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Case Number 55,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EUGENE MOSS,	:	
	:	C.A. 55,2016
APPELLANT/DEFENDANT BELOW,	:	
	:	
V.	:	Case Below: Superior Court
	:	New Castle County
Deutsche Bank National Trust	:	C.A. No.: N11L-03-097 ALR
Company,	:	
	:	
APPELLEE/PLAINTIFF BELOW,	:	
	:	

AMENDED APPELLANT/DEFENDANT BELOW REPLY BRIEF

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NATURE OF THE PROCEEDINGS

Appellant herein ("Moss") repeats and incorporates the Nature of Proceedings as stated in Moss' Opening Brief.

Appellee in its Answering Brief incorrectly states that "Moss does not appeal the Superior Court's entry of judgment against him and in favor of Deutsche on the Counterclaim." (Answering Brief, P.3) As evidence by both the Notice of Appeal to this Court and the Opening Brief, Moss has appealed the decision of the Superior Court in its entirety. Under Moss' argument, the Note and Mortgage are inseparable.

In particular, the Notice of Appeal filed with this Court specifically stated:

"This appeal is of the Memorandum Opinion of the Honorable Andrea L. Rocanelli, granting Summary Judgment to Appellee/Plaintiff Below and Denying Summary Judgment to the Appellant/Defendant Below, thereby granting judgment in favor of Appellee/Plaintiff Below, as dated January 26, 2016."

SUMMARY OF ARGUMENT

FIRST ARGUMENT:

The U.S. Supreme Court, this Honorable Court, and learned scholars all agree that the obligations under a promissory note and the security interest of a mortgage are inseparable. As stated by Richard Powell, Esq., in *Powell on Real Property*, the holder of a mortgage who does not hold rights in the underlying obligation simply holds "a worthless piece of paper." It is this standing that Moss challenged in the Superior Court and which he continues to challenge here. The Superior Court misinterpreted Moss's challenge to Plaintiff's standing and incorrectly held that Moss lacked standing to challenge the assignments of mortgage.

Although common practice for lenders is to separate the personal obligation from the security from the beginning of the loan, the two must be re-connected in a civil action in order to establish standing to foreclose. Were this not true, a borrower would be subjected to multiple liability from the same transaction.

Deutsche Bank's Answering Brief does not address the legal requirement of standing but instead argues factually that it is the "holder" of the Note [addressed below] and, in Deutsche Bank's mind, "submitted sufficient evidence to establish [standing]". A review of the Superior Court decision, however, clearly indicates

the Superior Court did not address the factual evidence regarding entitlement to standing as holder of the Note, but merely relied on the recorded mortgage and its assignments. Because the Superior Court's decision was in the context of a summary judgment motion, there are clearly issues of material fact in dispute that should have precluded summary judgment.

SECOND ARGUMENT:

The Superior Court incorrectly asserted the doctrine of judicial estoppel although the Court had not issued any rulings based on Moss's earlier inconsistent position. This was conceded by Deutsche Bank in its Answering Brief. In his Opening Brief, Moss argued that judicial estoppel was not appropriate since the Court had not relied on Moss' alleged inconsistent position in any decision.

REBUTTAL OF FACTS

Moss restates and incorporates the facts as stated in the Opening Brief.

In its Answering Brief, P. 7, Deutsche Bank states that Moss has made no payment since September 2009. In his deposition, Moss explained that the default was not by intention but caused by confusion over ownership of the obligation. From his deposition, Moss stated:

"Q: When was the last time you made a payment on the Mortgage?

A. I believe it was September or August maybe of 2009. That was when all of the confusion started with when I received a phone call from Ocwen or whatever, someone from Ocwen.

Q. And why did you stop paying?

A. I didn't refuse to pay. They refused to accept the amount. . . .

Q. Have you put aside on a monthly basis since August or September 2009 the amount of money you believe is due . . . ?

A. Well, I had $100,000 sitting in an account which I had to wind up using because of Ocwen trashing my credit report.

Moss Deposition PP. 38 – 39 (B161)

Reviewing the multiple assignments, the confusion is understandable. Deutsche Bank concedes that New Century's loan servicing business was approved

by the Bankruptcy Court on April 23, 2007. (Answering Brief, P. 7). According to the First Assignment (B051), dated January 17, 2008, MERS assigned its interest in the mortgage to Duetsche Bank's servicer, Saxon Mortgage Services. In 2009, Moss was contacted by Ocwen to discuss his alleged default. Nowhere in the record is there any evidence that Ocwen was involved in servicing the loan until 2010 when the Second Assignment was assigned by Ocwen to Ocwen. No documents exist in the record giving Moss notice of the transfer of the loan.

