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Case Number 306,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

J.M. Shrewbury, a/k/a J. Michael Shrewsbury, and Kathy Shrewsbury	)	
Defendant-Below Appellant	)	No. 306, 2016
v.	)	
The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9	)	
Plaintiff- Below Appellee	)	

CORRECTED APPELLEE'S ANSWERING BRIEF ON APPEAL

Appeal from the Superior Court for New Castle County
N15L-03-108 (FSS)
(Honorable Calvin L. Scott, Judge)

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Dated: September 14, 2016

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NATURE OF THE PROCEEDINGS

On March 20, 2015, The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9 (hereinafter "Appellee") filed a scire facias sur mortgage complaint against J.M. Shrewsbury a/k/a J. Michael Shrewsbury and Kathy Shrewsbury (hereinafter "Appellants") to initiate foreclosure proceedings on the property located at 9 Barnsdale Drive, Middletown, Delaware 19709. Court-ordered mediation concluded on June 5, 2015. The mediation process was unsuccessful because Appellants were denied by Appellee for a loan modification.

Appellants filed an Answer to the Complaint and New Matter/Counterclaims on June 4, 2015, alleging, inter alia, that the Plaintiff was not the owner and holder of the note. Appellee filed its Answer to Counterclaims on June 12, 2015. No discovery was conducted by either party at any stage of the proceeding.

Appellee filed its Motion for Summary Judgment on September 18, 2015. Appellant filed its Response to Motion for Summary Judgment on November 2, 2015 and its Amended Response to Motion for Summary Judgment on November 16, 2015. The Superior Court granted the Appellee's Motion for

Summary Judgment on February 17, 2016, allowing foreclosure proceedings to proceed.

Appellants filed their Motion for Reargument on February 24, 2016 on the grounds that the Note was not validly assigned to Plaintiff. Appellee filed its Response to Motion for Reargument on March 1, 2016, alleging that the Note was irrelevant, as a scire facias sur mortgage complaint is based on the Mortgage, not the Note. The Superior Court denied Appellants' Motion for Reargument on May 18, 2016.

Appellants filed their notice of appeal on June 16, 2016. Appellants filed their Opening Brief on August 1, 2016. This is Appellee's Answering Brief.

SUMMARY OF ARGUMENTS

1. Denied. The Superior Court properly held that in a scire facias sur mortgage foreclosure action that the Plaintiff has standing to foreclose based upon a properly assigned Mortgage, as the action was founded on the Mortgage, and not the Note.

2. Denied. In order to foreclose, the Plaintiff must only be the assignee of the mortgage. The Plaintiff does not need to be the party entitled to enforce the promissory note.

3. Denied. The Superior Court properly considered the case law which makes standing to foreclose on the mortgage dependent upon the right to enforce the mortgage, not the note.

4. Denied. The Superior Court properly held that whether the Note was validly assigned was irrelevant because Appellants lacked standing to challenge the validity or enforceability of the assignment of the Mortgage and Note.

STATEMENT OF FACTS

On May 15, 2007, Appellants signed a Promissory Note (the "Note") and Mortgage (the "Mortgage") in favor of Mortgage Electronic Registration Systems, Inc. acting solely as a nominee for Countrywide Home Loans, Inc. in the amount of $653,553.26. That Mortgage was recorded with the New Castle County Recorder of Deeds on May 22, 2007 in Instrument #20070522-0046305. (See the Mortgage attached as Appendix B-1-24)

On June 6, 2011, Mortgage Electronic Registration Systems, Inc. assigned all interest under the mortgage to The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass Through Trust 2007-9, Mortgage Pass-Through Certificates, Series 2007-9 (the "Assignment"). That Assignment was validly recorded with the New Castle County Recorder of Deeds on June 10, 2011 in Instrument #20110610-0028634. (See the Assignment of Mortgage attached as Appendix B-25-27)

On an unknown date, the Note was endorsed by Countrywide Home Loans, Inc. in blank. (See the Note attached as Appendix B-28-30)

On or about July 1, 2010, Appellants stopped making payments on the mortgage and the loan was accelerated. Foreclosure proceedings were initiated thereafter.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN HOLDING THAT THE PLAINTIFF HAD STANDING TO FORECLOSE ON THE MORTGAGE

A. QUESTION PRESENTED

Did the Superior Court properly hold in a scire facias sur mortgage foreclosure action that the Plaintiff had standing to foreclose based solely upon a properly assigned Mortgage, as the action was founded on the Mortgage, and not the Note?

