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Case Number 26,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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, assignee of Deutsche Bank Trust Company Americas fka 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 Plaintiff – Below Appellant, v. Eugene Moss The United Stated of America Defendant - Below Appellee.	)	No. 26, 2014 Court Below: Superior Court of the State of Delaware, in and for New Castle County (C.A. No. N11L-03-097-ALR)

APPELLEE'S CORRECTED ANSWERING BRIEF

Dated: April 16, 2014

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NATURE OF PROCEEDINGS

On March 9, 2011, the Plaintiff instituted foreclosure proceedings in Superior Court against Moss. DI 1.[1] Moss, filed his Pro-se Answer to the Complaint on April 12, 2011 which he amended on April 18, 2011 and June 17, 2011, and added counterclaims. DI 5, 6, 8. The Plaintiff filed an Answer to the Counterclaims, on July 7, 2011. DI 9.

On October 17, 2011, Defendant filed his Motion for Summary Judgment, pro-se, DI 12-22, to which Plaintiff responded on January 4, 2012. DI 41. On May 8, 2012, through undersigned Counsel, the Defendant, filed an Amended Motion for Summary Judgment DI 44-51, 53 and 54. The Plaintiff filed a Response to this Amended Motion on May 9, 2012. A hearing was conducted on the Motion by The Honorable Jerome Herlihy on May 16, 2012, and the Defendant's Motion for Summary Judgment was denied without prejudice. DI 56. A Transcript of that hearing is docketed at DI 57.

After the case was placed on the Dormant Docket at the Plaintiff's request, Defendant filed a new Motion for Summary Judgment, with Expert Report and supporting Affidavit, on August 14, 2013, DI 59, 60-70. The Plaintiff filed its

[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 Appendices (Dated March 3, 2014) are made as "A" followed by the appropriate page number. References to the Plaintiff's Opening Brief are to the [Second Corrected] Appellant's Opening Brief filed on March 17, 2014. Reference to Appellee Appendix are made as "Def. Ex." followed by the appropriate page number.

Response on September 10, 2013 DI 77, to which the Defendant Replied on September 24, 2013. DI 82-24, see Def. Ex. B9-B48.

On October 29, 2013, the Plaintiff filed a Substitution of Counsel. DI 87. A hearing on the Defendant's Motion for Summary Judgment was conducted by the Honorable Andrea Rocanelli on November 13, 2013, Transcript at DI 94. The Plaintiff filed a Supplemental Response on December 12, 2013. DI 90. See A589 to A626.

On December 18, 2013, the Court issued an Order Granting Defendant's Motion for Summary Judgment. DI 91. See Def. Ex. B79. The Plaintiff filed its Motion for Reargument, pursuant to Superior Court Rule 59(e) on December 23, 2013. DI 72, A627 to A631. On December 28, 2013, the Defendant filed a Response to the Plaintiff's Motion for Reargument. See Def. Ex. B49. On December 30, 2013, the Court issued an Order denying the Plaintiff's Motion for Reargument, DI 93, See Def. Ex. B94, and the Plaintiff filed this Appeal.

SUMMARY OF ARGUMENT

1. Denied. The grant of Summary Judgment to the Defendant was proper as a matter of law, and supported by the evidence because the Plaintiff failed to satisfy its evidentiary burden in accordance with Super. Ct. Civ. R. 56 that it was a real party in interest to foreclose as required by Super. Ct. Civ. R. 17. Plaintiff failed to file supporting Affidavits. After dismantling the façade of the two purported assignments attached to the Complaint, the Defendant's evidence proved that the alleged assignments were actually void, defective, and the alleged chain of assignments actually created inconsistencies in the timelines, thus evidencing the Plaintiff's lack of standing to foreclose. The Defendant is well within the zone of interests to do this, and is not seeking to enforce the assignments in contract or tort as a third party beneficiary. Plaintiff's MERS information conflicted with the MERS' own systems and sworn testimony.

2. Denied. The Plaintiff should be precluded from raising any judicial admission argument for the first time in this Appeal, as it was not fairly presented to the Trial Court, pursuant to Sup. Ct. R. 8. For this reason, it cannot be the source of error, as claimed by the Plaintiff. Allowing this argument would also be contrary to the interests of justice, due to the Plaintiff's attempted fraud on the Court in submitting the July 14, 2008 Bankruptcy Court Order to the Superior Court. Moreover, because the Defendant specifically denied the allegations that the

Plaintiff was "duly assigned" his mortgage, in his Answer and both Amended Answers to the Complaint, the statements and actions claimed do not rise to the level of judicial admissions as alleged by the Plaintiff.

3. Denied. In a recent Delaware case, Us Bank Nat'l Ass'n v. Gilbert, 2014 Del. Super. LEXIS 20, (Del. Super. Ct. Jan. 15, 2014) at *9-10, the Plaintiff's Motion for Summary Judgment in a *scire facias* action was denied, where the Plaintiff failed to show, among other things, that it was the holder of the note, and the alleged assignments created inconsistencies in the timelines. 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".

4. Denied. According to MERS, Plaintiff is not the owner of the loan. A366. Additionally, the Plaintiff has now floated four different scenarios of when the Defendant's mortgage was allegedly sold, all unsupported by Affidavits. Contrary to the mis-characterization contained in the Plaintiff's Opening Brief statements, the Defendant has not agreed that his loan was sold to the Plaintiff under any of these scenarios. Moreover, based on MER's own sworn testimony, MERS could not have acted for all of New Century's alleged successors and assigns.

STATEMENT OF FACTS

I. THE MORTGAGE

The Defendant, Eugene Moss, is the owner of 210 Porky Oliver Drive, Middletown, Delaware, 19709, his personal residence. Mr. Moss entered into a mortgage loan agreement with New Century Mortgage Corporation on January 10, 2007, the mortgage which was recorded on January 31, 2007.

II. NEW CENTURY'S BANKRUPTCY AND THE COMPLAINT

New Century Mortgage Corporation ("New Century") stopped originating loans and filed for Chapter 11 Bankruptcy protection in the District of Delaware on April 2, 2007, Lead Case Number: 07-10406 (KJC). See A422 and A552.

On March 9, 2011, the Plaintiff filed a Foreclosure Complaint against the Defendant in Superior Court. The Plaintiff attached two purported assignments to its Complaint, in an effort to show that it was assigned the mortgage. The First Assignment states it was executed by New Century through MERS as nominee on January 17, 2008, and filed on February 6, 2008. See A041. The alleged assignee was a trust named "Morgan Stanley, MSAC 2007-NC3". See A319. A search of the "Morgan Stanley, MSAC 2007-NC3" trust is not the name of any trust that the Defendant's Expert could locate. See A350 and A415. This January 2008 assignment also refers to Saxton Mortgage Services Inc. f/k/a Meritech Mortgage

Services, Inc. "as its attorney-in-fact". However, no Power of Attorney was recorded with this assignment as required by Delaware Law. A315.

The second purported assignment was executed on April 1, 2010 and recorded on April 13, 2010, but according to the assignment, entered into "as of" November 16, 2009. See A037. This back dated assignment from a non-existent trust purports to assign the mortgage "together with and any all notes and obligations". MERS does not assign interests in notes. See A401. The nonexistent trust was not only named in the caption of the Plaintiff's Complaint, but also in the alleged First Assignment. A09, A10, A041. It is through this alleged Second Assignment that the Plaintiff alleges to have obtained the note as well as the mortgage. See A043.

