

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

CITIMORTGAGE, INC.	)	
	)	
Plaintiff,	)	
	)	C.A. No. 09L-07-313 CLS
v.	)	
	)	
ROMIE D. BISHOP and SHIRLEY	)	
A. BISHOP,	)	
	)	
Defendants.	)	

Date Submitted: January 9, 2013  
Date Decided: March 4, 2013

**MEMORANDUM OPINION**

Lisa R. Hatfield, Esq. and Chase N. Miller, Esq. Morris, Hardwick, Schneider, LLC. Newark, Delaware. Attorneys for Plaintiff.

Romie and Shirley Bishop. Middletown, Delaware. *Pro se* Defendants.

**Scott, J.**

## I. INTRODUCTION

This is the Court's decision following a 3-day bench trial for an *in rem* mortgage foreclosure action brought by Plaintiff CitiMortgage, Inc. ("Plaintiff") against Defendants Romie and Shirley Bishop ("Defendants"). The issues before the Court are whether Plaintiff has shown that it was the proper party to bring the foreclosure action on July 9, 2009 and whether Defendant has proved payment as a defense to foreclosure. For the reasons stated below, the Court finds for Plaintiff.

## II. PARTIES' CONTENTIONS

On July 27, 2009, Plaintiff CitiMortgage, Inc. filed a complaint against Romie Bishop and Shirley Bishop alleging that, "[o]n May 4, 2007, Defendants executed and delivered to Plaintiff a Mortgage on the property known as 220 Hazel Ridge Drive, Wilmington, Delaware 19810, Tax Parcel No. 06-014.00-199".<sup>1</sup> Plaintiff asserted that the loan was in default and requested that the Court enter judgment on the mortgage. Plaintiff contends that it has demonstrated a *prima facie* case for a foreclosure action: a valid mortgage was created and perfected, the defendants defaulted, a demand was made, no payment was made after the demand, and that Plaintiff, as servicer on behalf of Fannie Mae, was the proper party to bring suit.

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<sup>1</sup> Compl., at ¶ 3.

Defendants argue that foreclosure is improper because the assignment, confirmatory assignment, mortgage, and note were deficient and fraudulent. Defendants assert that the evidence and testimony proves that Plaintiff was not the servicer or owner of the loan and that the assignment was fraudulent. In addition, Defendants contend that payment has been made by a third-party. As a result, Defendants request that the Court dismiss the action, invalidate the assignments, nullify the loan and clear cloud on the title.

### **III. FINDINGS OF FACT**

On April 9, 2007, Romie Bishop applied for a mortgage loan through Mortgage Network Solutions, LLC (“MNS”).<sup>2</sup> At the time, Romie Bishop was employed by MNS.<sup>3</sup> Along with the application, Romie Bishop signed “Servicing Disclosure Statement” which contained information about the rights provided by the Real Estate Settlement Procedures Act.<sup>4</sup> In particular, the statement provided that the applicant must be given notice if “the servicing of [the applicant’s] loan is assigned, sold, or transferred to a new servicer”.<sup>5</sup> In the section marked, “Servicing Transfer Estimates,” a best estimate was given for the possible servicing of the loan. It was estimated that the lender might assign, sell, or transfer

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<sup>2</sup>Pl. Ex. 7.

<sup>3</sup> Defs. Ex. 4.

<sup>4</sup> Pl. Ex. 7.

<sup>5</sup> *Id.*

the servicing of the loan and that the probability of such a transaction in the 12-month period after the loan was funded was between 76 to 100%.<sup>6</sup> The Servicing Disclosure Statement also provided that, from 2004 to 2006, the lender had a 100% record of transferring the servicing of mortgage loans.<sup>7</sup>

On May 4, 2007, Romie Bishop and Shirley Bishop executed the mortgage on 220 Hazel Ridge Drive in Wilmington, Delaware.<sup>8</sup> On the mortgage instrument, each defendant was listed as a “Borrower.” Mortgage Electronic Registration Systems, Inc. (“MERS”) was the nominee for the lender and the “mortgagee.” The lender was Cardinal Financial Company, LP (“Cardinal”). The mortgage instrument stated that the “Borrower” owed Cardinal \$299,250.00. The instrument also provided a statement informing the borrower that

[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower [...] If the Note is sold and thereafter the Loan is serviced by a Loan servicer other than the purchaser of the Notes, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser [...]<sup>9</sup>

On the mortgage instrument, there were two signatures on the lines designated for witnesses and signatures on the lines specifically designated for

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<sup>6</sup> *Id.* at 2, ¶¶ 1.A, 2.

<sup>7</sup> *Id.* at 2, ¶ 3.

