial Code ("UCC"). The lack of an indorsement on the note; the alleged assignment which purports to assign the mortgage and note; and the incomplete chain of assignments from the originator to the Plaintiff, all expose

the façade created by the purported mortgage assignment attached to the Plaintiff/Appellee's Complaint.

3. The Superior Court erred in failing to addressing the caselaw which makes standing to foreclose on the mortgage dependent upon the right to enforce the note.

4. The Superior Court erred in ruling that that the Shrewsburys had no right to challenge the assignment in this case. A homeowner defending a foreclosure lawsuit has the right to challenge assignments when the promissory note transfer fails to comply with the Uniform Commercial Code.

STATEMENT OF FACTS

On May 15, 2007, the Defendant signed a promissory note and mortgage in favor of Countrywide Home Loans, Inc. ("Countrywide") in the amount of $653,553.26. According to the Federal Deposit Insurance Corporation's ("FDIC") website, Countrywide ceased operations on April 27, 2009. The FDIC also indicated that Bank of America National Association was the acquiring institution. *See* A85. (Available as of 7/29/2016 at the FDIC website, https://www5.fdic.gov/idasp/confirmation_outside.asp?inCert1=33143).

On March 25, 2013 the Defendant sent a Qualified Written Request under 12 U.S.C. Section 2605(e) to Residential Credit Solutions, Inc. ("RCS"). RCS sent the Defendant a response on April 5, 2013. *See* A139. In this response, RCS stated it was the servicer and The Bank of New York was the investor. This response also included a copy of a promissory note marked "original", payable to the originator, Countrywide, with no indorsements whatsoever, nor any permanently-affixed allonges. *See* A141 - A143.

On March 20, 2015, the Plaintiff filed a foreclosure Complaint against the Defendants. *See* A6. The Complaint alleges that Countrywide assigned its entire interest in the mortgage to the Plaintiff through a MERS assignment. *See* A60.

Attached to the Complaint was a copy of a mortgage in favor of Countrywide, along with a purported assignment recorded on August 10, 2011.

See A60. This purported assignment was signed by an Assistant Secretary of Mortgage Electronic Systems, Inc. ("MERS") on June 11, 2011, more than two (2) years after Countrywide ceased operations. *See* A60, A85. The alleged assignment states MERS is "the undersigned holder of a mortgage (herein 'Assignor')". The alleged assignment does not state that MERS is the holder of the note. Yet, the alleged MERS assignment purports to assign "all beneficial interests under that certain mortgage described below together with the note(s) and obligations therein described". *See* A60. There is no mention of Bank of America this assignment, contrary to the FDIC's reporting. *See* A85.

The Defendants filed their Answer to the Complaint and New Matter on June 4, 2015. *See* A73. The Defendants raised two affirmative defenses, breach of contract, and lack of jurisdiction under Rule 12(b)(6), and standing under 10 Del. C. Section 5061 and Super. Court Civ. Rule 17(a). The Defendants' Answer also raised counter-claims under the Fair Debt Collection Practices Act, deceptive foreclosure practices, and breach of fiduciary duty. The Plaintiff filed its Answer to the Counterclaims on June 12, 2015. *See* A88.

On September 8, 2015, the Plaintiff filed a Motion for Summary Judgment. *See* A91. In their Amended Response to the Plaintiff's Motion for Summary Judgment ("Amended Response"), the Shrewsburys presented an Affidavit supporting their Amended Response, which included the unendorsed note that RCS

ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING THAT THE PLAINTIFF HAD STANDING TO FORECLOSE WITH AN UNINDORSED NOTE

A. QUESTION PRESENTED

Did the Superior Court err in holding that the Appellee had standing to foreclose in an *in rem scire facias sur* foreclosure case, when the evidence showed that the Plaintiff did not have the right to enforce the underlying promissory note? This issue was raised in Superior Court. See A129-A134; A137-143; A198-A199.

B. STANDARD OF REVIEW

Summary judgment may not be granted unless there are no genuine issues of material fact, and the moving party is entitled to summary judgment as a matter of law. Moore v. Sizemore, 405 A.2d 679 (Del. Supr., 1979); Super. Ct. Civ. R. 56. The moving party bears the burden of demonstrating the absence of any material facts. Matas v. Green, 171 A2d 916, 918 (Del. Super. 1961). This Court reviews a grant of summary judgment by the Superior Court *de novo*, in the light most favorable to the Non-Movant. Dennis v. Del. Racing Ass'n, 70 A.3d 205 (Del. 2012), 2012 Del. LEXIS 661, *3. This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitled the movant to the judgment as a matter of law." State Farm Mut. Auto. Ins., Co. v. Davis, 80 A.3d 628, 632 (Del. Supr. 2013).

provided to Mr. Shrewsbury in April, 2013. *See* A141 - A143. The Defendant also presented caselaw in which MERS, by its own admission, does not own promissory notes secured by security interests, nor does it hold the rights to payments on promissory notes. MERS v. Nebraska Dept. of Banking, 704 N.W.2d 784, 787, 270 Neb. 529 (Neb., 2005). *See* A132. MERS Terms and Conditions from the mersinc.org website, as well as an excerpt from MERS System Procedures Manual, give further support of MERS' in-court testimony. *See* A144 – A149, A202 – A214. The Plaintiff, in its Response to the Defendant's Motion for Reargument, presented no indorsed note, nor any other evidence in response to the Defendant's evidence. *See* A240.