B. STANDARD OF REVIEW

The Court may grant summary judgment if "the pleadings…show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). The moving party bears the initial burden of showing no material issues of fact are present. *Id.* at 681. If the moving party properly supports their motion, the burden then shifts to the non-moving party to rebut the contention that no material issues of fact exist. *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992). In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party. *Ebersole v. Lowengrub*, 54 Del. 463, 180 A.2d 467, 470, 4 Storey 463 (Del. 1962).

C. MERITS OF ARGUMENT

1. THE SUPERIOR COURT PROPERLY HELD THAT STANDING TO FORECLOSE ON THE MORTGAGE IS DEPENDENT ON THE MORTGAGE ONLY, NOT THE MORTGAGE AND NOTE, AND THAT OWNERSHIP OF BOTH THE NOTE AND MORTGAGE ARE NOT CRITICAL IN A SCIRE FACIAS SUR MORTGAGE FORECLOSURE ACTION

Delaware case law has repeatedly held that scire facias sur mortgage actions are based upon the Mortgage, not the Note. A scire facias action is one used in connection with proceedings founded upon a matter of record, such as in this instance, a mortgage, and is strictly an *In Rem* action. 2 Woolley on Delaware Practice, p. 889, § 1309, p. 932, § 1386. "The available defenses or counterclaims in a scire facias sur action [are] limited to payment, satisfaction, absence of seal, or a plea in avoidance of the deed." *Lasalle Nat'l Bank v. Ingram*, 2005 Del. Super. LEXIS 185, 2005 WL 1284049 (Del. Super. May 19, 2005). 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." *Gordy v. Preform Building Components, Inc.*, 310 A.2d 893, 896 (Del. Super. 1973).

Delaware's Superior Court has consistently held that under Delaware law, the mortgagee's right to foreclose emanates from the Mortgage, not the Note. *M&T Bank v. Watkins*, 2016 Del. Super LEXIS 377 (Del. Super. Jul. 29, 2016) citing *Deutsche Bank Nat'l Trust Co. v. Moss*, 2016 Del. Super. LEXIS 32; 2016 WL 355017, at *3 (Del. Super. Jan. 26, 2016)(quoting *HSBC Mortgage Corp. (USA) v. Bendfeldt*, 2014 Del. Super. LEXIS 44; 2014 WL 600233, at *2 (Del. Super. Feb. 4, 2014), aff'd sub nom. *Bendfeldt v. HSBC Mortgage Corp. (USA)*, 2014 Del. LEXIS 454; 2014 WL 4978666 (Del. Oct. 7, 2014)); see *Davis v. 913 N. Mkt. St. P'ship*, 1996 Del. Super LEXIS 579; 1996 WL 769326, at *1 (Del. Super. Dec. 12, 1996) ("The [] note and the mortgage confer separate rights and obligations. Thus, the [] note is a separate matter and is not part of the foreclosure action on the mortgage.")

In *Ryan v. Ryan*, 1989 Del. Super. LEXIS 434 (Del. Super. Nov. 2, 1989) the Superior Court held that: "A deed of trust or mortgage is valid without any note or bond although it purports to secure a note or bond, and subsequently describes it. The mortgage debt exists independently of the note." *Ryan*, citing 9 G. Thompson, Commentaries on the Modern Law of Real Property § 4744 (1958 replacement by J. Grimes) at 379. The Court goes on to state:

> An action in Scire Facias "Sur Mortgage, governed by 10 Del. C. § 5061, is based upon breach of the condition of the mortgage of real

estate by the nonpayment of the mortgage money, or nonperformance of the conditions stipulated in the mortgage...The action is one on the mortgage, independent of the debt evidenced by the Bond and Warrant agreement. For many decades, this State has found that the action of Scire Facias Sur Mortgage, like all processes of Scire Facias, is founded upon a record, the record in Scire Facias Sur Mortgage, of course, being the mortgage."

