

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

DEUTSCHE BANK NATIONAL	§	
TRUST COMPANY, as trustee for the	§	
registered holders of Morgan Stanley	§	
ABE Capital I Inc., trust 2007-NC#	§	
mortgage pass-through certificates, series	§	
2007-NC3, assignee of Deutsche Bank	§	
Trust Company Americas, f/k/a Bankers	§	
Trust Company, as trustee and custodian	§	
for Morgan Stanley MSAC 2007- NC3,	§	No. 26, 2014
assignee of Mortgage Electronic	§	
Registration Systems, Inc., as nominee for	§	Case Below:
New Century Mortgage Corporation,	§	Superior Court of the
	§	State of Delaware in and
Plaintiff-Below,	§	for New Castle County
Appellant,	§	C.A. No. N11L-03-097-ALR
	§	
v.	§	
	§	
EUGENE MOSS,	§	
	§	
Defendant-Below,	§	
Appellee.	§	

Submitted: June 11, 2014

Decided: June 24, 2014

Before **STRINE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

**ORDER**

This 24th day of June 2014, the Court having considered this matter on the briefs filed by the parties and after oral argument has determined that:

(1) This is an appeal from the Superior Court’s grant of summary judgment for the defendant below and appellee here, Eugene Moss, in an action for foreclosure brought by the plaintiff below and appellant here, Deutsche Bank National Trust Company, as trustee for the registered holders of Morgan Stanley ABE Capital I Inc., trust 2007-NC#

mortgage pass-through certificates, series 2007-NC3 (“Deutsche Bank”). By granting summary judgment, the Superior Court found that there was no dispute of material fact that Deutsche Bank was not the proper owner of the mortgage loan and note that Moss executed in connection with his purchase of his home.<sup>1</sup> The effect of the final judgment would seem to be to allow Moss to keep his home and be released from any obligation to make future mortgage payments to Deutsche Bank, even though there is no dispute that he owes a substantial sum of money to whoever now owns the mortgage loan and note.

(2) On January 10, 2007, Moss executed a note in favor of New Century Mortgage Corporation (“New Century”). On the same day, Moss executed and delivered a mortgage on the property as security for the note.<sup>2</sup> The proceedings in the Superior Court focused on whether, since that time, the mortgage, the note, or both had been transferred to Deutsche Bank validly. Deutsche Bank claims that the mortgage and note had been transferred to it validly, and that Deutsche Bank was entitled to foreclose on the mortgage because Moss failed to make the required payments. Moss, on the other hand, argued that the mortgage and note had not been validly transferred to Deutsche Bank, and that Deutsche Bank was not entitled to foreclose on the mortgage.

(3) The proceedings below were confusing. In Moss’s Answer to Deutsche Bank’s Complaint filed in the Superior Court, Moss embraced the notion that Deutsche Bank was the owner of the mortgage and note, and sought to enforce against Deutsche

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<sup>1</sup> Order at 3 (Dec. 18, 2013) (recognizing that summary judgment may be granted only if there are no material issues of fact) (citing *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979)).

<sup>2</sup> Appendix to Opening Br. at A14-36.

Bank a modification to the loan he entered into in 2009.<sup>3</sup> Moss then changed course, and through counsel, filed a motion for summary judgment. In that motion for summary judgment, Moss contended that there was no material dispute of fact that Deutsche Bank was not, in fact, the owner of the mortgage and the note and that Deutsche Bank, therefore, could not foreclose on the mortgage. Moss raised arguments that cast doubt on the chain of transfers of the mortgage and note from the original lender with whom Moss dealt — New Century Mortgage Corporation (“New Century”) — to Deutsche Bank. In particular, Moss argued that because New Century filed for bankruptcy on April 7, 2007, there was no way that New Century could have transferred the mortgage and note validly on January 17, 2008 — when the first assignment of the mortgage from New Century was dated — because Deutsche Bank had not produced an order of the Bankruptcy Court dated between the time of the bankruptcy filing and the first assignment of the mortgage that would allow such a transfer.

(4) Deutsche Bank then responded in a confusing and unhelpful way that understandably was vexing to the Superior Court. In its response to Moss’s motion for summary judgment, Deutsche Bank argued that it did have authority from the Bankruptcy Court to transfer the mortgage and note, but attached an order of the Bankruptcy Court that was dated after the assignment of the mortgage and note in this case and that did not provide New Century with authority to transfer its assets as Deutsche Bank represented.<sup>4</sup>

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<sup>3</sup> See Appendix to Opening Br. at A51 (Answer) (raising a request that Deutsche Bank honor the April 14, 2009 loan modification under a header titled “new matter”).

<sup>4</sup> Appendix to Opening Br. at A552; *id.* at A569.