<sup>8</sup> Pl. Ex. 1.

<sup>9</sup> Pl. Ex. 1, ¶ 20

“Romie David Bishop” and “Shirley Bishop.” The instrument was notarized by Anthony Figliola, Jr., Esquire (“Attorney Figliola”). The Note was executed on May 4, 2007. Romie Bishop signed the Note, but Shirley Bishop did not.<sup>10</sup> Among other things, the Note stated that “[the Borrower] understood that the Lender may transfer this Note.”<sup>11</sup>

Also on May 4, 2007, several other documents were executed in addition to the Mortgage instrument.<sup>12</sup> A “Uniform Residential Loan Application” (“Residential Loan Application”) was completed and signed by Romie Bishop. The Residential Loan Application listed only Romie Bishop as the borrower, but provided that both Defendants would hold title in the property as joint tenants.<sup>13</sup> Romie Bishop signed the “Notice of Assignment, Sale or Transfer of Servicing Rights” (Notice of Assignment”) on May 4, 2007 that stated that the “servicing of [the] mortgage loan, that is, the right to collect payments [], is being assigned sold or transferred from” Cardinal to Plaintiff and would be effective on July 1, 2007.<sup>14</sup> On May 11, 2007, the mortgage was recorded at the New Castle County Recorder

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<sup>10</sup> Joint. Ex. 2, at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *E.g.*, Initial Escrow Document, Defs. Ex. 5, Certification Addendum to HUD-1 Settlement Statement, Defs. Ex. 6; HUD-1 Settlement Statement, Pl. Ex. 2; Federal Truth-in-Lending Disclosure Statement, Pl. Ex. 4; Itemization of Amount Financed, Pl. Ex. 5; Occupancy and Financial Status Affidavit, Pl. Ex. 6.

<sup>13</sup> Defs. Ex. 4

<sup>14</sup> Joint Ex. 1.

of Deeds.<sup>15</sup>

An Assignment of Mortgage (“Assignment”) dated July 17, 2009, stated that MERS, as nominee for Cardinal, assigned and transferred the mortgage to Plaintiff “[f]or Valuable Consideration”.<sup>16</sup> The Assignment was signed by Aaron Menne, Vice President of MERS, and notarized by Dennis J. Luecke with a notarization date of “May 4, 2007.”<sup>17</sup> On November 12, 2009, a Confirmatory Assignment of Mortgage (“Confirmatory Assignment”) was executed between MERS, as Cardinal’s nominee, and Plaintiff, which was “filed to correct a computer generated error setting forth the incorrect date of the Notrary (*sic*) Signature which should have read July 17, 2009.”<sup>18</sup> The Confirmatory Assignment was signed by Aaron Menne and notarized by Dennis Luecke on November 12, 2009.

MERS maintains “MILESTONES” reports and “MIN summaries” as part of its electronic record-keeping. Regarding the mortgage at issue, the MILESTONES report (“Report”)<sup>19</sup> from MERS stated that Cardinal was the servicer when the mortgage was registered on May 7, 2007. The Report stated that on, May 17, 2007, Plaintiff became the new servicer of the mortgage and the new investor.

At trial, Julia Wood (“Wood”) testified on behalf of Plaintiff and stated that she had been an operations analyst until 2010, when she became a litigation

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<sup>15</sup> Pl. Ex. 3.

<sup>16</sup> Defs. Ex. 1.

<sup>17</sup> *Id.*

<sup>18</sup> Defs. Ex. 2.

<sup>19</sup> Defs. Ex. 9.

specialist.<sup>20</sup> Wood testified that a servicer's role was to act on behalf of a loan company in order to maintain and manage the account. Wood distinguished a servicer from an investor and stated that an investor provides the financial backing for the loan, either initially or through purchasing the loan. Wood also testified that, generally, the date of an assignment may not necessarily be the date of transfer. She further testified that an assignment may occur after the date of transfer, if necessary. Upon review of the loan payment history, Wood testified that the account was in default. However, she did state that payments were made on various dates ranging from June 1, 2007 to the last payment on November 6, 2008 and that the payments which had been received were credited to the account of Romie Bishop. No other payment was made by the Bishops or any other third party.

Attorney Figliola represents MNS and has participated in settlements for Defendants and clients of MNS. Attorney Figliola was the settlement attorney who signed the HUD-1 Settlement Statement.<sup>21</sup> He also signed other documents, but in his capacity as a notary. Attorney Figliola signed the documents relating to the mortgage at issue in the presence of the signators, Carmine and Cheryl Rapucci and Defendants. He testified that he would not have notarized the documents

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<sup>20</sup> Wood stated that her current job was Assistant Vice President of CitiMortgage and that her duties included overseeing a team of litigators regarding foreclosures on mortgages that CitiMortgage services.

