



IN THE SUPREME COURT OF THE STATE OF DELAWARE

EUGENE MOSS, :
 : C.A. 55,2016
 APPELLANT/DEFENDANT BELOW, :
 :
 V. : Case Below: Superior Court
 : New Castle County
 Deutsche Bank National Trust : C.A. No.: N11L-03-097 ALR
 Company, :
 :
 APPELLEE/PLAINTIFF BELOW, :
 :

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is a mortgage foreclosure action initiated by Plaintiff (“Deutsche Bank”). Defendant (“Moss”) has challenged Deutsche Bank’s standing to assert the present action. Contrary to the Superior Court’s holding, and in large part the subject of this appeal, Moss’ defense does not challenge assignment of the mortgage. Instead, Moss challenges Deutsche Bank’s standing as a real party in interest and its claim as holder of the underlying obligation. Since early in this litigation, Moss has demanded documents from Deutsche Bank confirming its standing to enforce the mortgage.

Following commencement of this suit, Moss demanded Deutsche Bank, through the discovery process, produce evidence that it was the holder of the underlying promissory note, in part to confirm that his possible payment or refinancing would be paid out to the proper party. Deutsche Bank at first failed to respond to the discovery and discovery from Deutsche Bank was procured only after judicial intervention.

That judicial intervention in the discovery process eventually lead to the Superior Court’s initial granting of summary judgment to Moss. *Deutsche Bank Nat’l Trust Co. v. Moss*, 2013 Del. Super. LEXIS 3490 (Del. Super. 2013). That decision, however, was subsequently overturned and the case remanded by this

Court. *Deutsche Bank Nat'l Trust Co. v. Moss*, 2014 Del. LEXIS 294 (Del. 2014).

On remand, the Superior Court permitted further discovery. That discovery was followed by Moss's Motion to Dismiss (subsequently converted to a summary judgment motion) and Deutsche Bank's Motion for Summary Judgment. The Court granted Deutsche Bank's motion, denied Moss's motion, and this appeal followed.

Neither Moss, nor this Court, has reliable evidence that the obligation under the promissory note is vested in Deutsche Bank. In other words, it challenges Deutsche Bank's standing to enforce the mortgage. Moreover, the handling of this case by Deutsche Bank's three (3) attorneys, their failure to produce evidence in a timely manner without Court Order, and its suspected misrepresentations to the Superior Court in earlier proceedings, and its lack of candor to this Court in a prior appeal, gives credence to Moss's position that Deutsche Bank lacks standing. As will be discussed herein, and presented in opposition to summary judgment below, an examination by a forensic auditor has determined that it is impossible for Deutsche Bank to have a legitimate vested interest in the underlying obligation and therefore lacks standing to foreclose.

This doubt, created primarily by Deutsche Bank's failure to provide forthright information, creates a genuine issue of material fact precluding summary judgment.

Notwithstanding this unresolved issue of fact, the Superior Court granted Deutsche Bank's motion for summary judgment. It is from that decision (attached as Exhibit A and A001-A0014) that Moss takes this appeal.

SUMMARY OF ARGUMENT

FIRST ARGUMENT:

The U.S. Supreme Court, this Honorable Court, and learned scholars all agree that the obligations under a promissory note and the security interest of a mortgage are inseparable. As stated by Richard Powell, Esq., in *Powell on Real Property*, the holder of a mortgage who does not hold rights in the underlying obligation simply holds “a worthless piece of paper.” It is this standing that Moss challenged in the Superior Court and which he continues to challenge here. The Superior Court misinterpreted Moss’s challenge to Plaintiff’s standing and incorrectly held that Moss lacked standing to challenge the assignments of mortgage. Conversely, it is Plaintiff’s burden to establish standing, which it has not done.

SECOND ARGUMENT:

The Superior Court incorrectly asserted the doctrine of judicial estoppel although the Court had not issued any rulings based on Moss’s earlier inconsistent position.