The Plaintiff, in the Second Assignment, claims to be trustee for a securitized trust named Morgan Stanley ABS Capital 1 Inc. Trust 2007-NC3 Mortgage Pass-Through Certificates, Series 2007-NC3. See A158. The Defendant's Expert provided a link to the Pooling and Servicing Agreement (PSA) governing this trust, which was still operational as of April 2, 2014. See A339. The Closing Date of this particular trust was May 31, 2007. See A337. According to the governing documents for this trust (the PSA), in order to transfer assets into this trust, a series of true sales must be completed to ensure that the investors have the right of ownership to the mortgage assets contained in the trust. See A337-

A343 as follows: From New Century to NC Capital; From NC Capital to Morgan Stanley Mortgage Capital, Inc.; From Morgan Stanley Mortgage Capital Inc. to Morgan Stanley ABS Capital I Inc.; and from Morgan Stanley ABS Capital I Inc. Deutsche Bank National Trust Company, as Trustee for The Morgan Stanley ABS Capital I Inc Trust 2007-NC3. An unbroken chain of these transfers and acquisition by the PSA must have been completed by the May 31, 2007 Closing Date of the trust, and each party of the subject transfers would have to be MERS members, in order for MERS to act as nominee for each assignee. See A339-A343, A402. As indicated on A345, only two of the alleged beneficiaries of the transfers were MERS members. In addition, the PSA provides that the notes are to be indorsed on the face of the note with all intervening endorsements showing a complete chain of endorsements. A342 and A353. The copy of the note Plaintiff presented does not show any indorsement on the face of the note, and none of the above requisite intervening indorsements. See A407.

On April 12, 2011, Mr. Moss filed his pro-se Answer to the Plaintiff's Complaint, and subsequently filed Amended Answers. The Defendant consistently denied Allegation 2, that the Plaintiff was assigned his mortgage, and denied most of the remaining allegations, except Allegation 1 (that he executed a mortgage to New Century), and Allegation 5 (that a federal tax lien encumbered the property). See A10, A11. A051, A061, A071.

On May 8, 2012, the Defendant through Counsel filed an Amended Motion for Summary Judgment, and the Plaintiff filed a Response. A hearing was on this Motion was held on May 16, 2012. The Defendant's Motion was dismissed without prejudice. DI 57. On August 14, 2013, the Defendant again through undersigned Counsel filed the Motion for Summary Judgment, supported by Affidavit, to which the Plaintiff responded, and the Defendant then filed a Reply. Def. Ex. B9-B48. The Plaintiff's Response wasn't supported by Affidavit. A550-A568. Plaintiff made a tacit admission to not having an indorsed note. A558.

On October 29, 2013, the Plaintiff filed a Substitution of Counsel. A hearing was conducted on November 13, 2013 by the Honorable Andrea L. Rocanelli. Plaintiff's new counsel, Defendant's counsel and the Defendant were present. At this hearing, Plaintiff's counsel indicated that he had reviewed the Plaintiff's Response to the Defendant's Third Motion for Summary Judgment which was submitted by the prior firm, as well as the transcript showing Judge Herlihy's comments at the May 16, 2012 hearing. See A635 and A636.

The Court also indicated that the Plaintiff had not provided sufficient evidence to support its claim that New Century had authority to transfer the loan from New Century as indicated on the January 17, 2008 assignment attached to its Complaint. Judge Herlihy also expressed his concern regarding New Century's bankruptcy at the May 16th hearing. See DI 57. As Judge Rocanelli pointed out,

the Plaintiff admitted in Paragraph 4(b) that New Century stopped originating loans, filed Bankruptcy and sold substantially all of its servicing platform to Carrington. See A552 and A637. 11 U.S.C. § 363(b)(1) requires Bankruptcy Court permission to sell an asset that is not in the ordinary course of business. So, the Plaintiff submitted a July 14, 2008 Sect. 362 lift-stay Order from New Century's Bankruptcy case, as purported authorization for New Century to have transferred the Defendant's mortgage through MERS on January 17, 2008, six (6) months earlier. See A628, A638, A569-A571. Contrary to Plaintiff's representation, this July 14, 2008 blanket order under 11 U.S.C. § 362 clearly did not apply to the January 17, 2008 transfer. A552, A628, Def. Ex. B14-B35 [includes New Century's Motion related to the July 14, 2008 Order (A569-A571)].

The Plaintiff's Response further stated "But It doesn't then follow the assignment of the mortgage is invalid". A552. This statement, according to the Court, was submitted without support, and in direct violation of Judge Herlihy's concerns as expressed at the May 16, 2012 hearing. A637.

The Court next quoted the following from Paragraph 4(b) of Plaintiff's response to Defendant's Motion for Summary Judgment. "Although it is true that Plaintiff has not until now produced evidence that New Century had Bankruptcy Court permission to transfer a mortgage after the commencement of the Bankruptcy proceeding, the 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". See A552 and A638.

Again, the Court admonished Plaintiff for this statement, stating that "it directly flies in the face of Judge Herlihy's specific May 16, 2012 instructions, wherein Judge Herlihy warned that sanctions might be imposed upon counsel who made a submission to this Court that included unsupported factual statements in the context for a Motion for Summary Judgment". A638.

Next, the Court gave the Plaintiff one month to supplement the record, and gave examples of what type additional evidence would be appropriate, "including without limitation an Affidavit from an expert in Bankruptcy Law or counsel in Delaware to New Century who handled the proceedings a block from this Court House". See A641. The Court then went onto state the following to the Plaintiff's counsel at the hearing:

> "Mr. Miller, you may have an opportunity to supplement the record or make a submission you would like to do so with the express warning that my expectation will be that you will exceed my expectation for appropriate presentation. If you cannot provide legal or factual support for the concerns expressed by this Court, then my suggestion is to step up and say you cannot".

The Plaintiff filed a Supplemental Response on December 12, 2013, again without supporting Affidavit A589-A630. In this Supplemental Response, the Plaintiff provided legal argument, plus a copy of a note without an indorsement on

its face, then a copy a purported indorsement payable to the order of another party, not the Plaintiff. A626. The Court issued its December 20, 2013, decision granting the Defendant's Motion for Summary Judgment. See Def. Ex. B90.

On December 27, 2013, the Plaintiff filed its Motion for Reargument, pursuant to Super. Ct. Civ. R. 59(e). A627-A631. In that Motion, the Plaintiff stated that it was unaware of the Court's concerns. However, not only was Plaintiff's new Counsel present at the November 13, 2013 hearing and a transcript made available by November 18, 2014 (A644), but a transcript of the May 16, 2012 hearing was filed on the docket at DI 57. Also in this Motion, the Plaintiff stated that it was in the process of preparing a Subpoena in Deuces Tecum seeking more evidence, but this was to have been completed by the December 13, 2013 deadline. A643.

The Plaintiff also tried to distance itself from the July 14, 2008 Bankruptcy Court Order it submitted, while admitting that the prior counsel did submit the blanket stay relief Order from the New Century bankruptcy case as authority for the transfer reflected in the First January 17, 2008 Assignment. See A628. In Plaintiff's Motion for Reargument filed under Rule 59(e), the Plaintiff did not allege that the Superior Court made an error of law, but claimed not to have been given the opportunity to provide oral argument or testimony. A628.

