IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH BENDFELDT, and BETTINA ROLOFF,	)	
Defendants-Below, Appellants,	)	
v.	)	No. 68, 2014
HSBC MORTGAGE CORPORATION, (USA)	)	
Plaintiff-Below, Appellee.	)	Superior Court - Kent County

APPELLANTS' CORRECTED OPENING BRIEF

DOUGLAS A. SHACHTMAN, I.D. NO. 756
The Shachtman Law Firm
1200 Pennsylvania Avenue, Suite 302
Wilmington, DE 19806
(302) 655-1800
Attorney for Defendants-Below, Appellants

CORRECTED DATE: April 3, 2014

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STATEMENT OF NATURE OF PROCEEDINGS

On November 6, 2009, Plaintiff filed its Complaint, identifying the plaintiff to be HSBC Mortgage Corporation (USA) ("HSBC Mortgage"), without any designation that it was an assignee. A first mortgage assignment was allegedly executed five days later from MERS to HSBC Mortgage. Almost three years later, "corrective assignments" were supposedly signed and filed with the Recorder of Deeds from MERS to HSBC Mortgage Corporation, USA and then, in turn, to HSBC Bank USA, N.A. (App.). HSBC Bank is not the plaintiff.

Ten *Del.C.* § 3103(a) requires service to the defendant personally or upon an adult at defendant's residence. Someone put court documents inside the screen door of Defendants' residence; (s)he did not knock on the door or otherwise attempt personal contact. This procedure did not give the Court personal jurisdiction over Defendants.

Despite the lack of proper service, Defendants repeatedly requested information from Plaintiff's law firm. They believed, without the benefit of legal representation, that their actions were an appropriate response to the document put inside the screen door. Plaintiff failed to respond.

Plaintiff directed the entry of a default judgment on March 22, 2010. It neither filed a motion, nor served Defendants. It then directed a sheriff's sale.

On June 29, 2010, Douglas Shachtman, having been retained by

Defendants, e-mailed Plaintiff's counsel to request a stay of the then-pending sale, so that the parties could resolve their differences. After exchanging several e-mails on that date, on the following day, Plaintiff's counsel confirmed that the sale would be postponed. Defendants' counsel responded that he was looking forward to finding out what needed to be done to reinstate the mortgage.

On August 16, 2010, Defendants' counsel emailed a reminder to Plaintiff's counsel seeking what needed to be done to reinstate the mortgage. Plaintiff's counsel responded that they were following up.

On August 24, 2010, Plaintiff filed an *Alias Lev Fac*. Despite Shachtman's Entry of Appearance on June 30, 2010 and repeated email exchanges, Plaintiff did not give notice to Shachtman that Plaintiff was proceeding with sale. Plaintiff also did not direct a Notice to Lienholders to Shachtman.

On October 8, 2010, uninformed as to the pending *Lev Fac*., Shachtman emailed another reminder regarding resolving the account. On October 11, 2010, Plaintiff's counsel advised that Defendants should contact directly HSBC's loss mitigation department. Plaintiff still did not advise Shachtman of the pending *Lev Fac*. It was later posted on Defendants' door.

On November 18, 2010, Defendants filed Defendants' Motion to Stay Sheriff's Sale And From Relief From Judgment. The next day, the Honorable Robert B. Young stayed the Sheriff's Sale until January 19, 2011.

Defendants served discovery on December 9, 2010 related to their defenses regarding ownership of the Note and Mortgage. On January 7, 2011, the parties stipulated to further stay the sheriff's sale to complete discovery.

Plaintiff provided unverified, incomplete answers to interrogatories on February 8, 2011. It has never answered the Request for Production. On July 29, 2011, Defendants' counsel wrote to Plaintiff's counsel as to the deficiency in responses and served a single supplemental interrogatory. On August 8, 2011, a representative of Plaintiff's counsel requested additional ten days due to a family tragedy. Defendants' counsel offered a one-month extension and more if needed.

Plaintiff never responded to either the July 29, 2011 deficiency letter, or the Request for Production. Other than the response to Supplemental Interrogatory 15 on November 2, 2011, Defendants' counsel no communications from Plaintiff's counsel until he filed a Motion to Affirm Judgment.

On April 23, 2013, Plaintiff filed its Motion to Affirm Default Judgment and Proceed to Sheriff Sale. Defendant filed Defendants' Response to Motion to Affirm Default, Defendants' Renewed Motion For Relief From Judgment and Motion To Compel on June 14, 2013. With leave of the Court, Defendants filed Defendants' Amended Response to Motion to Affirm Default and Defendants' Renewed Motion For Relief From Judgment on September 27, 2013, .

On December 6, 2013, counsel presented oral argument with regard to the

pending cross-motions. After Plaintiff raised a new legal position, the Court set up a supplemental briefing schedule. Plaintiff filed its Supplemental Brief on January 7, 2014, and Defendants responded on January 21, 2014.

On January 30, 2014 the Court granted Defendants' Motion to Compel.

On February 4, 2014, the Superior Court issued its Order, styled Upon Consideration of Plaintiff's Motion to Affirm Default and Proceed to Sheriff Sale. *HSBC Mortgage Corporation (USA) v. Bendfeldt*, 2014 Del. Super. LEXIS 44 (Del. Super. 2014).

On February 11, 2014, Defendants filed their Notice of Appeal. This is their Opening Brief.

SUMMARY OF ARGUMENT

1. The Superior Court erred as a matter of law in holding that the defendant to a mortgage foreclosure action does not have standing to challenge the assignment of the mortgage, depriving the defendant of the ability to prove that the plaintiff is not the real party in interest.

2. Superior Court Rule of Civil Procedure 17 gives defendants the right to require the plaintiff to prove that it is the real party in interest.

3. A long recognized defense in a *sci. fa. sur* mortgage proceeding is a plea of avoidance that the cause of action was assigned.

4. The Superior Court erred in making factual findings without consideration of the submissions of the Defendant.

5. Plaintiff was not the real party in interest in asserting rights in the mortgage from the time that it filed suit and thereafter.

6. The mortgage assignments, signed by robosigners, are invalid.

7. The Superior Court erred as a matter of law in holding that a plaintiff in a *sci. fa. sur* mortgage action does not need to own the Note.

8. Plaintiff has not owned the Note at the time of the filing of the action or thereafter.

STATEMENT OF FACTS

On May 3, 2007, Defendants executed and delivered to Plaintiff a note (the "Note"), secured by a mortgage (the "Mortgage" (App.)) on upon 5513 Whiteleysburg Road, Harrington, Delaware ("the Property"). The Mortgage defines the Mortgagee to be Mortgage Electronic Registration Systems, Inc. ("MERS") (Mortgage Definition (C)). HSBC Mortgage is the "Lender" (Def. (D))

As to payments, the Mortgage describes the obligation of the Borrower: "Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note" (Uniform Covenant ¶ 1). The Mortgage has no other statement as to the frequency or amount of that payment. Payments are to be applied according to the Note (Uniform Covenant ¶ 2).