STATEMENT OF FACTS

This is a foreclosure complaint initially filed on March 9, 2011.

The mortgage sued upon was executed by Moss on January 13, 2007. (A0015- A0037**-) (“The Mortgage”) The lender was New Century Mortgage Corporation. Mortgage Electronic Registration Systems, Inc. (MERS) was identified as New Century’s nominee. Less than three (3) months later, Deutsche Bank filed a Chapter 11 Bankruptcy Petition with the U.S. Bankruptcy Court, District of Delaware. (A0038-A0044)

This is the second appeal to this Honorable Court. On December 18, 2013, the Superior Court, per Judge Rocanelli, granted Moss summary judgment thereby dismissing Plaintiff’s claims. Deutsche Bank filed a timely appeal with this Court captioned *Deutsche Bank National Trust Company v. Moss*, No. 26, 2014. (A0045-A0053) (Hereinafter “the First Appeal”). This Court reversed and remanded the case to the Superior Court because the Superior Court had granted Moss summary judgment. In this Court’s decision, it characterized Deutsche Bank’s pleadings in the Superior Court as “confusing” and “unhelpful”. To explain those terms, this Court turned to an excerpt from the proceedings below:

“One of the things that [Moss] complains about is that [Deutsche Bank] has not produced evidence to support its claim that it had authority to transfer assets after New Century sought protection of Chapter 11. [Deutsche Bank's] response [5] to [Moss's] Third Motion for Summary Judgment, at paragraph 4(b) states, "While it is true that plaintiff has not until now produced evidence that New Century had Bankruptcy Court permission to transfer a mortgage after commencement of the bankruptcy proceeding, the New Century Bankruptcy Trust assured [Deutsche Bank's] counsel that this particular loan was actually transferred to the pooling trust prior to the filing of the bankruptcy." Once again, this is a statement of fact that is absolutely unsupported in the record evidence.” (A0048).

The state of the evidence has not changed since being remanded. Plaintiff still has not produced any evidence to prove the interest in the underlying obligation was transferred to Plaintiff prior to the filing of bankruptcy.

At oral argument before this Court, Deutsche Bank's attorney argued vigorously that the promissory note had been transferred in the ordinary course of business and Deutsche Bank was the holder in due course of a promissory note endorsed in blank. (A0059). In the First Appeal, Chief Justice Strine refused to address Deutsche Bank's argument that Moss lacked standing to challenge the assignment of mortgage. *Id.* @ 8

At the heart of the First Appeal, and now in this appeal, is not only the chain-of-title to the mortgage, but more importantly, true ownership of the underlying promissory note obligation. In argument to this Court, and in the Superior Court, Deutsche Bank argued, and presented a copy of the signed promissory note, indorsed in blank. (A0078-A0082) This promissory note copy

was only produced by Deutsche Bank after the Superior Court's threat to impose sanctions on Deutsche Bank for its failure to cooperate in the discovery process. (A0083-A0095). Another copy of the promissory note was also produced. This second copy differs on its face from the one endorsed in blank, allegedly the original. (A0096- A0099)

In the First Appeal, Deutsche Bank's newest attorneys, strongly argued the promissory note had been endorsed in blank and therefore became payable to the bearer pursuant to Article 3 of the UCC (6 Del.C. §3-101 et.seq.) (A copy of Deutsche Bank's argument is attached as A0054-A0077). According to Plaintiff's Opening Brief in the First Appeal, the loan servicing business of the lender was assigned to Carrington Capital Management, LLC on June 29, 2007. (A0020). Notwithstanding that representation, on November 16, 2009, Deutsche Bank Trust Company Americas FKA Bankers Trust Company as Custodian for Morgan Stanley MSAC 2007-NC3 allegedly assigns its rights in the Note to the Plaintiff in this case. (A00191 – A00192). To further confuse the ownership, Deutsche Bank has now produced an Allonge, not produced prior to the First Appeal, in which New Century Mortgage Corporation claims to be the "Present Owner and Holder" of the Note as of February 8, 2012. (A00100)