The Superior Court granted the Plaintiff's Motion for Summary Judgment, and also denied the Defendants' Motion for Reargument. *See* A191 – A196 and A256 – A261.

C. MERITS OF ARGUMENT.

1. The Superior Court erred in failing to consider the caselaw that makes standing to foreclose on the mortgage dependent on the note.

Several Delaware cases, in determining whether a mortgagee has standing to foreclose on a mortgage, have analyzed whether the mortgagee has the right to enforce the underlying promissory note. *See* Bendfeldt v. HSBC Mortg. Corp., (USA), 2014 Del. Lexis 454, *3 (Del. Supr. October 7, 2014)(standing found as the mortgagee was the holder of the mortgage with the right to enforce the note); In re Sears, 2015 Del. Super. LEXIS 393, *11 (the mortgagee had possession of the original note indorsed in blank); Branch Banking & Trust Co. v. Eid, 2013 Del. Super. LEXIS 264, 2013 WL 3353846 (Del. Super. Ct. June 13, 2013)(promissory note endorsed in blank); US Bank Nat'l Ass'n v. Gilbert, 2014 Del. Super. LEXIS 20, (Del. Super. Ct. Jan. 15, 2014) at *9-10, (where the Plaintiff's summary judgment motion in an *in rem* foreclosure proceeding, was initially denied due to its failure to show that it was the holder of the note, and the inconsistency in the chain of assignments). Most of these cases were discussed in the Shrewsburys' submissions to the Superior Court. *See* A130 – A132. Other cases outside of Delaware have similarly held. *See* JP Morgan Chase Bank v. Murray, 2013 PA Super 55, Pa. Super. Ct. 2013, 63 A.3d 1258, 1265 (Pa. Super. Ct., 2013) (summary judgment reversed in a *scire facias* mortgage foreclosure case, because

the mortgagee failed to establish a clear chain of assignments and possession of the original indorsed note).

The Shrewsburys also discussed a Delaware *in rem* foreclosure case almost directly on point, WBMCT 2006-C29 OFFICE 4250, LLC v. Chestnut Run Investors, LLC 2015 Del. Super. LEXIS 383; 2015 WL 4594538 (Del. Super. July 30, 2015) in its Motion for Reargument. *See* A198. The Plaintiff/Appellee herein incorrectly stated that the Chestnut Run Court was "analyzing the Plaintiff's status as a holder of the Note in order to enforce the Note". *See* A242. However, the Chestnut Run case was an *in rem* mortgage foreclosure case. *See* A262.

The Court in Chestnut Run analyzed the mortgagee's standing to foreclose on the mortgage under 10 Del. C. Section 5061 by determining its ability to enforce the note under Article 3 of the Uniform Commercial Code (UCC). *Id.* at *1-2. The Plaintiff in the Chestnut Run case, like the Plaintiff in the case at bar, did not have an indorsed note. The Court in the Chestnut Run case, nevertheless, found that the mortgagee had standing to foreclose on the mortgage because the evidence showed the Chestnut Run Plaintiff was entitled to enforce the note under 10 Del. C. Sections 3-203(a) and 3-301, through several allonges, assignments, corrective assignments, and an unbroken chain of assignments from the originator to the mortgagee.

In contrast, the Appellee/Plaintiff's evidence in the case *sub judice* demonstrates that it is not entitled to enforce the note under 6 Del. C. Section 3-301. Unlike the Plaintiff in the Chestnut Run case, the Appellant/Plaintiff's evidence herein reflects a faulty chain of assignments. See supra at 5. The Appellant/Plaintiff claims an interest in the mortgage through a defective mortgage assignment dated two years after the originator ceased operations. This assignment also fails to mention Bank of America, which the FDIC stated was the institution that acquired Countrywide. *See* A69 – A85. This failure of the evidence to document each step in the chain of assignments from the originator to the Plaintiff should have been fatal to the Plaintiff's Motion for Summary Judgment. *See* Deutsche Bank Nat'l Trust Co. v. Moss, 2014 Del. LEXIS 294, *3-4. Due to the lack of an indorsement, the note and purportedly assigned mortgage are both rendered unenforceable. *See* In re Kemp, 440 B.R. 624, 633-634 (Bankr. D.N.J. 2010).

The Appellee/Plaintiff did not come forward with the original note in Superior Court, so there was no evidence of delivery or intent to deliver under 6 Del. C. Section 3-203. The Defendants produced a purported copy of an original note. *See* A141 – A143. Also, the copy of the promissory unendorsed note without permanently-affixed allonges, is still payable to Countrywide, and thus it is payable to order. *See* 6 Del. C. § 3-109(b)(c). The note contained no

indorsements or allonge. Thus, the Plaintiff cannot be a holder. 6 Del. C. § 1-201(21)(A), and thus not entitled to foreclose under 10 Del. C. Section 5061.