MERITS OF ARGUMENT

I. THE PLAINTIFF FAILED SUSTAIN ITS EVIDENTIARY BURDEN TO SHOW THAT IT IS A REAL PARTY IN INTEREST WITH THE RIGHT TO BRING THIS FORECLOSURE ACTION AGAINST THE DEFENDANT.

A. QUESTIONS PRESENTED

Did the Plaintiff meet its evidentiary burden, under Super. Ct. Civ. R. 56, to show that it is a real party in interest? This issue was presented to the Superior Court in the Defendant's Motion for Summary Judgment (A313-A549), the Defendant's Reply to the Plaintiff's Response to the Defendant's Third Motion for Summary Judgment (DI 82-84, Def. Ex. B9-B48), as well as the Defendant's Response to the Plaintiff's Motion for Reargument, filed December 28, 2013 (Def. Ex. B49-B53).

B. STANDARD OF REVIEW

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, to determine whether the Movant has proven that there are no material issues of fact, and that the Movant is entitled to summary judgment as a matter of law. Dennis v. Del. Racing Ass'n, 70 A.3d 205 (Del. 2012), 2012 Del. LEXIS 661, *3. A determination will first be made as to whether Non-Movant (here, the Plaintiff) has made a sufficient showing to establish the existence of the essential elements of its

claim, because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial". Hazel v. Del. Supermarkets, Inc., 953 A.2d 705, 709 (Del. 2008). The Movant initially bears the burden to show that none are present. Moore v. Sizemore, 405 A.2d 679 (Del. Supr., 1979). "When a motion for summary judgment is 'supported' by such a showing under the Rule, the burden shifts to the non-moving party to demonstrate that there are material issues of fact". Id. Brzoska v. Olson, 668 A.2d 1355 (Del. Supr., 1995). The non-movant may not simply rely on mere allegations or denials of the adverse party's pleading, but must respond, by affidavits or as otherwise provided in Rule 56, setting set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not controvert the movant's affidavits or other record evidence with an affidavit of its own, the motion for summary judgment should be granted. Nix v. Sawyer, 466 A2d 407 (Del. Super. Ct. 1983); *See* Moore v. Sizemore, Del. Supr., 405 A.2d 679 (1979).

C. ARGUMENT.

1. Plaintiff's status as a real party in interest is an essential element of its claim in these foreclosure proceedings, and the Plaintiff failed to sustain its evidentiary burden in this case.

As an essential element of the Plaintiff's *scire facias* foreclosure action, the Plaintiff must prove that it is a real party in interest with the right to foreclose. *See* 10 Del. C. Section 5061(a) and Super. Ct. Civil Rule 17(a). In the Superior Court, the Defendant alleged the Plaintiff was not a real party in interest to initiate these foreclosure proceedings, supporting his Motion for Summary Judgment with an Expert Report and Supporting Affidavit. A313-420.

To survive summary judgment, the burden shifted to the Plaintiff to support its factual assertions by Affidavit, as per Nix v. Sawyer, which the Plaintiff failed to do. 11 U.S.C. Sect. 363(b)(1) requires Bankruptcy Court permission for asset transfers outside of the ordinary course of business. The Plaintiff conceded that New Century was no longer in the servicing business by the time of the sale of all of its servicing assets to Carrington in June, 2007. A552. By submitting the July 14, 2008 blanket stay relief Order from the New Century bankruptcy case, and arguing that the Order provided authority for the January 17, 2008 assignment (A628), the Plaintiff had, in effect, already conceded that Bankruptcy Court permission was needed for this assignment. Def. Ex. B79.

2. The issue of whether the Defendant made a judicial admission was not presented to the Superior Court and should not be considered on appeal.

In this Appeal for the first time, the Plaintiff alleged that the Defendant made a judicial admission by attaching a copy of a loan modification to his Answer and Amended Answers to the Complaint and a Motion for Summary Judgment. Since this allegation of judicial admission was never raised in Superior Court, it cannot be the source of error. This Court has held that arguments must be "fairly presented" to the Superior Court in order to be preserved on appeal. Bryant v. Bayhealth Medical Center, Inc., 937 A.2d 118, 125 (Del., 2007); Rochester v. Katalan, 320 A.2d 704, 705 (Del. 1974). Furthermore, applying the plain error standard, this Court has held that reversal would not be warranted absent material defects which are apparent, basic, fundamental and would result in manifest injustice. Wallace v. State, 956 A.2d 630, 637, 2008 WL 2952064 (Del., 2008). Winn v. State, 1993 Del. LEXIS 176, at Pages 5-6, (Del. Apr. 21, 1993).

Judicial admissions are knowing and voluntary concessions of fact made during judicial proceedings by a party. BE&K Eng'g Co., LLC v. Rocktenn CP, LLC, 2014 Del. Ch. LEXIS 3, 19 (Del. Ch. 2014). Equivocal statements do not constitute judicial admissions, and are not binding. Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972); Blinder, Robinson & Co. v. Bruton, 1988 Del. Ch. LEXIS 45 at 14 (Del. Ch. Mar. 31, 1988). Evidentiary admissions, as distinguished from judicial admissions, are not binding, but are considered

evidence to be rejected or accepted by the trier of fact. Merritt v. UPS, 956 A.2d 1196, 1201 (Del. 2008). Where a statement is not a knowing concession of fact related to a necessary element for a claim, the statement is not deemed a judicial admission. *See* Eli Lilly & Co. v. Valeant Pharms. Int'l, 2011 U.S. Dist. LEXIS 15243 (S.D. Ind. Feb. 15, 2011) at page 9-10 [citing and distinguishing Merritt v. UPS, 956 A.2d 1196 (Del. 2008)]. Here, the Defendant consistently Denied Allegation No. 2 of the Complaint, in his Answers and Amended Answers, specifically denying that the Plaintiff owned his mortgage, and thus the act of attaching an unsigned loan modification and requesting that it be honored, does not rise to the level of an unequivocal admission of fact to constitute a judicial admission. *See*, Ervin v. Robert Vesnaver & Murray Transp. Co., 2000 Del. Super. LEXIS 312, at Page 6, (Del. Super. Ct. 2000), (where, since the Defendant did not specifically admit in his Answer to the acts of negligence alleged in the Complaint, the Defendant's general negligence admissions were not deemed judicial admissions). Also, the interests of justice should prevent the Plaintiff from being heard on this judicial argument on appeal. The Plaintiff clearly attempted fraud on the court in submitting the July 14, 2008 "blanket order of relief from stay in the New Bankruptcy case" as authority for a January 17, 2008 assignment six (6) months prior, when it clearly did not apply to this assignment. See A628, A552, and the Court's December 20, 2013 Order, and Def. Ex. B9, B14-B35, and B91.

II. THE DEFENDANT HAS A RIGHT TO CHALLENGE ASSIGNMENTS TO DETERMINE THE PLAINTIFF'S RIGHT TO CONDUCT A VALID FORECLOSURE

A. QUESTIONS PRESENTED

Does the Defendant have the right to challenge assignments of the note and mortgage, not as a third-party beneficiary seeking to recover under a contract, but for the purpose of determining the Plaintiff's right to conduct a valid foreclosure, especially if there is evidence that the transfer(s) is void, or if the alleged chain of title created inconsistencies in the timelines? This issue was presented to the Superior Court in the Defendant's Motion for Summary Judgment (A313-A549), and in Defendant's Reply to the Plaintiff's Response to the Defendant's Third Motion for Summary Judgment (DN 82-84, at Def. Ex. B9-B48).