Following remand to the Superior Court, Deutsche Bank, filed its motion for summary judgment. The Superior Court stayed the motion and permitted additional time for discovery. During the stay, Moss conducted an inspection of Plaintiff's collateral file and found an Allonge. (A00100). This Allonge had not been previously produced. The Allonge purports to be from New Century Mortgage Corporation to Deutsche Bank and is dated February 12, 2012. The Allonge is signed not by a representative of New Century Mortgage Corporation but by a representative of Ocwen Loan Servicing, LLC, which identifies itself as attorney-in-fact for New Century. Plaintiff had not produced this Allonge as part of its discovery response and has not explained why it was not produced, but more importantly, why an Allonge was obtained if the endorsement in blank was valid and why New Century represents itself as the "Owner and Holder" of the Note in February 2012.

Based in part on Plaintiff's failure to produce the Allonge, despite previous warnings from the Court, Moss filed a Motion to Dismiss. Deutsche Bank subsequently filed its Motion for Summary Judgment and the Superior Court proceeded as if cross-motions for summary judgment had been filed.

In his defense of the summary judgment motion, Moss again raised the issue of standing. As part of his defense and proof of lack of standing, Moss presented the following documents:

(1) Moss drew attention to the previously produced copies of the promissory note supplied by Deutsche Bank in discovery and the promissory note allegedly endorsed in blank. (A0096 – A0099 v. A0078 – A0082 , respectively. The first copy of the promissory note has an unreadable stamp and bar code at the bottom of the document. The promissory note, allegedly endorsed in blank, does not contain those same markings. The endorsement on the note (A0082) is undated, and stamped with the name of “Steve Nagy” appearing to represent himself as “V.P. Records Management for New Century.”

(2) A lengthy affidavit from Bernard J. Patterson, Certified Fraud Investigator and Forensic Accountant outlining the plethora of reasons why Deutsche Bank cannot have vested title in the promissory note and lacks standing. (A00101-A00194)

(3) The sworn declaration from Donna Walker, a former employee of New Century Mortgage Inc. and current consultant for New Century Liquidating Trust, Inc., Chapter 11 Trustee for New Century. In her sworn declaration

producing subpoenaed documents, she produced over 400 pages of documents, none of which referenced an assignment, or endorsement of the promissory note, to Deutsche Bank. (A00195 – A00197). Conversely, a letter from the Liquidating Bankruptcy trustee indicates that the “Trust never owned or serviced the Moss Loan and the Debtors [sic] transferred their interest in the Moss Loan prior to the filing of the bankruptcy petition. (Exhibit L A-00198)

On January 26, 2016, the Superior Court granted Deutsche Bank’s Motion for Summary Judgment. (See Exhibit A A0001- A00014)

In the Superior Court’s holding, Judge Rocanelli, granted summary judgment to Deutsche for two (2) apparent reasons: (1) Despite New Century’s filing of bankruptcy, its nominee, MERS, had authority to assign the mortgage and Moss lacks standing to challenge the assignment; and (2) Moss was judicially estopped from challenging the mortgage because Moss had originally admitted that Deutsche Bank was the owner of the mortgage. (Exhibit A @ P. 9 & A0008 – A0009).