The Superior Court erred by failing to evaluate the evidence in this case under the UCC. The Appellee/Plaintiff herein, in its Response to the Defendant's Motion for Reargument, incorrectly stated that the Chestnut Run Court was analyzing the mortgagee's status as a holder of the note to enforce the note. *See* A242. However, it is clear the Chestnut Run case was an *in rem* foreclosure action on commercial real estate, where the mortgagee was enforcing the mortgage. *See* A262 – A269 for a copy of the *in rem* foreclosure Complaint in the Chestnut Run case.

2. The Plaintiff failed to sustain its evidentiary burden to demonstrate that it is a real party in interest with standing to foreclose.

As an essential element of the Plaintiff's *scire facias* foreclosure action, the Plaintiff bears the burden of proving that it is a real party in interest with the right to foreclose. *See* 10 Del. C. Section 5061(a); Super. Ct. Civil Rule 17(a); Deutsche Bank Nat. Trust Co. v. Goldfeder, No. 08-10-197, *5 (Del. Super. Dec. 9, 2014). The Plaintiff/Appellee failed to sustain its evidentiary burden on this issue, and thus the Plaintiff's Motion for Summary Judgment should not have been granted.

The case herein is the mirror image of the case Deutsche Bank Nat'l Trust Co. v. Moss, 2014 Del. LEXIS 294. In the Moss case, the homeowner's motion for summary judgment was granted by the Superior Court. The mortgagee in that case, at the last minute, produced an alleged promissory note with a purported indorsement in blank. Mr. Moss produced evidence attacking the chain of mortgage assignments, and argued that the originator did not have authority to execute an assignment of mortgage after seeking Chapter 11 bankruptcy protection. On appeal in Moss, this Court opined that the Plaintiff's failure to "provide record evidence to document each step in the chain of transfer that led to their client's current possession (and claimed ownership) of both the note and the mortgage" with the right to foreclose would have been fatal to the mortgagee had it been the party to move for summary judgment, and not the Defendant. *Id* at *3-4.

In the case *sub judice*, the Plaintiffs are the ones that moved for summary judgment. The Defendants, in response, submitted a purported copy of the note produced by the alleged servicer, still bearing the name of the originator, that did not include any indorsements whatsoever to the Plaintiff or in blank. *See* A141 – A143. This note also did not contain any allonges, which must be permanently affixed to the note. 6 *Del. C.* Section 3-204(a); Adams v. Madison Realty & Development, Inc., 853 F.2d 163, 167 (C.A.3 (N.J.), 1988); P&B Properties I, L.L.C. v. Owens, 1996 WL 111128 (Del. Super. Feb. 15, 1996). The Defendant also produced caselaw and evidence that MERS did not hold any beneficial interest in any promissory notes, and thus could not have transferred the promissory note in this case to the Plaintiff. *See* supra at 16-18. The Plaintiff did not present an original note with indorsements, or any other evidence regarding ownership of the note to counteract the Defendant's evidence. Yet, the Plaintiff's summary judgment motion was granted by the Superior Court in error.

3. Ownership of both the note and mortgage are critical in a *scire facias sur* mortgage foreclosure action.

Ownership of the note and mortgage are required in a *scire facias* action. The U.S. Supreme Court, in Carpenter v. Longan, 83 U.S. 271, 274 (1872), has held that "[t]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity". Restatement Third of Property (Mortgages) Section 5.4(c) provides that "a mortgage may only be enforced by or on behalf of, a person who is entitled to enforce the obligation." *See* 6 Del. C. Sections 9-203(g) and 3- 201(b); Davis v. 913 North Market Street Partnership, 1996 Del. Super. Lexis 579 *4 (the Court opined that Davis, the owner of the mortgage and note on the 913 property, properly filed that *scire facias* action). In re Kemp, 440 B.R. 624 (Bankr. D.N.J. 2010); Bank of New York v. Raftogianis, 13 A.3d 435 (N.J. Super. Ct. 2010); Metropolitan Life Ins. Co. v. Monroe Park, 442 A.2d 503, 509 (Del. Super. Ct. 1982), *rev'd by* Monroe Park v Metropolitan Life Ins Co., 457 A.2d 734, 1983 Del. LEXIS 389 (Del. 1983). Here the Superior Court stated:

> It is the usual view that the mortgage and a note or bond secured by it are considered part of one transaction and, where possible, construed together in order to gain the intentions of the parties. *55 Am. Jur. 2d, Mortgages, § 176* (1971); 59 C.J.S., Mortgages, § 156 (1949); *Boyette v. Carden, Fla. App., 347 So.2d 759 (1977).* In Delaware, the mortgage creates no interest in the land but is

merely "a high security" for the payment of the debt. 2 *Woolley on Delaware Practice*, § 1353

In a *scire facias* action, the current version of 10 Del. C. Section 3901 omits the previous requirement for an affidavit of demand at the Complaint stage, and now requires a mortgage, plus "a certified abstractor transcript" of the mortgage to be filed with the Complaint. The Superior Court has previously considered whether a Plaintiff in a *scire facias* action must attach documentation for the alleged promissory note to the Complaint, and proof that the debt owed was a sum certain. Elmwood Federal Savings Bank v. Forest Manor Estates, Inc., 621 A2d 354 (Del. Super. 1992). While the Elmwood case pointed out that, at the Complaint stage, the Plaintiff did not have to attach a copy of the note (or affidavit of demand) to a *scire facias* complaint, the Elmwood case did not state that a mortgagee could foreclose without also being the note holder. In fact, the Elmwood case is distinguishable from the instant case, in that the foreclosure Plaintiff in that case was apparently also the owner of the underlying promissory note. The Elmwood scenario is not always the case in this post-mortgage meltdown era.

