DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL I INC. TRUST 2004-WMC2	*	**NO. 2017-CA-0173**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**

SANDRA C. MCNAMARA, JAMES P. MCNAMARA, HONORABLE DALE N. ATKINS, CLERK OF COURT AND EX-OFFICIO RECORDER, AND SUGARCANE PARK, LLC

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-01143, DIVISION "I-14"
Honorable Piper D. Griffin, Judge

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JUDGE SANDRA CABRINA JENKINS

* * * * * *

(Court composed of Judge Joy Cossich Lobrano,
Judge Sandra Cabrina Jenkins, Judge Paula A. Brown)

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REVERSED AND REMANDED
OCTOBER 18, 2017

Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2004-WMC2 ("Deutsche Bank"), appeals the trial court's November 21, 2016 judgment sustaining an exception of no cause of action filed by appellee, Sugarcane Park, LLC ("Sugarcane Park"). For the reasons that follow, we reverse the trial court's judgment and remand this matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of our review, the following well-pleaded factual allegations in Deutsche Bank's Amended and Restated Petition ("Amended Petition"), and in its attached exhibits, are accepted as true. *Taylor v. Sider*, 99-2521, pp. 2-3 (La. App. 4 Cir. 5/31/00), 765 So.2d 416, 418.

On January 21, 2004, defendants Sandra C. McNamara and James P. McNamara (collectively, the "McNamaras"), executed a written mortgage (the "Mortgage") in favor of defendant WMC Mortgage, LLC ("WMC"). The Mortgage encumbered immovable property located at 1527 Harmony Street in

New Orleans, Louisiana (the "Property"). On February 6, 2004, the Mortgage was recorded as Instrument No. 751465 in the Orleans Parish mortgage records.

The Mortgage secured a promissory note executed by the McNamaras on the same date in favor of WMC, in the original principal amount of $850,000.00 (the "Note") (the Mortgage and Note are hereinafter collectively referred to as the "Loan"). Under the terms of the Note, the McNamaras were required to make monthly payments of principal and interest totaling $5,344.66, to be paid by the first of the month beginning March 1, 2004.

On August 1, 2004, WMC sold the Loan to Deutsche Bank.

On September 23, 2005, more than one year after WMC sold the Loan to Deutsche Bank, Robert Rothleder, Vice-President of Production Operations employed by WMC, signed a Lost Note Affidavit/Cancellation of Mortgage (the "Mortgage Cancellation"). In a July 2015 affidavit attached to the Amended Petition, Mr. Rothleder attested that the person who presented the Mortgage Cancellation to him for his signature presented it alongside loan information for the wrong loan. He stated that the information presented to him showed that the loan had been satisfied, but that it was not the McNamaras' Loan. Mr. Rothleder attested that the Mortgage Cancellation was executed in error and without the consent or knowledge of Deutsche Bank. On March 7, 2007, the Mortgage Cancellation was recorded in the Orleans Parish mortgage records as Instrument No. 141038. When the Mortgage Cancellation was executed and recorded, WMC no longer owned the Loan.

On August 27, 2013, defendant Dale N. Atkins, Clerk of Court and *Ex Officio* Recorder for Orleans Parish, executed a "Certification of Cancellation"

certifying that the Mortgage had been cancelled and erased from the mortgage records on March 7, 2007.

The McNamaras made the required loan payments from March 1, 2004 until July 1, 2013. Thereafter, the McNamaras defaulted on the Note by failing to pay, when due, the monthly installment payment for August 1, 2013, and remained in default.

On January 13, 2015, Mrs. McNamara and Sugarcane Park entered into an Act of Cash Sale of the Property in the amount of $100,000.00, plus "other valuable consideration."