FIRST ARGUMENT

A. DEUTSCHE BANK LACKS STANDING TO ENFORCE THE MORTGAGE

Deutsche Bank's standing to enforce the mortgage has been repeatedly challenged. The most recent statement raising this argument can be found in Paragraph 7 of Moss's Response to Plaintiff's Motion for Summary Judgment in which the following paragraph appeared:

"Defendant throughout this litigation has challenged the standing of Plaintiff. Standing is jurisdictional in nature. *Thornton v. Bernard Techs., Inc.*, 2009 Del. Ch. LEXIS 29 (Del. Ch. Feb. 20, 2009);, citing *Kououfaris v. Dick*, 604 A.2d 390, 401 (Del. 1992). " A promissory 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". *Carpenter v. Longan*, 83 U.S. 271, 271 (U.S. 1873). "A mortgage may only be enforced by or on behalf of a person entitled to enforce the obligation." In Delaware, as in most states, a mortgage and the underlying Note are one transaction. *Metropolitan Life Ins. Co. v. Monroe Park*, 442 A.2d 503, 509 (Del. Super. 1982) , rev'd on other grounds, 457 A.2d 140 (Del. 2007).

B. STANDARD OF REVIEW: The standard of review for issues of law is *de novo*. *Schock v. Nash*, 732 A.2d 217 (Del. 1999).

C. ARGUMENT ON THE MERITS

Defendant throughout this litigation has challenged the standing of Plaintiff. Standing is jurisdictional in nature. *Thornton v. Bernard Techs., Inc.*, 2009 Del. Ch. LEXIS 29 (Del. Ch. Feb. 20, 2009);, citing *Kououfaris v. Dick*, 604 A.2d 390, 401 (Del. 1992). Standing is the requisite interest that must exist in the outcome of the litigation at the time the action is commenced. *GMC v. New Castle County*, 701 A.2d 819, 823 (Del. 1997) Standing and subject matter jurisdiction, although closely related, are separate questions. Standing relates to issues of justiciability and addresses the question whether a court may grant relief to a party in the plaintiff's position, but subject matter jurisdiction addresses the question whether a court may grant relief to any plaintiff given the claim. *Appriva S'holder Litig. Co. v. ev3, Inc.*, 937 A.2d 1275, 1285 (Del. 2007)

“ A promissory 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”. *Carpenter v. Longan*, 83 U.S. 271, 271 (U.S. 1873). This Court has previously recognized this concept of inseparability of a note and mortgage. *Iowa-Wisconsin Bridge Co. v. Phoenix Finance Corp.*, 25 A.2d 383 (Del. 1942).

A mortgage may only be enforced by or on behalf of a person entitled to enforce the obligation. *Id.* In Delaware, as in most states, a mortgage and the underlying Note are one transaction. *Metropolitan Life Ins. Co. v. Monroe Park*, 442 A.2d 503, 509 (Del. Super. 1982) , rev'd on other grounds, 457 A.2d 140 (Del. 2007). “Every action shall be prosecuted by the real party in interest.” Superior Court Civil Rule 17. The party asserting the claim has the burden of proof to prove standing. *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103 (Del. 2003).

The statement by the United States Supreme Court in 1873, and repeatedly accepted by this Court, is still applicable today. A mortgage and its underlying debt are inseparable. The Superior Court, and Deutsche Bank, repeatedly fail to consider the concept that the note and mortgage are inseparable. In the Court's opinion, Section II, the Court rules that Deutsche Bank has “standing to foreclose on the Mortgage. New Century's bankruptcy did not affect MERS ability to assign the Mortgage.” (Exhibit A, PP. 8 – 9). That statement alone cannot be correct . If a note and mortgage are inseparable, the single transfer of the mortgage is of no value. Moss is painfully aware of the prior Delaware decisions holding that a mortgagee is prohibited from challenging the assignment of a mortgage. (Discussed below). That argument notwithstanding, the Superior

Court in its decision failed to address the transfer of the underlying obligation, i.e. the promissory note. The record presented through Bernard Patterson's report clearly indicates that the obligation and the mortgage were separated almost from the beginning. This separation was apparently irrelevant to the Superior Court judge. Even assuming the mortgage was properly assigned it does not follow that the underlying obligation was properly transferred to this Plaintiff.