While the right to foreclose under 10 Del. C. Section 5061 emanates from the mortgage, it's clear that in a *scire facias* action, ownership of the note as well as the mortgage is required, because the right to payment emanates from the note and not the mortgage, which is merely the security for said payments. This is clear

II. THE SUPERIOR COURT ERRED IN HOLDING THAT MERS TRANSFERRED BOTH THE NOTE AND THE MORTGAGE TO THE PLAINTIFF

A. QUESTION PRESENTED

Did the Superior Court err in holding that MERS transferred both the note and the mortgage to the Appellee/Plaintiff? This issue was raised in Superior Court. See A132-134; A145-A149; A199-A214.

B. STANDARD OF REVIEW

As stated previously in Section I.B., Summary judgment may not be granted unless there are no genuine issues of material fact, and the moving party is entitled to summary judgment as a matter of law. Moore v. Sizemore, 405 A.2d 679 (Del. Supr., 1979); Super. Ct. Civ. R. 56. The moving party bears the burden of demonstrating the absence of any material facts. Matas v. Green, 171 A2d 916, 918 (Del. Super. 1961) This Court reviews a grant of summary judgment by the Superior Court *de novo*, viewing the facts in the light most favorable to the Non-Movant. Dennis v. Del. Racing Ass'n, 70 A.3d 205 (Del. 2012), 2012 Del. LEXIS 661, *3. This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitled the movant to the judgment as a matter of law." State Farm Mut. Auto. Ins., Co. v. Davis, 80 A.3d 628, 632 (Del. Supr. 2013).

from the language in the mortgage and note, as well as the foreclosure statute itself.

The purpose of a *scire facias* foreclosure action is to direct the mortgagor to show cause why "the mortgaged premises ought not to be seized and taken in execution for a payment of the said mortgage money, with interest" (emphasis added) for the non-performance of the condition of payment (emphasis added). *See* 10 Del. C. Section 5061(a); Practice and Civil Actions in the Law Court of Delaware, Victor Baynard Woolley, Volume 2, Page 918. See also Superior Court Form 13. *See* Us Bank Nat'l Ass'n v. Gilbert, 2014 Del. Super. LEXIS 20, (Del. Super. Ct. Jan. 15, 2014) (*See Supra* at Pages 4,21); JP Morgan Chase Bank v. Murray, 2013 PA Super 55, Pa. Super. Ct. 2013, 63 A.3d 1258, 1265 (Pa. Super. Ct., 2013) (*See Supra* at Pages 21-22). It is the promissory note, and not the mortgage, that grants the right to payment. *See* In re Kemp, 440 B.R. at 633 – 634.

C. MERITS OF THE ARGUMENT

1. MERS could not have transferred the note because, by its own admission, it did not have a beneficial interest in the note.

The Superior Court misapprehended the Shrewsburys' attack on the MERS' assignment of the note as an attack on MERS' ability to transfer the mortgage. *See* A195. The Shrewburys dispute MERS' ability to transfer a promissory note, not only as being contrary to the Delaware Uniform Commercial Code, but also contrary to MER's own judicial admissions and written procedures.

The Appellee/Plaintiff attached an assignment to its Complaint in which MERS purports to assign to the Plaintiff/Appellee "all beneficial interests under that certain mortgage described below together with the note(s) and obligations therein described". *See* A60.

The Superior Court determined that this assignment was effective to "convey all the rights and interest of the assignor." *See* A192. However, the caselaw and evidence presented to the Superior Court demonstrates that MERS cannot assign an interest that it does not have – an interest in the promissory note. *See* A60; A133-134; A145-A149; A202-A214. In the assignment itself, MERS does not claim to be "the holder of the note". *See* A60. Moreover, the evidence further demonstrates that, by its own admission in court proceedings, its terms and conditions with its member banks, and through its own procedures, MERS does

not claim an interest in any promissory notes. A133-134; A145-A149; A202-A214.

The Nebraska Department of Banking and Finance filed suit seeking to declare MERS a "mortgage banker" under the relevant Mortgage Bankers Registration and Licensing Act. According to that Court, MERS, not only admitted, but argued, that it does not own promissory notes:

> "MERS argues that it does not acquire mortgage loans and is therefore not a mortgage banker under § 45-702(6) because it only holds legal title to members' mortgages in a nominee capacity and is contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members. Further, MERS argues that it does not own the promissory notes secured by the mortgages and has no right to payments made on the notes. MERS explains that it merely 'immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur.' Brief for appellant at 12." MERS v. Nebraska Dept. of Banking, 704 N.W.2d 784, 787, 270 Neb. 529 (Neb., 2005).

In another case, MERS itself has prohibited this language, as being without legal effect:

> "Although mortgage assignments sometimes include language purporting to assign the promissory note as well, such assignments of the note have no legal effect. Under the laws of almost every state .... the right to enforce a promissory note can only [be] transferred from one party to another by endorsement and delivery of the note". *See* In re Cartier, Case No. 04-15754 (Bankr. N.D. Ohio 2008), ECF Nos. 105, filed June 12, 2008, Mortgage Electronic Registration Systems, Inc.'s Statement Explaining the Nature of Its Business and Providing a Status Report on Its Case Audits, at *7 n. 20. *See* A202 – A214.

