IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA, CIVIL DIVISION

AURORA LOAN SERVICES, LLC,
Plaintiff,

vs. CASE NO.: 09-142-CA

JUDITH MENDES DA COSTA; UNKOWN SPOUSE OF JUDITH MENDES DA COSTA IF ANY; ANY AND ALL UNKNOWN PARTIES CLAIMING BY, THROUGH, UNDER, AND AGAINST THE HEREIN NAMED INDIVIDUAL DEFENDANT(S) WHO ARE NOT KNOWN TO BE DEAD OR ALIVE, WHETHER SAID UNKOWN PARTIES MAY CLAIM AN INTEREST AS SPOUSES, HEIRS, DEVISEES, GRANTEES, OR OTHER CLAIMANTS; ISLAND WALK HOMEOWNERS ASSOCIATION, INC.; JOHN DOE AND JANE DOE AS UNKOWN TENANTS IN POSSESSION
Defendant(s).
_____/

ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on Defendant's Motion to Dismiss Amended Complaint. A hearing was held on Plaintiff's motion on April 7, 2010; Plaintiff's counsel appeared telephonically; Defense counsel appeared in person. The basis for the motion is Defendant's assertion that Plaintiff lacks standing. Having considered the evidence and arguments presented and the applicable law, and otherwise being fully advised in the premises, the Court finds as follows:

Amended Complaint Never Filed

Defense counsel provided the Court a copy of the Amended Complaint to Foreclose Mortgage and the exhibits attached thereto in consideration of the instant motion. However, there is no amended complaint in the Court file, and the Clerk of Court has confirmed that no amended complaint has been filed. There are only minor differences in the two complaints. The original complaint includes a second count to enforce a lost note; the amended complaint does not. A copy of the mortgage is attached as an exhibit to Count I of the original complaint. The

amended complaint has attached to it not only the mortgage but also the note and the assignment. Even considering those additional exhibits as if they had been properly filed, Defendant correctly argues that Plaintiff lacks standing.

Standing

Standing is a threshold issue. Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates, 18 So.3d 1079 (Fla. 2nd DCA 2009); Hillsborough County v. Florida Restaurant Ass'n, Inc., 603 So.2d 587 (Fla. 2nd DCA 1992); Miller v. Publicker Industries, Inc., 457 So.2d 1374 (Fla. 1984). It is necessary and proper for this Court to address the issue of standing. In Re Hwang, 396 B.R. 757 (U.S.B.C., 2008) ("Hence, 'a defect in standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent'."); Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619 (Missouri Court of Appeals, 2009) ("Lack of standing cannot be waived and may be considered by the court sua sponte."). Counsel argued at the hearing that Plaintiff has standing based on (1) WM Specialty Mortg., LLC v. Salomon, 874 So.2d 680 (Fla. 4th DCA 2004), (2) its possession of the original note, and (3) the assignment to Plaintiff. These arguments are without merit as explained below.

WM Specialty Mortg., LLC v. Salomon

This case stands for the proposition that the actual, physical delivery of a note and mortgage prior to the execution of an assignment may vest Plaintiff with standing based upon an equitable transfer. In *Wm Specialty*, however, the assignment specifically stated that the mortgage was physically transferred prior to the execution of the assignment; that is not the case here. Unlike *Wm Specialty*, there is no indication in the assignment that the note and mortgage were physically transferred to Plaintiff prior to its execution. To the contrary, there is every indication that the note had not been transferred to Plaintiff prior to the execution of the assignment by virtue of the second count to enforce a lost note in the original complaint. Therefore, there is nothing in *WM Specialty* that confers standing upon Plaintiff.

Possession of the Original Note

"While U.S. Bank alleged in its unverified complaint that it was the holder of the note and mortgage, the copy of the mortgage attached to the complaint lists 'Fremont Investment & Loan' as the 'lender' and 'MERS' as the 'mortgagee.' When exhibits are attached to a complaint, the contents of the exhibit control over the allegations of the complaint...Because the exhibit to U.S. Bank's complaint conflicts with its allegations concerning standing and the

exhibit does not show that U.S. Bank has standing to foreclose the mortgage, U.S. Bank did not establish its entitlement to foreclose the mortgage as a matter of law. Moreover, while U.S. Bank subsequently filed the original note, the note does not identify U.S. Bank as the lender or holder." BAC Funding Consortium Inc. v. Jean-Jacques, 2010 WL 476641 (Fla. 2nd DCA 2010).