On February 6, 2016, Deutsche Bank filed a Petition for Nullity against the McNamaras, Sugarcane Park, and Ms. Atkins. On August 8, 2016, Deutsche Bank filed an Amended Petition, adding WMC as a defendant. Deutsche Bank asserted claims against the McNamaras for breach of contract, unjust enrichment, and fraud and deceit. Deutsche Bank asserted claims against WMC for negligence and breach of warranty. Deutsche Bank also sought recognition of the validity and priority of its security interest in the Property. Deutsche Bank sought a judgment: (1) annulling, voiding, and vacating *ab initio* the Cancellation of Mortgage executed by Mr. Rothleder; (2) annulling, voiding, and vacating *ab initio* the Certificate of Cancellation issued by Ms. Atkins; (3) directing Ms. Atkins to reinstate the Mortgage; and (4) granting Deutsche Bank all other relief to which it might be entitled, including reasonable costs, expenses, and attorney's fees.

On August 25, 2016, Sugarcane Park filed Peremptory Exceptions of No Cause of Action and/or No Right of Action as to Deutsche Bank's claim for annulment of the Mortgage Cancellation, and reinstatement of the Mortgage. On November 21, 2016, the trial court signed a judgment sustaining Sugarcane Park's

Exception of No Cause of Action and denying Sugarcane Park's Exception of No Right of Action (the "Judgment"). Deutsche Bank appeals the trial court's ruling sustaining the Exception of No Cause of Action. Sugarcane Park filed an Answer to Appeal.

DISCUSSION

Law Governing Exceptions of No Cause of Action

The function of the peremptory exception of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. *Moses v. Moses*, 15-0140, p. 3 (La. App. 4 Cir. 8/5/15), 174 So.3d 227, 229. No evidence may be introduced to support or controvert an exception of no cause of action. *Id*., 15-0140, p. 3, 174 So.3d at 229-30. Thus, the exception is triable on the face of the petition and each well-pleaded fact must be accepted as true. *Id*., 15-0140, p. 3, 174 So.3d at 230.

"A court appropriately sustains the peremptory exception of no cause of action only when, conceding the correctness of the facts, the plaintiff has not stated a claim for which he or she can receive legal remedy under the applicable substantive law." *Maw Enterprises, L.L.C. v. City of Marksville*, 14-0090, p. 7 (La. 9/3/14), 149 So.3d 210, 215. "'Every reasonable interpretation must be accorded the language used in the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial.'" *Moses,* 15-0140, p. 4, 174 So.3d at 230 (quoting *Badeaux v. Southwest Computer Bureau, Inc*., 05-0612, 05-0719, p. 7 (La. 3/17/06), 929 So.2d 1211, 1217).

Standard of Review

In reviewing a trial court's ruling sustaining an exception of no cause of action, the appellate court should subject the case to *de novo* review because the

exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition. *Mid-South Plumbing, L.L.C. v. Dev. Consortium-Shelly Arms, L.L.C.*, 12-1731, p. 4 (La. App. 4 Cir. 10/23/13), 126 So.3d 732, 736.

Assignment of Error

Deutsche Bank's sole assignment of error is that the trial court erred in sustaining Sugarcane Park's Exception of No Cause of Action in contravention of a well-established exception to the public records doctrine.

Exception to Public Records Doctrine Where Mortgage is Cancelled Through Fraud, Error, or Mistake.

Louisiana's public records doctrine is codified at La. C.C. art. 3338:

> The rights and obligations established or created by the following written instruments are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records pursuant to the provisions of this Title:
>
> (1) An instrument that transfers an immovable or establishes a real right in or over an immovable.
>
> (2) The lease of an immovable.
>
> (3) An option or right of first refusal, or a contract to buy, sell, or lease an immovable or to establish a real right in or over an immovable.
>
> (4) An instrument that modifies, terminates, or transfers the rights created or evidenced by the instruments described in Subparagraphs (1) through (3) of this Article.

"The Louisiana public records doctrine provides that third persons dealing with immovable property may rely on the face of the public records and need not go beyond or behind those records to ascertain the validity of the title that they acquire." *Lacour v. Crais*, 367 So.2d 1203, 1208 (La. App. 4th Cir. 1978). The doctrine "generally expresses a public policy that interest in real estate must be recorded in order to affect third persons." *Cimarex Energy Co. v. Mauboules*, 09-1170, 09-1180, 09-1194, p.18 (La. 4/9/10), 40 So.3d 931, 943. The public records

doctrine is also "founded upon our public policy and social purpose of assuring stability of land titles." *Id*.