Additionally, MERS Member financial institutions are specifically prohibited from claiming that MERS is a "note-owner in any action". *Id.* at *11, A212. MERS own Terms and Conditions provides:

> "MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no right whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgaged loans or mortgaged properties. References herein to "mortgage(s)" and "mortgagee of record" shall include deed(s) of trust and beneficiary under deed of trust and any form of security instrument under applicable state law." See MERS Terms and Conditions (*See* A145 – A147) (emphasis added); also available at www.mersinc.org.

MERS' Procedures Manual provides that "[t]he debt can only be transferred by properly endorsing the promissory note to the transferee". *See* A149.

Also, a promissory note must be transferred in accordance with the UCC. Pursuant to the Delaware Uniform Commercial Code (UCC), the promissory note in question here is a negotiable instrument payable to an identified person, or to order. *See* 6 Del. C. Sections 3-104(a) and 3-109. As such, it is transferred by negotiation and indorsement. See 6 Del. C. Sections 3-201, 3-203, 3-204.

Courts in this Circuit have held that a promissory note cannot be transferred through a mortgage assignment. For example, in Kemp v. Countrywide Home Loans, Inc. (In re Kemp), 440 B.R. 624 (Bankr. D.N.J. 2010), the Bankruptcy Court disallowed the Bank of New York's secured mortgage claim, because the

promissory note, still payable to Countrywide, bore no indorsements. The Bankruptcy Court also determined that the attempt to transfer the note through an assignment was ineffective:

> "The recorded assignment of mortgage does include provision for the assignment of the note as well. However, the recorded assignment of the mortgage does not establish the enforceability of the note. As discussed above, the UCC governs the transfer of a promissory note".
>
> Kemp v. Countrywide Home Loans, Inc. (In re Kemp), 440 B.R. 624, 633 (Bankr. D.N.J. 2010)

Courts around the country have held that MERS cannot transfer a promissory note. *See* Weingartner v. Chase Home Fin., LLC, 702 F. Supp. 2d 1276, 1281-1283 2010 U.S. Dist. LEXIS 23959 (D. Nev. 2010) (MERS had no ability to transfer the beneficial interest in the note "merely by assigning the security instrument"); In re Weisband, 427 B.R. 13, 20 (Bankr. D. Ariz. 2010) (assignees from MERS take only the rights and remedies available to MERS, and since MERS has no beneficial interest in debt obligation, an assignee cannot acquire standing that passes constitutional muster by assignment from MERS); Aurora Loan Serv., L.L.C. v. Weisblum, 923 N.Y.S.2d 609, 618 (N.Y. App. Div. 2011) (transfer of note may affect assignment of mortgage, but the opposite is not true: MERS' action to assign mortgage "together with" the underlying note with no evidence MERS had note, did not transfer note); In re Thomas, 447 B.R. 402 (Bankr. D. Mass. 2011) (MERS' assignment of mortgage not treated as transfer of

note: "While the assignment purports to assign both the mortgage and the note, MERS, which is a registry system that tracks the beneficial ownership and servicing of mortgages, was never the holder of the note and therefore lacked the right to assign it.")

2. The Homeowner has Standing to Challenge the Mortgagee's Standing.

The Appellants have standing to challenge the Appellee's standing to foreclose, because the Appellants will suffer an injury in fact as a result of the assignments. *See* Citimortgage, Inc. v. Bishop, 2013 Del. Super. LEXIS 95, *12-13 (Del. Super. Ct. Mar. 4, 2013). *See* A134.

It is fundamental in Delaware that a defendant has the right to insist that suit brought against him be instituted by the real party in interest, because:

> "First, that he may avail himself of all defenses which he has against the real party; second, that his payment to the plaintiff on plaintiff's recovery will fully protect him in the event of another suit upon the same cause."

Cammile v. Sanderson, 101 A.2d 316 (Del. Super., 1953).

The Shrewsburys will suffer an injury in fact if the Plaintiff/Appellee is allowed to foreclose on the mortgage without having to prove that it is the proper party to enforce the note. This would expose the Appellants to the risk of payment on the note to some unrelated 3rd party later claiming the right to payment on the promissory note, even after the collateral had been foreclosed on by the Plaintiff/Appellee, and the loan were no longer secured. *See* Adams v. Madison Realty & Dev., Inc., 853 F.2d 167-168 (3d Cir. 1988); JP Morgan Chase Bank, N.A. v. Murray, 63 A.3d 1258, 1265 (Pa. Super. Ct. 2013).

In the instant case, the Plaintiff/Appellee is not entitled to enforce the note under 6 Del. C. Section 3-301, because the note is still payable to Countrywide and is not indorsed as required by 6 Del. C. Section 3-204. Moreover, the assignments do not show an unbroken chain of assignments from Countrywide to the Plaintiff. As a result, the sale of the property at a foreclosure sale will not discharge the obligation under the note. *See* 6 Del. C. Section 3-602(a), which provides:

> "an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument".