REBUTTAL OF ARGUMENT ON THE MERITS

In large part, Deutsche Bank's Answering Brief takes a position that the Court should ignore the issue of standing. In its opening paragraph to the Argument (Answering Brief P. 13), Deutsche Bank does not answer with facts and law in support of its standing, but with reliance on the bare public record only. In citing the case of *JPMorgan Chase Bank v. Hopkins,* 2013 Del. Super. LEXIS 401 (Del. Super. Ct Sept. 12, 2013), Deutsche Bank takes the same old position that the mortgage assignments are valid and there has been a default of mortgage. In doing so, Deutsche Bank ignores the available defenses to a mortgage foreclosure action and the requirement of standing

. The *JPMorgan* discussion opens with the following pronouncement:

" Delaware courts recognize only the defenses of payment, satisfaction, or a plea in avoidance against a scire facias action. A plea in avoidance must "relate to the mortgage sued upon, i.e., the plea must relate to the validity or illegality of the mortgage documents. 'Traditionally recognized avoidance defenses include: "acts of God, assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, ratification, unjust enrichment and waiver.' "*JPMorgan Chase Bank v. Hopkins*, 2013 Del. Super. LEXIS 401, *4-5 (Del. Super. Ct. Sept. 12, 2013).

The list of defenses is not exhaustive although Moss has raised issues of assignment, fraud, and most importantly, standing. Although not enumerated in *JPMorgan Chase* as a defense, standing is always available to any defendant. As indicated by this Court before, standing is jurisdictional in nature and the party

whose standing is challenged bears the burden of proving standing. *Dover Historical Soc'y v. City of Dover Planning Comm'n,* 838 A.2d 1103 (Del. 2003). Throughout this litigation Moss has raised claims of fraud against Deutsche Bank. Common sense says that Plaintiff should defend the allegations and come forward with proof of its standing. Rather Deutsche Bank argues to the Court that it should ignore Deutsche Bank's standing and rely simply on the confusing public record.

Deutsche Bank in its Answering Brief has chosen to address standing from a factual basis, based solely on the mortgage assignments, rather than a legal basis using the facts to establish standing. Deutsche Bank has provided no legal support, nor even suggested, that *Carpenter v. Longan*, 83 U.S. 271, 271 (U.S. 1873) nor *Iowa-Wisconsin Bridge Co. v. Phoenix Finance Corp.*, 25 A.2d 383 (Del. 1942) are not good law. Those cases from both the United States Supreme Court and the Delaware Supreme Court stand for the proposition that a mortgage and its underlying obligation are inseparable.

1. The Extent of Moss' Default is Irrelevant

Interestingly, Deutsche Bank's Answering Brief's argument opens with a statement that "Moss has been in default for over six years." It makes no difference under Deutsche Bank's argument whether the default has been for thirty (30) days or six (6) years. Even in this Court on the first appeal, the Justices

recognized that Moss owes a substantial sum of money "to **whoever now owns the mortgage loan and note.**" *Deutsche Bank Nat'l Trust Co. v. Moss*, 99 A.2d 226 (Del. 2014) [Emphasis added herein]. In the prior appeal this Court recognized the questionable standing of Deutsche Bank. Factually, Moss explained in his deposition that it was not his refusal to pay the mortgage, but his confusion over how much and to whom to pay it. That confusion was based on the same issues we discuss here today. Who owns the Note?

