COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Final Report: August 20, 2018
Submitted: August 13, 2018

via U.S. Mail & FSX

Daniel L. Tabb, Jr.
Dana L. Tabb
202 East Wayne Way
Middletown, DE 19709

David A. Dorey
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1201 N. Market Street, Suite 800
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Re: *Tabb v. The Bank of New York Mellon*
C.A. No. 2017-0016-MTZ

Dear Counsel and Litigants,

In this quiet title action, mortgagors seek to remove a mortgage from the title to their residential property. The mortgagors, proceeding *pro se*, assert several theories as to why the mortgage should be nullified, including that the trustee of the trust holding their mortgage does not possess the underlying note. The trustee moved to dismiss for failure to state a claim. I converted the motion to dismiss into a motion for summary judgment, and the parties engaged in limited discovery

and submitted supplemental materials. The trustee also offered the purported original note for inspection in court. The mortgagors filed a cross-motion for summary judgment. This is my final report on the motions for summary judgment. For the following reasons, I recommend the Court grant the trustee's motion and deny the mortgagors' motion.

I. Background

Plaintiffs Daniel L. Tabb, Jr. and Dana L. Tabb ("Plaintiffs") own property identified as 202 East Wayne Way, Middletown, Delaware ("the Property"). On December 20, 2004, in consideration of a loan in the principal amount of $420,000.00, Mr. Tabb executed and delivered to Popular Financial Services, LLC, an adjustable rate note ("the Note").[1] To secure the obligations under the Note, Mr. Tabb executed and delivered to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Popular Financial Services, LLC, a mortgage dated December 20, 2004 ("the Mortgage") on the Property, recorded on January 3, 2005 with the New Castle County Recorder of Deeds.[2] On July 30, 2014, the Mortgage was assigned to The Bank of New York Mellon f/k/a the Bank of New York, as Successor Trustee for JP Morgan Chase Bank, N.A., as Trustee for the Benefit of

[1]Def. D.I. 26, Ex. 1. Because of the many supplemental submissions pertaining to the pending motions, I refer to them by the filing party and the lead document's docket item ("D.I.") number.
[2] *Id.* Ex. 2.

The Certificateholders of Popular ABS, Inc. Mortgage Pass-Through Certificates Series 2005-2 ("the Bank") via MERS ("the Assignment").[3] The Assignment was recorded on August 26, 2014 with the New Castle County Recorder of Deeds.

On July 3, 2014, Plaintiffs filed a Chapter 7 voluntary petition for bankruptcy.[4] The bankruptcy documents acknowledge the $420,000 debt secured by a mortgage on the Property, and the bankruptcy trustee abandoned the Property "given the lack of any value or equity for the Estate in excess of the liens and security interests held by creditors against the Property," citing the Mortgage.[5] The debtors and their debts, including *in personam* responsibility under the Note, were discharged from bankruptcy on October 20, 2014.[6] The creditor's right to enforce the Mortgage *in rem*, against the Property, was preserved.[7]

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[3] *Id.* Ex. 3.
[4] Def. D.I. 38, Decl. of David A. Dorey, Esq. [hereinafter "Dorey Decl."], Ex. C, TABB-BR-2.
[5] *Id.*, TABB-BR-22, 27, 70-71.
[6] *Id.*, TABB-BR-73.
[7] *Id.*, TABB-BR-74; *see Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991); *In re DiClemente*, 2012 WL 3314840, at *4 (D.N.J. 2012) ("The earlier Chapter 7 proceeding discharged DiClemente's personal liability only; the surviving mortgage interest has the same properties as a nonrecourse loan and is enforceable against debtor's property."); *In re Anderson*, 348 B.R. 652, 656 (Bankr. D. Del. 2006); *accord*, Pls. D.I. 92, Ex. A (Letter from Chetan Bachale, Consumer Account Analyst, Ocwen Loan Servicing LLC, to Daniel Tabb (Mar. 9, 2016) ("As the bankruptcy has been discharged, you are no longer personally liable for the debt. However, this is still a valid lien and Ocwen may foreclose its security interest in the Real Property under the terms of the loan documents if the required payments are not received in a timely manner.").

Plaintiffs filed a *pro se* Verified Complaint for Quiet Title ("the Complaint") on January 12, 2017. Plaintiffs do not dispute that they signed the Note and Mortgage, the terms of the Note and Mortgage, or that they defaulted. Plaintiffs claim they should have clear title to the Property because the Bank does not hold the original Note and the Note was not indorsed in a manner that permits the Bank to enforce it. Plaintiffs also challenge the assignment and securitization of the Mortgage.