Deutsche Bank also argued that Moss did not have standing to challenge the validity of the assignment.<sup>5</sup> After the response was filed, Deutsche Bank hired new counsel.

(5) At oral argument on the motion for summary judgment, the Superior Court expressed its frustration with Deutsche Bank's response, stating:

One of the things that [Moss] complains about is that [Deutsche Bank] has not produced evidence to support its claim that it had authority to transfer assets after New Century sought protection of Chapter 11. [Deutsche Bank's] response to [Moss's] Third Motion for Summary Judgment, at paragraph 4(b) states, "While it is true that plaintiff has not until now produced evidence that New Century had Bankruptcy Court permission to transfer a mortgage after commencement of the bankruptcy proceeding, the New Century Bankruptcy Trust assured [Deutsche Bank's] counsel that this particular loan was actually transferred to the pooling trust prior to the filing of the bankruptcy." Once again, this is a statement of fact that is absolutely unsupported in the record evidence.<sup>6</sup>

But the Superior Court provided Deutsche Bank's new counsel with the opportunity to supplement the record or to make a submission to the Court. Deutsche Bank's counsel made a supplemental submission to the Court, arguing that, as a business debtor in a Chapter 11 Bankruptcy, New Century was permitted to transfer its existing loans and mortgages in the "ordinary course of business."<sup>7</sup>

(6) The Superior Court then entered an order granting Moss's motion for summary judgment. The Superior Court explained that its ruling was based on the fact that Deutsche Bank had not presented record evidence to defeat Moss's claim that Deutsche Bank did not have authority to transfer the asset at the time of first assignment

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<sup>5</sup> Appendix to Opening Br. at A553-54.

<sup>6</sup> Appendix to Opening Br. at A637-39.

<sup>7</sup> Appendix to Opening Br. at A590.

on January 17, 2008.<sup>8</sup> The Superior Court’s order recognized that summary judgment may only be granted where the moving party can show that there is no genuine issue to any material fact and that the moving party is entitled to judgment as a matter of law and recognized that the moving party bears the initial burden of proof.<sup>9</sup> The Superior Court also recognized that, on a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party.<sup>10</sup> But the Superior Court then held that Moss had satisfied his initial burden of proof and that Deutsche Bank had not offered competent evidence to show that a material issue of fact existed.<sup>11</sup>

(7) Although we do not condone the confusing nature of the papers filed by Deutsche Bank below and understand the Superior Court’s frustration, Deutsche Bank was not alone in presenting confusing papers. As indicated, Moss had fundamentally shifted position and premised his affirmative motion for summary judgment on arguments that were more characteristic of what would be contained in a brief trying to defeat a motion by Deutsche Bank for summary judgment. Moss never presented record evidence that, if true, indisputably showed that Deutsche Bank is not the owner of the mortgage and the note. At best, Moss proffered facts that cast doubt on whether Deutsche Bank owned the mortgage and the note, and that doubt is dependent on

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<sup>8</sup> Order at 3 (Dec. 18, 2013).

<sup>9</sup> *Id.* (citing *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979) (“A summary judgment may not be granted under Rule 56 unless there are no material issues of fact . . . and the moving party initially bears the burden of showing that none are present.”) (internal citation omitted)).

<sup>10</sup> *Id.* (citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (“In deciding whether there is a disputed issue for trial, the court must view the evidence in the light most favorable to the non-moving party.”)).

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

assumptions of fact about what happened in the Bankruptcy Court proceeding. Notably, Moss nowhere indicates who he thinks actually owns the mortgage and the note or provides evidence to back up that theory. Rather, it appears that Moss's theory is that New Century somehow kept his loan and that his obligation was extinguished in the Bankruptcy Court proceeding, leaving the debtor-estate with no value for his loan and leaving Moss with a free house.

(8) In response, Deutsche Bank made confusing arguments that were accompanied by record evidence that was more slight than was ideal. Rather than provide record evidence to document each step in the chain of transfer that led to their client's current possession (and claimed ownership) of both the note and the mortgage, two successive sets of counsel for Deutsche Bank made factual assertions without providing appropriate record support. Moss argues that this evidence fell short of that which might be considered necessary to prove that Deutsche Bank was the current owner of the mortgage and note and had the right to foreclose. But that failure is one that would be fatal to Deutsche Bank if it were moving for summary judgment for itself, and would justify the denial of its motion and force Deutsche Bank to face a trial where it would bear the burden of proving its right to foreclose.