The Note and Mortgage have been separately owned since at least 2007. On October 30, 2007, the Note was transferred from HSBC Bank USA, N.A. to HSI Asset Securitization Corp., into a trust for a mortgage pool, HSI Asset Loan Obligation Trust 2007-2 ("Professional Audit"[1]). It was transferred again to Deutsche Bank National Trust Co., Trustee HSI Asset Loan Obligation Trust

[1]Due to news reports that financial institutions were foreclosing when they lacked a legal interest in the loan, Defendants contracted for Securitization Audit Pro, LLC to investigate the status of their loan. The Securitization Audit ("Professional Audit"; App.) searched documents on file with the Kent County Recorder of Deeds, as well as those records for securitized documents on Fannie Mae's Loan Lookup, Freddie Mac's Self Service Loan Lookup, and MERS' website, *inter alia* (Audit, pp.7-8).

2007-2. The Master Servicer is Wells Fargo Bank, NA (Audit, pp.7, 9-10, 17; see also discussion at Audit pp. 25-26). MERS kept the mortgage until 2009.

On November 6, 2009, Plaintiff filed its Complaint, alleging that HSBC Mortgage was the holder, without assignment, relying upon its Exhibit "A", a certified copy of the Mortgage (Complaint ¶ 3) (App.). Contrary to the Complaint, the Mortgage defines the Mortgagee to be MERS (Mortgage Definition (C)), not HSBC Mortgage.

The Mortgage was not assigned from MERS to HSBC Mortgage until November 11, 2009, five days after Plaintiff filed its Complaint (App.).

Almost three years later, on August 23, 2012, there were two "corrective assignments", from MERS to HSBC Mortgage (App.) and that same day from HSBC Mortgage to HSBC Bank USA, N.A. (App.). On October 19, 2012, HBSC Bank USA, N.A. (allegedly) assigned the mortgage to Federal National Mortgage Association (Fannie Mae) (App. ""). That assignment was held for over a year and not recorded until January 30, 2014 (*id*.).

Therefore, neither the Note nor the Mortgage were owned by Plaintiff at the time of the 2009 filing of the lawsuit, or at any time thereafter.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING THAT THE DEFENDANT IN A FORECLOSURE ACTION DOES NOT HAVE STANDING TO CHALLENGE THE PLAINTIFF'S OWNERSHIP OF A MORTGAGE.

A. QUESTION PRESENTED.

Did the Superior Court err in holding that a defendant to a mortgage foreclosure does not have standing to contest whether the plaintiff owned the mortgage upon which it sued? Preserved at App. A78.

B. STANDARD OF REVIEW.

This Court reviews questions of law *de novo* to determine whether the trial judge committed legal error. *Scarpinato v. Nehring*, 864 A.2d 929 (Del. 2004).

C. DEFENDANTS WERE ADDRESSING THE RULE 60(b) CRITERION THAT THEY HAVE THE POSSIBILITY OF A DEFENSE.

This is an appeal from the denial of a Rule 60(b) motion. The Superior Court had before it cross-motions. Defendants filed their Motion to Stay Sheriff's Sale and for Relief from Judgment. The Court stayed the Sheriff's Sale to allow for discovery. Later Plaintiff filed its Motion to Affirm Default Judgment and Proceed to Sheriff Sale.

To satisfy the Rule 60 prong establishing whether the outcome would be

changed if the judgment was vacated, the standard is whether the defendant can demonstrate that there is "the possibility of a meritorious defense". *Williams v. Delcollo Elec. Inc*., 583 A.2d 787 (Del. Super. 1989); *Apt. Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 72 (Del. 2004).

On February 4, 2014, the Court denied Defendants' arguments and affirmed the default. *HSBC Mortgage Corporation (USA) v. Bendfeldt*, 2014 Del. Super. LEXIS 44 (Del. Super. 2014) ("Order")(attached hereto). *Inter alia*, it held,

> Defendants lack standing to challenge the assignment of the Mortgage to Plaintiff, because Defendants are not parties or third-party beneficiaries to the assignment according to Delaware contract law. Defendants merely benefitted from the assignment indirectly once Defendants purchased the loan from Plaintiff (sic).

Order at 1-2.

By its ruling, the Superior Court expressly refused to consider Defendants' arguments (and their supporting documents) of a substantial defense, i.e., that due to assignments, Plaintiff was not the real party in interest.[1]

D. SEVERAL LEGAL PRINCIPLES GIVE DEFENDANTS THE RIGHT TO CHALLENGE PLAINTIFF'S STANDING.

Appellants will first discuss several principles of Delaware law, establishing a defendant's right to challenge a foreclosure plaintiff's status as the real party in

[1]The Court's error in finding that Plaintiff owned the Note and Mortgage is addressed *infra* in Argument II.

interest and its standing. They will then address the reasons why the Court Below's holding sharply contradicted decisional law, court rules and oft-cited treatises on Delaware procedure.

1. Superior Court Rule 17 Requires That the Plaintiff Be the Real Party in Interest.

A foreclosing mortgagee must strictly comply with the law in order that it be permitted to proceed. *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734 (Del.Supr. 1983). Superior Court Rule of Civil Procedure 17 and 10 *Del.C.* § 5061(a), require that every action shall be prosecuted in the name of the real party in interest, i.e., the one who has the legal right to pursue the claim. Rule 17's protection has been repeatedly described as equivalent to legislative enactment.

> Judge Stiftel, in the case of *Cohee v. Ritchey*, 1 Storey 597, 599-600, 150 A.2d 830, 831, said - "* * * This Rule has the force and effect of a legislative enactment. *Associated Transport v. Pusey*, 10 Terry 413, 118 A.2d 362, 365. The promulgation of the Rule was tantamount to the legislature itself passing a statute covering the subject. See 10 *Del.Code Ann*. Sec. 561."

Catalfano v. Higgins, 182 A.2d 637, 638, 640 (Del.Super. 1962). Then-judge Carey provided two rationales for the rule:

> Under the rule, the real party in interest is the one who, by the substantive law, has the right sought to be enforced. 3 *Moore's Federal Practice* 1305. * * *
>
> It has been pointed out that there are two reasons why a

> defendant has the right to insist that an action brought against him shall be in the name of the real party in interest; 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. *McWhirter v. Otis Elevator Co.*, D.C.S.C., 40 F.Supp. 11. * * *

Cammile v. Sanderson, 101 A.2d 316, 318-319 (Del.Super. 1953).

Since our rules of civil procedure are largely derived from the Federal Rules of Civil Procedure, our courts have frequently cited *Moore's Federal Practice* for the interpretation and history of the federal rules. The treatise expressly addressed the application of Rule 17 to the issue of assignments of a legal claim.

> The effect of the real party in interest provision, in respect to assignments, is that if by the substantive law an interest could be and was transferred by an assignment, as suit on the assigned chose in action must be brought in the name of the transferee.
>
> * * *
>
> Thus if the plaintiff has assigned away all his right, title and interest in a contract, he may not maintain an action for its breach. On the other hand, the transferee may not maintain the suit if the transfer was an invalid assignment, a mere sham, or power of attorney.

3 *Moore's Federal Practice* (1979), §17.09.

As reasoned in *Cammile v. Sanderson*, one purpose of Rule 17 is to protect defendants from multiple liability. 3 *Moore's Federal Practice* (2013), §17.10[2]. If the plaintiff is not the real party in interest, a borrower could be sued by two different entities, each asserting that it had been assigned the mortgage. The

borrower could suffer separate judgments, inconsistent rulings, or lose his home to an entity that had no right in the mortgage.

