IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INGRID BERG, Plaintiff, v. eHOME CREDIT CORP., a New York corporation; SAXON MORTGAGE SERVICES INC., Defendants.	)	No. 08 C 05530 Judge Sharon Johnson Coleman Magistrate Judge Nan Nolan

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on plaintiff Ingrid Berg's Motion to Dismiss defendant Saxon Mortgage Services Inc.'s Counterclaim pursuant to Rule 12(b)(1) for lack of standing [46] [49]. For the reasons that follow, the motion is denied.

Background

Plaintiff and her husband, Stanley Berg, purchased a property in Highland Park, Illinois, in 2001. The Bergs financed the purchase of the property with a mortgage originally held by eHome Credit Corporation ("eHome Mortgage"). In 2005, Stanley Berg filed for bankruptcy. Ingrid Berg did not file for bankruptcy. The bankruptcy court ruled that the trustee of Stanley Berg's bankruptcy estate could avoid the eHome Mortgage as to Stanley Berg's half-interest in the property, but it had no jurisdiction over the half-interest owned by Ingrid Berg. The bankruptcy court further ruled that the trustee could sell the property and Ingrid Berg's share of the proceeds would be subject to valid liens, and that the trustee could deposit the proceeds with

a neutral custodian during the adjudication of any liens.

Ingrid Berg filed this lawsuit seeking a declaratory judgment that her interest in the property is not encumbered by the eHome Mortgage. Defendant eHome Credit Corp. has not filed an appearance in this action. Saxon Mortgage Services, Inc. ("Saxon"), who asserts that it is the servicer of the eHome Mortgage for FV-1, Inc. ("FV-1"), was granted leave to intervene as a defendant. FV-1 purports to be the current holder of the eHome Mortgage and note. Saxon filed an answer and counterclaim seeking a declaratory judgment that the eHome Mortgage is the senior lien on the proceeds from the sale of Ingrid Berg's half-interest in the property.

Legal Standard

The present challenge relates to standing and this Court's jurisdiction over the matter. The requirements of standing are: (1) an injury in fact; (2) causation; and (3) redressibility. See, e.g., RK Co. v. See, 622 F. 3d 846, 851 (7th Cir. 2010). When deciding a motion to dismiss the Court accepts well-pleaded allegations of the complaint as true, (Tamayo v. Blagojevich, 526 F. 3d 1074, 1081 (7th Cir. 2008)), and draws all reasonable inferences in favor of the nonmoving party. Pisciotta v. Old Nat. Bancorp, 499 F.3d 629, 633 (7th Cir. 2007). On Rule 12(b)(1) motions, the court may consider material outside the pleadings. See United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2003).

Discussion

Plaintiff moves to dismiss defendant Saxon's counterclaim, asserting that Saxon has no standing to assert the counterclaim because only the entity entitled to enforce the note may bring a complaint to foreclose the mortgage against the mortgagor. See Bayview Loan Servicing v. Nelson, 382 Ill. App. 3d 1184, 1187-88 (2008). Saxon responds that it is an entity entitled to enforce the note because FV-1 is the holder of the

note and the mortgage and FV-1 authorized Saxon, as its servicer, to enforce the note on its behalf.

Here, it is undisputed that the eHome mortgage and note were transferred once by an allonge to Option One Mortgage Corporation ("Option One") on July 16, 2004. Saxon further asserts that Option One then indorsed the note in blank by an allonge, and that FV-1 is in possession of the original mortgage and note with the allonge indorsed in blank.

Saxon attached as exhibits to its response, the original note (Exhibit A, Dkt. # 53-1), the allonge to the promissory note indorsing the note to Option One on July 16, 2004 (Exhibit B, Dkt. # 53-2), the allonge to the note indorsed in blank by Option One (Exhibit C, Dkt. # 53-3), a declaration under penalty of perjury signed by Roger Perlstadt, attorney for Saxon, averring that Saxon has provided the law firm with the original note and indorsements relating to the loan secured by the mortgage on the property at 2205 Kipling Lane in Highland Park, Illinois (Exhibit D, Dkt. # 53-4), and the "Limited Power of Attorney" authorizing Saxon to enforce any of the mortgages/notes that it services on behalf of FV-1 (Exhibit E, Dkt. # 53-5).

Under Illinois law, when an instrument is indorsed in blank it becomes payable to the bearer. 810 ILCS 5/3-205(b) (West 2010). The person in possession of an instrument payable to the bearer is the "holder" of that instrument, 810 ILCS 5/1-201(b)(21)(A) (West 2010), and the "holder"of an instrument is entitled to enforce it. 810 ILCS 5/3-301 (West 2010). Here, the counterclaim alleges that FV-1 is the current holder of the note secured by the eHome Mortgage, and that Saxon has the authority to enforce the note on FV-1's behalf. It alleges that FV-1 obtained the note through various transfers or assignments. The documents attached as exhibits support Saxon's assertions that FV-1 is the holder of the note and that Saxon has the authority to act on FV-1's behalf to enforce the note. Proof of possession is essential for standing to enforce

payment on an instrument. Locks v. North Towne Nat'l Bank, 115 Ill. App. 3d 729, 71 Ill. Dec. 531, 451 N.E.2d 19 (2 Dist. 1983). It is undisputed that the note in Saxon's possession that it presented to the Court is the original. At issue here is the validity of the allonges purporting to indorse the note from eHome Credit Corp to Option One and from Option One to blank payable to bearer.

Plaintiff argues that the allonge presented by Saxon, purporting to be the allonge transferring the note from eHome Credit Corp to Option One is a different allonge than the one presented by eHome in the bankruptcy proceedings. Indeed, the allonge that plaintiff attached to her motion to dismiss that purports to transfer the note from eHome Credit Corp to Option One (Exhibit F, Dkt. # 46-7) appears to be different from the one presented by Saxon. The Court directed Saxon to produce for the Court the original note and the allonges purporting to transfer the note; first from eHome Credit Corp. to Option One and then from Option One to blank. Saxon could provide no explanation for the two different allonges indorsing the note from eHome Credit Corp to Option One. Despite a difference in appearance, the two allonges purport to make the same indorsement and transfer.

Plaintiff further asserts that this Court should adopt a rule that an allonge is not an effective means of indorsement unless there is no space on the note itself to write the indorsement. Plaintiff relies on Brown [Fountain] v. Bookstaver, 141 Ill. 461 (1892), in which the Illinois Supreme Court stated: "Generally, an assignment of a negotiable instrument must be indorsed on the instrument, viz., written on the back of it, that being the meaning of the word >indorsement.' If, however, by reason of the number of indorsements, the back of the instrument is so covered as to make it necessary, 'an extra piece of paper may be tacked or pasted on the instrument, and all future indorsements may be written on the attached paper." Id. at 465.