Appellant argues that several courts have analyzed whether the mortgage holder has the right to enforce the underlying Promissory Note. See *Bendfeldt v. HSBC Mort. Corp. (USA)*, 2014 Del. LEXIS 454, *3, 2014 WL 4978666 (Del. Supr. Oct. 7, 2014); *Nationstar Mortgage, LLC v. Sears*, 2015 Del. Super. LEXIS 393, *11, 2015 WL 719941 (Del. Super. Aug. 7, 2015); *Branch Banking & Trust Co. v. Eid*, 2013 Del. Super LEXIS 264, 2013 WL 3353846 (Del. Super. Jun. 13, 2013) and *US Bank Nat'l Assn. v. Gilbert*, 2014 Del. Super. LEXIS 20, 2014 WL 595510 (Del. Super Jan. 15, 2014). Appellants' reliance on these cases is flawed, because Appellant focuses on specific language in each case, without citing the holding of each case. In the *Bendfeldt* case, the Court never reached the issue of whether the mortgagors had standing to challenge an assignment because the mortgagor's challenge was found to be without merit on other grounds. *Bendfeldt* at 3. Appellant cited the *Gilbert*

case, where Plaintiff's motion for summary judgment was denied due to a failure to show that it was the holder of the note. Appellant failed to note that Plaintiff's motion for summary judgment was subsequently granted with no mention of the Note at all. The *Sears* and *Eid* cases both state that the debtors do not have standing to object to the assignments.

Appellants cite the *Chestnut Run* case as being directly on point for their proposition that the mortgagee must be the holder of the note to bring a mortgage foreclosure action. *WBMCT v. Chestnut Run Investors*, 2015 Del. Super. LEXIS 383 (Del. Super. Jul. 30, 2015). The law disagrees. The case does not stand for the proposition that the Note is required to prove standing in an *In Rem* scire facias sur mortgage foreclosure action. Rather, the Court held that even if the Plaintiff was required to be the holder of the note to bring the *In Rem* scire facias sur mortgage foreclosure action, which the Court never actually decides, the Defendant would lose because the Plaintiff was found to be a non-holder in possession of the note who had the rights of a Holder.

Accordingly, the Superior Court in this case properly held that standing to foreclose was dependent on the Mortgage only, and that Appellee was entitled to foreclose on the mortgage.

2. THE PLAINTIFF SUSTAINED ITS EVIDENTIARY BURDEN TO DEMONSTRATE THAT IT IS A REAL PARTY IN INTEREST WITH STANDING TO FORECLOSE

Pursuant to 10 Del. C. § 5061(a), a mortgagee or the assignee of a mortgagee's interest has standing to pursue foreclosure. Pursuant to 25 Del. C. § 2109(a), an assignment attested to by a credible witness shall be valid to convey all the rights and interest of the assignor.

Appellants executed a Mortgage in favor of Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Home Loans, Inc. on May 15, 2007. That Mortgage was properly recorded with the New Castle County Recorder of Deeds on May 22, 2007 in Instrument #20070522-0046305. Appellants admit executing the Mortgage and delivering it to Countrywide Home Loans. See Defendant's Answer to the Complaint, paragraph 2. Appellants do not present any evidence to dispute the validity of the Mortgage.

The Mortgage was properly assigned to Appellee on June 6, 2011, through an Assignment. The Assignment was signed by Yomari Quintanilla and notarized by Lillian J. Ellison. The assignment was recorded with the New Castle County Recorder of Deeds on June 10, 2011 in Instrument #20110610-0028634. Appellants admit they are not challenging the validity or

enforceability of the Mortgage Assignment. See Defendant's Motion for Reargument, paragraph 9.

Appellant cites the Moss case in support of Appellant's position that the chain of assignment of the Note was faulty. *Deutsche Bank v. Moss*, 2014 Del. LEXIS 294, *3-4, 2014 WL 2918227 (Del. Supr. June. 24, 2014). What Appellant fails to mention, however, is that the case was reversed and remanded to Superior Court, where the lender's motion for summary judgment was granted on the grounds that the lender had standing to foreclose on the mortgage based upon the Assignments of Mortgage. *Moss* at 5. The Superior Court in that case found that Mortgage Electronic Registration Systems, Inc. executed an assignment on behalf of a lender and the lender established the validity of that assignment, pursuant to 10 Del. C. § 5061. The Court went on to state that:

> ...although Moss now argues that the Note has not been properly authenticated, the Note is not dispositive. Scire facias sur mortgage actions are in rem proceedings and "are based upon the mortgage, not the [n]ote." *Deutsche Bank v. Moss*, 2016 Del. Super. LEXIS 32, 2016 WL 355017 (Del. Super. Jan. 26, 2016), citing *HSBC Mortgage Corp. (USA) v. Bendfeldt*, 2014 WL 600233, at *2 (Del. Super. Feb. 4, 2014) *aff'd sub nom. Bendfeldt*

v. HSBC Mort. Corp. (USA), 2014 Del. Lexis 454, *3 (Del. Supr. Oct. 7, 2014); Therefore, because this is an in rem proceeding to foreclose on the Mortgage and not an in personam action, Moss' arguments regarding the Note's authenticity are without merit." *Deutsche Bank v. Moss*, 2016 Del. Super. LEXIS 32, 2016 WL 355017 (Del. Super. Jan. 26, 2016).

