

MORTGAGE ASSIGNMENTS, MORTGAGE SERVICERS AND SECURITIZED TRUSTS IN BANKRUPTCY CASES

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In 2010, the concept of “foreclosure fraud” emerged in case law. Foreclosure fraud differed from mortgage fraud in that foreclosure fraud referred to fraud by mortgage companies, mortgage servicing companies, and banks servicing as trustees for securitized trusts, where mortgage fraud most often referred to fraudulent acts by borrowers, and brokers.

Several cases in the first week of 2011 make it clear that fraud by mortgage servicers and securitized trusts, in particular, is now one of the most important considerations in the defense of foreclosures.

In *In re Szumowski*, Case No. 10-12431 (REL), USBC, Northern District of New York, Tracey Hope Davis, the Bankruptcy Trustee for Region 2, submitted a response to the debtor’s objections to the proof of claim filed by BAC Home Loans Servicing, LPⁱ on January 6, 2011. According to the Trustee, “The documents in the record do not demonstrate that BAC is a “creditor” of the debtor. The United States Trustee supports a finding that BAC has not established through adequate documentary proof that it has a claim against the debt arising out of the Note.” The Assignment in the Szumowski case was signed by Elpiniki M. Bechakas as “Assistant Secretary and Vice President of Mortgage Electronic Registration Systems, Inc. as Nominee for Home Funding Finders, Inc. its successors and assigns.” When Bechakas signed the Assignment, she was an attorney in the law firm of Steven Baum, the law firm that represented the plaintiff in the foreclosure action. The Assignment assigned the mortgage, but not the note, to Countrywide Home Loans, Inc.ⁱⁱ According to the Trustee, “With respect to BAC, there is no document in the record establishing that either the Note or the Mortgage were assigned to BAC.” The Trustee noted that while the mortgage was assigned to Countrywide, there was nothing in the record to establish that the Note was also assigned. According to the Trustee, “If BAC is not the holder of the Note, then there is no basis for the claim.”

The Trustee also stressed the role of the Baum Firm, the firm that filed the BAC proof of claim, noting: "It appears that the attorneys filing the proof of claim and objection to confirmation did not take adequate steps to verify the truth or accuracy of their statements as required under Rule 9011." The Trustee pointed out that the Baum Firm "recently was sanctioned \$5,000 for submitting pleadings with defects similar to the documents filed in this Court," citing Federal Home Loan Mtg. Corp. v. Raia, 29 Misc.3d 1226 (A), 2010 WL 4750043, 2010 NY Slip OP. 52003 (U)(Dist. Ct. Nassau Co. Nov. 23, 2010.) The Trustee also noted that the state court judge called the Baum Firm's actions "reprehensible."ⁱⁱⁱ

In In re Bevins, Jr., Case No. 10-12856, USBC, Northern District of New York, Albany Division, United States Trustee Davis also filed a response to the debtor's objections to a proof of claim filed by a mortgage servicer. In the Bevins case, the mortgage servicer was GMAC as servicer for Deutsche Bank Trust Company Americas as Trustee for RALI 2006QS18. Once again, Elpiniki Bechakas signed the Assignment of Mortgage relied upon by GMAC and attached to the proof of claim. On this Assignment, Bechakas again signed as an "Assistant Secretary and Vice president of Mortgage Electronic Registration Systems, Inc." The Trustee again asserts that Deutsche Bank has no standing because an Assignment of Mortgage does not demonstrate that there was also an assignment of the underlying note.

The Trustee cites a recent opinion by Hon. Martin Glenn, Bankruptcy Judge, Southern District of New York, In re Tandela Mims, Case No. 10-14030 (Bankr. S.D.N.Y. 2010), in which Judge Glenn surveyed New York case law and concluded that an Assignment of Mortgage, standing alone, is a nullity and cannot be the basis of a state court foreclosure action and is, therefore, insufficient to establish standing to request or obtain a relief from stay in a bankruptcy court.