2. Delaware's Long-Standing Foreclosure Procedure Requires that the Plaintiff be the Real Party in Interest.

Even before the adoption of the Federal Rules, our courts interpreted Delaware statutory law to require the plaintiff in a *sci. fa. sur* mortgage proceeding to have a legal interest in the mortgage. Courts have placed considerable reliance upon the historical recitation of civil procedure provided by Victor Woolley, *Woolley on Delaware Practice*. In his discussion of *sci. fa. sur* mortgage proceedings, Woolley stated the requirement that not only must the plaintiff have a legal interest in the mortgage, but also it must disclose assignments in the plaintiff's pleadings.

> Sec. 1359. **Parties Plaintiff**. A *sci. fa. sur* mortgage, being a legal proceeding in a law court, the parties plaintiff should have a legal interest in the mortgage sued upon. Therefore the statute provides that "The mortgagee, his heirs, executors, administrators or assigns may • • • sue out • • • a writ of *sci. fa.* upon such mortgage." [1] If the mortgage, by death or assignment, has parted with his interest in the mortgage, it should appear upon the *praecipe*, and the action should be brought in the name or names of the personal representatives or the assignee of the mortgagee. If there are numerous assignments, each assignment should be recited. No further suggestion of death or assignment is necessary to make personal representatives or assignees proper parties than a correct recital of the transmutation of the legal interest.[2]

[1] Revised Code, Ch. 111, Sec. 55.
[2] *Infra*, Sec. 1360.

2 *Woolley on Delaware Practice*, § 1359. More recently, the Superior Court held,

> *Scire facias sur* mortgage foreclosures are governed by 10 *Del.C.* § 5061(a) which provides that the only parties entitled to institute a foreclosure action are the mortgagee and the heirs, executors, administrators, successors, and assigns thereof.

Branch Banking & Trust Co. v. Eid, 2013 Del. Super. LEXIS 264.

3. The Effect of the Assignment of the Mortgage Is a Long-recognized Plea in Avoidance of the Mortgage.

It has long been held, and this Court re-affirmed a few months ago, that one of the permissible pleas of avoidance was assignment of the cause of action.

> See *Gordy v. Preform Building Components, Inc*., 310 A.2d 893, 895-96 (Del. Super. 1973) (setting forth examples of matters that could be asserted under a plea in avoidance of a deed: an act of God, assignment of the cause of action, conditional liability, discharge, duress, forfeiture, fraud, illegality of transaction, justification, nonperformance of condition precedent, ratification, unjust enrichment and waiver).

Miller v. Pennymac Corp., 77 A.3d 272, n.6 (Del. 2013)[2]. *Gordy* had traced the history of *sci. fa. sur* mortgage defenses back to the Revised Code of 1935.

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[2]Also citing *Gordy* that assignment is a plea in avoidance are *Lasalle Nat'l Bank v. Ingram*, 2005 Del. Super. LEXIS 185, *4, Young, J. (Del. Super. 2005) *Am. Nat'l Ins. Co. v. G-Wilmington Assocs., L.P.*, 2002 Del. Super. LEXIS 555 (Del. Super. 2002) and *First Fed. S&L Assn. v. Christiana Falls, L. P.*, 1986 Del. Super. LEXIS 1324, *3-4 (Del. Super. 1986).

E. THE COURT BELOW ERRED IN RULING THAT A DEFENDANT DOES NOT HAVE STANDING TO CONTEST THE ASSIGNMENT OF THE MORTGAGE.

With this history, we review the ruling of the Court Below that it would not address the defense that Plaintiff did not own the mortgage through assignment. It cited *Citimortgage, Inc. v. Bishop*, 2013 Del. Super. LEXIS 95, 10-14 (Del. Super. 2013) and *Branch Banking & Trust Co. v. Eid*, which followed *Bishop*.

After *Bishop*, this Court analyzed the correctness of a holding as to the allegation of a wrongful assignment. *Miller v. Pennymac Corp.* (see discussion *supra*). While it affirmed the rejection of the challenge based upon the facts, it did not hold that the defendants lacked "standing" to do so.

The Ruling Below was inconsistent with both the procedure and most of the reasoning of *Bishop*. *Bishop*, after trial, reviewed defendants' assignment claim. It held that the plaintiff had the burden of proof to show its assignments. 2013 Del. Super LEXIS, *9. *Bishop* has been cited for the principle, "Central to the decision in this matter is the legal premise that a plaintiff with an assignment has the burden to show the assignment in order to establish that it is the proper party to bring the action". *Klinedinst v. CACH*, LLC, 2014 Del. Super. LEXIS 80 (Del. Super. 2014).

Bishop (and *Klinedinst*) followed the standard practice of analyzing

assignments to determine whether the plaintiff was the real party in interest.

> Defendants challenge the validity of the Assignment and the Confirmatory Assignment alleging that the documents were deficient and fraudulent. This Court considered a similar argument in *Citimortgage v. Trader*, 2011 Del. Super. LEXIS 648, 2011 WL 3568180 (Del. Super.) where a mortgagee sought to set aside a sheriff's sale by arguing that the foreclosure action was void because the plaintiff, an assignee of the mortgage, was not a proper party in interest because it had not recorded the assignment at the time it obtained judgment.[27] The Court stated that the plaintiff's standing to bring the suit "depend[ed] on whether the assignment was valid and effective.[28]" In *P & B Properties I, LLC v. Owens*, 1996 Del. Super. LEXIS 52, 1996 WL 111128 (Del. Super. 1996), defendants moved to dismiss a mortgage foreclosure action arguing that assignments of the mortgage and note were invalid and that, as a result, plaintiff was not a real party in interest to bring the action. [29] The Court reviewed the requirements of 6 *Del. C.* § 2702 and determined that the assignment was valid. [30]
>
> [27] *Trader*, 2011 Del. Super. LEXIS 648, 2011 WL 3568180 at *1.
> [28] Id.
> [29] 2011 Del. Super. LEXIS 648, [WL] at *1.
> [30] Id.

2013 Del. Super LEXIS, *4. The Court then held that the plaintiff met its burden.

Bishop's analytical process up to that point was consistent with our courts' traditional approach. However, *Bishop* then offered dictum, which was inconsistent both internally with its prior analyis and with Delaware law and practice. Having acknowledged the plaintiff's burden to prove the validity of the assignment, *Bishop* suggested that the defendant had no standing to challenge the validity of the assignment. 2013 Del. Super. LEXIS, *12.

The conceptual problem with *Bishop*'s reasoning is its application of "standing" and its reliance upon federal cases which were procedurally inapposite. Standing is the principle addressing whether the plaintiff (or counterclaim plaintiff) has a sufficient legal interest to invoke the jurisdiction of the court to assert a claim. 59 *Am.Jur*.2d § 26. Federal interpretations of standing have been widely criticized.

> In the 1970s and 1980s, as standing became an increasingly prominent constraint on developing bodies of federal constitutional law, the doctrine remained the focus of sustained academic attention and criticism. [25]
>
> [25] To take but one example, as Professor Gene Nichol has explained, "In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical." Gene R. Nichol, Jr., *Rethinking Standing*, 72 Cal. L. Rev. 68, 68 (1984); *see also id.* at 68 n.3 (citing extensive literature critical of standing doctrine).