The Bank moved to dismiss on June 9, 2017, and the parties briefed that motion. In a draft report dated November 14, 2017, I recommended the Court grant the Bank's motion to dismiss on two of Plaintiffs' counts regarding assignment and securitization, and converted the Bank's motion to dismiss Plaintiffs' remaining counts, regarding the Bank's possession of the Note, into a motion for summary judgment.[8]

On November 30, 2017, the Bank filed a supplemental brief and exhibits in support of its motion for summary judgment. The exhibits included a color scan of the execution page of the Note, which showed a blue signature and a faint gray

[8] In that draft report, I stayed exceptions until the exceptions period for a draft report on the Bank's motion for summary judgment. I am waiving exceptions on the draft and hereby deem that report to be a final report pursuant to Court of Chancery Rule 144. Exceptions may now be taken upon that report and this final report.

indorsement stamp.[9] On December 28, 2017, Plaintiffs filed a response, pointing out the different appearance of the alleged indorsement on different copies of the Note provided in this litigation.[10] I asked the Bank to ensure they had sent Plaintiffs a color copy of the Note as it appeared Plaintiffs might have only received a black and white copy,[11] and the Bank complied.[12]

On February 23, 2018, Plaintiffs filed a motion requesting the opportunity to perform discovery "about the authenticity of the original Note" and "on the different copies of the Note that has [sic] been provided to Plaintiffs outside and inside of the court proceedings."[13] The Bank opposed this motion on March 9, 2018. On March 15, 2018, I entered an order permitting discovery on those two issues, to be completed within ninety days.

On May 11, 2018, Plaintiffs filed a motion asking to inspect the original Note under Court supervision, and for an extension of the discovery period in order to engage an "expert document examiner" to review the Note. The Bank responded on June 4, 2018, agreeing to produce the original Note in court for inspection but opposing Plaintiffs' request to engage an expert document examiner.

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[9] Def. D.I. 38, Dorey Decl. Ex. B.
[10] Pls. D.I. 39-41.
[11] D.I. 44.
[12] Def. D.I. 46.
[13] Pls. D.I. 47, ¶¶ 8-9.

On June 8, 2018, Plaintiffs filed a reply, seeking an extension of the discovery period, and stating Plaintiffs intended to engage Dennis J. Ryan, a "Board Certified Document Examiner" from Washington, D.C., and that Plaintiffs were also in the process of retaining counsel. On June 14, 2018, I issued an order denying Plaintiffs' request for an extension of the discovery period, concluding the opinion of an "expert document examiner" would not be helpful and therefore was inadmissible under Delaware Rule of Evidence 702. That order also stated that a hearing at which the parties and I could inspect the original Note would be scheduled.

On June 22, 2018, Plaintiffs filed a "motion for reconsideration" asking again for more time for discovery to allow an "expert document examiner" to review the Note at the hearing. I responded that Plaintiffs' motion for reconsideration would be considered an exception to my June 14 order, and that exceptions were stayed pending the final report on the converted motion for summary judgment.[14] A hearing was scheduled for August 13, 2018.

On June 29, 2018, the Bank filed another supplemental brief, and submitted a declaration from the Bank's servicer and additional documents regarding

[14] Those exceptions may be renewed upon issuance of this report.

possession of the Note.[15] On July 9, 2018, Plaintiffs filed a motion seeking an extension of time, stating they had subpoenaed "Certified Document Examiner" Katherine Mainolfe Koppenaven ("Koppenaven") "to give expert testimony in determining the authenticity of the Note produced for inspection."[16] I denied the Motion the same day, and reminded the parties that discovery was closed.[17] Plaintiffs filed a supplemental brief opposing the motion for summary judgment on July 23, 2018, comparing different copies of the Note to attack its authenticity.[18] The Bank replied on August 3, 2018.

At the hearing on August 13, 2018, the Bank produced the alleged original Note for the Plaintiffs and me to inspect. Shortly before that hearing, Plaintiffs submitted two more filings. The first filing was a "Motion for Summary Judgment" contending Plaintiffs were entitled to summary judgment because the Bank had not shown it possessed the Note. The second filing, titled "Plaintiffs' Mandatory Judicial Notice Pursuant to Delaware Uniform Rules of Evidence Article II," asked the Court to consider a report from Koppenaven opining that the Note was a "counterfeit" based on inconsistent formatting on different pages of the

[15] Def. D.I. 76.
[16] Pls. D.I. 78, ¶ 11.
[17] D.I. 79.
[18] Pls. D.I. 82.

