

Wells Fargo Bank, N.A. v. Cavacas, No. 429-6-09 Rdcv (Cohen, J., Oct. 28, 2009)

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**STATE OF VERMONT
RUTLAND COUNTY**

WELLS FARGO BANK, N.A., as TRUSTEE)	Rutland Superior Court
for OPTION ONE MORTGAGE LOAN)	Docket No. 429-6-09 Rdcv
TRUST 2007-CP1 ASSET-BACKED)	
CERTIFICATES, SERIES 2007-CP1)	
)	
Plaintiff,)	
)	
v.)	
)	
HURLEY R. CAVACAS,)	
TERRY DION CAVACAS,)	
CREDIT ACCEPTANCE CORPORATION,)	
and OCCUPANTS RESIDING at)	
[Redacted], RUTLAND, 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 Wells Fargo Bank, N.A.’s proposed Judgment Order, Decree of Foreclosure, and Order for Public Sale, filed September 8, 2009. The Court previously granted plaintiff’s Motion for Default Judgment and/or Summary Judgment against Hurley and Terry Cavacas on June 23, 2009. Plaintiff Wells Fargo Bank, N.A. (“Wells Fargo”) is represented by Joshua B. Lobe, Esq. Defendants Hurley and Terry Cavacas (the “Cavacases”) appear *pro se*.

Background

In its uncontested Statement of Material Facts, plaintiff Wells Fargo set forth the

following:

On October 23, the Cavacases purchased certain real property in Rutland, Vermont. Terry Cavacas executed a Promissory Note (the “Note”) in favor of Option One Mortgage Corporation (“Option One”) in the original principal amount of \$170,000. Said Note is attached to the Complaint. The Note was secured by a Mortgage Deed dated October 23, 2006, from Hurley and Terry Cavacas to Option One, and recorded in the Rutland City land records on November 1, 2006.

The Note and Mortgage Deed were assigned from Option One to Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2007-CP1 Asset-Backed Certificates, Series 2007-CP1 by an instrument dated July 19, 2007, and recorded in the Rutland City Land Records on July 23, 2007. The Cavacases failed to make the payments called for under the subject Note and Mortgage.

The attached Note appears to be a negotiable instrument. It lists “Option One Mortgage Corporation” as the payee. The Note is not endorsed, either specifically to Wells Fargo Bank, N.A., or in blank. The assignment by Option One, purporting to assign the Mortgage Deed and Note to Well Fargo Bank, N.A., as trustee, is not attached.

Discussion

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 not available to plaintiff because the note is not payable to plaintiff, nor has it been indorsed, either specifically to plaintiff or in blank. See *Id.*; 9A V.S.A. § 3-205(b) (blank indorsement becomes payable to bearer). Also, 9A V.S.A. § 3-301(iii) is not applicable, as it does not appear that plaintiff is entitled to enforce the instrument pursuant to either section 3-309 or 3-418(d).

A “nonholder in possession of the instrument who has the rights of a holder,” 9A V.S.A. § 3-301(ii), includes persons who acquire physical possession of an unindorsed note. See 9A V.S.A. 3-203(a),(b). As the statutory comments explain, however, such nonholders must “prove the transaction” by which they acquired the note:

If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. *Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption*

under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.

Id. cmt. 2 (emphasis added). Plaintiff has provided no proof to “prove the transaction.”

Because the Note is not endorsed, nor is the assignment purporting to transfer the Note and Mortgage Deed from Option One to plaintiff Wells Fargo attached, the Court will not grant the proposed Judgment Order at this time.

ORDER

PLAINTIFF shall have 30 days to provide proof that it may enforce the obligation pursuant to 9A V.S.A. § 3-301. Otherwise, the Court shall vacate the Order granting Default Judgment and/or Summary Judgment issued on July 29, 2009.

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

Hon. William Cohen
Superior Court Judge