<sup>21</sup> Pl. Ex. 2.

without explaining them and unless the signators signed in his presence. Attorney Figliola also testified that the original documents were sent directly to the Recorder of Deeds after settlement.<sup>22</sup> He testified that the deed and the mortgage were signed on the same day and that providing a notice of assignment is not unusual at closing. Lastly, Attorney Figliola testified that the loan “funded.” Attorney Figliola explained that a loan “funds” when a loan company is satisfied that the attorney has followed instructions and it sends the money to the attorney for escrow.

The Recorder of Deeds (“Recorder”), Michael Kazokowski, testified that he received a letter from the Bishops notifying him of two fraudulent and deficient assignments of the mortgage.<sup>23</sup> Consequently, the Recorder directed his secretary to deliver the letter to the Delaware Department of Justice. Aside from forwarding the letter, the Recorder took no further action and had not received a response. The Recorder stated that his office was responsible for recordation, but did not have the authority to make determinations as to whether the documents were fraudulent. He stated that his office considered the mortgage sufficient for recordation.

#### **IV. STANDARD OF REVIEW**

In a bench trial, the Court is the finder of fact and the parties must prove the

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<sup>22</sup> Receipt from Recorder of Deeds, Pl. Ex. 5.

<sup>23</sup> Defs. Ex. 11.



elements of each of their claims by a preponderance of the evidence.<sup>24</sup> The Court shall find in favor of the party upon whose side “the greater weight of the evidence is found.”<sup>25</sup>

## V. CONCLUSIONS OF LAW

### A. Proper Party to Bring Foreclosure

Plaintiff has proven, by a preponderance, that it was the assignee to the mortgage at the time of the foreclosure action and, as such, it was the proper party to bring the action. Under 10 *Del. C.* § 5061, an assignee may bring a foreclosure action.<sup>26</sup> Plaintiff has shown that it was an assignee of the mortgage on the date of foreclosure based on the Notice of Assignment, the Assignment, Confirmatory Assignment, Wood’s testimony, and the entries in the Report. Plaintiff became both servicer and investor on May 17, 2007 and remained servicer through July 27, 2009, the date of the Complaint. Therefore, on July 27, 2007, Plaintiff was a proper party to foreclose.

Defendants challenge the validity of the Assignment and the Confirmatory Assignment alleging that the documents were deficient and fraudulent. This Court

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<sup>24</sup> *Pencader Associates, LLC v. Synergy Direct Mortg. Inc.*, 2010 WL 2681862, at \*2 (Del. Super. June 30, 2010)(citing *Pouls v. Windmill Estates, LLC*, 2010 WL 2348648, at \*4 (Del. Super. June 10, 2010)).

<sup>25</sup> *Id.*

<sup>26</sup> 10 *Del. C.* §5061(a); *Citimortgage, Inc. v. Trader*, 2011 WL 3568180, at \*1 (Del. Super. May 13, 2011); *See CWCapital Asset Management, LLC v. Chicago Properties, LLC*, 610 F.3d 497, 501 (7th Cir. 2010) (holding that a servicer was a real party in interest to bring suit in its own name) (citing *Sprint Commc 'ns Co. v. APCC Services Inc.*, 554 U.S. 269 (2008)).

considered a similar argument in *Citimortgage v. Trader*, 2011 WL 3568180 (Del. Super.) where a mortgagee sought to set aside a sheriff's sale by arguing that the foreclosure action was void because the plaintiff, an assignee of the mortgage, was not a proper party in interest because it had not recorded the assignment at the time it obtained judgment.<sup>27</sup> The Court stated that the plaintiff's standing to bring the suit "depend[ed] on whether the assignment was valid and effective."<sup>28</sup> In *P & B Properties I, LLC v. Owens*, 1996 WL 111128 (Del. Super. 1996), defendants moved to dismiss a mortgage foreclosure action arguing that that assignments of the mortgage and note were invalid and that, as a result, plaintiff was not a real party in interest to bring the action.<sup>29</sup> The Court reviewed the requirements of 6 *Del. C. § 2702* and determined that the assignment was valid.<sup>30</sup>

An assignment of mortgage is valid when it is attested by 1 credible witness and it operates to convey all the rights and interests of the assignor.<sup>31</sup> Both the Assignment and the Confirmatory Assignment assigned and transferred the mortgage to Plaintiff and were signed by Aaron Menne<sup>32</sup> and notarized by Dennis

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<sup>27</sup> *Trader*, 2011 WL 3568180 at \*1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at \*1.