Note. Koppenaven also appeared at the hearing to inspect the Note. In keeping with my previous orders denying Plaintiffs' request to extend discovery to retain an expert document examiner, I declined to hear testimony from Koppenaven.

This is my final report on the parties' cross-motions for summary judgment.

II. Analysis

Plaintiffs seek to remove the Mortgage from the title of the Property based on a theory that the Mortgage is void because the Bank does not possess the original Note. Plaintiffs also assert the Note is not indorsed in a manner that authorizes the Bank to enforce it. Plaintiffs argue the Note was tampered with, based on their comparisons of various copies of the Note and the Note's formatting.

The Bank asserts that it possesses the original and properly indorsed Note, and therefore has the right to enforce the Mortgage. In the alternative, the Bank offers several legal theories as to why Plaintiffs cannot quiet title regardless of whether the Bank possesses the Note.

"The function of summary judgment is the avoidance of a useless trial where there is no genuine issue as to any material fact."[19] Summary judgment is

[19] *Emmert v. Prade*, 711 A.2d 1217, 1219 (Del. Ch. 1997).

appropriate where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[20] "A fact is material if it might affect the outcome of the suit under the governing law."[21] A material issue of fact exists if "a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way."[22]

The movant bears the initial burden of demonstrating that there is no question of material fact.[23] When the movant carries that burden, the burden shifts to the nonmoving party "to present some specific, admissible evidence that there is a genuine issue of fact for trial."[24] The court must view the evidence most favorably to the non-moving party.[25] Even so, the non-moving party may not rely on allegations or denials in the pleadings to create a material factual dispute.[26]

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[20] CT. CH. R. 56(c). This rule, enumerating all the sources of proof I can consider, disposes of Barbosa's argument that the defendants' motions must fail because the defendants did not submit affidavits.
[21] *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] CT. CH. R. 56(e); *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000).
[26] *Fike*, 754 A.2d at 260.

While each party filed a motion for summary judgment, I do not evaluate those motions under Court of Chancery Rule 56(h), as the disputed factual issue of the Bank's possession of the original Note is material to the disposition of the pending motions.[27]

1. Possession of the Original Note

I conclude the Bank has demonstrated the absence of any material fact with regard to its possession of the original Note. It has done so through documents showing the Note's chain of custody, and through presenting the original Note. An Ocwen employee named Kevin Flannigan submitted an affidavit explaining Ocwen's business records that demonstrate possession of the original Note. [28] According to those records, the Bank received the collateral file and original Note on August 31, 2009, as "custodian for Ocwen and/or its predecessors."[29] The Bank kept the Note until December 6, 2014, when it sent it to Ocwen.[30] On May 15, 2017, Ocwen returned the file and original Note to the Bank.[31] The Bank sent the

[27] *See* Ct. Ch. R. 56(h) ("Where the parties have filed cross motions for summary judgment *and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion*, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.") (emphasis added).
[28] Def. D.I. 76, Decl. of Kevin Flannigan; *id.* Ex. A.
[29] *Id.*, Decl. of Kevin Flannigan, ¶ 5.
[30] *Id.*
[31] *Id.*

file and original Note back to Ocwen on June 22, 2017.[32] On June 26, 2017, Ocwen sent the file and original Note to counsel for the Bank, who received it on June 27, 2017, and has possessed them ever since.[33]

The collateral file indicates that Ocwen, the Bank's servicer, sent the original note and mortgage to the Bank's counsel in this case on June 26, 2017. [34] Inventories of the collateral file dated June 22, 2017, and December 5, 2014, also indicate the collateral file contains the original Note and Mortgage.[35] The execution page in the Bank's possession bears Daniel Tabb's wet-ink signature, in blue ink.[36]

I personally reviewed the document the Bank offered as the original Note at the August 13 hearing. It bore a purple "Original" stamp, blue wet-ink initials and signatures by Mr. Tabb, and a faded gray indorsement stamp. The paper looked and felt aged.

