

CitiMortgage, Inc. v. Bischoff, No. 255-4-09 Rdcv (Cohen, J., Oct. 28, 2009)

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**STATE OF VERMONT
RUTLAND COUNTY**

CITIMORTGAGE, INC.,)	
)	Rutland Superior Court
)	Docket No. 255-4-09 Rdcv
Plaintiff,)	
)	
v.)	
)	
PETER D. BISCHOFF,)	
GRETCHEN M. BISCHOFF,)	
and OCCUPANTS RESIDING at)	
[Redacted],)	
CASTLETON, VERMONT)	
)	
Defendants)	

ENTRY ORDER RE MOTION FOR JUDGMENT ORDER, DECREE OF FORECLOSURE AND ORDER FOR PUBLIC SALE

This matter came on before the Court on plaintiff CitiMortgage, Inc’s proposed Judgment Order, Decree of Foreclosure, and Order for Public Sale, filed September 3, 2009. The Court previously granted plaintiff’s Motion for Default Judgment against the defendant Bischoffs on August 27, 2009. Plaintiff is represented by Joshua B. Lobe, Esq.

In its Amended Complaint, filed June 10, 2009, plaintiff asserts that on February 14, 2003, Peter D. Bischoff and Gretchen M. Bischoff (the “Bischoffs”) purchased certain real property in Castleton, Vermont, and executed a Promissory Note (the “Note”) in favor of Flagstar Bank, FSB (“Flagstar Bank”) in the original principal amount of \$70,000. Said Note is attached to the Complaint. The Note is secured by a Mortgage

Deed dated October 20, 2005, from the Bischoffs to Mortgage Electronic Registration Systems, Inc. (“MERS”), as nominee for Flagstar. This Mortgage Deed was recorded in the Land Records of the Town of Castleton.

Plaintiff further asserts that the Note and Mortgage Deed were assigned from MERS, as nominee for Flagstar Bank, to CitiMortgage, Inc. (“CitiMortgage”) by an instrument dated March 6, 2008 and recorded in the Castleton Land Records on or about March 19, 2008. The plaintiff asserts that the Bischoffs failed to make the payments called for under the subject Note and Mortgage, thereby constituting a breach.

The attached Note is endorsed in blank by Flagstar Bank and appears to be a negotiable instrument. The assignment by MERS, purporting to assign the Mortgage Deed and Note to CitiMortgage, is not attached.

In general, a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. Restatement (Third) of Property, Mortgages § 5.4 cmt. e. If the mortgage obligation is a negotiable note, Uniform Commercial Code § 3-203 is generally understood to make the right of enforcement of the promissory note transferrable only by delivery of the instrument itself to the transferee. *Id.* at cmt. c. Vermont has adopted the Uniform Commercial Code in regards to negotiable instruments. Addressing the enforceability of a negotiable instrument, 9A V.S.A. § 3-301 sets forth:

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

To be a “holder” of an instrument, 9A V.S.A. § 3-301(i), one must possess the note *and* the note must be payable to the person in possession of the note, or to bearer. 9A V.S.A. § 1-201(b)(21)(A) (emphasis added). Here, the “holder” option is available to plaintiff because the note has been indorsed in blank by Flagstar Bank. See *Id.*; 9A V.S.A. § 3-205(b) (blank indorsement becomes payable to bearer). Therefore, plaintiff may enforce the note.

Regarding the mortgage deed, “[a] transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.” Restatement (Third) of Property, Mortgages § 5.4(a). The objective of this rule is to keep the obligation and the mortgage in the same hands unless the parties wish to separate them. *Id.* at cmt. b. Here, the parties split the Note and Mortgage Deed; Flagstar Bank retained the Note, which it later indorsed to CitiMortgage, while MERS held the mortgage deed, becoming the mortgagee of record.

Separation of the obligation from the mortgage results in a practical loss of efficacy of the mortgage. Restatement (Third) of Property, Mortgages § 5.4 cmt. a. When the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter unsecured. *Id.* The result confers an unwarranted windfall on the mortgagor. *Id.* Here, the Note is enforceable by CitiMortgage, but the assignment of the Mortgage Deed from MERS to CitiMortgage has not been filed. CitiMortgage must prove that MERS assigned it the Mortgage Deed; thereby reuniting the obligation and mortgage deed that secures it in the same hands.

Order

PLAINTIFF shall have 30 days to provide the assignment of the Mortgage Deed,

otherwise the Court shall vacate the Default Judgment issued on August 27, 2009.

Dated at Rutland, Vermont this _____ day of _____, 2009.

Hon. William Cohen
Superior Court Judge