In its Motion for Summary Judgment, Deutsche Bank attached the affidavit of Rashad Blanchard. (A00199 A00293) A review of the affidavit finds the affiant begins his tracking of the assignments of mortgage in paragraphs 7, 8, and 9. Nowhere in those paragraphs is there any mention of transfer of the note. Instead, Mr. Blanchard only states in Paragraph 11 that Deutsche Bank is in possession of the original note. Instead of tracking the note's separation from the mortgage and the course it took to allegedly reach Deutsche Bank, Mr. Blanchard only references the assignments of mortgage.

Additionally, Plaintiff's own documents are in conflict. The Certificate of Assignment from MERS to Deutsche Bank Company America is only an assignment of the mortgage. It does not assign the underlying obligation. (A00204)

The Delaware Assignment of Mortgage (A00205 – A00207) from Deutsche Bank Company America to Deutsche Bank National Trust on April 1, 2010 is also flawed.

In Mr. Patterson's analysis and review of the case, he notes that the 2010 assignment does purport to assign the note to plaintiff. However, the assignor did not appear to own the note and therefore had no right or authority to assign it. Mr. Patterson's report states: "The assignment purports to assign the NOTE together with the mortgage. The previous assignment did not assign the NOTE. There is no evidence that the note was ever owned by the assignor. This assignment purports to assign a note and mortgage into a securitization trust more than three years after this trust closed and stopped accepting loans. Furthermore, the Plaintiff's own trust documents show that the only entity that could ever assign the note and mortgage into the trust is the Depositor – Morgan Stanley ABS Capital I Inc." (A00103). He further states: "According to my investigation, examination and analysis, in order for the note to be sold and transferred into the Morgan Stanley ABS Capital I Trust 2007-NC3, the note would need to contain four endorsements" The Note produced by Plaintiff does not contain these required endorsements. The Note produced by Plaintiff does not contain any endorsements. The Note produced by Plaintiff does not

contain any evidence that it was sold, transferred and/or deposited into the Plaintiff Trust. The Note produced by Plaintiff shows New Century Mortgage Corporation as the last known owner. This entity is NOT the Plaintiff.” (A00103)

Based on the report and analysis of Mr. Patterson, and records produced by Plaintiff, Plaintiff cannot and does not lawfully own the note, or rights in it, despite its claim of possession. Moreover, Plaintiff has made no effort to account for how it acquired its alleged possession of the Note. In fact, the attempts that have been made to substantiate ownership of the Note have been conflicting and supportive of Defendant’s position.

Previously in discovery and in vehement arguments to this Court during the First Appeal, Plaintiff argued that it had acquired the Note through an undated endorsement in blank.¹ Only through a request to review a collateral file during a deposition was it found that Plaintiff had an Allonge in its possession which had not been produced. (A-00100) The 2012 Allonge states that New Century Mortgage Corporation is the “present owner and holder of the Note.” However, the Delaware Assignment of Mortgage (A00205 – A00207), executed in 2009, indicates ownership of the obligation at that time as having been transferred to

¹The Court is asked to take judicial notice its own records from the First Appeal’s to include all briefs submitted by Plaintiff and Oral Arguments. 16.

Deutsche Bank Trust Company Americas – an entity which is different from the Plaintiff. Not only does this raise a genuine issue of material fact as to ownership of the Note, it also indicates that Plaintiff has not, and cannot, meet its burden of proof to prove standing. The conflict in Plaintiff's own documents calls into question the authenticity and validity of the documents. The simple question remains: Has Plaintiff proved its standing to enforce the Note?