Maxwell L. Stearns, *Standing at the Crossroads: the Roberts Court in Historical Perspective*, 83 Notre Dame L. Rev. 875, 884-886 (2008).

> Standing has been called one of "the most amorphous concepts in the entire domain of public law."[1] It is vague enough to have confused many federal court judges throughout the years. The fundamental aspect of standing focuses on the party, not on the issue to be litigated,[2] and on the fact that the party has enough of a personal stake in the "outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues" [3] to assist the court in making a decision.
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> [1] Hearings on S. 2097 Before the Subcomm. on Constitutional Rights

of the Senate Judiciary Comm., 89th Cong., 2d Sess., 465, 467-68 (1966) (statement of Prof. William D. Valente).
[2] See Flast v. Cohen, 392 U.S. 83, 99 (1968).
[3] Baker v. Carr, 369 U.S. 186, 204 (1962).

Jennifer Gartner, *The Meaning of "Interested Party" Under 28 U.S.C. § 1491*, 29 Pub. Cont. L.J. 739, 739 (2000).

Bishop, and in turn *Eid* and the Court Below, failed to note the distinction between a mortgagor's challenging the plaintiff's right to sue and the procedural postures and claims in the federal cases cited. In the federal cases, the mortgagors were asserting the right to enforce the terms of securitized trust agreements to which they were not a party. *Bishop's* recitation shows the difference:

> In cases where debtors brought claims against assignees challenging the validity of assignments based upon pooling service agreements, federal courts have concluded that debtors lacked standing as non-parties to the assignments and failed to show that there was a causal connection between the assignments and the injury complained of. Following this reasoning, a federal court in Georgia stated that "[t]he assignment does not affect whether the security deed's power of sale can be exercised; it merely affects who can exercise it.

2013 Del.Super. LEXIS 95, *12 (internal citations omitted).

Consistent with the reasoning of the Georgia case, Defendants here challenge who may exercise the mortgage. They do not claim affirmative rights from the terms of a collateral document, like a trust pooling agreement.

The distinction was recognized by Judge Fitzgerald, in holding that a

creditor was partially correct and partially in error regarding the debtor's standing.

> Although a debtor lacks standing when challenging an assignment of a mortgage due to failure to comply with the terms of a PSA, courts within the Third Circuit have not questioned the standing of debtors challenging a proof of claim based on failure to comply with the Uniform Commercial Code. See *Kemp v. Countrywide Home Loans, Inc*., 440 B.R. 624 (Bankr.D.N.J.2010) (sustaining debtor's objection to a secured proof of claim because the claimant failed to satisfy the indorsement element for negotiation of the note under the Uniform Commercial Code); *[In re] Walker*, 2012 WL 443014 at *5-6 [(Bankr.E.D.Pa. 2012)](addressing debtor's argument that claimant did not have a right to enforce the note under the Pennsylvania Uniform Commercial Code but finding that the claimant complied with the UCC and had possession of the note).

Washington v. Saxon Mortgage Services, 469 B.R. 588, 591-592 (W.D. Pa. Bkcy 2012).

There is a crucial distinction between initiating an action and defending one. In defending a foreclosure, the defendant/mortgagor has an indisputable interest in the outcome of the controversy. He is exercising his right under Superior Court Rule 17 to require that only the real party in interest might divest defendant from his home (see discussion *supra* at 3-5). He is asserting one of the long-standing, avoidance defenses of having determined whether the mortgage has been assigned (discussion *supra* at 6). He is also avoiding the risk that another party - which **is** the real party in interest - will subsequently bring its own action. *Cammile v. Sanderson*; 3 *Moore's Federal Practice*, § 17.10.

The proper application of the standing principle was made to analyze alleged assignments and dismiss foreclosure actions. *U.S. Bank, N.A. v. Adrian Collymore*, 68 A.D.3d 752, 753-54 (N.Y. App. Div. 2009); *CitiMortgage, Inc. v. Patterson*, 984 N.E.2d 392, 394-398 (Ohio Ct. App. 2012).

II. THE SUPERIOR COURT ERRED IN MAKING CASE-DISPOSITIVE, FACTUAL FINDINGS WITHOUT CONSIDERING SUBMISSIONS BY DEFENDANTS.

A. QUESTION PRESENTED.

Did the Court Below err in making case-dispositive, factual findings without considering submissions by Defendant, without an evidentiary hearing, and which were contrary to the law of assignments? Preserved at App. A78.

B. STANDARD OF REVIEW.

> A motion to vacate a judgment or order is reviewed under an abuse of discretion standard. In determining whether there is an abuse of discretion, the Court considers whether the defaulting party has shown that, if the order were vacated, the outcome would be different from the default judgment.

Scarpinato v. Nehring (internal citations omitted).

C. THE COURT IGNORED DEFENDANTS' SUBMISSIONS.

As discussed *supra* at 1-2, the court looks to whether the Rule 60 movant can demonstrate that there is "the possibility of a meritorious defense".

In *Keener v. Isken*, 58 A.3d 407 (Del.Supr. 2013), this Court reversed, *inter alia*, because in evaluating a Rule 60(b) motion, the trial court refused to consider a party's submission and affidavit.

The Court Below violated both of these principles in making a factual finding, "First, Plaintiff is the real party in interest, because the Mortgage and the

Note in this case both clearly list HSBC Mortgage Corporation as the lender, with the Note also having been signed by Plaintiff (sic)". Order at 1. These "facts" were based upon the argument of Plaintiff's counsel, with some attached documents[3]. The Order did not address the failure of Plaintiff's complaint to identify assignments. See 2 *Woolley on Delaware Practice*, § 1359. It also did not consider Defendants' submissions, including affidavits, an expert report, Recorder of Deeds filings, and the discussion of contradictions between Plaintiff's Complaint and the Mortgage upon which it relied, *inter alia*. Defendants' documentation demonstrating Plaintiff's lack of interest is discussed *infra*.

Not only was the process of reaching the conclusion deficient, the finding ignored the law regarding assignments. The mere fact that a plaintiff was the original obligee/mortgagee does not mean that it did not transfer its rights before filing suit. See discussion *supra* at 3-6.

D. OFFICIAL DOCUMENTS AND OTHER SUBMISSIONS SHOW THAT PLAINTIFF IS NOT THE REAL PARTY IN INTEREST.

Had the Superior Court addressed Defendants' argument and their

[3]It was additionally error to make such a finding, since Plaintiff had not yet responded to some long-outstanding discovery. On January 30, 2014, the Court granted Defendants' Motion to Compel, which was largely uncontested. The Order also makes findings regarding alleged communications regarding a purported offer of a loan modification program. These findings are irrelevant to the issue of whether Plaintiff has a legal interest in the Mortgage.

documentary records regarding the ownership of the Mortgage, then it should have determined that there was far more than a "possibility" that Plaintiff did not have a legal interest in the mortgage. The default judgment should have been vacated.

On November 6, 2009, Plaintiff filed its Complaint (App. A9), identifying the plaintiff to be HSBC Mortgage Corporation (USA), without any designation that it was an assignee. The Mortgage attached to the Complaint (App. A14) contradicts Plaintiff, since the Mortgagee is defined to be Mortgage Electronic Registration Systems, Inc. ("MERS"), not HSBC Mortgage Corporation (USA).