B. STANDARD OF REVIEW

As stated previously in Section I.B., 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, to determine whether the Movant has proven that there are no material issues of fact, and that the Movant is entitled to summary judgment as a matter of law. Dennis v. Del. Racing Ass'n, 70 A.3d 205 (Del. 2012), 2012 Del. LEXIS 661, *3. The Movant initially bears the burden to show that none are present. Moore v. Sizemore, 405 A.2d 679 (Del. Supr., 1979). "When a motion for summary judgment is 'supported' by such a showing under

the Rule, the burden shifts to the non-moving party to demonstrate that there are material issues of fact". Id. Brzoska v. Olson, 668 A.2d 1355 (Del. Supr., 1995). The non-movant may not simply rely mere allegations or denials of the adverse party's pleading, but must respond, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not controvert the movant's affidavits or other record evidence with an affidavit of its own, the motion for summary judgment should be granted. Nix v. Sawyer, 466 A2d 407 (Del. Super. Ct. 1983); *See* Moore v. Sizemore, Del. Supr., 405 A.2d 679 (1979).

C. ARGUMENT.

1. Mr. Moss has standing to object to void assignments, assignments involving improperly-indorsed notes, as well as those in which the Plaintiff's alleged chain of title to ownership created timeline inconsistencies.

Del. Code Tit. 6 Sec. 2510 Deceptive foreclosure practices. (Delaware Code (2014 Edition), provides as follows:

> (a) No person shall make, use, or cause to be made or used a deceptive or fraudulent record, document, or statement in support of any foreclosure upon real property, including, without limitation, statements about the offering of a loan modification, the borrower's history of payments, the validity of the assignment of the mortgage loan, the identity of the record holder of the mortgage loan, or the compliance with any other requirements of the Delaware Code or Superior Court rule (emphasis added).

Although this statute may not give a homeowner a private right of action, it is clear that the Delaware Legislature has expressed a clear policy against the use invalid assignments to support a foreclosure. It is also 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, 48 Del. 225, 9 Terry 225 (Del. Super., 1953)

In a recent Delaware case, Us Bank Nat'l Ass'n v. Gilbert, 2014 Del. Super. LEXIS 20, (Del. Super. Ct. Jan. 15, 2014) at *9-10, the Plaintiff's Motion for

Summary Judgment in a *scire facias* action was denied, where the Plaintiff failed to show, among other things, that it was the holder of the note, a sufficient chain of assignments of the mortgage, nor that the FHA foreclosure conditions precedent were met. The Court also found there were inconsistencies in the timelines. Id. at Page 11. Similarly, in Pennsylvania, where *scire facias* is also employed, the Court reversed summary judgment for the Plaintiff because it failed to establish a clear chain of assignments and possession of the original indorsed note. *See* JP Morgan Chase Bank v. Murray, 2013 PA Super 55, Pa. Super. Ct. 2013, 63 A.3d 1258, 1265 (Pa. Super. Ct., 2013).

The fear of multiple suits expressed in the Cammile has proven to be a real threat with loans originated by New Century. For example, in the case New Century Mortgage Corporation v. Braxton, 2010 Mass. LCR LEXIS 21, 2010 WL 59277 (Mass. Land. Ct. Jan. 11, 2010), two separate entities had filed submissions with the Court, both claiming to have an interest in the same mortgage loan, with one of the entities having the mortgagors' loan on the Mortgage Loan Schedule of a Mortgage Loan Purchase Agreement. *Id.* At *3-4, Paragraphs 6 and 13.

In the Braxton case, the homeowner, like Defendant Moss, originated a loan with New Century. In that case, New Century sued the defendant homeowners for reformation of two mortgages. The Braxton Court granted summary judgment for defendants because New Century had failed to show, after being ordered to do so,

how it had the authority to assign the mortgages of the homeowners while bankruptcy proceedings were pending, also similar to the instant case. The Court in Braxton held that since New Century failed to submit sufficient proof that it was able to assign the mortgage post-petition, when ordered it to do so, New Century could not show that it had the authority to proceed with the reformation action.

In the instant case, not only has the Plaintiff failed to come forward with an original note indorsed to it, the alleged indorsement is to a third party and not the Plaintiff and the chain of title of the assignments created inconsistencies. The chain of title was further muddied by Plaintiff's assertion, in its Opening Brief, for the first time in this appeal, "that the Mortgage was one of the mortgages that New Century sold in the sale of its loan servicing business". See Plaintiff's Def. Ex. B52, B56. New Century sold its servicing platform to Carrington on June 29, 2007. See A425. Nowhere in the Assignments attached to the Complaint (A037-A041) is Carrington mentioned as being one of the assignees. See A11, A37, A41, A627-A630; A589-A626.

On this point, contrary to Plaintiff's mischaracterization on Page 23 of its 2nd Amended Opening Brief, (Def. Ex. B82), the Defendant did not state that the mortgage was "one of the mortgages that New Century sold in the sale of its loan servicing business". A314; A425-A426. The Defendant's point here, as expressed in his Motion for Summary Judgment (A314-A315), since the transfer from New

Century (via "MERS as nominee"), as reflected in the First Assignment attached to the Plaintiff's Complaint (A319), could not have occurred on January 17, 2008, because by this time, New Century had sold its servicing platform to Carrington; or, if the Defendant's loan had been properly transferred to the securitized trust in accordance with the Plaintiff's own PSA, the loan would have needed to be transferred by the May 31, 2007 the closing date of that trust. See A314, A319, A 338-341, A351, A352.

The chain of assignments created inconsistencies in the timelines, as indicated above. The record in this case also consists of a void alleged assignment into a securitized trust, and a backdated assignment from a non-existent trust allegedly to the Plaintiff. The Second Assignment also claims to transfer "together with any and all notes and obligations" to Plaintiff (A043), when MERS as nominee for bankrupt originator New Century, the alleged Assignor of the First Assignment, has no interest in notes that it could have assigned (see A355, Paragraphs 18 and 19).

Plaintiff has now told four different stories regarding when the Defendant's loan was allegedly transferred to it. Firstly, the FIRST ASSIGNMENT dated January 17, 2008 by MERS as nominee of New Century on January 17, 2008 to the "Morgan Stanley, MSAC 2007-NC3" trust; then as per the SECOND ASSIGNMENT from the Morgan Stanley, MSAC 2007-NC3 trust to the Plaintiff

"as of November 16, 2010". See A041, A037. Secondly, the Plaintiff claims that the loan "was actually transferred to the pooling trust prior to the filing of" New Century Mortgage Corporation's Chapter 11 filing of April 2, 2007. See A422, and A552. Thirdly, the loan was to have been transferred by May 31, 2007, in accordance with its own PSA. *Supra*, at Page 8. And, Plaintiff's new theory advanced for the first time in this appeal -- that the loan in question here was one of the mortgages that New Century sold to Carrington in the June 29, 2007 sale of its loan servicing platform to Carrington. *Supra*, Page 21-22.