<sup>30</sup> *Id.*

<sup>31</sup> 25 *Del. C. § 2109(a)*.

<sup>32</sup> Aaron Menne was one of several witnesses that the Court expected Defendants to call based upon the pretrial conference. Menne was not properly served. It was argued to the Court that Defendants were unaware as to who Menne worked for or where he was located. The extent of contact between Defendants and Menne seemed to be a lawsuit filed by Defendants against Menne. Witnesses, such as Menne, someone named "Mario" of Federal National Mortgage

Luecke. Defendants have not presented any evidence showing that Dennis Luecke's notarization was not credible. Although there was an error of the notary date on the Assignment, the assignment was still valid. The Confirmatory Assignment merely corrected the computer-generated clerical error regarding the date on the Assignment and did not alter the effect of the Assignment.

Defendants' challenge to the validity of the mortgage is further diluted by their status as non-parties to the assignment and by recent federal court decisions that the Court finds persuasive on this matter which indicate that a mortgage-debtor lacks standing to challenge the validity of an assignment.<sup>33</sup> In a case also involving Defendants, Judge Shannon of the Bankruptcy Court for the District of Delaware stated that Defendants' challenges to a proof of claim were without merit because they lacked the standing to dispute the validity of a lender's assignment.<sup>34</sup> This conclusion was based on the fact that the Defendants "d[id] not allege that they were parties to the transaction, third-party beneficiaries, or somehow injured by the assignment."<sup>35</sup> In cases where debtors brought claims against assignees challenging the validity of assignments based on pooling servicing agreements, federal courts have concluded that debtors lacked standing as non-parties to the

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Association, and Sanjiv Das, CEO of Citimortgage, whose testimony would have dealt with assignments, would not have been relevant to this case.

<sup>33</sup> See *E.g., In re Perretta*, 2011 WL 6305552 (Bankr. D. R.I. Dec. 16, 2011.).

<sup>34</sup> *In re: Romie David Bishop, and Shirley Ann Bishop*, Case No. 11-12338 (BLS) and *Bishops v. Argent Mortgage Company, LLC*, Adv. Pro. No. 11-53412 (BLS), at 3.

<sup>35</sup> *Id.*

assignments and failed to show that there was a causal connection between the assignments and the injury complained of.<sup>36</sup> Following this reasoning, a federal court in Georgia stated that “[t]he assignment does not affect whether the security deed’s power of sale can be exercised; it merely affects who can exercise it. Consequently, [the debtor’s] home would be subject to foreclosure even absent [the alleged fraudulent assignment], and that alleged misconduct cannot be said to have caused [the debtor] injury.”<sup>37</sup>

Under Delaware contract law, a nonparty to a contract generally has no rights relating to it unless he or she is a third-party beneficiary to the contract.<sup>38</sup> In order to qualify as a third-party beneficiary, a party must be an intended, and not an incidental, beneficiary.<sup>39</sup> If the third-party “happens to benefit from the performance of the contract either indirectly or coincidentally, such third person has no rights under the contract.”<sup>40</sup> With regard to the Assignment and Confirmatory Assignment at issue here, the Court finds that Defendants were not

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<sup>36</sup> *Blake v. Bank of America*, 845 F. Supp. 2d 1206 (D. Alabama 2012); *In re Walker*, 466 B.R. 271, 285 (Bankr. E.D. Pa. 2012); *In re Washington*, 469 B.R. 587, 591 (Bankr. W.D. Pa. 2012); *Metcalf v. Deutsche Bank Nat. Trust Co.*, 2012 WL 2399369, at \*5 (D. N.D. Tex. June 26, 2012); *In re Edwards*, 2011 WL 6754073, at \*4 (Bankr. E.D. Wisconsin Dec. 23, 2011); *See Juarez v. U.S. Bank Nat. Ass’n*, 2011 WL 533046, at \*4 (D. Mass. Nov. 4, 2011).

<sup>37</sup> *Dehdashti v. The Bank of New York Mellon, et al.*, 1:12-cv-595-TCB (D. Ga. June 7, 2012).

<sup>38</sup> *Browne v. Robb*, 583 A.2d 949, 954 (Del. 1990); *MetCap Securities, LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at \*7 (Del. Ch. May 16, 2007); *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 434 (Del. Ch. 2007); *Thomas v. Harford Mut. Ins. Co.*, 2003 WL 220511, at \*3 (Del. Super. Jan. 31, 2003); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver Inc.*, 312 A.2d 322, 326 (Del. Super. 1973).

<sup>39</sup> *See Metcap*, 2007 WL 1498989 at \*7.