It appears that after the filing of the action, Plaintiff's counsel prepared and forwarded to someone a form of assignment. Plaintiff's Answer to Interrogatory 1 identifies an assignment dated November 11, 2009, five days after the Complaint was filed (App. A34).

To further undermine Plaintiff's claim of being the party in interest, almost three years after the initial assignment, Plaintiff's counsel prepared "corrective assignments", which were supposedly signed August 23, 2012 and then filed with the Recorder of Deeds. They were from MERS to HSBC Mortgage Corporation (USA) (App. A36) and, in turn, to HSBC Bank USA, N.A. (App. A39). HSBC Bank USA, N.A. is a different entity than HSBC Mortgage Corporation. Since these assignments were "corrective", Plaintiff has, at best, been the real party in

interest for a few hours on August 23, 2012.

The serial assignments were to continue. First disclosed in a footnote in Plaintiff's January 7, 2014 Supplemental Brief, HSBC Bank USA, N.A. allegedly assigned the mortgage to Federal National Mortgage Association (Fannie Mae) (App. A42) on October 19, 2012. That assignment was kept private for over a year and not recorded until January 30, 2014 (*id*.). Neither HSBC Bank nor Fannie Mae is the Plaintiff in this action.

> It is well settled that if a plaintiff at the time of commencing an action has no valid and subsisting title or right to the subject thereof, his subsequent acquisition, or perfection, of a right or title to the subject of the action during the pendency thereof will not remedy the defect to allow him to maintain the action.

59 *Am. Jur*. 2d § 28. This situation contrasts with *Citimortgage, Inc. v. Trader*, 2011 Del. Super. LEXIS 648, *2 (Del. Super. 2011), which held, "Plaintiff had a valid interest in the mortgage as of [the date it received the witnessed assignment]. Thus, Plaintiff had standing as a "real party in interest" to sue on a mortgage default when it initiated the action in June of 2009."

Since Plaintiff was neither the owner of the mortgage at the filing of the action nor at the time of the Court's ruling, Rule 17 bars the action.

E. THE VALIDITY OF THE ALLEGED ASSIGNMENTS IS SUSPECT.

Arguendo, if the Court were to find that the timing of the assignments did not bar Plaintiff as the real party in interest, that still leaves an issue of the validity of the assignments.

> Plaintiff's standing to bring the lawsuit depends on whether the assignment was valid and effective. The statute governing the assignment of a mortgagee's interest provides that "[a]n 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."

Citimortgage, Inc. v. Trader, 2011 Del. Super. at *4-5 (citing 25 *Del.C.* § 2109).

Defendants have raised more than a "possibility" that credibility is lacking in execution of the assignments. The November 11, 2009 Assignment (App. A34) shows it to have been allegedly executed by an Alfonso Green, purportedly "V.P. MERS". The Register of the Southern Essex (Massachusetts) District Registry of Deeds has provided an Affidavit (App. A45), describing his process for having a forensic analyst verify suspect signatures. They identified Alfonso Green as an alleged robo-signer or surrogate signer, *i.e.*, a person who regularly does not have the authority to execute the documents which he signs.

Plaintiff conceded that the original 2009 assignment was invalid when it proffered two "corrective" assignments. The supposed signatory to both

assignments was Michael Peter. On August 23, 2012, one moment he was allegedly Assistant Secretary of MERS (App. A36); the same day he was purportedly Assistant Secretary of HSBC Mortgage Corp. USA (App. A39). Two months later, on October 29, 2012, he was supposedly Vice President and Assistant Secretary for HSBC Bank USA, N.A. (App. A42). Not surprisingly, the Professional Audit names him as another, alleged robo-signer (Audit p. 32; App. A77).

MERS' assignment practices have been challenged nationally, *see e.g.*, *U.S. Bank v. Emmanuel*, 910 N.Y.S.2d 766 (N.Y. Sup. 2010), and in Delaware. On October 21, 2011 the Delaware Department of Justice sued MERSCORP in the Delaware Court of Chancery alleging deceptive trade practices under 6 Del.C. § 2532. *State v. MERSCORP, Inc.,* 2012 Del. Ch. LEXIS 115 (2012) (denial of motion to intervene).

III. THE SUPERIOR COURT ERRED IN REFUSING TO ADDRESS WHO OWNS THE NOTE THAT THE MORTGAGE SECURES.

A. QUESTION PRESENTED.

Did the Superior Court err in holding that a defendant to a mortgage foreclosure did not have standing to contest whether the plaintiff was the real party in interest, because it did not own the note which the mortgage secured? Preserved at App. A78.

B. STANDARD OF REVIEW.

This Court reviews questions of law *de novo* to determine whether the trial judge committed legal error. *Scarpinato v. Nehring*.

C. THE SUPERIOR COURT'S RULING IS INCONSISTENT WITH ITS PRIOR RULINGS AND WITH THE LAW REGARDING THE NATURE OF MORTGAGES.

The Superior Court held, "Second, the Court does not address Defendants' challenge to Plaintiff's standing based on the Note, because *scire facias sur* mortgage actions are based upon the mortgage, not the Note". Order, at 1.

To the contrary, this is an avoidance defense, recognizing the limitation of a mortgage, dating back to *Woolley*. The most fundamental principle is to recognize the limited nature of the mortgage. It merely secures the debt. Then-Judge Walsh explained the dependent relationship.

> 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.

Metropolitan Life Ins. Co. v. Monroe Park, 442 A.2d 503, 509, (Del.Super. 1982), rev'd sub nom *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734 (Del. 1983)[on holding that Metropolitan could still foreclose]. Accord *Wedderien v. Collins*, 937 A.2d 140 (Del. 2007).

Woolley's instructs that the *sci. fa. sur* mortgage requires both a breach of the mortgage and of the note:

> By the mortgage, the mortgagor binds his land specified in the mortgage and obligates to pay a certain sum of money or to perform some act therein named. If he fails to keep the covenant contained in the mortgage, and breaks the condition of the bond upon which the mortgage is founded, the mortgagee is entitled to recover upon the obligation according to the terms.

Woolley, § 1358. His language is conjunctive, so that one of the prerequisites to suit is breaking the condition of the bond/note.

Judge Young, just three weeks before issuing the Order in the instant action, recognized the importance of ownership of the Note. He denied summary judgment to a foreclosure plaintiff, because, *inter alia,* the plaintiff failed to

produce evidence that it was the holder of the Note.

> First, Plaintiff has failed to provide any affirmative evidence that it is the holder of the note. Plaintiff also failed to provide a copy of the promissory note. Therefore, there is an issue of whether Plaintiff is the holder of the note; and whether Plaintiff has standing to pursue the instant foreclosure.

Us Bank Nat'l Ass'n v. Gilbert, 2014 Del. Super. LEXIS 20, *9-10 (Del. Super. 2014).

D. COURTS THROUGHOUT THE COUNTRY HAVE HELD THAT A PARTY WHICH OWNS THE MORTGAGE BUT NOT THE NOTE MAY NOT FORECLOSE.

Numerous sister states have held that a party may not foreclose unless it owns the Note. They have relied not only on their own decisional and statutory authority, but also upon respected treatises that Delaware courts regularly cite.