The Superior Court erred in holding that the Defendants lack standing to challenge assignments in this case. *See* A195. The instant case is distinguishable from recent Delaware foreclosure cases which have held that the homeowner had no standing to challenge the mortgagee's standing. Citimortgage, Inc. v. Bishop, 2013 Del. Super. LEXIS 95 (Del. Super. Ct. Mar. 4, 2013); Branch Banking & Trust Co. v. Eid, 2013 Del. Super. LEXIS 264 (Del. Super. Ct. June 13, 2013).

Unlike the case at bar, these cases do not address the mortgagor's standing to challenge the standing of a transferee mortgagee holding an unendorsed note that fails to comply with the UCC. *See* Wash v. Saxon Mortg. Servs. (In re Washington), 469 B.R. 587, 592 (Bankr. W.D. Pa., 2012)(recognizing that courts within the Third Circuit have not questioned the standing of homeowners to challenge a mortgage company's failure to "satisfy the indorsement element for

negotiation of the note under the Uniform Commercial Code"); Kemp v. Countrywide Home Loans, Inc., 440 B.R. 624 (Bankr. D.N.J. 2010); In re Walker, 466 B.R. 271 (Bankr. E.D. Pa. 2012), 2012 Bankr. LEXIS 451, 2012 WL 443014 at *5-6; JP Morgan Chase Bank v. Murray, 2013 PA Super 55, Pa. Super. Ct. 2013, 63 A.3d 1258, 1265 (Pa. Super. Ct., 2013).

CONCLUSION

For the foregoing reasons, the Appellant/Defendants, the Shrewsburys, respectfully request that the Superior Court's Order Granting Summary Judgment to Defendant be Reversed, and any further relief for the Defendants the Court deems proper under the circumstances.

Respectfully submitted

CYNTHIA L. CARROLL, P.A.

/s/ Cynthia L. Carroll

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Dated: August 1, 2016

RULE 14 (b) (vii) Attachment 1

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Transaction ID 58586345

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

The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9,	)	
Plaintiff(s),	)	
v.	)	C.A. No. N15L-03-108 CLS
J.M. Shrewsbury aka J. Michael Shrewsbury and Kathy Shrewsbury,	)	
Defendant,	)	
and	)	
The United States of America,	)	
Third-Party Defendant.	)	

February 17, 2016

On Plaintiff's The Bank of New York Mellon Motion for Summary Judgment. **GRANTED.**

ORDER

Melanie J. Thompson, Esq., Atlantic Law Group, LLC, 913 North Market Street, Wilmington, Delaware 19801. Attorney for Plaintiff.

Cynthia L. Carroll, Esq., Cynthia L. Carroll, P.A., 262 Chapman Road, Newark, Delaware 19702. Attorney for Defendants.

Scott, J.

Introduction

Before the Court is Plaintiff Bank of New York Mellon's ("Defendant" or "Mellon") Motion for Summary Judgment in this mortgage foreclosure action. The Court has reviewed the parties' submissions. For the following reasons, Plaintiff's Motion for Summary Judgment is **GRANTED.**

Background[1]

Defendants J.M. Shrewsbury and Kathy Shrewsbury (collectively "Defendants") executed a promissory note (the "Note") in favor of Countrywide Home Loans, Inc. ("Lender"), and executed a mortgage (the "Mortgage") that secured that Note in favor of Mortgage Electronic Registration System ("MERS") as "nominee" for the Lender on a property located in Middletown, Delaware (the "Property"). The Mortgage was duly filed and recorded in the real property records of New Castle County, Delaware. By a transfer through MERS, Lender assigned all of its interest to Plaintiff, which was also filed and recorded in the real property records of New Castle County, Delaware.

[1] Defendants assert that there are genuine issues of material fact at issue in this case which preclude granting of summary judgment in favor of Plaintiff because of Defendants' denials in their Answer and Response. Yet their denials in both are merely conclusory, and unsupported by any evidence in the record. *See Wells Fargo Bank, N.A. v. Nickel*, 2011 WL 6000787 (Del. Super. Nov. 18, 2011). In fact, Defendants' conclusory factual denials are directly contradicted by the factual record. Furthermore, as discussed below, Defendants fail to offer any evidence to rebut the presumptions created by notarized documents and proofs of notice provided by Plaintiff. For these reasons, the Court finds there is no genuine issue of material fact, and that the record evidence demonstrates the facts set forth in this section.

On March 20, 2015, Plaintiff filed a *scire facias sur* mortgage complaint against Defendants seeking foreclosure of Plaintiff's interest in the Property. The mortgage provides that, upon Defendants' failure to pay when due any obligation or any portion of thereof when due, the loan shall be in default and Plaintiff, after notice and opportunity to cure, may accelerate the sum secured by the Mortgage and may foreclose upon the Property for the collection of the obligation. On June 2, 2015, Defendants filed an answer to Plaintiff's Complaint. Plaintiff's filed this motion for summary judgment on September 18, 2015. An Affidavit of Exemption from Loss Mitigation Affidavit and a 4f4 Affidavit were filed concurrently with Plaintiff's motion, pursuant to 10 *Del. C.* § 5062(a).