(9) That failure does not, however, justify granting Moss's own affirmative motion for summary judgment, because Moss never presented record evidence that, if true, proves that Deutsche Bank is not the owner of the mortgage and note. If, contrary to Moss's assertion, the transfer of his mortgage and note did not escape the eyes of the Bankruptcy Court, whose perception would be aided by a large group of watchful

creditors of New Century, and the assignment of Moss's mortgage and note was valid, then Deutsche Bank would be the proper holder of the note and mortgage. Based solely on the fact that Deutsche Bank never provided an order of the Bankruptcy Court that expressly approved the transfer of the mortgage from New Century, the Superior Court held that Moss had satisfied his burden of proving that no material issue of fact existed and that Deutsche Bank had not defeated Moss's claims that New Century did not have the authority to transfer the mortgage and note while it was in bankruptcy.<sup>12</sup> Put simply, Moss did a sound job of raising factual doubts that Deutsche Bank would have to overcome at trial to prevail. But Moss did not proffer uncontradicted facts that demonstrated that Deutsche Bank did not own the mortgage and note. Notably, Moss never provided firm legal authority — and the Superior Court never made a legal finding — that the mere fact that New Century had filed for Chapter 11 Bankruptcy would prevent it from conducting its ordinary course of business, including transferring mortgages.<sup>13</sup> After all, it is common for Americans to fly on airplanes that are owned by companies that are in Chapter 11 Bankruptcy. And Deutsche Bank presented legal authority to the Superior Court that the mere fact of a Chapter 11 bankruptcy filing would not have prevented New Century from transferring a mortgage or a note. Because the Superior Court had no basis to conclude that the Bankruptcy Court proceeding indisputably prevented New Century from transferring the mortgage and note, summary judgment was improperly awarded to Moss.

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<sup>12</sup> *Id.* at 2-3.

<sup>13</sup> Appendix to Opening Br. at A590-91 (Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment).

(10) Furthermore, Deutsche Bank made other colorable legal arguments below in opposition to Moss’s summary judgment motion that were never considered by the Superior Court. These include arguments that Moss lacked standing to challenge the assignment of the mortgage, and that Deutsche Bank could foreclose on the mortgage regardless of whether the mortgage and note had been validly transferred. The Superior Court entered summary judgment in favor of Moss without considering these arguments, which are not makeweight and have support in case law from other jurisdictions<sup>14</sup> and even the Superior Court itself.<sup>15</sup> Deutsche Bank has asked us to consider these legal arguments and to reverse the Superior Court on legal grounds, but we decline the invitation to address important issues of law that are more properly considered, in the first instance, by the Superior Court. But we conclude that Deutsche Bank was entitled to have these legal arguments addressed before summary judgment was entered against it.

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<sup>14</sup> See, e.g., *In re Perretta*, 2011 WL 6305552, at \*2 (finding that mortgage-debtors who were not parties to the assignment of their mortgage and were not third-party beneficiaries of the assignments lacked standing to challenge the assignments); see also *Livonia Property Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC*, 399 Fed. Appx. 97, 102-03 (Oct. 28, 2010) (holding that, under Michigan Law, a mortgage-debtor ordinarily lacks standing to challenge the validity of assignments to which she is not a party and may only raise a defense that renders the assignment “absolutely invalid or ineffective, or void” — such as the nonassignability of the instrument); *Lizza v. Deutsche Bank National Trust Co.*, 2014 WL 794752, at \*8 (D. Haw. Feb. 27, 2014) (finding, in a case involving the transfer of a New Century mortgage from the bankruptcy estate, that the mortgagor did not have standing to challenge the assignment of the mortgage because, even if the assignment was voidable at the option of the bankruptcy trustee, it was not void as a matter of law).

<sup>15</sup> See *Branch Banking & Trust Co. v. Eid*, 2013 WL 3353846, at \*3-4 (Del. Super. Jun. 13, 2014) (finding that, under Delaware Law, mortgage-debtors lack standing to contest the validity of an assignment of their mortgage) (*citing CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670, at \*4 (Del. Super. Mar. 4, 2013) (explaining that “[u]nder 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” and that where a mortgage-debtor was neither a party to the assignment or a third-party beneficiary, the mortgage-debtor lacks standing to challenge the validity of an assignment of the mortgage)).



(11) In so finding, we again note that Deutsche Bank's confusing approach to litigating the case likely contributed to the Superior Court's failure to address its legal arguments, because the Superior Court, understandably, was focused on addressing Deutsche Bank's continually evolving factual submissions. Nonetheless, Deutsche Bank fairly raised several colorable legal arguments, which if they were determined to have merit, would have served as an independent basis to defeat Moss's summary judgment motion.

NOW, THEREFORE, IT IS HEREBY ORDERED, that the judgment of the Superior Court is REVERSED and REMANDED for further proceedings.

BY THE COURT:

/s/ Leo E. Strine, Jr.

Chief Justice