> The key to this argument is that, under the common law generally, the transfer of a mortgage without the transfer of the obligation it secures renders the mortgage ineffective and unenforceable in the hands of the transferee. *Restatement (Third) of Property (Mortgages)* § 5.4 cmt. e [916] (1997) ("in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation"). As stated in a leading real property treatise:
>
> > When a note is split from a deed of trust "the note becomes, as a practical matter, unsecured." *Restatement (Third) of Property (Mortgage)* § 5.4 cmt. a (1997). Additionally, if the deed of trust was assigned without the note, then the assignee, "having no interest in the underlying debt or obligation, has a worthless piece of

paper."

> 4 Richard R. Powell, *Powell on Real Property* [4], § 37.27[2] (2000). *Cf. In re Foreclosure Cases*, 521 F. Supp. 2d 650, 653 (S.D. Ohio 2007) (finding that one who did not acquire the note which the mortgage secured is not entitled to enforce the lien of the mortgage); *In re Mims*, 438 B.R. 52, 56 (Bankr. S.D.N.Y. 2010) ("Under New York law 'foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.'") (quoting *Kluge v. Fugazy,* 145 A.D.2d 537, 536 N.Y.S.2d 92, 93 (N.Y. App. Div. 1988)).
>
> * * *
>
> This rule appears to be the common law rule. See, e.g., *Restatement (Third) of Property (Mortgage)* § 5.4 (1997); *Carpenter v. Longan*, 83 U.S. 271, 274-75, 21 L. Ed. 313 (1872) ("The 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."); *Orman v. North Alabama Assets Co.*, 204 F. 289, 293 (N.D. Ala. 1913); *Rockford Trust Co. v. Purtell*, 183 Ark. 918, 39 S.W.2d 733 (1931).33 While we are aware that some states may have altered this rule by statute, that is not the case here

Veal v. Am. Home Mortg. Servicing, Inc., 450 B.R. 897, 915-918 (9th Cir. 2011).

The Oklahoma Supreme Court similarly held that unless a plaintiff could demonstrate a right to enforce the note, it lacked standing, relying upon Article III of the Uniform Commercial Code. *Wells Fargo Bank, N.A. v. Heath*, 280 P.3d 328, 333 (Okla. 2012). Since the note and security interest are "inseparable", an

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[4]Delaware courts frequently rely upon the *Restatements*, including *Restatement (Third) of Property (Mortgages)* (see e.g., *Word v. Johnson*, 2005 Del. Ch. LEXIS 168 (2005); *Oldham v. Taylor*, 2003 Del. Ch. LEXIS 85 (2003); *Beal Bank* v. Lucks, 2001 Del. Ch. LEXIS 25 (2001)), as well as *Powell on Real Property (see e.g., Peters v. Robinson*, 636 A.2d 926, 929 (Del. 1994)).

attempted transfer of the security interest "separate from the note has no 'force.'" *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009).

Courts in numerous jurisdictions have explained that to permit a party to foreclose which does not have an interest in the note, would subject the borrower to double liability, since the note holder could later sue.

> Were a mortgagee without an interest in the debt able to exercise the power of sale, the note would be left outstanding as a valid obligation of the mortgagor to its holder. Cf. *Cooperstein v. Bogas*, 317 Mass. 341, 344, 58 N.E.2d 131 (1944) (recognizing double liability as a concern in a reach and apply case). "[T]he holder of the note could attempt to collect on the note after the mortgage was foreclosed subjecting the mortgagor to double liability." *Adamson*, 2011 Mass. Super. LEXIS 212, 2011 WL 4985490, at *9; see *Residential Funding Co., LLC v. Saurman*, Nos. 290249, 291443, 292 Mich. App. 321, 807 N.W.2d 412, 2011 Mich. App. LEXIS 719 (Mich. Ct. App. Apr. 21, 2011)("[I]f [a mortgagee who does not hold the note] were permitted to foreclose on the properties, the borrowers obligated under the note would potentially be subject to double-exposure for the debt. That is, having lost their property to [the mortgagee], they could still be sued by the noteholder for the amount of the debt because [the mortgagee] does not have the authority to discharge the note."); see also *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings*, *LLC*, 399 F. App'x 97, 102 (6th Cir. 2010) (suggesting that where the foreclosing entity does not own the indebtedness, the borrower is at risk of double liability on the loan); *Tate v. BAC Home Loan Servicing, LP*, No. 10-13257, 2011 U.S. Dist. LEXIS 101268, 2011 WL 3957554, at *4 (E.D. Mich. Aug. 5, 2011) (same); *Stein v. U.S. Bancorp*, No. 10-14026, 2011 U.S. Dist. LEXIS 18357, 2011 WL 740537, at *11 (E.D. Mich. Feb. 24, 2011) (same); *5-Star Mgmt., Inc. v. Rogers*, 940

> F. Supp. 512, 520 (E.D.N.Y. 1996) ("To allow the assignee of a security interest to enforce the security agreement would expose the obligor to a double liability, since a holder in due course of the promissory note clearly is entitled to recover from the obligor." (quoting *In re Hurricane Resort Co.*, 30 B.R. 258, 261 (Bankr. S.D. Fla. 1983))); cf. *NattyMac Capital LLC v. Pesek*, 2010 SD 51, 784 N.W.2d 156 (S.D. 2010) (where the loan servicer failed to meet its duty to forward the loan payoff to the note holder, the note holder then sought a declaratory judgment against the new homeowners that the satisfaction of the mortgage was a nullity and that its mortgage remained in effect); *Washington Mut. Bank, F.A. v. Green*, 156 Ohio App. 3d 461, 2004 Ohio 1555, 806 N.E.2d 604, 609 (Ohio Ct. App. 2004) (the defendant adduced facts sufficient to survive summary judgment showing that the plaintiff was not the real party in interest in foreclosing her mortgage).

Culhane v. Aurora Loan Servs., 826 F. Supp. 2d 352, 366-367 (D. Mass. 2011); accord *Eaton v. Fannie Mae*, 2011 Mass. Super. LEXIS 211, 4-10, 13-14 (Mass. Super. 2011); *Fleet Nat. Bank v. Nazareth*, 818 A.2d 69, 71-72 (Conn. App. 2003); *5-Star Mgmt. v. Rogers*, 940 F. Supp. 512, 520-521 (E.D.N.Y. 1996) (applying New York law); *In re Leisure Time Sports, Inc.*, 194 B.R. 859, 861 (9th Cir. 1996) (applying Florida law); *In re BNT Terminals, Inc.*, 125 B.R. 963, 970 (Bankr. N.D. Ill. 1990) (applying Illinois and Nebraska law).

Emphasizing a temporal component, the New York Supreme Court Appellate Division and courts in other surrounding states hold that the plaintiff must have ownership of the mortgage at the time suit is filed. A corrective assignment does not cure that defect. *Countrywide Home Loans, Inc. v. Gress*,

888 N.Y.S.2d 914 (N.Y. App. Div. 2009); accord *U.S. Bank Nat. Ass'n v. Dellarmo*, 942 N.Y.S.2d 122 (N.Y. App. Div. 2012); *Deutsche Bank Nat. Trust Co. v. Mitchell*, 27 A.3d 1229 (N.J. Super. 2011); *Am. Home Mortg. Servicing, Inc. v. Tarantine*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 108, 15-17 (Pa. County Ct. 2011).

