**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 4, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP139** **Cir. Ct. No. 2011CV2768**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A. AS SUCCESSOR TO LASALLE BANK, N.A. AS TRUSTEE FOR THE MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATE SERIES 2007-3,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LORI A. HERMES,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed; motion denied*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Lori Hermes, pro se, appeals a summary judgment of foreclosure. Hermes argues that Bank of America, N.A., as servicer for U.S.

Bank, National Association, lacked standing because the note was not properly assigned to U.S. Bank. We reject Hermes's argument, and affirm.

## BACKGROUND

¶2 Hermes executed a note and a mortgage with First Franklin Mortgage in April 2007. The mortgage identified Mortgage Electronic Registration System (MERS) as the nominee for First Franklin. After Hermes ceased payments on the note, Bank of America filed this foreclosure action in December 2011. Appended to the complaint was a copy of the note, which was endorsed in blank by First Franklin. Also attached was an October 2010 assignment of mortgage from MERS / First Franklin to U.S. Bank.

¶3 Bank of America moved for summary judgment, supported by an affidavit from assistant vice president Stefanie Buchanan. Buchanan averred she was an officer of Bank of America, "which is plaintiff's servicing agent for the subject loan ('the Loan') … [and] maintains records for the Loan." Further, she stated:

> As part of my job responsibilities for [Bank of America], I am familiar with the type of records maintained … in connection with the Loan. … The information in this affidavit is taken from [Bank of America's] business records. I have personal knowledge of [Bank of America's] procedures for creating these records. … Bank of America … is the loan servicer which collects and tracks payments, distributes collections to the trustee and pursues legal action when necessary. … [U.S. Bank] is the holder of the original note ….

Hermes responded and moved to dismiss, asserting Bank of America lacked standing and the note was governed by WIS. STAT. ch. 409. The circuit court granted Bank of America's motion and denied Hermes's. Hermes now appeals.

## DISCUSSION

¶4 Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[1] We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. First, "[w]e examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. If they do, then we examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial." ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503 (citations omitted).

¶5 Hermes primarily argues Bank of America failed to demonstrate U.S. Bank was the proper note holder because the record contains no chain-of-custody or other evidence demonstrating the note had been assigned to U.S. Bank. This argument is premised on Hermes's assertion that the note is a security instrument governed by WIS. STAT. ch. 409. However, in her reply brief, Hermes explains she did not understand that the note and mortgage are two separate documents, and she concedes the note is a negotiable instrument governed by WIS. STAT. ch. 403.

¶6 Nonetheless, Hermes maintains, "There is no evidence on the record in … this case to support Respondent's statements that US Bank has the original Note or that it was assigned to them." She then argues that, because the mortgage

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

is a security instrument under WIS. STAT. ch. 409, the *note* must follow the requirements for an assignment under that chapter. This argument is not supported by any citation of law, and, frankly, does not make sense in light of Hermes's recognition that the note is a negotiable instrument governed by WIS. STAT. ch. 403. We therefore reject the argument. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we may reject argument that is undeveloped or lacks citation to legal authority). In any event, a negotiable instrument need not be assigned in order to transfer ownership. *See* WIS. STAT. § 403.201(2) ("If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.").

¶7 Hermes also disputes whether U.S. Bank is the holder of (i.e., possesses) the original note.[2] That issue is resolved by ***PNC Bank, N.A. v. Bierbrauer***, 2013 WI App 11, 346 Wis. 2d 1, 827 N.W.2d 124 (Ct. App. 2012). Like here, in ***PNC Bank*** an officer of the servicing agent averred that the servicer maintained the loan records and that, based on the officer's personal inspection of those records, the plaintiff bank was the current holder of the note. *See* ***id.***, ¶¶3, 10. We held those facts established a prima facie case the bank was the note holder, which, in turn, established the right to enforce the note. ***Id.***, ¶10 (citing WIS. STAT. § 403.301). Here, Hermes directs us to no evidence contradicting the facts underlying Bank of America's prima facie case that U.S. Bank is the holder of the original note. Accordingly, Bank of America is entitled to enforce the note.

[2] "'Holder' means any of the following: 1. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." WIS. STAT. § 401.201(2)(km)1. Because the note here was endorsed in blank, it was payable to the bearer. *See* WIS. STAT. § 403.109(3).

¶8 Hermes also appears to raise an issue concerning the assignment of the mortgage, asserting that "MERS cannot transfer the mortgage to anyone until that party provides proof of assignment of the Note." As noted above, unlike a mortgage, a note is not transferred by assignment because it is a negotiable instrument. Moreover, not only is there a recorded assignment of the mortgage in the record, but the mortgage would also follow any transfer of the note under the principle of equitable assignment. *See* ***Dow Family, LLC v. PHH Mortg. Corp.***, No. 2013AP221, slip op. ¶¶26, 39 (WI App Aug. 6, 2013) (recommended for publication) (citing WIS. STAT. § 409.203(7)).

¶9 Finally, we deny Hermes's motion for remand. Following briefing, Hermes moved to remand this case to the circuit court so she could present a new argument why Bank of America lacked standing to foreclose. Attached to her motion was a June 25, 2013 letter informing her that the servicing of her loan had been transferred from Bank of America to Nationstar Mortgage. Such a transfer, occurring after the summary judgment of foreclosure, can have no effect on the validity of the summary judgment.[3]

*By the Court.*—Judgment affirmed; motion denied.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] This appeal was originally captioned with Bank of America identified as the plaintiff, as servicer for U.S. Bank. Following Hermes's remand motion concerning a new loan servicer, we granted Bank of America's substitution motion and removed the servicer from the caption.