Standard of Review[2]

The Court may grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law."[3] The moving party bears the initial burden of showing that no material issues of fact are present.[4] Once such a showing is made, the burden shifts to the non-moving party to

[2] Despite Defendants' conclusory denial of such, the summary judgment standard discussed in this section is, in fact, the appropriately applicable standard on this motion for summary judgment. *See* Def. Response at ¶¶ 5-6.
[3] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[4] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

demonstrate that there are material issues of fact in dispute.[5] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.[6] "Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances."[7]

Discussion

Plaintiff has satisfied its burden and is entitled to summary judgment as a matter of law. Defendants' argument against summary judgment is that Plaintiff has not proven that it is the owner or holder of the Note, and therefore, Plaintiff is not the proper party to bring the foreclosure action.

Under Delaware law, a mortgagee or the assignee of a mortgagee's interest has standing to pursue foreclosure.[8] An assignment is valid when it operates to convey all the rights and interest of the assignor, was attested to by a credible witness, and notarized.[9] The assignment in this case was valid because it operated to convey all the rights and interest of the assignor, was attested to by a credible

[5] *Id.* at 681.
[6] *Burkhart*, 602 A.2d at 59.
[7] *Phillip-Postle v. B.J Prods., Inc.*, 2006 WL 1720073, at *1 (Del. Super. Apr. 26, 2006).
[8] 10 *Del C.* § 5061(a) (providing "upon breach of the condition of a mortgage of real estate by nonpayment of the mortgage money or nonperformance of the condition stipulated in such mortgage at the time and in the manner therein provided the mortgagee, the mortgagee's heirs, executors, administrators, successors or assigns may, at any time after the last day whereon the mortgage money ought to have been paid or other condition performed, sue out of the Superior Court of the county wherein the mortgage premises are situated a writ of *scire facias*").
[9] 25 *Del. C.* § 2109(a): An assignment of a mortgage or any sealed instrument attested by 1 creditable witness shall be valid and effectual to convey all the right and interests of the assignor. (b) All assignments of mortgages or any sealed instruments heretofore made in the presence of 1 witness and all satisfactions made by assignees in such assignments are made good and valid.

witness,[10] and was notarized by Lillian J. Ellison. Defendants have not presented any evidence showing that Ms. Ellison's notarization was not credible.[11] As such, the assignment meets the requirements set forth in the Delaware Code and Plaintiff is a valid assignee of the mortgagee.[12] As a valid assignee Plaintiff is the proper party to enforce the Note.

Moreover, Defendants attack the assignment of the Mortgage from MERS to Plaintiff. Defendants, however, lack standing to challenge the validity or enforceability of the assignment as a non-party who is not a third-party beneficiary to the assignment.[13] Furthermore, Defendants cite no authority under ***Delaware law*** suggesting that MERS assignments are treated differently than any other assignment in Delaware. On the contrary, Delaware Courts have shown little appetite for invalidating mortgage assignments merely because they were assigned by MERS.[14]

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[10] Yomari Quintanilla

[11] *See CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670, at *4 (Del. Super. Mar. 4, 2013).

[12] *See e.g., Nationstar Mortgage, LLC v. Sears*, 2015 WL 4719941, at *5 (Del. Super. Aug. 7, 2015); *CitiMortgage, Inc. v. Bishop,* 2013 WL 1143670, at *4–6 (Del.Super. Mar. 4, 2013).

[13] *Nationstar Mortgage, LLC v. Sears*, 2015 WL 4719941, at *5 (Del. Super. Aug. 7, 2015); *CitiMortgage, Inc. v. Bishop,* 2013 WL 1143670, at *4–6 (Del.Super. Mar. 4, 2013) (The Court holding that a debtor is not a party to a mortgage assignment, is not a third party beneficiary to the assignment and cannot show legal harm as a result of the assignment. As such, the debtor has no legally cognizable interest in an assignment and therefore is not in a position to complain about it. Thus, it is not plaintiff who lacks standing to sue, but defendants who lack standing to contest the assignment.)

[14] *Branch Banking & Trust Co. v. Eid*, 2013 WL 3353846, at *4 (Del. Super. June 13, 2013). *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 WL 3568180 (Del. Super. May 13, 2011) (finding plaintiff to be the proper party in interest after an assignment of a mortgage from MERS to plaintiff).

Finally, Defendant's make a conclusory challenge to the authenticity of the Mortgage. An acknowledgment of a signature by a notary, however, gives rise to a presumption of the genuineness of that signature, and the party challenging the authenticity of the document has the burden of proving otherwise.[15] In this case, Defendants have offered no evidence to support their allegation that the signatures of the Mortgage are not authentic. Without such an offering, the notary's presumption of authenticity eliminates any genuine issue of material fact.

Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

/s/Calvin L. Scott
Judge Calvin L. Scott, Jr.

[15] *Estate of Osborn ex rel. Osborn v. Kemp*, No. 2009 WL 2586783, at *6 (Del. Ch. Aug. 20, 2009) aff'd sub nom. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010).

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Transaction ID 59024734
Case No. N15L-03-108 CLS

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

THE BANK OF NEW YORK MELLON, f/k/a THE BANK OF NEW YORK, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9,	)	
Plaintiff,	)	
v.	)	C.A. No. N15L-03-108 CLS
J. M. SHREWSBURY, a/k/a J. MICHAEL SHREWSBURY, and KATHY SHREWSBURY,	)	
Defendants.	)	

Submitted: March 1, 2016
Decided: May 18, 2016

On Defendants' Motion for Reargument. **DENIED**.