E. SUBMISSIONS TO THE SUPERIOR COURT ESTABLISH THAT PLAINTIFF HAS NO INTEREST IN THE NOTE.

As is common, the terms of the Mortgage require compliance with the Note; the Court cannot determine a breach without consideration of whether the borrower has paid the holder of the Note. Plaintiff's Complaint (App. A9) tracks the dependent relationship, "On May 3, 2007, Defendant(s) executed and delivered to Plaintiff[5] a note (the "Note"), secured by a mortgage (the "Mortgage") on the Property. A certified copy of the Mortgage is attached hereto as Exhibit A and incorporated by reference" (Complaint ¶ 3).

Plaintiff completely bases its rights upon the obligations under the Note as to the amount of payment and the consequences if payments are not made (Complaint ¶¶ 4-6). As to payments, the Mortgage describes the obligation of the

[5]The Mortgage (App. A14) contradicts Plaintiff in that the Mortgagee is defined to be MERS (Mortgage Definition (C)), not HSBC Mortgage Corporation (USA). HSBC is defined to be the "Lender" (Def. (D)). The Complaint makes no averment of an assignment.

Borrower: "Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note" (Uniform Covenant ¶ 1). The Mortgage has no other statement as to the frequency or amount of that payment. Payments are to be applied according to the Note (Uniform Covenant ¶ 2).

As discussed in the Statement of Facts, Defendants independently contracted for Securitization Audit Pro, LLC to do a Securitization Audit (App. A46). It describes the background and the process which it followed, using documents on file with the Kent County Recorder of Deeds, as well as those records for securitized documents on Fannie Mae's Loan Lookup, Freddie Mac's Self Service Loan Lookup, and MERS' website, *inter alia* (Audit, pp.7-8).

The Audit determined that HSBC Bank USA transferred its interest in the Bendfelt loan, so that the Promissory Note and Mortgage have been separately owned, since at least 2007. On October 30, 2007, the Note was transferred to HSI Asset Securitization Corp., into a trust for a mortgage pool, HSI Asset Loan Obligation Trust 2007-2 (Audit, pp.7, 9-10, 17; see also discussion at Audit pp. 25-26). It was transferred again to Deutsche Bank National Trust Co., Trustee HSI Asset Loan Obligation Trust 2007-2 (*id.*). The Master Servicer is Wells Fargo Bank, NA. After 2007, HSBC no longer had a legal right to the payments

under the Note[6].

In contrast, the Mortgage stayed with MERS until November 11, 2009, when it was assigned to HSBC Mortgage Corp. Almost 3 years later, on August 23, 2012, there were a set of "corrective assignments", from MERS to HSBC Mortgage Corp., USA and then from HSBC Mortgage Corp., USA to HSBC Bank USA, NA (Audit, pp. 18).

The Audit, consistent with legal authority throughout the country, opined that once the loan was securitized, it lost its security component and the right to foreclose (Audit, pp. 30).

[6]The Court Below found that Plaintiff possesses the original Note. Order at 5. As discussed *supra* at 13, the Court did not consider Defendants' expert analysis that Plaintiff does not **own** the Note. The rights in the Note should be determined after the judgment is vacated, discovery is done and an evidentiary hearing is held.

CONCLUSION

Because the Court Below erred in applying the improper standard for considering a motion for relief from judgment, in refusing to consider arguments that Plaintiff did not own the Mortgage and Note, and in making factual findings without considering Defendants' submissions, this Court should reverse and remand with instruction that the default judgment be vacated.

/s/ *Douglas A. Shachtman*
DOUGLAS A. SHACHTMAN, ID #756
The Shachtman Law Firm
1200 Pennsylvania Avenue, Suite 302
Wilmington, Delaware 19806
(302) 655-1800
Attorney for Defendants-Below, Appellants

DATED: April 3, 2014

HSBC MORTGAGE CORPORATION (USA), Plaintiff, v. KENNETH BENDFELDT and BETTINA ROLOFF, Defendants.

C.A. No: K09L-11-016 RBY

SUPERIOR COURT OF DELAWARE, KENT

2014 Del. Super. LEXIS 44

January 28, 2014, Submitted
February 4, 2014, Decided

NOTICE:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

PRIOR HISTORY: [*1]

Upon Consideration of Plaintiff's Motion to Affirm Default and Proceed to Sheriff Sale.

DISPOSITION: GRANTED.

COUNSEL: Daniel T. Conway, Esquire, and Thomas D.H. Barnett, Esquire Atlantic Law Group, LLC, Georgetown, Delaware for Plaintiff.

Douglas A. Shachtman, Esquire, The Shachtman Law Firm, Wilmington, Delaware for Defendants.

JUDGES: Robert B. Young, J.

OPINION BY: Robert B. Young

OPINION

ORDER

Young, J.

SUMMARY

HSBC Mortgage Corporation (USA) ("Plaintiff" or "HSBC Mortgage Corporation") moves this Court for an entry of an order affirming default judgment against Kenneth Bendfeldt and Bettina Roloff ("Defendants"), permitting the Sheriff to sell the subject property in accordance with Plaintiff's foreclosure action. The Court must decide: 1) whether Plaintiff is the real party in interest in order to foreclose on the subject property, and 2) whether Defendants have standing to challenge the validity of the Note or the Mortgage assignment to Plaintiff. First, Plaintiff is the real party in interest, because the Mortgage and the Note in this case both clearly list HSBC Mortgage Corporation as the lender, with the Note also having been signed by Plaintiff. Second, the Court does not address Defendants' challenge to Plaintiff's standing based [*2] on the Note, because *scire facias sur* mortgage actions are based upon the mortgage, not the Note. Finally, Defendants lack standing to challenge the assignment of the Mortgage to Plaintiff, because Defendants are not parties or third-party beneficiaries to the assignment according to Delaware contract law. Defendants merely benefitted from the assignment indirectly once Defendants purchased the loan from Plaintiff. Therefore, Plaintiff's Motion is **GRANTED**.

FACTS AND PROCEDURAL POSTURE

Defendants executed and delivered a valid mortgage to HSBC Mortgage Corporation on May 3, 2007 (the "Mortgage"). On April 1, 2009, Defendants defaulted on the Mortgage. After a Demand Letter was sent to Defendants on June 3, 2009, the Defendants failed to cure the default as required by the Demand Letter. Pursuant to Section 22 of the Mortgage, the mortgage was accelerated. On November 6, 2009, Plaintiff filed its Complaint (the "Complaint") against Defendants in this *in rem scire facias sur* mortgage action. Plaintiff sought foreclosure of Plaintiff's interest in the property known as 5513 Whiteleysburg Road, Harrington, Delaware 19952 (the "Property") under the mortgage referenced in the Complaint. On [*3] January 25, 2010, Defendants received service of the Complaint.