Likewise, a copy of the mortgage and two riders are attached to the complaint in the instant case. A copy of the mortgage, two riders, the note, and an addendum are attached to the amended complaint. The original note has also been filed. Every one of these exhibits and the original note identify an entity other than Plaintiff as "lender." The mortgage identifies an entity other than Plaintiff as "grantee." None of the documents identify Plaintiff as "holder." Moreover, the language in these exhibits, including the note, indicates that Plaintiff does not have standing, and that language controls over contrary allegations contained in the complaint. Further, there are two endorsements on the note, each to a specific entity other than Plaintiff. Therefore, possession of the original note, in and of itself, does not vest Plaintiff with standing. Rather, Plaintiff must necessarily rely upon a valid assignment, which does not exist.

Assignment

The assignment attached to the amended complaint is from Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") to Plaintiff, and that assignment is completely ineffective. As nominee for the lender, MERS serves in a very limited capacity. Specifically, MERS records the mortgage and tracks ownership of the lien. MERS has no substantive rights itself and, therefore, cannot assign what it does not have. "A nominee of the owner of the note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee." LaSalle Bank Nat. Ass'n v. Lamy, 824 N.Y.S.2d 769, 2006 WL 2251721 (Sup.2006).

When a state agency found that MERS is a mortgage banker subject to license and registration requirements, MERS appealed to the Supreme Court of Nebraska and outlined its very limited role as nominee. "Subsequently, counsel for MERS explained that MERS does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members." Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance, 704 N.W.2d 784 (Neb.2005). "MERS argues

that it does not acquire mortgage loans and...only holds legal title to members' mortgages in a nominee capacity and is **contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members**. Further, MERS argues that it does not own the promissory notes secured by the mortgages and has no right to payments made on the notes." *Id. Emphasis added.* "Documents offered during the Department hearing support the limited nature of MERS' services." *Id.* Based on the explanation from MERS itself and documents presented by MERS and reviewed by the Supreme Court of Nebraska, it is undisputed that MERS serves in a very limited capacity and holds no substantive rights. MERS is contractually prohibited from exercising any rights in a foreclosure case without the authorization of the lender, and that prohibition was confirmed by MERS itself. There is no evidence of any such authorization in the instant case.

Other courts around the country have likewise recognized the limited role that MERS plays as nominee. "We specifically reject the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act...Nothing in the record shows that MERS had authority to act." Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas, 2009 WL 723182 (Supreme Court of Arkansas, 2009). "MERS's role in this transaction casts no light on the contractual issues raised in this case." *Id.* "The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing all the rights given a buyer." Landmark National Bank v. Kesler, 216 P.3d 158 (Supreme Court of Kansas, 2009). "MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner." In Re Vargas, 396 B.R. 511 (Bankr.C.D.Cal. 2008). "As noted above, MERS purportedly assigned both the deed of trust and the promissory note to Consumer...however, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority by New Century to assign the note...Accordingly, the Court concludes that there is insufficient evidence that Consumer has standing to proceed with this litigation." Saxon Mortgage Services, Inc. v. Hillery, 2008 WL 5170180 (N.D.Cal. 2008).

Not only are there substantive deficiencies with an assignment from MERS, but the instant assignment was also untimely. The complaint was filed on January 7, 2009 and states, "The Plaintiff owns and holds the note and mortgage." Complaint ¶5. However, the assignment was not executed until May 20, 2009 – more than four months after the complaint was filed. As

stated above, there is no indication on the assignment that the note and mortgage were physically transferred prior to that date. "[T]he plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." Progressive Exp. Ins. Co. v. McGrath Community Chiropractic, 913 So.2d 1281 (Fla. 2nd DCA 2005). "If on the date the Provider filed the original statement of claim Mr. Joseph had not assigned benefits to the provider, only Mr. Joseph had standing to bring the action. It follows that the Provider would have lacked standing under these circumstances, and the case should have been dismissed." *Id.*

There is no evidence of record that establishes that MERS was authorized to assign anything to Plaintiff, and therefore, the assignment was invalid. Even if the assignment were valid, it was not executed until after the complaint was filed. Therefore, Plaintiff's standing at the inception of the case was based entirely on the complaint and the exhibits attached thereto. It appears on the face of those exhibits that an entity other than Plaintiff has standing, and those exhibits control over contrary allegations contained in either version of the complaint. Plaintiff lacks standing now based on the substantive deficiencies with an assignment from MERS. Plaintiff lacked standing at the inception of the case based on those substantive deficiencies and the timing of the execution of the assignment. Absent standing, there is no justiciable controversy between the parties, and this case must be dismissed. It is therefore

ORDERED AND ADJUDGED that Defendant's motion is granted, and this case is hereby dismissed. The Court reserves jurisdiction to address Defendant's request for attorneys' fees.

DONE AND ORDERED in chambers on the 28 day of April, 2010.

Rob Crown
Acting Circuit Court Judge

cc: Plaintiff/Defendant(s)