Not only should this new theory be precluded by Supreme Court Rule 8, Carrington is not reflected in the chain of transfers attached to the Complaint. See A11, A37, A41, A551. To be clear, the Defendant does not agree that the loan was assigned to Plaintiff in any of the various scenarios the Plaintiff has alleged throughout these proceedings.

2. **The Defendant's focus is on the Plaintiff's authority to conduct a valid foreclosure, and he is not trying to enforce the assignments or the PSA as a Third Party Beneficiary.**

The Plaintiff has cited various cases, inside and outside of Delaware, for the proposition that because the Defendant was not a 3rd Party beneficiary, he has no standing to challenge the assignments. *See* Plaintiff's Opening Brief, Def. Ex. B15-B18. However, the Defendant distinguishes himself from those prior cases in several respects. The Defendant, has submitted evidence to the Superior Court that the assignments are void, not just voidable, as well as inconsistencies in the alleged timelines and the alleged indorsement is made payable to a Third Party. *See* Us Bank v. Gilbert at 11.

The Defendant is not attempting to enforce a contract as a 3rd party beneficiary would, but the Defendant is protecting a real cognizable interest at stake–the right to be protected against duplicative claims. *See* Cammile v. Sanderson, 101 A.2d 316, 48 Del. 225, 9 Terry 225 (Del. Super., 1953).

Also, like the JPMorgan and Gilbert cases (*see Supra* at 21-22), the Defendant's is attacking the invalid and void assignments and inconsistent timelines to focus on the Plaintiff's authority to conduct a valid foreclosure, which would terminate the Defendant's his interest in his home, subject him to physical eviction, and terminate his equity of redemption. An unauthorized eviction by a party who has not proven the right to do so, risks the Defendant's claim to

possession and ownership of his property, posing a very concrete injury to the Defendant, an injury that he has standing to prevent, and puts him well within the zone of interests required for standing to challenge the assignments at issue here. *See* Gewecke v. U.S. Bank N.A., 2011 U.S. Dist. LEXIS 116065 (D. Minn. June 6, 2011); Brezzel v. Bank of America, 2011 WL 268973, at *4 (ED. Mich. July 11, 2011).

The Defendant's case is distinguishable from many of the Delaware cases the Plaintiff cited in its Opening Brief, where the Court applied the 3rd Party Beneficiary doctrine to instances where the plaintiff was either suing to enforce or recover under a contract, or suing under a tort theory. *See* MetCap Secs. LLC v. Pearl Senior Care, Inc., 2007 Del. Ch. LEXIS 65 (Del. Ch. May 16, 2007)(suit by investment banking advisory firm for reformation of a contract, fraud, unjust enrichment, and for damages under a third-party beneficiary contract theory); NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC, 922 A.2d 417 (Del. Ch. 2007)(brought suit against defendants to enforce contractual provisions drafted for plaintiff's benefit in its operating agreement regarding inspection of records and specific performance); Thomas v. Harford Mut. Ins. Co., 2003 Del. Super. LEXIS 36 (Del. Super. Ct. Jan. 31, 2003), *vacated in part* by Thomas v. Harford Mut. Ins. Co., 2003 Del. Super. LEXIS 268 (Del. Super. Ct. July 25, 2003)(workers' compensation claimant sued a workers' compensation insurer and the insurer's case

manager for negligence, emotional distress, and other torts); Delmar News, Inc. v. Jacobs Oil Co., 584 A.2d 531 (Del. Super. Ct. 1990)(Plaintiff an insurer and its insured oil company for negligence in improperly pumping gas which leaked onto the plaintiff's property).

There's a major difference in this case from the Delaware foreclosure cases that the Plaintiff cites, where the Courts here have ruled that the homeowner was not a 3rd party beneficiary. The Defendant's evidence of noncompliance with the PSA, void assignments, and inconsistencies in timelines show that the foreclosing entity did not properly hold the mortgage at the time of the foreclosure due to a void assignment. For example, in Citimortgage, Inc. v. Bishop, 2013 Del. Super. LEXIS 95 (Del. Super. Ct. Mar. 4, 2013); the Court was not presented with any evidentiary reason by the homeowners to look deeper into the assignments. The greater weight of the evidence was presented by the Plaintiff (*9), including an assignment signed by the Defendants assigning the mortgage to the Plaintiff (*15). While the Court did discuss the third party beneficiary doctrine, the Bishop case was apparently also decided in large part on evidentiary grounds, where the Defendants failed to produce sufficient evidence supporting their claim that the assignments were defective. Also, in Branch Banking & Trust Co. v. Eid, 2013 Del. Super. LEXIS 264 (Del. Super. Ct. June 13, 2013), the Defendant homeowner took no discovery from the plaintiff, admitted to the complaint allegations, and

raised no objections to the authenticity of the documents submitted by the Plaintiff's Affiant, and merely attacked the mortgage assignments because they were assigned by MERS. Thus, the Court found that the Defendant did not have any legally cognizable interest in the assignment and thus could not show legal harm as a result of the assignment.

Cases within the 3rd Circuit have upheld the homeowner's standing to object when the mortgagee presented an unindorsed note. *See* 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) (unindorsed note and questionable chain of assignments).

Cases in other jurisdictions have upheld a homeowner's standing to challenge void assignments, defective securitizations which would render an assignment to a securitized trust void, and cases where the mortgagee failed to supply a properly indorsed note. *See* Butler v. Deutsche Bank Trust Co. Americas for RALI 2007 QS3, 2012 WL 3518560, (D. Mass. 2012)(Mortgagor has standing to challenge a foreclosure due to void assignment. Injury to the mortgagor is the termination of the right of redemption). Lacey v. BAC Home Loans Servicing, LP (In re Lacey), 480 B.R. 13 (Bankr. D. Mass. 2012) (Unindorsed note case, where

the Plaintiff has standing to establish defects in the chain of assignments affecting the validity of a foreclosure sale), at Page 35-36. Washington v. Saxon Mortg. Servs. (In re Washington), 469 B.R. 587, 592 (Bankr. W.D. Pa. 2012)(in an unindorsed note case where the debtor's standing arguments precluded by res judicata & Rooker Feldman, the Court case found the homeowner had standing to challenge the creditor's authority to enforce a note) Bailey v. Wells Fargo Bank, NA (In re Bailey), 468 B.R. , 475 (Bankr. D. Mass. 2012)(Assertion that party did not own mortgage at the time of purported assignment encompassed an injury in fact); Simmerman v. Ocwen Fin. & Mortg. Servs. (In re Simmerman), 463 B.R. 47 (Bankr. S.D. Ohio 2011)(Debtor's objection to proof of claim survived dismissal where defendant failed to attach an indorsed note to the proof of claim); Ball v. Bank of N.Y., 2012 U.S. Dist. LEXIS 179878 (W.D. Mo. Dec. 20, 2012)(In a wrongful foreclosure action, Plaintiffs had standing to point to defects in the securitization process as evidence that "neither title nor possession of the note passed to the Trustee" seeking to foreclose on their mortgages, which would render a foreclosure sale "void" (at page 8), finding that the plaintiffs were not seeking to enforce the contracts "or affect the relationship between the parties to the contract"); Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 291 (1st Cir. Mass. 2013)(holding that a mortgagor has standing to contest void assignments).