The Delaware Superior Court has repeatedly held that a mortgagee does not have standing to challenge the assignment of a mortgage. These rulings are based on the common law of contract whereby the mortgagee as neither a party nor third party beneficiary of the contract has a right to challenge the terms of the contract. *See e.g., WBMCT 2006-C29 OFFICE 4250, LLC v. Chestnut Run Investors, LLC*, 2015 Del. Super. LEXIS 383 (Del. Super. Ct. 2015). This contract analysis, however, runs afoul of the concept that a promissory note and mortgage are inseparable. A challenge to the assignment, and a challenge to standing to enforce an obligation, although related are distinguishable. A challenge to an assignment draws into question the terms of the contract between the parties and the rights of those parties viz-a-viz each other or a third party beneficiary. A challenge to standing, on the other hand, questions rather the rights to enforce an underlying obligation through a security instrument are

legitimately rights of the party asserting those rights.

Judge Victor Woolley recognized the concept that a plaintiff must have standing to enforce a mortgage. “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.” *Woolley on Delaware Practice*, §1359. Woolley thus continues his instruction with the proposition that all assignments should be attached to the mortgage foreclosure complaint. *Id.*

Professor Richard Powell in his treaties on real properties was not so subtle:

“It must be remembered that the mortgagee has two interests: (1) the debt or obligation which is owed to him, and (2) the security interest in land represented by the mortgage. . . . Much trouble has been caused by mortgagees attempting to transfer only one of these two interests. Where the mortgagee has “transferred” only the mortgage, the transaction is a nullity and his “assignee” having received no interest in the underlying debt or obligation, **has a worthless piece of paper.**” *4 Powell on Real Property*, §37.27(2). [Emphasis added herein only]

Moss, through his challenge to standing, has raised the question of whether the mortgage, in the words of the learned Richard Powell, is “a worthless piece of paper” in the hands of Deutsche Bank. Lenders, such as Deutsche Bank, are highly sophisticated entities usually equipped with an army of attorneys. Notwithstanding the precision to which banks must operate, Deutsche Bank cannot account for the chain-of-title to the underlying obligation, and instead, have offered conflicting documents. Maintaining the chain-of-title to the ownership of

a \$300,000.00 obligation should not be so difficult. In the criminal context, the law requires police officers and other law enforcement officials to maintain an uninterrupted chain-of-custody over evidence before the Court can rely, or even consider, that evidence. In the real estate context, the law requires property owners to have a clear chain-of-title in order to convey good title. Even the holder-in-due-course concept adopted by the UCC and codified by 6 Del.C. §302(a) allows the authenticity of the underlying instrument to be questioned. 6 Del.C. § 302(a)(1). Conversely, in a mortgage foreclosure where a homeowner's home is in jeopardy of loss, the case law seems to suggest that the Defendant lacks standing to challenge the standing of the foreclosing bank simply because a document of assignment has been recorded in the name of the foreclosing bank. As noted by the above excerpt from *Powell on Real Property*, the assignment of the mortgage alone is only the transfer of a "worthless piece of paper." These types of decisions allow abuse and disregard the concept of inseparability between the note and the mortgage. They allow foreclosure plaintiffs to avoid its obligation to prove standing to enforce the underlying obligation. That leads to situations such as this where the ownership of the underlying obligation is confused with the assignment of mortgage.

Moss has clearly established a genuine issue of material fact by challenging the ownership of the note. With proper documentation and forthright production of that documentation, Deutsche Bank could have established its standing to enforce the obligation of the note. Inconsistent documentation, conflicting documentation, and refused documentation, however, has been Deutsche Bank's answer.

The Superior Court has committed legal error in its decision. Accepting the long recognized legal concept, adopted by the U.S. Supreme Court and this Honorable Court, that being a note and mortgage are inseparable, and that a mortgage without an interest in the underlying obligation is worthless, placed Deutsche Bank in a position where it should prove its standing. Deutsche Bank has simply proven its lack of standing and Moss clearly has a right to challenge that standing.

In any other typical case, it is incumbent on the Plaintiff to prove standing. Somehow, the burden has been shifted to Moss to prove a lack of standing.