A longstanding exception to the public records doctrine exists, however, where a mortgage is cancelled from the public records through fraud, error, or mistake:

> It is well-settled that the cancellation of the mortgage by the recorder without the knowledge or consent of the holder of the negotiable mortgage does not deprive him of his security even with regard to a third-party dealing with the property on his faith in the public record. When there has been an erroneous cancellation of a mortgage from the mortgage records by the Clerk of Court and the purchase of the property by a third-party relying on the public records which show the mortgage to be cancelled, the mortgagee is entitled to enforce the mortgage against the mortgaged property.

Pioneer Enterprises, Inc. v. Goodnight, 561 So.2d 824, 828 (La. App. 2d Cir. 1990) (citing *Central Bank v. Frost*, 552 So.2d 508 (La. App. 2d Cir. 1989); *Cheleno v. Selby*, 538 So.2d 706 (La. App. 4th Cir. 1989); *Gulf South Bank & Trust v. Demarest*, 354 So.2d 695 (La. App. 4th Cir. 1978); *Davis-Wood Lumber Co. v. Debrueys*, 200 So.2d 916 (La. App. 1st Cir. 1967); *Bornes v. Vernon*, 64 So.2d 18 (La. App. 1st Cir. 1953)).

In *Lacour v. Ford Inv. Corp*., 183 So.2d 463 (La. App. 4th Cir. 1966), this court explained the rationale behind Louisiana's exception to the public records doctrine:

> This case poses for our consideration the classic theoretical conflict between the necessity for security of land titles on the one hand and the integrity of the public records doctrine on the other. In effect, the primary argument made by the intervenors is that they purchased the property on the faith of the contends [sic] of the public records of the Parish of Jefferson, which unequivocally revealed that no mortgage existed in favor of the plaintiff on the property purchased by them.
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> * * *
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> "The doctrine that a person in good faith buying real estate, or acquiring a mortgage or lien on it, may rely upon the public records in

> determining the ownership of the property, and its freedom from mortgages or liens, does not protect one who, in good faith, buys real estate or acquires a mortgage on real estate on which a prior mortgage has been cancelled fraudulently or without the consent of the holder of the mortgage or of the mortgage note or notes."
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> * * *
>
> "The rule seems arbitrary, but it is now well settled by the decisions of this court, that a cancellation of a mortgage by the recorder without the knowledge or consent of the holder of the negotiable mortgage note does not deprive him of his security, even with regard to a third party dealing with the property on his faith in the public record."
>
> ***
>
> [T]he rationale on which the rule is predicated is not as arbitrary as it would appear. . . . **In contradistinction to popular legal opinion, the law of registry does not create rights, but instead makes them effective against third persons. If an act of release of mortgage constituted irrebuttable proof of its own validity irrespective of forgery or material alteration, third persons would be fully protected in acquiring property in sole reliance on the public records. However, if this were so, no title to real property would be safe, since it could be divested from its true owner through a forged or altered document by means of the mere recordation thereof. Consequently, we are convinced that [this] rule . . . is necessary for the security and protection of titles to immovable property**.

Id. at 465-66 (emphasis added) (quoting *Zimmer v. Fryer*, 190 La. 814, 183 So. 166 (1930); *Freeland v. Carmouche*, 177 La. 395, 148 So. 658 (1933)).[1]

Deutsche Bank contends that its Amended Petition states a cause of action for reinstatement of the Mortgage by alleging: (1) the Note was never satisfied; (2)

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[1] One commentator has explained Louisiana's limited reliance on the validity of recorded documents as follows:

> No law guarantees the truth or validity of a document simply because it is recorded in the public records. "But being recorded, like being in writing, is itself not proof of anything, and particularly it is neither proof nor promise of the genuineness or validity of the recorded or written instrument which alone can be the source of the rights asserted." . . . Attempts arise occasionally to try to give greater credence to the documents, but the Louisiana system is so structured that additional credence is not merited. Louisiana does not have the safeguards that would scrutinize documents for validity before recordation, and without that type of procedure, it is impossible to guarantee accuracy of recorded documents.

