Household Fin. Corp. II v. Perkins, No. 972-12-08 Rdcv (Cohen, J., Oct. 28, 2009)

STATE OF VERMONT
RUTLAND COUNTY

HOUSEHOLD FINANCE CORPORATION II, d/b/a HSBC MORTGAGE SERVICES,	)	**Rutland Superior Court Docket No. 972-12-08 Rdcv**
Plaintiff,	)	
v.	)	
TONI L. PERKINS	)	
Defendants	)	

ENTRY ORDER RE MOTION TO SHORTEN REDEMPTION PERIOD AND PROPOSED JUDGMENT ORDER

This matter came on before the Court on plaintiff Household Finance Corporation II's Motion to Shorten Redemption Period and proposed Judgment Order and Decree of Foreclosure, filed September 10, 2009. The Court previously granted plaintiff's Motion for Default Judgment, Motion for Attorney Fees and Costs, and Motion for Judgment for Foreclosure by Sale, on August 27, 2009.

Plaintiff Household Finance Corporation II ("Household Finance") is represented by Carrie Folsom, Esq. Defendant Toni Perkins is not represented by counsel.

Background

In its Complaint, filed December 29, 2008, plaintiff asserts that on September 18, 2006, Toni Perkins purchased certain real property in the Town of Mount Holly, Vermont, and executed a Promissory Note (the "Note") in favor of Accredited Home

Lenders, Inc. ("Accredited Home Lenders"), in the original principal amount of $199,000.00. Said Note is attached to the Complaint. The Note was secured by a Mortgage Deed dated September 18, 2006, from Toni Perkins to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Accredited Home Lenders. This Mortgage Deed was recorded in the Land Records of the Town of Mount Holly.

Plaintiff further asserts that the Note and Mortgage Deed were assigned from MERS, as nominee for Accredited Home Lenders, to plaintiff Household Finance, by an instrument dated December 9, 2008. Toni Perkins failed to make the payments called for under the Note and Mortgage.

The attached Note is not payable to Household Finance. Further, the attached Note is not endorsed by Accredited Home Lenders, either to Household Finance or to bearer. The attached Note appears to be a negotiable instrument.

The Court now raises, *sua sponte*, the issue of plaintiff Household Finance's standing to bring the instant foreclosure action.

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. This is because, "[w]here a promissory note is secured by a mortgage, the mortgage is an incident to the note." *Huntington v. McCarty*, 174 Vt. 69, 70 (2002) (citing *Island Pond Nat'l Bank v. Lacroix,* 104 Vt. 282, 294-95 (1932)); see also *Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 275 (1872) (stating "[a]ll the authorities agree that the debt is the principal thing and the mortgage an accessory."). The Court finds the following analogy provided by the late Professor Chester Smith of the University of Arizona College of Law

to be particularly apt – "The note is the cow and the mortgage the tail. The cow can survive without the tail, but the tail cannot survive without the cow." Restatement (Third) of Property, Mortgages § 5.4, Reporters' Notes (quoting *Best Fertilizers of Arizona, Inc. v. Burns*, 571 P.2d 675, 676 (Ariz. Ct. App. 1977) (reversed on other grounds, 570 P.2d 179 (Ariz. 1977))).

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. Restatement (Third) of Property, Mortgages § 5.4 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 posses 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 endorsed, 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).

The attached assignment from MERS, as nominee for Accredited Home Lenders, purporting to transfer the Mortgage Deed and the Note to plaintiff, does not "prove the transaction" by which plaintiff acquired possession of the Note because plaintiff has not established that MERS's has any authority to transfer the Note at issue. See *In re Wilhem*, 407 B.R. 392, 404 (Bankr. D. Idaho 2009). Here, as in *Wilhem*, the Mortgage Deed names MERS "solely as nominee" for Accredited Home Lenders, but does not, either expressly or by implication authorize MERS to transfer the Note at issue. See *Id*.; see also *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. Ct. App. 2009) (finding that MERS could not transfer promissory note where there was no evidence that MERS held the note or that the lender gave MERS authority to transfer the

note). The word "nominee" is defined nowhere in the mortgage document, and the functional relationship between MERS and Accredited Home Lenders is likewise not defined. See *Landmark National Bank v. Kesler*, 216 P.3d 158, 165 (Kan. 2009) (analyzing similar language in mortgage document).

Black's Law Dictionary defines the term "nominee" as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th ed.2004). Indeed, the mortgage deed itself states that "MERS holds only legal title to the interests granted by Borrower in this security instrument."

MERS itself argued before the Nebraska Supreme Court that as a "nominee" it merely "immobilizes the mortgage lien while transfers of the promissory notes and servicing right continue to occur." *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784, 787 (Neb. 2005) (quoting brief for MERS). The Nebraska Supreme Court found the role of MERS to be very limited: "MERS serves as legal title holder in a nominee capacity, permitting lenders to sell their interests in the notes and servicing rights to investors without recording each transaction" *Id*. at 788. This finding suggests that MERS, in its role as "nominee" and legal title holder, is necessarily detached from the promissory note. See also Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 818 fn.2 (stating "[f]or mortgages sold into the secondary market, legal title and equitable ownership are commonly severed. Mortgage servicers retain bare legal title to facilitate mortgage servicing; equitable interests are transferred to the investor.").

Therefore, MERS's relationship to the transferee (Household Finance) is "akin to that of a straw man," see *Kesler*, 216 P.3d at 166, whose job is limited to transfer of the mortgage deed.

This view comports with the Black's Law definition of "nominee." MERS has authority to act "in a very limited way" - it "holds bare legal title for the benefit of others." Black's Law Dictionary 1076 (8th ed.2004). There is no evidence that MERS's authority extends to the transfer of the promissory note or that MERS acts as an agent or power-of-attorney for the lender. Rather than define MERS as an "agent," the Mortgage Deed specifically defines MERS as the unique legal term "nominee," thereby designating MERS to act "in a very limited way." See Black's Law Dictionary 1076 (8th ed. 2004). Without any further evidence as to MERS's authority as a "nominee," this Court finds that MERS did not have the authority to transfer the promissory note.

Thus, plaintiff has provided no evidence that it is entitled to enforce the instrument pursuant to either 9A V.S.A. § 3-301(i) or (ii). The Court cannot allow the assignee of only a security interest to enforce the mortgage deed, as this could expose the obligor to a double liability; a "person entitled to enforce," 9A V.S.A. § 3-301, could later rightly seek to enforce the unsecured obligation.

Furthermore, since this is a matter involving title to property, the Court is obligated to ensure that the plaintiff has standing to bring the foreclosure action. Failure by a plaintiff mortgagee to show that it has standing to bring a foreclosure action could expose borrowers to double liability and create title issues for future unsuspecting purchase of land.

ORDER

PLAINTIFF shall have 30 days to show that it is entitled to enforce the Promissory Note pursuant to 9A V.S.A. § 3-301. Otherwise, the Court shall dismiss PLAINTIFF'S foreclose action for lack of standing, thereby vacating all prior Orders issued by the Court.

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

_____
Hon. William Cohen
Superior Court Judge