The Plaintiff received no answer or other responsive pleading to the Complaint which was sent to Defendants on November 6, 2009. Plaintiff obtained a default judgment against the Defendants on March 22, 2010. On May 3, 2010, Plaintiff filed a *Writ of Levari Facias*, which was entered into the record and sent to the Kent County Sheriff to execute upon the judgment exposing the Property to the public sale. On June 30, 2010, one day before the scheduled Sheriff's Sale, Defendants entered appearance. On August 24, 2010, Plaintiff filed a second *Writ of Levari Facias.* Plaintiff stayed the Sheriff's Sale to permit negotiations to attempt to resolve the underlying arrear ages. On the same day, counsel faxed Defendants' settlement proposal to Plaintiff, and continued to follow up with Plaintiff. On October 11, 2010, counsel for Plaintiff directed Defendants to Plaintiff's Loss Mitigation Department. Having received no further communication or instruction, counsel for Plaintiff proceeded in an effort to exercise its rights under the Mortgage. On November 19, 2010, this Court stayed the Sheriff's Sale, which was scheduled to occur [*4] on December 20, 2010 upon the Motion of Defendants.

Thereafter, Defendants served Discovery Requests upon the Plaintiff on December 9, 2010, and, on January 7, 2011, the Court entered a stipulation (the "Stipulation") staying the Sheriff's Sale. The Stipulation did not vacate the default judgment. Plaintiff's response to discovery was sent to counsel on February 8, 2011. On July 29, 2011, Defendants, through counsel, served upon Plaintiff their supplemental interrogatory, and, on November 2, 2011, Plaintiff responded.

Prior to the filing of the instant case, on April 15, 2009, Defendants spoke with a representative of Plaintiff, inquiring about which type of work out programs they qualified for. Defendants were asked to provide a work out package in order for Plaintiff to review their financial situation. Defendants failed to provide this package. On May 13, 2009, Defendants called Plaintiff to make a payment, and were advised that they were pre-qualified for Home Affordable Modification Program (HAMP), whereupon Defendants advised they would call Plaintiff back in two weeks. Defendants failed to do so. Instead, on July 2, 2009, Plaintiff mailed the HAMP documents with approval for the [*5] trial payments. After receiving no further communication from Defendants, Plaintiff mailed Defendants a HAMP failure letter.

On April 23, 2013, Plaintiff filed a Motion to Affirm Default Judgment and Proceed to Sheriff Sale. Defendant filed a response to the motion. Then, a hearing was held before this Court on December 6, 2013, where the Court ordered additional briefing from the parties.

STANDARD OF REVIEW

Superior Court Civil Rule 55(c) provides that upon a motion, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under *Rule 59(b)*; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason [*6] justifying relief from the operation of the judgment that the Court may set aside a default judgment in accordance with *Rule 60(b)*.

DISCUSSION

First, Plaintiff argues that it is the real party in interest to bring the instant foreclosure action, because the Mortgage and the Note both explicitly list HSBC Mortgage Corporation as the lender. Superior Court Rule of Civil Procedure 17 requires that the party filing suit is the one who has the legal right to pursue the claim. The Mortgage and the Note in this case both clearly list HSBC Mortgage Corporation as the lender. The Plaintiff

has the Note in its possession. Further, the Note is signed by Plaintiff. Therefore, on the assignment's face, the Plaintiff is the real party in interest.

In response, Defendants contend that Plaintiff lacks standing to bring this foreclosure action on the basis that Plaintiff does not own the Note, rendering the purported assignment to the Plaintiff invalid. However, the Court will not address Defendants' challenge to Plaintiff's standing based on the Note, because *scire facias sur* mortgage actions are based upon the mortgage, not the Note. Generally, "only those claims or counterclaims arising under the mortgage [*7] may be raised in a *scire facias sur* mortgage foreclosure action."[1] An action on the Note is an *in personam* litigation, which is distinct from the *in rem* action at hand. Pleading any defenses which do not arise from the initial mortgage transaction would "infuse an *in personam* litigation and judgment based upon a different transaction into an action which is essentially an *in rem* action."[2]

1 *LaSalle National Bank v. Ingram, 2005 Del. Super. LEXIS 185, 2005 WL 1284049, at *1 (Del. Super. Ct. May 19, 2005)*, citing *Harmon v. Wilmington Trust Co., 1995 Del. LEXIS 220, 1995 WL 379214, at *2 (Del. Super.)*.

2 *Gordy v. Preform Building Components, Inc., 310 A.2d 893, 896 (Del. Super. Ct. 1973)*.

Second, Plaintiff contends that Defendants lack standing to challenge the validity of the assignment. In *CitiMortgage, Inc. v. Bishop (herein Bishop), 2013 Del. Super. LEXIS 95, 2013 WL 1143670, at *4 (Del. Super. Ct. March 4, 2013)*, the Court held that, "a mortgage-debtor lacks standing to challenge the validity of the assignment." This holding is also cited in *Branch Banking & Trust Co. v. Eid* (herein *Branch Banking*)[3], which followed *Bishop.*

3 *2013 Del. Super. LEXIS 264, 2013 WL 3353846, at *4 (Del. Super. Ct. June 13, 2013).*

Defendants (overlooking that *Bishop* and *Branch Banking* now are Delaware authorities) [*8] argue that neither *Bishop* nor *Branch Banking* cites any Delaware authority in support of reaching this holding. To the contrary, *Bishop* states that under Delaware contract law, a nonparty to a contract generally has no rights relating to it unless he or she is a third-party beneficiary to the contract. In order to qualify as a third-party beneficiary, a party must be an intended beneficiary. Even though a third-party happens to benefit from the performance of the contract indirectly, the third person has no rights under the contract.[4] This contract law principle is consistent with *Bishop's* statement 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.[5]

4 *2013 Del. Super. LEXIS 95, 2013 WL 1143670, at *5*.

5 *Id.*

While *Bishop's* holding rests on several federal decisions [6], where the mortgagor was in the position of a plaintiff, or a party raising an affirmative claim to a remedy; nonetheless, the assignment in this action, treated like any other contract under Delaware law, does not recognize Defendants as a parties to the assignment. Defendants merely benefitted from the assignment coincidentally once Defendants [*9] purchased the loan from the Plaintiff, the assignee. Therefore, Defendants, as mortgage-debtors, do not have standing to challenge the validity of the instant Mortgage assignment.

6 *In re: Romie David Bishop, and Shirley Ann Bishop*, Case No. 11-12338 (BLS) and *Bishops v. Argent Mortgage Company, LLC*, Adv. Pro. No. 11-53412 (BLS), at 3. See also *Blake v. Bank of America, 845 F.Supp.2d 1206 (D. Alabama 2012)*; *In re Walker, 466 B.R. 271, 285 (Bankr.E.D.Pa.2012)*; *In re Washington, 469 B.R. 587, 591 (Bankr.W.D.Pa.2012)*; *Metcalf v. Deutsche Bank Nat. Trust Co., 2012 U.S. Dist. LEXIS 88331, 2012 WL 2399369, at *5 (D. N.D. Tex. June 26, 2012)*; *In re Edwards, 2011 Bankr. LEXIS 5065, 2011 WL 6754073, at *4 (Bankr.E.D. Wisconsin Dec. 23, 2011)*; See *Juarez v. U.S. Bank Nat. Ass'n, 2011 U.S. Dist. LEXIS 128087, 2011 WL 533046, at *4 (D.Mass. Nov. 4, 2011)*.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Affirm Default and Proceed to Sheriff Sale is **GRANTED**.

IT IS SO ORDERED.

/s/ Robert B. Young