Appellants also cite the Elmwood Federal Savings Bank case for their proposition that although a mortgagee does not have to attach a copy of the note to a scire facias complaint, the case did not state that a mortgagee could foreclose without also being the note holder. *Elmwood Federal Savings Bank v. Forest Manor Estates, Inc.* 621 A.2d 354 (Del. Super. 1992). Appellants fail to point out that the case also did not state the converse. In fact, the case was silent as to the issue of whether a mortgagee must also be the note holder to foreclose in a scire facias sur mortgage foreclosure action.

As a result, in this case, Appellee sustained its evidentiary burden to prove that it is a real party in interest with standing to foreclose.

ARGUMENT

II. THE SUPERIOR COURT DID NOT ERR IN HOLDING THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. TRANSFERRED THE MORTGAGE TO THE PLAINTIFF, AND THAT APPELLANT LACKED STANDING THE CHALLENGE THE ASSIGNMENT OF THE MORTGAGE AND NOTE

A. QUESTION PRESENTED

Did the Superior Court properly hold, when granting the Motion for Summary Judgment, that the transfer of the Note was irrelevant to this action, and did the Superior Court properly hold that Appellants lacked standing to challenge the assignment of that Mortgage and Note?

B. STANDARD OF REVIEW

The Court may grant summary judgment if "the pleadings…show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). The moving party bears the initial burden of showing no material issues of fact are present. *Id.* at 681. If the moving party properly supports their motion, the burden then shifts to the non-moving party to rebut the contention that no material issues of act exist. *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992). In considering a motion for summary judgment, the Court must view the record in a light most favorable to

the non-moving party. *Ebersole v. Lowengrub*, 54 Del. 463, 180 A.2d 467, 470 (Del. 1962).

C. MERITS OF ARGUMENT

1. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. WOULD NOT HAVE TRANSFERRED THE NOTE BECAUSE THE LENDER DOES THIS, AND WHETHER MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. HAS A BENEFICIAL INTEREST IN THE NOTE IS IRRELEVANT

Appellants admit in their motion for reargument that they are not challenging the validity or enforceability of the Mortgage Assignment. They do not dispute Mortgage Electronic Registration Systems, Inc.'s ability to transfer the mortgage. See Appellants Motion for Reargument at 2. Instead, they dispute Mortgage Electronic Registration Systems, Inc.'s ability to transfer the Promissory Note. For the reasons cited above, and based upon the case law cited above, Appellee asserts that Mortgage Electronic Registration Systems Inc.'s ability to transfer the note is irrelevant and should not be at issue.

Even if the Court finds that Mortgage Electronic Registration Systems, Inc. lacked the ability to transfer a note, which it should not, Appellant's argument is moot. In this case, Countrywide did transfer its interest in the Note to the bearer of that Note, through a blank endorsement. Any language in the Assignment whereby Mortgage Electronic Registration Systems, Inc. purported

to transfer its interest in the Note was in addition to, not instead of, the actual transfer effected by Countrywide's endorsement of the Note.

2. THE HOMEOWNER LACKS STANDING TO CHALLENGE THE PLAINTIFF'S STANDING TO FORECLOSE

Appellant argues that homeowners have standing to challenge the Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. to Appellee. This argument is contrary to the established case law in Delaware. Delaware courts have consistently held that a debtor, as a non-party to a mortgage assignment, lacks standing to challenge the validity of the assignment. JP Morgan Chase Bank v. Smith, 2014 Del. Super LEXIS 661; 2014 WL 7466729 (Del. Super. Dec. 15, 2014), citing *CitiMortgage, Inc. v. Bishop*, 2013 Del. Super. LEXIS 95, 2013 WL 1143670, at *4 (Del. Super. Mar. 4, 2013); *see, e.g., Branch Banking & Trust Co. v. Eid*, 2013 Del. Super. LEXIS 264, 2013 WL 3353846, at *3-4 (Del. Super. Jun.13, 2013) (recognizing mortgagee-debtors lack standing to challenge the validity of an assignment of their mortgage); *see also Branch Banking & Trust Co. v. Eid*, 2013 Del. Super. LEXIS 264, 2013 WL 3353846, at *3 (Del. Super. Jun. 13, 2013) (stating "Delaware Courts have shown little appetite for invalidating mortgage assignment merely because they were assigned by MERS"); See also *In re Perretta*, 2011 Bankr. LEXIS 4913, 2011 WL 6305552, at *3 (Bankr. D.R.I.