The Bank has met its burden of demonstrating there is no genuine issue as to any material fact with regard to its possession of the original Note. The burden therefore shifts to Plaintiffs to "do more than simply show that there is some

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[32] *Id.*
[33] *Id.*
[34] Def. D.I. 38, Dorey Decl., Ex. A, TABBCF-001.
[35] *Id.* Ex. A, TABBCF-004, TABBCF-010
[36] *Id.* Ex. B.

metaphysical doubt as to material facts."[37] Plaintiffs fail to create any doubt as to the fact that the Bank possesses the original Note. Plaintiffs presented conclusory testimony at the August 13 hearing that the proffered original is not the document Mr. Tabb signed.[38] I did not find this testimony to be credible, based on Plaintiffs' demeanor and based on the near impossibility of knowing whether the pieces of

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[37] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[38] After reviewing the document offered as the original Note for as long as she wished, Mrs. Tabb testified as follows:

> THE MASTER: Do you dispute that what you saw this morning is what Mr. Tabb signed?
>
> …
>
> MRS. TABB: I can't guarantee –
>
> …
>
> MRS. TABB: I am disputing it, because I - - I just feel that it's been fraudulent. They've been filed – things have been filed, and I think that anybody could try to get someone that can sign a signature that looks similar. So no, I don't agree that that's it. Because I haven't had a chance to really examine it myself. We just looked at it briefly. But no, I don't agree.

Hearing Tr. 10-11. Mr. Tabb testified as follows:

> THE MASTER: … Mr. Tabb, is that the document that you signed?
> MR. TABB: No, it's not.
> THE MASTER: Why do you think that?
> MR. TABB: Because I can tell you that it's – the inconsistency of the notes, as far as the – the way the footnotes are on it, and also the – the fonts on the note.
> MRS. TABB: Font.
> MR. TABB: The fonts on the note is completely different than the other pages. What it is – that is not the original note, and that's not – there was no wet ink that I signed.

Id. at 11-12. Mr. Tabb also testified about differences between different copies of the Note he has received, including some in which the faded indorsement stamp was not picked up by the copier and in some where the holes were allegedly punched in different places. *Id.* at 12-13.

paper offered by the Bank were or were not the ones Mr. Tabb initialed and signed in 2004. Plaintiffs' noncredible testimony does not create a genuine issue of material fact in light of the Bank's business records, and the document's indicia of authenticity including the wet-ink signatures and colored "Original" stamp.

The remainder of Plaintiffs' submitted evidence regarding the authenticity of the purported original Note is based on inconsistencies among different copies of that original, and on formatting inconsistencies within the Note. Plaintiffs assert that the location of hole punches in a copy "from Ocwen" ("the Alleged Ocwen Copy")[39] is different than the location of the hole punches on the color copy the Bank provided in this case ("the Color Copy")[40].

This argument does not create a genuine issue of material fact. The hole punches in the Color Copy are in the same location on the copy of the Note in Ocwen's collateral file,[41] and the copy Ocwen provided to Plaintiffs in 2017.[42] The only copy of the Note in the record with the aberrant hole punches is the copy presented by Plaintiffs to support their hole-punch argument. And the hole-punched header in the Alleged Ocwen Copy looks doctored or manipulated. The

[39] Pls. D.I. 82 at 5; *id.* Ex. A; Pls. D.I. 83 at 5, Exs. A, B.
[40] Def. D.I. 46.
[41] Def. D.I. 38, Dorey Decl. Ex. A, TABBCF-005.
[42] Pls. D.I. 41, Ex. B.

"AD" in "Adjustable," which is visible on the Alleged Ocwen Copy but is punched out on the Color Copy (and all other copies), is noticeably lower than the rest of the word on the Alleged Ocwen Copy. This argument fails to generate a dispute of material fact as to the Bank's possession of the original Note.

Plaintiffs also argue that formatting inconsistencies across different pages of the color copy of the Note create a genuine issue of material fact with regard to the Bank's possession of the original Note.[43] For example, Plaintiffs point out that the footers are different on different pages, in that the page numbers and "Initials" signature block are in different locations, and that the form identifications vary. In my view, the fact that the Note Mr. Tabb signed contains internal formatting inconsistencies is not relevant to whether the Bank possesses that original Note. In keeping with my previous orders denying Plaintiffs' request to extend discovery to retain an expert document examiner, I decline to consider Koppenhaver's opinion that the internal formatting inconsistencies indicate that the color copy of the Note is a "counterfeit document."[44]

Plaintiffs fail to meet their burden of presenting some specific, admissible evidence that there is a genuine issue of fact for trial. Even viewing their evidence

[43] Pls. D.I. 99; *id.* Ex. B.
[44] *See id.*

in the light most favorable to them, I find their denials that the presented document was not the original Note to be unsupported and not credible; I find their comparison of hole punches on a recently submitted copy of the Note to be unsupported at best and fabricated at worst; and I find their attack on the Note's formatting via an expert opinion to be irrelevant and in violation of my previous discovery orders. I conclude the Bank has met its burden of demonstrating there is no genuine issue of fact for trial with regard to the Bank's possession of the original Note. By the same logic, I conclude Plaintiffs have not prevailed on their own motion for summary judgment.