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

It's clear that the Plaintiff in a *scire facias* action must own both the note and the mortgage. Its purpose 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" for the non-performance of the condition of payment (emphasis added). See 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).

In the instant case, the Plaintiff claims an interest in the mortgage and note through void assignments, a failed securitization void under New York Trust law, and inconsistencies in the chain of title. Additionally, the Plaintiff did not produce a note with all of the requisite indorsements on the face of the note to the Superior Court, as required by the PSA. *Supra, Page 8.* In fact, the alleged copy of an indorsement belatedly submitted to the Superior Court, after having tacitly admitted to not having an indorsed note, is not indorsed to the Plaintiff nor in blank, as the Plaintiff alleged in its Supplemental Response, A592. The alleged indorsement, if properly authenticated, appears instead to be payable to the order of third party, and not the Plaintiff. *See* 6 Del. C. § 3-109(b). Thus, the Plaintiff cannot be a holder. 6 Del. C. § 1-201(21)(A). The Plaintiff did not allege in its Opening Brief that it was the holder of a note indorsed in blank or to Plaintiff, and thus waives this argument on appeal. Supr. Ct. R. 14(b)(vi)(3).

4. **The alleged transfer to the Plaintiff's trust is void as a matter of New York Trust Law, and is additional evidence that the Plaintiff is not a real party in interest.**

The Defendant's Expert, at A339 , provided a link to the PSA governing the Plaintiff's securitized trust. No Delaware case that the Defendant's research could find considered the effect of a failed securitization under New York law on a foreclosure plaintiff's status as a real party in interest in a foreclosure proceeding, coupled with lack of ownership of the note. But the California Supreme Court considered the issue of a failed securitization in Glaski v. Bank of Am., Nat'l Ass'n, 218 Cal. App. 4th 1079, 160 Cal.Rptr.3d 449, 462-463 (Cal. App., 2013). In this case, the Court reversed demurrer for the Defendant, because the alleged transfer of the note and the mortgage to the securitized trust past the closing date and otherwise not in accordance with the PSA rendered the alleged transfer void under New York law. The Glaski Court found:

> "The allegation that the WaMu Securitized Trust was formed under New York law supports the conclusion that New York law governs the operation of the trust. New York Estates, Powers & Trusts Law section 7–2.4, provides: "If the trust is expressed in an instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void."

Id. *See also* Wells Fargo Bank, N.A. v. Erobobo, 39 Misc.3d 1220, 972 N.Y.S.2d 147, 2013 N.Y. Slip Op. 50675 (N.Y. Sup. Ct., 2013), *7 (the Court held that "Under New York Trust Law, every sale, conveyance or other act of the trustee in

contravention of the trust is void. New York EPTL § 7–2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void").

Similar to Glaski and Erobobo, the Plaintiff's alleged assignments violate the terms of its own securitized trust, as reflected by the PSA, and thus the alleged transfer of the Defendant's mortgage loan into the Plaintiff's trust is void. NY EPT Law 7-2.4 . See A314, A337, A 340-A342, A349, A569-A571. The Plaintiff admitted, in its Opening Brief, that the alleged transfer was not accomplished prior to the closing date of the trust, May 31, 2007. Def. Ex. B82.

5. **The MERS Information presented by the Plaintiff, coupled with MERS' own sworn statements, contradicts its assertion that it is a real party in interest.**

MERS own documents allege that the investor/owner of the loan is Morgan Stanley Capital Holdings, LLC and not the Plaintiff. See A401, A420.

Additionally, MERS own sworn testimony given in other courts provides that MERS ceases being the Mortgagee of record as soon as the note is assigned to the first MERS member (see A402, Paragraph 13). If the Plaintiff's securitized trust was involved in a true sale, as per the PSA, at least 3 of the entities involved in the sale were not MERS members, and thus MERS would not have acted as nominees for these non-member entities, as per MERS own analysis. See A352, A345, A394-396, and In re Agard, 444 B.R. 231, 244-254 (Bankr. E.D.N.Y 2011), *See also vacated in part*, Agard v. Select Portfolio Servicing, Inc., 2012 WL 1043690 (E.D.N.Y. Mar. 28, 2012)(vacating part of Bankruptcy Ct. decision on jurisdictional grounds).

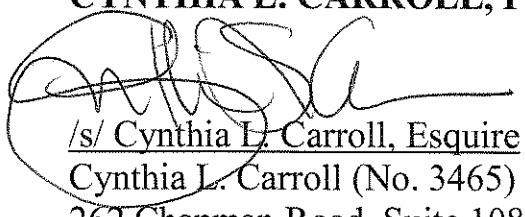
MERS does not own loans. See A401, and no notes were alleged to have been assigned in Assignment No. 1. A561. Yet Assignment No. 2 attached to the Plaintiff's Complaint purports to assign "notes and mortgages" to the Plaintiff. A562. Clearly, it is impossible for an assignee to receive something than an assignor has no power to assign.

CONCLUSION

For the foregoing reasons, Defendant Eugene Moss respectfully requests that the Superior Court's Order Granting Summary Judgment to Defendant be Affirmed, and any further relief for the Defendant the Court deems proper under the circumstances.

Respectfully submitted

CYNTHIA L. CARROLL, P.A.



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Dated: April 16, 2014

UNREPORTED DECISION

New Century Mortgage Corporation v. Braxton,

210 Mass. LCR LEXIS 21, 2010 WL 59277 (Mass. Land. Ct. Jan. 11, 2010)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

NEW CENTURY MORTGAGE CORPORATION, CONSUMER SOLUTIONS REO, LLC, and CONSUMER SOLUTIONS, LLC v. SHUANN N. BRAXTON, and KENYA D. NICKERSON-BRAXTON

18 LCR 36

MISC 09-393485
PLYMOUTH, ss.
January 11, 2010

Piper, J.

DECISION

This case, which commenced in this court February 13, 2009, seeks reformation of two mortgages given to New Century Mortgage Corporation ("New Century") by Shuann N. Braxton and Kenya D. Nickerson-Braxton ("Defendants"). I heard argument on the motion for summary judgment filed by plaintiffs, granting it in part, and reserving ruling on the question of the plaintiffs' standing in this action, challenged by defendants (who filed a motion to dismiss, see note 1, below, argument on which I heard at the same time as the summary judgment motion). At and following the hearing, I afforded the parties opportunities to make supplemental filings. Those I now have, and so I proceed to rule on the open aspects of the summary judgment motion and the motion to dismiss. I conclude that plaintiffs, despite the opportunity the court has afforded them, have been unable to demonstrate their standing to have this court adjudicate this case, which I therefore direct be dismissed without prejudice.

On March 16, 2009, New Century filed a Request for Default Pursuant to Mass. R. Civ. P. 55(a). Defendants were defaulted by the court (Patterson, Rec.) on March 17, 2009. On March 19, 2009, counsel appeared for Defendants, who filed an Objection to Request for Default, and an Answer to the Complaint. The Defendants' Answer was not docketed because, at the time, they had been defaulted. A case management conference was held on April 7, 2009, during which, with assent of counsel for New Century, I allowed the Defendants' Motion to Vacate Default. Counsel for New Century reported that one of the subject mortgages had, since the commencement of this action, been assigned to Consumer Solutions REO, LLC and that the second subject mortgage was in the process of being assigned to the same assignee.