Dec. 16, 2011) (finding that, under Rhode Island Law, mortgagee-debtors lack standing to contest assignment if they are neither parties to the assignment nor third-party beneficiaries of the assignments); *In re Edwards*, 2011 Bankr. LEXIS 5065, 2011 WL 6754073, at *4 (Bankr. E.D. Wis. Dec. 23, 2011) (holding a party lacks standing when a "debtor was neither a party to the pooling or serving agreements nor a potential third party beneficiary of those agreements"). Since Appellants are non-parties to the Assignment and do not qualify as third-party beneficiaries, they lack standing to contest the validity of the assignment of the Note to Appellee.

The Sears case, cited by Appellants, specifically states: "General contract principles upheld in Delaware Courts provide a third-party who is not a party to the contract does not have rights under a contract. As a non-party to the contract that is not a third-party beneficiary, Sears does not have standing to object to the assignments she disputes." *Nationstar Mortgage, LLC v. Sears*, 2015 Del. Super. LEXIS 393,*12 (Del. Sup. Aug. 7, 2015).

The Eid case, which is also cited by Appellants, provides that:

> ...a debtor is not a party to a mortgage assignment, is not a third party beneficiary to the assignment and cannot show legal harm as a result of the assignment. As such, the debtor has no legally cognizable interest in an assignment and therefore is not in a

position to complain about it. Thus, it is not plaintiff who lacks standing to sue, but Defendants who lack standing to contest the assignment." *Branch Banking & Trust Co. v. Eid*, 2013 Del. Super. LEXIS 264, 2013 WL 3353846 (Del. Super. Jun. 13, 2013), citing *CitiMortgage v. Bishop*, 2013 WL 1143670 (Del. Super. Mar. 4, 2013).

Based on the above, Appellants lack standing to challenge the assignment of the Mortgage and Note.

Appellants attempt to differentiate the present case on the sole basis that the Assignment was done by Mortgage Electronic Registration Systems, Inc. Simply put, Appellants cite no Delaware authority that would suggest that Mortgage Electronic Registration Systems, Inc. assignments of mortgage are treated differently than any other assignment in Delaware. On the contrary, Delaware Courts have shown little appetite for invalidating mortgage assignments merely because they were assigned by Mortgage Electronic Registration Systems, Inc. *Branch Banking & Trust Co. v. Eid*, 2013 Del. Super. LEXIS 264, 2013 WL 3353846 (Del. Super. Jun. 13, 2013).

Appellants state that the instant case is distinguishable from recent Delaware foreclosure cases which have held that the homeowner had no standing to challenge the mortgagee's standing, arguing that cases such as

Bishop and Eid do not address the mortgagor's standing to challenge the standing of a transferee mortgagee who holds an unendorsed note that fails to comply with the UCC. *CitiMortgage, Inc. v. Bishop*, 2013 Del. Super LEXIS 95 (Del. Super. Mar. 4, 2013); *Branch Banking & Trust Co. v. Eid*, 2013 Del. Super. EXIS 264 (Del. Super. Jun. 13, 2013).

The cases cited did not turn on the status of the Note Holder, which, for the aforementioned reasons, is irrelevant. The Note at issue in this case has a blank endorsement from Countrywide. Appellants lack standing to challenge the Appellee's standing to foreclose.

CONCLUSION

The Superior Court properly held that in a scire facias sur mortgage foreclosure action that the Plaintiff had standing to foreclose based upon a properly assigned Mortgage, as the action was founded on the Mortgage, and not the Note. The Superior Court also properly held that whether the Note was properly transferred or not was irrelevant because Appellants lacked standing to challenge the validity or enforceability of both the Assignment of either the Mortgage or the Note. For the foregoing reasons, the Superior Court judgment should be Affirmed.

Respectfully Submitted,
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