Hargrave, *Public Records & Property Rights*, 56 LA. L. REV. 535, 564-65 & n.147 (1996) (quoting *Gulf States Bank & Trust Co. v. Demarest*, 354 So.2d 695, 697 (La. App. 4th Cir. 1978)).

Deutsche Bank was the holder of the Mortgage when it was cancelled; (3) WMC, which cancelled the Mortgage, was not the mortgage holder; (4) WMC cancelled the Mortgage in error; (5) the Mortgage was cancelled without Deutsche Bank's knowledge or consent.

Neeb v. Graffagnino

Sugarcane Park contends that Deutsche Bank was required to specifically allege in its Amended Petition – not just that it did not have knowledge of the Mortgage Cancellation – but that it did not have knowledge of the Mortgage Cancellation **at any time prior to the sale of the Property to Sugarcane Park**. Sugarcane Park relies on *Neeb v. Graffagnino*, 13-687 (La. App. 5 Cir. 2/26/14), 136 So.3d 353, in which the Fifth Circuit stated:

> Cases involving fraudulent or erroneous cancellations, in which the exception to the public records doctrine has been applied, involve **mortgage holders who did not know or consent to the cancellation and who had no way of knowing of the wrongful cancellation of the mortgage and no means of protecting their security interests in the property.** In many of these cases, the mortgage holder becomes aware of the cancellation only after a sale of the property to a third party. In such cases, mortgage holders are limited in the methods available to correct the wrongful cancellations and to protect their security interests. Therefore the exception to the public records doctrine is necessary in the interest of justice.

Id., 13-687, p. 8, 136 So.3d at 358 (emphasis added) (citing *Schudmak v. Prince Phillip P'ship*, 573 So.2d 547, 551 (La. App. 5th Cir. 1991); *Central Bank v. Frost*, 552 So.2d 508, 512 (La. App. 2d Cir. 1989); *Hiers v. Dufreche*, 12- 1132 (La. App. 1 Cir. 5/31/13), 2013 WL 2395055, *vacated on reh'g*, 2013 WL 8445626 (La. App. 1 Cir. 10/24/13); *Ralston Purina Co. v. Cone*, 344 So.2d 95 (La. App. 2d Cir. 1977)).

Sugarcane Park argues that this language in *Neeb* sets a narrower legal standard for the "knowledge or consent" requirement of a mortgagee's cause of

action to reinstate a mortgage that has been cancelled by fraud, error, or mistake. Sugarcane Park contends that, because Deutsche Bank did not plead that it had no knowledge of the cancellation at any time prior to the sale of the Property to Sugarcane Park, Deutsche Bank has no cause of action. We disagree.

Neither *Neeb*, nor the cases cited therein, hold that a mortgage holder who learns of the wrongful cancellation of his mortgage after the cancellation – but before the sale of the property to a third party – has no cause of action to annul the cancellation and reinstate his mortgage.

In *Neeb*, the mortgagee did not become aware of a court order cancelling his mortgage until **after** the mortgaged property was sold. The *Neeb* court properly held that the public records exception applied because the mortgage was cancelled without the mortgagee's knowledge. In *Central Bank*, the origin of the *Neeb* language, the mortgagee **was a party to the litigation** in which the court ordered his mortgage cancelled; hence, the exception did not apply because the mortgage was cancelled with the mortgagee's knowledge. And although the court in *Central Bank* refers to "many cases" supporting its rule, none are cited. Likewise, in *Schudmak*, the court correctly found that the public records exception did not apply because the mortgagees **cancelled their own mortgage**. In all of these cases, the language cited by Sugarcane Bank is not essential to the holdings, and is dicta. *Shaw v. Young*, 15-0974, p. 9 (La. App. 4 Cir. 8/17/16), 199 So.3d 1180, 1186 n.5.

Finally, in both *Hiers* and *Ralston*, the courts confirm, rather than restrict, the longstanding rule recognized by this court more than 50 years ago in *Lacour*. *See Hiers*, 12-1132, 2013 WL 2395055, at *4 ("The cancellation of a mortgage through fraud, error or mistake, without the consent or knowledge of the holder, does not deprive the holder of his security, even as against third parties dealing

with the property in good faith reliance on the public records."); *Ralston*, 344 So.2d at 97 ("All parties concede that in spite of the erroneous cancellation of the mortgage from the mortgage records by the Clerk of Court and the purchase of the property by a third party relying on the public records which showed the mortgage to be cancelled, the mortgagee is entitled to enforce it against the mortgaged property.")