Deutsche Bank concludes its first argument with the statement that "Deutsche Bank needs only show that it has a right to payment under the Mortgage." (Answering Brief P. 14). That is a correct statement that Deutsche Bank does need to show it has "a right to payment" – that right of course comes from the promissory note, not from the mortgage. No attempt is made by Deutsche Bank to explain how it has a right to payment under the mortgage if it lacks the standing to enforce the obligation created in the Note. Deutsche Bank ignores the simple fact that any right to receive payment is based on the obligation created in the Promissory Note. As stated by Professor Powell, the holder of a mortgage without the underlying obligation is in possession of a "worthless piece of paper." *4 Powell on Real Property,* §37.27(2).

2. Deutsche Bank is not the "holder" of the Promissory Note and as a result has no right to enforce the Mortgage

In the first appeal, this Court stated that Moss owes a debt to "**whoever now owns** the mortgage loan and note." *Deutsche Bank Nat'l Trust Co. v. Moss*, 99 A.2d 226 (Del. 2014) [Emphasis added herein]. In the Answering Brief Deutsche Bank is attempting to change the term "owns", used by this Court, to "holder". In fact, Deutsche Bank makes no effort in the Answering Brief to prove ownership of the note. Instead it relies on bare possession. The reason for the change in terminology is obvious – Deutsche Bank cannot, and has not, proved its ownership of the Note in order to establish standing.

Throughout the Answering Brief, Deutsche Bank uses the term "holder" in order to establish its standing. In particular, Deutsche Bank relies on the provisions of 6 Del. C. §3-301which states that a "Person entitled to enforce" an instrument means (i) the holder of the instrument . . . ." 6 Del. C. §3-301(i). What Deutsche Bank ignores is the fact that the word "holder" is a defined term. "Holder means the person in possession of a negotiable instrument that is payable **to bearer** or to an identified person that is the person in possession." 6 Del. C. §1-201 (21).

Deutsche Bank is not the "Holder". A review of the Promissory Note demonstrates that it is not a "bearer" document. [See A0000078 – A0000081] In fact, it identifies only New Century Mortgage Corporation as the "Lender" and does not use the term "bearer" in the document. (See A000078 – A000081). Deutsche Bank although it may be in mere possession of the Note, has not, and cannot, satisfy the other requirements to become a "Holder" as required by 6 Del.C. §1-201(21).

Deutsche Bank relies on two (2) Superior Court cases to provide support for its position that ownership of the Note is irrelevant to the foreclosure. However, neither case is on point. *HSBC Mortgage Corporation v. Bendfeldt*, 2014 Del. Super. LEXIS 44 (Del. Super. 2014) does not address standing. The lender and foreclosing party in *Bendfeldt* are the same therefore satisfying the definition of "holder" as defined in 6 Del.C. §1-201(21). In *Davis v. 913 North Mkt. St. Pshp.*, 1996 Del. Super. LEXIS 579 (Del. Super. Ct. Dec. 12, 1996) the Superior Court was faced with a defense of set-off and factual issues involving the substitution of promissory notes. In any event, in *Davis*, the lender and the note "holder" remained the same thereby satisfying the statutory definition of "holder."

Deutsche Bank's failure to address the inseparability of the note and mortgage is significant. In fact, Deutsche Bank's reference to 6 Del. C. §3-301

weighs in favor of Moss. If the note and mortgage are inseparable, then it only stands to follow that the "holder" of the note is the only party with standing to enforce the mortgage. Deutsche Bank's standing as "holder" of the note has been the factual question in this case since its beginning.

Deutsche Bank next claims that challenges to the authenticity of the Note are unsubstantiated. Yet one only need look at the docket of this case, and prior proceedings, to understand that Deutsche Bank has been less than cooperative in answering discovery requests. Deutsche Bank, in its Answering Brief, takes the position that the Allonge in question was not available in the prior appeal or underlying summary judgment motion. That is simply another incorrect statement by Deutsche Bank.

The Allonge at issue was purportedly created on February 8, 2012. (B219) Even as late as November 2013, Deutsche Bank's counsel was permitted to supplement briefing on Moss' first summary judgment motion. Moss' motion was granted in December 2013 and the First Appeal followed. Deutsche Bank, in an apparent continuation to avoid explaining the conflicting positions it has advanced, takes a position that the Allonge did not exist when Moss' summary judgment motion was granted. The record indicates otherwise. If it was in fact signed in February 2012, why was it not produced?