2. Enforcement of the Note

Plaintiffs argue the Bank cannot enforce the Note because the Note was not clearly and properly indorsed. The Bank asserts on summary judgment that the Note's indorsement gives the Bank the power to enforce it. The Bank asserts the faded indorsement stamp reads as follows:

> PAY TO THE ORDER OF _____
> WITHOUT RECOURSE
>
> Popular Financial Services, LLC
> Dennis J. Lauria, Vice President[45]

[45] Def. D.I. 76 at 7.

The Bank asserts this indorsement is "in blank" and therefore gives the Bank the power to enforce it as a holder under the Uniform Commercial Code, pursuant to 6 *Del. C.* § 3-301(i). In the alternative, if the indorsement is not "in blank," the Bank contends it is a non-holder in possession of the instrument who has the rights of a holder to enforce the Note pursuant to 6 *Del. C.* § 3-203(a).

The indorsement on the color copy of the Note is illegible to me, both on the original document I inspected and in the copies provided by the Bank.[46] I cannot conclude the Note is indorsed in blank, so I cannot conclude the Bank has the rights of a holder. I therefore turn to whether the Bank is entitled to enforce the Note as a nonholder in possession with the rights of a holder.

A nonholder in possession of an instrument may enforce the rights under the instrument if the party has physical possession of the instrument, if the intent in transferring physical possession of the instrument was to deliver the right to enforce the instrument, and if actual delivery of the instrument was accomplished.[47] As explained above, the Bank has proven that it physically possesses the Note, which also proves that actual delivery was accomplished. The intent behind the delivery to the Bank is evidenced by the Assignment of the

[46] *E.g.*, Def. D.I. 38, Dorey Decl. Ex. B.
[47] 6 *Del. C.* §§ 1-201(b)(21)(A), 3-203(a); *WBCMT 2006 C-29 Office 4250, LLC v. Chestnut Run Investors, LLC*, 2015 WL 4594538, at *7 (Del. Super. July 30, 2015).

Mortgage securing the Note to the Bank: the intent was to transfer the ability to enforce the Note as secured by the Mortgage.[48] The Bank has met its burden of showing the absence of any genuine issue of material fact regarding its right to enforce the Note as a nonholder in possession with the rights of a holder.

Plaintiffs express suspicion about the indorsement's authenticity based on how faint it is compared to Mr. Tabb's signature, and how it appears differently on different copies of the Note. Based on my personal observation, the indorsement stamp is faint on the original Note: whether it was faint to begin with or has faded is irrelevant. I attribute its different appearance on different copies to different copying mechanisms and settings. Plaintiffs dispute the Bank's reading of the indorsement in blank, but do not dispute the Bank's legal right to enforce the Note as a nonholder in possession with the rights of a holder, so long as the Bank actually possesses the original Note. Plaintiffs have failed to meet their burden of presenting some specific, admissible evidence that there is a genuine issue of fact for trial. For the same reasons, I conclude Plaintiffs have not prevailed on their own motion for summary judgment.

[48] Def. D.I. 26, Ex. 3; *see WBCMT*, 2015 WL 4594538, at *8.

Plaintiffs' claims that the Mortgage is void because the Bank does not possess the Note are therefore defeated because the Bank has proven it possesses the Note and has the right to enforce it. I need not determine how Plaintiffs' bankruptcy might inform whether the Bank must possess or enforce the Note.

III. Conclusion

For the foregoing reasons, I recommend the Court grant the Bank's motion for summary judgment on Plaintiffs' Counts enumerated I(B) and (C), and deny the Plaintiffs' motion for summary judgment. This is a final report pursuant to Court of Chancery Rule 144. Exceptions on my other reports and orders to date were stayed until the exceptions period for this report. Exceptions may now be taken pursuant to Court of Chancery Rule 144.

Respectfully,

/s/ Morgan T. Zurn
Master in Chancery