In short, neither the Supreme Court nor this court has adopted, as a bright-line rule, the loose language used in *Central Bank*, *Schudmak*, and *Neeb.* We decline to do so now.

Based on well-established law, we conclude that Deutsche Bank, by pleading that its Mortgage was cancelled without its knowledge or consent, has stated a cause of action. We, of course, do not consider whether Deutsche Bank will be able to prevail on the merits at trial (or be able to defeat a motion for summary judgment), or whether Sugarcane Park may have a valid defense. *See Winstead v. Kenyon*, 15-0470, p. 6 (La. App. 4 Cir. 12/2/15), 182 So.3d 1087, 1091; *N. Clark, L.L.C. v. Chisesi*, 16-0599, p. 5 (La. App. 4 Cir. 12/7/16), 206 So.3d 1013, 1017.[2]

[2] Our conclusion is not altered by Sugarcane Park's contention that Deutsche Bank has no cause of action because it, **in fact**, had actual or constructive knowledge of the cancellation of its mortgage by virtue of a November 4, 2014 letter from the McNamaras to Ocwen Loan Servicing, LLC ("Ocwen"), the purported agent and loan servicer for Deutsche Bank. In this letter, which was attached to Sugarcane Park's Exception of No Cause/Right of Action, the McNamaras stated that on August 28, 2013 (before the sale of the Property), they had submitted to Ocwen "certified true documents recorded with the Orleans Parish Mortgage Office showing that [the Mortgage] had been officially cancelled." Under La. C.C.P. art. 931, no evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action.

For these reasons, we find that the trial court erred in sustaining Sugarcane Park's Exception of No Cause of Action. We reverse the trial court's Judgment, and remand for further proceedings.

Answer to Appeal

Sugarcane Park has filed an Answer to Appeal in which it asks this court to amend the Judgment to order that all notices of lis pendens filed by Deutsche Bank in the public records against the Property be cancelled, at Deutsche Bank's cost. Sugarcane Park also requests an award of costs incurred in this appeal.

A notice of lis pendens may be recorded to give notice of the pendency of an action "affecting the title to, or asserting a mortgage or privilege on, immovable property." *Campbell v. Melton*, 01-2578, p. 5 (La. 5/14/02), 817 So.2d 69, 74 n.4; La. C.C.P. art. 3751. The recordation of the notice of lis pendens makes the outcome of the suit of which notice is given binding on third parties. *Campbell*, 01-2578, p. 5, 817 So.2d at 74 n.4.

Sugarcane Park relies on La. C.C.P. art. 3753:

> When judgment is rendered in the action or proceeding against the party who filed the notice of the pendency thereof, the judgment shall order the cancellation of the notice at the expense of the party who filed it, and as part of the costs of the action or proceeding.

Because we reverse the trial court's Judgment and remand for further proceedings, we deny the relief sought in Sugarcane Park's Answer to Appeal.[3]

[3] "So long as an action is pending and affects title to immovable property, then the notice of lis pendens giving notice of that action is proper and the merits of the pending action do not affect the propriety of the notice of lis pendens." *Ducote v. McCrossen*, 95-2072, p. 2 (La. App. 4 Cir. 5/29/96), 675 So.2d 817, 818; *Whitney Nat'l Bank v. McCrossen*, 93-2160 (La. App. 4 Cir. 3/29/94), 635 So.2d 401, 404 ("lis pendens is proper as long as there is an ongoing lawsuit in which the ownership of the property is being disputed").

CONCLUSION

For the foregoing reasons, we reverse the trial court's November 21, 2016 Judgment sustaining Sugarcane Park's Exception of No Cause of Action. We remand the matter for further proceedings. We deny the relief sought by Sugarcane Park in its Answer to Appeal.

REVERSED AND REMANDED