On May 27, 2009, New Century brought a motion to file an Amended Complaint to add Consumer Solutions REO, LLC ("Consumer Solutions REO") as a plaintiff, and filed a motion for summary judgment. I allowed the motion to amend on June 2, 2009. (Hereinafter New Century and Consumer Solutions REO collectively are referred to as "Plaintiffs"). On June 16, 2009, Defendants filed an Objection to Motion to File Amended Complaint, and a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6).

On August 13, 2009, argument was held on both motions, treating Defendants' motion to dismiss as a cross-motion for summary judgment. [Note 1] The issues presented by the Plaintiffs' motion for summary judgment were confined to whether the plaintiff-mortgagees were entitled to reformation of the subject mortgages on a theory that, as a result of mutual mistake of all parties to the transaction, incorrect legal descriptions were appended to, and recorded with, the mortgages. The Defendants disputed that the mistake resulting in the incorrect property description was mutual, and also have challenged the standing of the Plaintiffs to maintain this action, arguing (1) that Plaintiffs cannot prove they hold either of the subject mortgages, and (2) that in light of the bankruptcy of New Century, New Century had no right to assign its interest to Consumer Solutions REO (or any other entity) without leave of the Bankruptcy Court.

After argument, I made rulings which were laid upon the record from the bench, and reflected on the court's docket for this case. I deferred ruling on the Defendants' motion, allowing the parties to file supplemental submissions addressing whether, in light of the orders of the Bankruptcy Court in Delaware, and the appointment of a liquidating trustee for New Century, the Plaintiffs had the requisite authority to maintain this action. On the Plaintiffs' motion regarding entitlement to reformation, I ruled in their favor, as the docket entry reflects:

Subject to the Foregoing Prerequisite to Entering Judgment [ie, that there be an appropriate showing of plaintiffs' standing], the Court GRANTED IN PART the Plaintiffs' Motion for Summary Judgment and Will, if There Is a Plaintiff with Standing and the Court Is Accordingly Able to Reach the Merits, Enter Judgment Reforming the Mortgage to Reflect What the Court Finds as a Matter of Law to Have Been, Based on the Evidence Properly Before it On the Summary Judgment Record, the Arguments and Submissions of Counsel, Granting Every Inference to the Party Opposing, Finding No Material Fact in Dispute, and Applying the Applicable Standard in Mass. R. Civ. P. 56, the Intent of All Parties to the Transaction that a Valid Recordable Mortgage of Property Located on Grafton Street Be Granted by the Defendants. This Reformation Is Based on a Finding that All Parties to the Transaction Were Mutually Mistaken; the Mortgages Identified the Grafton Street Property as the Land Being Mortgaged; None of the Parties Accomplished What They Intended, Which Was to Create and Duly Record Valid Mortgages on the Grafton Street Property Being Purchased the Same Day by the Braxtons with Proceeds of the Loans Being Secured by Mortgages in Question.

See New Century Mortgage Corp. v. Braxton, Land Court Misc. Case No. 393485 (Aug. 13, 2009)(Piper, J.).

On August 27, 2009, Plaintiffs made their initial supplemental filing. The court received the response of the Defendants on September 1, 2009. On September 3, 2009, I granted the Plaintiffs' request for more time to establish standing, because I found the initial filing was facially inadequate, and I requested an affidavit showing how either plaintiff is a party with standing to seek reformation. On September 24, 2009, Plaintiffs filed an affidavit and a substantial appendix of documents. On September 25, 2009, Plaintiffs brought a Motion for Substitution of Parties, also accompanied by an appendix of documents. Defendants have declined to file responses to these further filings by Plaintiffs.

For the purposes of deciding the pending motion relative to the standing of the Plaintiffs, I find the following facts to be material and without dispute:

1. On June 30, 2006, the Defendants, by deed recorded in the Plymouth County Registry of Deeds ("Registry") at Book 32974, Page 164, acquired two parcels of land comprising 76 Grafton Street, Brockton, Plymouth County, Massachusetts ("Property").

2. To fund the purchase of the Property, on June 30, 2006, Defendants granted a purchase money first mortgage to New Century, securing a loan in the original principal amount of $250,400.00, and recorded at the Registry at Book 32974, Page 166 ("First Mortgage").

3. Defendants also granted to New Century on June 30, 2006, a purchase money second mortgage, securing a loan in the original principal amount of $62,600.00 and recorded at the Registry in Book 32974, Page 186 ("Second Mortgage").

4. The legal description of property, attached to each mortgage as "Exhibit 'A,'" is for property located at 150 Auburn Street, Brockton, Massachusetts, property in and to which the Defendants have never at any time had any right, title, or interest. Defendants never occupied or had any other connection with the Auburn Street property at any time prior to the initiation of this action.

5. In April of 2007, New Century TRS Holdings, Inc., of which plaintiff New Century Mortgage Corporation is an affiliate or subsidiary, filed chapter 11 bankruptcy proceedings. Pursuant to those proceedings, by order of the Bankruptcy Court, on August 1, 2008, a liquidating trust was created with Alan M. Jacobs as trustee, and all of New Century's assets were distributed to the liquidating trust.

6. On September 23, 2009, counsel for Plaintiffs obtained a document titled "Mortgage Loan Purchase Agreement (Sub-Performing/Scratch and Dent) (Joint Bidders)" which is dated May 4, 2007, and executed between Morgan Stanley Capital Inc., as Seller, and three different entities as Bidders: CFSC Capital Corp. VIII; Consumer Solutions, LLC; and Cargill Financial Services Corporation. Exhibit A to the Mortgage Loan Purchase Agreement is titled "Mortgage Loan Schedule" and both the First Mortgage and the Second Mortgage can be found on the Mortgage Loan Schedule.

7. Counsel for Plaintiffs represents, in an affidavit, that Consumer Solutions, LLC was the "Prevailing Bidder" in the Mortgage Loan Purchase Agreement.

8. Counsel for Plaintiffs has obtained a document titled "Limited Liability Company Agreement of Consumer Solutions REO, LLC" dated May 29, 2007, and executed by Consumer Solutions, LLC as the "Sole Member."

9. On March 26, 2008, a Limited Power of Attorney was granted to Consumer Solutions, LLC by New Century "in connection with, and relat[ing] solely to, the mortgage loans . . . originated by New Century . . . that Consumer Solutions, LLC . . . acquired pursuant to one or more secondary market transactions." The Limited Power of Attorney was recorded with the Salt Lake County Recorder of Deeds in Utah, at Book 9586, Page 8991.

10. On March 31, 2009, New Century executed a document purporting to assign the First Mortgage to Consumer Solutions REO, with an "effective date" of June 2, 2007. The purported assignment was recorded at the Registry on April 3, 2009 at Book 37022, Page 153.

11. On September 23, 2009, Consumer Solutions, LLC executed an "Assignment of Mortgage" purporting to assign the First Mortgage from Consumer Solutions, LLC as attorney-in-fact for New Century Mortgage Corporation, to Consumer Solutions, LLC. This assignment was recorded with the Registry on September 24, 2009 at Book 37745, Page 110.

12. On September 23, 2009, Consumer Solutions REO executed an "Assignment of Mortgage" purporting to assign the First Mortgage from Consumer Solutions REO, LLC to Consumer Solutions, LLC. This assignment was recorded with the Registry on September 24, 2009 at Book 37745, Page 112.