The fact still remains that Deutsche Bank represented to this Supreme Court that Deutsche Bank's possession of the Promissory Note came through a blank endorsement while all along apparently holding an Allonge in its file. Deutsche Bank has as of yet failed to explain the problem with its own documentation. Deutsche Bank has further failed to explain to the Superior Court or this Court why this valuable document was withheld despite the continuing obligation to supplement discovery responses. Moreover, Deutsche Bank has failed to prove its standing despite having the burden of proof.

Even today, in the Second Appeal, in Deutsche Bank's Answering Brief, ownership of the promissory note remains a mystery. Deutsche Bank in its Answering Brief establishes the bankruptcy history of New Century Mortgage. On April 23, 2007 the Bankruptcy Court entered an order approving the sale of New Century's loans to Carrington Mortgage. (Answering Brief P. 7; A00040-00034). Notwithstanding the Bankruptcy Court Order from 2007, the 2012 Allonge is written as if New Century retained ownership of the promissory note in 2012. If the sale was approved and final to Carrington Mortgage in 2007, it does not follow that New Century continued to hold rights in the promissory note until 2012 when it was allegedly transferred to Deutsche Bank. Since early in discovery in the Superior Court, the Appellee has played "hide the ball" with critical

documents. It started with several motions to compel discovery in Superior Court. It continued into this Court on the First Appeal when Deutsche Bank based its case on an endorsement in blank and apparently kept the Allonge in its back pocket. It continued into the remand to the Superior Court where Deutsche Bank produced an Allonge allegedly transferring rights in the promissory note five (5) years after the rights were transferred to Carrington Mortgage. With this level of deceit, there can be no doubt why Moss has challenged standing and Deutsche Bank's rights to receive payment.

II. Moss did not make any Judicial Admissions but made Evidtiary Admissions which were later withdrawn.

Deutsche Bank in its Answering Brief does not attempt to defend the Superior Court's finding of judicial estoppel. Instead, Deutsche Bank turns to the position that Moss' earlier recognition of the Mortgage Modification Agreement constitutes a "judicial admission."

The law recognizes both "judicial admissions" and "evidentiary admissions". Judicial admissions, as distinguished from evidentiary admissions, are traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court. A tribunal may, however, in the exercise

of its discretion, relieve a party from the conclusiveness of its judicial admissions. *Merritt v. UPS,* 956 A.2d 1196, 1197 (Del. 2008).

At the time of filing the Answer in this case, Moss was clearly of the impression that he had entered into a mortgage modification agreement with the lender. But as discovery went forward, Moss discovered more conflicting documents. The 2009 Loan Modification Agreement upon which Deutsche Bank relies is dated June 3, 2009. (B255). It is signed by a representative from Mortgage Electronic Registration Services, Inc. (MERS), the original mortgage servicer. However, in January 2008, MERS, as nominee for New Century Mortgage, had already transferred its rights in the mortgage to Deutsche Bank. There is no record of MERS reacquisition of the mortgage. (B245) In fact, the record indicates that as of April 2010, servicing had been transferred to Ocwen Loan Servicing. (B247-B248) The factual record, therefore, shows MERS was mysteriously involved in a mortgage modification after it had transferred its rights in that mortgage.

After discovery, Moss no longer advanced his belief that he had entered into a valid mortgage modification. Moss, at the time acting *pro se,* never moved to withdraw the counterclaim and it has merely sat idle in this litigation. Unlike most foreclosure actions, this foreclosure has a five (5) year history in the Court.

Earlier in this litigation it would appear that Moss was making a judicial admission. However, that argument was not advanced after Deutsche Bank's standing came into question.

CONCLUSION

Case law from the Superior Court, as cited herein, clearly holds that Moss has no right to challenge the assignment of the mortgage. Moss, the law says, is not a party to the assignment contract and not an intended beneficiary.

Throughout this litigation Moss has objected to the foreclosure on Deutsche Bank's failure to prove standing. Deutsche Bank has not pointed to any authority that says the Courts of this State do not require standing in a foreclosure action.

For these reasons, and all reasons as stated in Moss' Opening Brief, Moss prays this Court will reverse the judgment of the Superior Court and remand this matter back to the Superior Court and require Deutsche prove its standing to foreclose as a result of its ownership of the underlying obligation.

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