<sup>40</sup> *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531,534 (Del. Super. 1990)(citing *Institutform of North America v. Chandler*, 534 A.2d 257(Del. Ch. 1987)).

intended beneficiaries of the assignment between Plaintiff and Cardinal and that they failed to show any harm directly resulting from any alleged fraud. In addition, no party to the assignment has challenged the validity of the assignment. In fact, on the date of the mortgage, Romie Bishop signed the Notice of Assignment, which indicated that Plaintiff was the assignee.

Furthermore, notice was provided to Romie Bishop prior to the mortgage that there was a high probability that the mortgage would be assigned. Also, the Servicing Disclosure Statement provided that Romie Bishop could send a “qualified written request” to the servicer in order to receive information regarding corrections to the account and information regarding any dispute. Payment was made from July 1, 2007 until November, 6, 2008; during this time, if Defendants wished to challenge the Assignment, they could have done so through a written request. There was no evidence presented which showed that Defendants availed themselves of this process.

## **B. The Foreclosure**

An action for foreclosure is appropriate “upon breach of the condition of a mortgage of real estate by nonpayment of the mortgage money or nonperformance of the condition stipulated in such mortgage at the time and in the manner therein provided”.<sup>41</sup> Plaintiff has proven that Defendants executed a mortgage on May 4,

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<sup>41</sup> 10 *Del. C.* § 5061(a).

2007 and that Romie Bishop executed a Note along with the mortgage. The mortgage was recorded on May 11, 2007. The mortgage stated that “Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note...”<sup>42</sup> Plaintiff showed, through the testimony of Julia Wood, who reviewed the payment history, that the last payment was received in November 2008, no additional funds were paid, and payment was still owing and due. While Defendants made several allegations that the mortgage was fraudulent, no evidence was presented to support this claim. Based on these facts, the Court finds that Plaintiff has sustained its burden of proof.

### **C. Defense of Payment**

The defenses available in a *scire facias sur* mortgage foreclosure action are limited and only those claims or counterclaims arising under the mortgage may be raised.<sup>43</sup> Delaware courts recognize the defenses of payment, satisfaction or avoidance.<sup>44</sup> “A plea in avoidance must “relate to the mortgage sued upon, i.e., the plea must relate to the validity or illegality of the mortgage documents.”<sup>45</sup> These

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<sup>42</sup> Mortgage, Pl. Ex. 1. at 3.

<sup>43</sup> *CitiMortgage, Inc. v. Kine*, 2011 WL 6000755 (Del. Super. Nov. 1, 2011)(citing *Harmon v. Wilmington Trust Co.*, 663 A.2d 487 (Del. 1995)).

<sup>44</sup> *Wells Fargo Bank, N.A. v. Williford*, 2011 WL 5822630 (Del. Super. Nov. 17, 2011); *First Fed. Sav. & Loan Assn. of Norwalk v. Falls*, 1986 WL 9916 (Del. Super. Sept. 9, 1986) aff'd sub nom. *Christiana Falls, L.P. v. First Fed. Sav. & Loan Ass'n of Norwalk*, 520 A.2d 669 (Del. 1986).

<sup>45</sup> *Id.*

include acts of God, assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, ratification, unjust enrichment and waiver.”<sup>46</sup>

Defendants asserted the defense of payment by stating that a third party paid the mortgage. At trial, no such evidence was presented. Defendants presented evidence that Fannie Mae purchased the mortgage at issue in June 28, 2007. The Court finds that Fannie Mae’s purchase of the mortgage from Plaintiff has no bearing on whether the mortgage was paid.

## **VI. CONCLUSION**

Plaintiff has proved by a preponderance of the evidence that it was servicer and assignee of the mortgage at the time of the foreclosure action. As such, Plaintiff was the proper party to bring the foreclosure action. Further, Plaintiffs have shown that a mortgage existed and that the mortgage was defaulted on. Defendants have also failed to present any evidence to demonstrate that payments were made on the mortgage after November 2008. Defendants have asserted no other valid defenses. Therefore, the Court holds for Plaintiff for the principal sum owed of \$ 294,878.67, along with interest of \$14, 665.87, and interest after July 27, 2009, accruing at the rate of 7.00% per annum, together with Escrow Advances of \$1,167.98 and Accumulated Late Charges of \$865.86, along with a Private

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<sup>46</sup> *Id.*

Mortgage Insurance Premium of \$498.76 and a Delinquent Expense Total of \$135.00, in addition to Servicing fees of \$47.00 and late charges and advances to the date of confirmation together with reasonable attorney's fees and the costs of this action, all to be levied on the premises described in the mortgage.

**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
**Judge Calvin L. Scott, Jr.**