13. An entity called FV-I, Inc. filed in this court, on February 27, 2007, a complaint under the Servicemembers Civil Relief Act in connection with an intended foreclosure of the First Mortgage. In its complaint, FV-I, Inc. claimed to be the holder of that Mortgage. Judgment in the Servicemembers action entered on May 8, 2007. See FV-I, Inc. v. Braxton, Land Court Misc. Case No. 341941 (May 8, 2007).

* * * * *

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." Ng Bros. Constr. v. Cranney, 436 Mass. 638 , 643-644 (2002); Mass. R. Civ. P. 56 (c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." Ng Bros., 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See Attorney General v. Bailey, 386 Mass. 367 , 371, cert. den. sub nom. Bailey v. Bellotti, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and "an adverse party may not manufacture disputes by conclusory factual assertions." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Ng Bros., 436 Mass. at 648.

Standing is a jurisdictional requirement. See Planning Bd. of Marshfield v. Zoning Bd. of Appeals of Pembroke, 427 Mass. 699 , 703 (1998). When a defendant challenges the jurisdictional standing of a plaintiff by motion supported by "extra-pleadings material, the defendant[] contest[s] the accuracy (rather than the sufficiency) of the jurisdictional facts pleaded. . . ." Callahan v. First Congregational Church of Haverhill, 441 Mass. 699 , 710-11 (2004). In that instance, the plaintiff has the burden of proving jurisdictional facts, and the plaintiff's factual "averments" receive no "presumptive weight." Id. Disputed facts are not viewed "in the light most favorable to the non-moving party" as they would be normally under the summary judgment standard. Wooten v. Crayton, 66 Mass. App. Ct. 187 , 189-90 n. 6 (2006). See also Segal v. First Psychiatric Planners, Inc., 68 Mass. App. Ct. 709 , 716 (2007) (Meade, J. dissenting) ("When the materials submitted present a 'factual challenge' to jurisdiction (as opposed to raising the legal sufficiency of uncontested jurisdictional facts), the plaintiff's allegations are given no presumptive weight.").

It is not clear from the record exactly what happened to the subject mortgages subsequent to their grant in June of 2006. By February 27, 2007, FV-I, Inc. was before this court claiming to be the holder of at least the First Mortgage; in April of 2007, New Century filed for bankruptcy; and in May of 2007, Morgan Stanley was claiming to hold the subject mortgages. In February of 2009, New Century commenced this lawsuit, presenting itself as the holder of the subject mortgages. On March 31, 2009, New Century executed and recorded a document purporting to assign the First Mortgage to Consumer Solutions REO, with an "effective date" of June 2, 2007.

Plaintiffs must demonstrate that either one or both of them hold the subject mortgages, to show their entitlement to seek and obtain a judgment of reformation in this equitable action. To do this, Plaintiffs must overcome a scattered and incomplete record that consists largely of off-record transfers, and assignments that post-date the commencement of this lawsuit. Plaintiffs have the additional obstacle of the pending bankruptcy of New Century to overcome; essentially they must show not only that the mortgages were transferred from New Century to Consumer Solutions REO, but that the transfers took place either before the bankruptcy, or with leave of the bankruptcy court or liquidating trustee. The Plaintiffs bear the burden of proving their standing, and their factual allegations are not viewed in an indulgent light. See Callahan, supra, at 710-11.

To support the view that the subject mortgages were not held by New Century in April of 2007, when the bankruptcy began, there is the Mortgage Loan Purchase Agreement between Morgan Stanley and Consumer Solutions, LLC, dated May 4, 2007. However, there is no evidence of how the subject mortgages came to be held by Morgan Stanley, or by precisely what date they were no longer held by New Century. The missing evidence of a transfer out from New Century breaks the chain of holders of the disputed mortgages. The mere fact that Morgan Stanley purported to hold, and transfer, the subject mortgages to Consumer Solutions, LLC in the spring of 2007 does not entitle the Plaintiffs to the inference that there "must be" an assignment (unrecorded) from New Century to Morgan Stanley (or to some intermediate entity) prior to April of 2007.

The unrecorded instruments introduced by the Plaintiffs do not adequately show any transfer of the mortgage out from New Century. Looking past the confusion and inconsistencies created by the unrecorded instruments, it appears from review of the record instruments that the mortgages traveled a somewhat clearer path. On July 3, 2006, New Century recorded the First Mortgage and Second Mortgage granted by the Defendants on June 30, 2006. On March 31, 2009, New Century executed and recorded an assignment of the First Mortgage to Consumer Solutions REO, with a purported "effective date" of June 2, 2007. Finally, on September 23, 2009, Consumer Solutions, LLC, as attorney-in-fact for New Century, executed, and the next day recorded, an assignment of each the First Mortgage and the Second Mortgage, to Consumer Solutions, LLC. Consumer Solutions REO also assigned whatever interest it had in the First Mortgage to Consumer Solutions, LLC on September 23, 2009. [Note 2] The result is that, by record assignments, it is possible to trace the path of both subject mortgages from New Century to Consumer Solutions, LLC. This record chain could well be enough to show that Consumer Solution REO or Consumer Solutions, LLC had a sufficiently justiciable interest in the subject mortgages to have standing to seek reformation in this court.

This conclusion, however, brings us back full circle. All of the recorded assignments out from New Century took place during the pendency of the bankruptcy proceedings in Delaware (which commenced in April of 2007). The terms of the August 13, 2009 Order of this court required the Plaintiffs to show how New Century could assign the subject mortgages, or maintain this action, in light of the bankruptcy proceedings and especially the transfer of assets to a liquidating trust. This could have been accomplished in any number of ways, perhaps by introducing evidence that the liquidating trustee permitted assignment of the subject mortgages or affirmatively authorized this action to be brought by New Century, or by legal memorandum showing the assignments were not prohibited by bankruptcy law. The Plaintiffs, however, made no showing that New Century was permitted to assign the subject mortgages, or permitted to maintain this action. The Plaintiffs' filings do not show what the Plaintiffs needed to show.

For the forgoing reasons, the Plaintiffs have failed, in their responses to the Orders of this court made on August 13, 2009 and September 3, 2009, to demonstrate their standing and authority to proceed with this action. Summary judgment must be granted in favor of the Defendants because Plaintiffs have failed to show that they possess the requisite standing. I will direct entry of a judgment of dismissal without prejudice.

Judgment accordingly.

Gordon H. Piper

Justice

Dated: January 11, 2010.

FOOTNOTES

[Note 1] A motion filed under Mass. R. Civ. P. 12(b) "shall be made before pleading if a further pleading is permitted." See Mass. R. Civ. P. 12(b). The Defendants filed an Answer on March 19, 2009.

[Note 2] These two assignments are the subject of Plaintiffs' Motion for Substitution of Parties, filed September 25, 2009, which I ALLOW in part (adding the putative assignee, Consumer Solutions, LLC as an additional party, as opposed to as a substituted party) so that the record on summary judgment is complete and up to date. For the reasons next given in this decision, however, these assignments, and the allowance of the motion, does not alter the outcome of the summary judgment motions which are the subject of this decision.

NY EPT Law 7-2.4 Act of trustee in contravention of trust (Laws of New York (2013 Edition))

§ 7-2.4 Act of trustee in contravention of trust

If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.