ORDER

Melanie J. Thompson, Esquire, Atlantic Law Group, L.L.C., Wilmington, Delaware, Attorney for Plaintiff.

Cynthia L. Carroll, Esquire, Cynthia L. Carroll, P.A., Newark, Delaware, Attorney for Defendants.

SCOTT, J.

On this 18th day of May, 2016, and upon Defendants', J. M. Shrewsbury, also known as J. Michael Shrewsbury, and Kathy Shrewsbury (collectively, "Defendants"), Motion for Reargument, it appears to the Court as follows:

1. On March 20, 2015, Plaintiff, The Bank of New York Mellon, formerly known as The Bank of New York ("Plaintiff"), as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9, instituted a *scire facias sur* mortgage action against Defendants, arising out of Defendants' alleged breach by non-payment of monthly installments due under a mortgage executed by Defendants and pertaining to certain real property located in Middletown, Delaware.

2. On September 18, 2015, Plaintiff moved for summary judgment, contending that Defendants failed to plead any allowable defense(s) in their Answer and, thus, there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law.

3. On November 16, 2015, Defendants responded to Plaintiff's motion for summary judgment, arguing that Plaintiff lacks standing for failure to prove that it is the owner and/or holder of the promissory

note, which, Defendants contend, is required in order to enforce the mortgage under Delaware law.

4. On February 17, 2016, this Court issued an order granting Plaintiff's motion based on its finding that, because the assignment of the mortgagee's interest to Plaintiff was valid, under Delaware law Plaintiff has standing to pursue foreclosure of Defendants' mortgage. The Court further found no genuine issue of fact owing to Defendants' having failed to satisfy their burden of rebutting the presumption of authenticity of the mortgage, which they alleged.

5. On February 24, 2016, Defendants timely filed their Motion for Reargument under Superior Court Civil Rule 59(e), contending that the Court misapprehended the law and facts of this case such as would affect the outcome of the decision. Specifically, Defendants contend that the Court, in its order, misapprehended Defendants' argument as challenging the validity or enforceability of the mortgage assignments, rather than challenging whether the note was validly assigned. In support of this contention, Defendants explicitly refer to the argument previously made in their response to Plaintiffs' summary judgment motion—"that the mortgagee must also be the noteholder,

pursuant to the note and mortgage contract"[1]—this time, the Court notes, without citation to non-binding, and otherwise irrelevant, case law from other states and appellate district courts of appeal, but also, and more importantly, without reference to any relevant Delaware case law or other binding precedent on this issue.

6. On March 1, 2016, Plaintiff responded to Defendants' Motion, contending that Defendants' argument is misplaced, because the mortgagee's right to foreclose under Delaware law emanates from the mortgage, not the note, and, thus, Plaintiff, as legal holder of the mortgage, has standing to bring the instant action. In support of its argument, Plaintiff cites to numerous Delaware cases standing for the legal principle that, in Delaware, a *scire facias sur* mortgage action is based upon the mortgage, is strictly an *in rem* action, and has limited allowable defenses, *i.e.*, only payment, satisfaction, absence of seal, or a plea in avoidance of the deed, and, thus, such an action is separate and apart from an action to enforce the note, which it does not seek.

7. On a motion for reargument under Superior Court Civil Rule 59(e), the only issue is whether the Court overlooked something that

[1] Defs.' Mot. Rearg. ¶ 10.

would have changed the outcome of the underlying decision.[2] Thus, the motion 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."[3] A motion for reargument is not an opportunity for a party to rehash the arguments already decided by the Court or to present new arguments not previously raised.[4] A party seeking to have the Court reconsider the earlier ruling must "demonstrate newly discovered evidence, a change in the law, or manifest injustice."[5]

8. Defendants fail to demonstrate that the Court has overlooked a controlling precedent or legal principles or misapprehended the law or facts as such would affect the outcome of the decision based on their unsupported, repetitive, and similarly unavailing argument that Delaware law requires a mortgagee hold both the note and the mortgage in order to bring a mortgage foreclosure action under 10 *Del. C.* § 5061(a). As such, Defendants' Motion merely rehashes the arguments already decided by the Court in its decision pertaining to

[2] *Brenner v. Vill. Green, Inc.*, 2000 WL 972649, at *1 (Del. Super. May 23, 2000) *aff'd*, 763 A.2d 90 (Del. 2000).
[3] *Kennedy v. Invacare, Inc.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006).
[4] *Id.*
[5] *Brenner*, 2000 WL 972649, at *1.

summary judgment, as evidenced by Defendants' explicit reference to and repetition of the same arguments made in their response to Plaintiff's motion for summary judgment, which is not enough to support a motion for reargument under Rule 59(e).[6]

9. Moreover, Defendants have offered no change in case law that would require the Court to reassess its decision to deny Plaintiff's motion for summary judgment. Accordingly, Defendants have failed to satisfy the standard under Rule 59(e) for the Court to grant their Motion for Reargument.

For the foregoing reasons, Defendants' Motion for Reargument is **DENIED**.

IT IS SO ORDERED.

/s/Calvin L. Scott, Jr.

Judge Calvin L. Scott, Jr.

[6] *See Brenner*, 2000 WL 972649, at *1.