DEFENDANT'S SECOND ARGUMENT

A. SUMMARY OF ARGUMENT: DEFENDANT IS NOT JUDICIALLY ESTOPPED FROM CHALLENGING STANDING

The doctrine of “judicial estoppel” was not raised in Plaintiff’s Motion for Summary Judgment and therefore not defended in Moss’ responses. Judicial estoppel first appears in the Court’s opinion which is the subject of this appeal.

B. STANDARD OF REVIEW:

“The determination of judicial estoppel is a question of law and is reviewed de novo. *Motorola Inc. v. Amkor Tech.*, 958 A.2d 852, 855 (Del. 2008)

C. DEFENDANT’S ARGUMENT ON THE MERITS

In its decision now on appeal, the Superior Court held:

“Moreover, any right Moss may have had to challenge the assignments of the Mortgage is judicially estopped. . . . Specifically, Moss originally admitted that Deutsche Bank was the owner of the Mortgage and Note and changed positions throughout the proceedings.” *Deutsche Bank Nat’l Trust Co. v. Moss*, 2016 Del. Super. LEXIS 32 (Del. Super. 2016) (Exhibit A, Part II).

It is important to first consider that Moss does not “challenge the assignments of Mortgage” but challenges Plaintiff’s standing to enforce the underlying obligation, discussed above.

. “[J]udicial estoppel operates only where the litigant contradicts another position that the litigant previously took **and** that the Court was successfully

induced to adopt in a judicial ruling." *Motorola Inc. v. Amkor Tech.*, 958 A.2d 852, 859-860 (Del. 2008) [Emphasis added herein only]. Ironically, it was Moss who raised the doctrine of judicial estoppel against Deutsche Bank in his motion for summary judgment because of its changed position. To establish judicial estoppel, a party must show that the opposing party took a position that contradicts another position that the litigant previously took and the Court was successfully induced to adopt in a judicial ruling. *Huffington v. T.C. Group, LLC*, 2012 Del. Super. LEXIS 176, *1 (Del. Super. 2012).

There are two (2) requisites to the doctrine of judicial estoppel. First, there must be a contradiction in positions. Second, however, that first position must have been adopted by the Court at the litigant's position.

The Superior Court opinion only considers the first requirement (contradiction in position) but fails to address when or how the Court adopted that position in an earlier decision. In fact, just the opposite is true. The Superior Court first adopted Moss's argument that the assignment was improper and granted Moss summary judgment on that issue. *Deutsche Bank Nat'l Trust Co. v. Moss*, 2013 Del. Super. LEXIS 3490 (Del. Super. 2013). That decision was the basis of the First Appeal.

The United States Supreme Court has suggested it is inappropriate to apply the doctrine of judicial estoppel "when a party's prior position was based on inadvertence or mistake." *New Hampshire v. Maine*, 532 U.S. 742, 753 (U.S. 2001). No doubt that in earlier proceedings, Moss believed that Deutsche Bank properly held the note and mortgage. However, through the process of discovery, and in consideration of Plaintiff's persistence to produce the promissory note, and then the production of contradictory documents, Moss came to understand that his belief was in error and a mistaken belief.

In making its ruling, the Superior Court ignored the factors which should be considered as recognized by the U.S. Supreme Court.

"Courts have observed that 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.' Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled,' Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (U.S. 2001).

The concept of "judicial estoppel" is concerned with maintaining the integrity of the Court and therefore includes the requirement that the Court has

adopted the earlier inconsistent position. Here, that judicial adoption of the earlier inconsistent position taken by Moss is missing. Therefore, Moss is not estopped from challenging standing.

CONCLUSION

Throughout this litigation, Moss has challenged Deutsche Bank's standing to foreclose. Time and time again Moss has challenged Deutsche Bank to present a chain of logical endorsements. As demonstrated by the discussions above, it is Deutsche Bank's burden to establish standing, not Moss's burden to disprove standing. Deutsche Bank has repeatedly presented conflicting documents, and conflicting positions in this litigation. It has not, and cannot, establish standing.

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