According to the Trustee, because the Deutsche Bank claim failed, the claim of GMAC, as servicer, must also fail because the agent can never be granted broader authority than that of the principal. GMAC cannot do anything that its principal, Deutsche Bank, lacked authority to do. As in the Szumowski case, the Trustee sets forth the many state court cases challenging the practice of The Baum Firm and Elpiniki Bechakas to submit Mortgage Assignments on behalf of MERS so that The Baum Firm appears on both sides of the mortgage assignment. The Trustee states: "To the extent the Court is inclined to consider sanctions against the law firm

that filed the documents, the United States Trustee supports such an outcome in order to protect the integrity of the bankruptcy system.”

One day later, on January 7, 2011, in a California bankruptcy case, the appropriateness of a law firm employee signing as both a movant and a MERS employee was also at issue in In re Brian W. Davies, Case No. 6:10-bk-37900-TD, USBC, Central District of California, a case involving OneWest Bank as both the movant and as agent of Deutsche Bank. In a very simple Order, the Court ruled 1) OneWest Bank and OneWest Bank as Agent for Deutsche Bank lack standing; and 2) that the movant’s declaration lacks credibility, having signed as both an employee of the movant and as an agent for MERS.

In Koontz v. EverHome Mortgage and Mortgage Electronic Registration Systems, Inc., Case No. 09-30024, Proc. No.-3005, October 20, 2010, USBC, Northern District of Indiana, (South Bend Division) EverHome Mortgage (“Everhome”) and Mortgage Electronic Registration Systems, Inc. (“MERS”) moved for summary judgment against Koontz, claiming that they did not file a fraudulent assignment, and that there was no dispute that Bethany Hood, who signed Koontz’s Mortgage Assignment as the Vice President of MERS, was in fact an employee of MERS. U.S. Bankruptcy Judge Harry C. Dees, Jr. dismissed the defendant’s motion for summary judgment. Judge Dees asserted that MERS admitted that Hood was not an employee of MERS, thus there were genuine issues of material fact, and Koontz may be able to prove that EverHome and MERS attempted to perform a fraudulent foreclosure: “MERS, in its Answer to the plaintiff’s Complaint, admit(ted) that Bethany Hood is not an employee of MERS. (cite omitted)... Indeed, MERS has completely sidestepped the fact that this Assignment was signed by someone representing herself to be a Vice President of MERS, and it has declined to explain why this false document was attached to the amended Proof of Claim... In the view of this court, the conduct of the EverHome defendants and the MERS defendant – reflecting a lack of transparency and determination not to provide information or documents until required – has burdened both the debtor and this Court.”

On October 11, 2010, Locke Barkley, the Standing Chapter 13 Trustee for the Northern District of Mississippi, joined a case against Lender Processing Services on behalf of herself and all Chapter 13 Trustees in the United States. The case, Thorne v. Prommis Solutions Holding Corporation, et al., Case No. 10-01172-DWH, USBC, Northern District of

Mississippi, was brought by a family who lost their home in foreclosure. The family and the Trustee alleged that fees charged by the law firm representing the mortgage company were improper, illegal, and not properly disclosed to the bankruptcy court. The couple alleged the Lender Processing Services engaged in illegal fee-splitting. According to the complaint, Johnson & Freedman contractually agreed to split legal fees with Lender Processing in return for cases Lender Processing sent to Johnson & Freedman, a law firm frequently representing banks, mortgage companies and securitized trusts in foreclosures. According to the lawsuit, the undisclosed fee-splitting arrangements are improper because fees designated as legal fees are being shared with companies that aren't authorized to practice law. The lawsuit alleges that these fee-splitting contracts are disguised as "administrative fees, document review 'views,' document download fees, document execution fees, and technology facilitation fees."

In In re Wilson, Case No. 0711862, USDC, Eastern District of Louisiana, the United States Trustee filed a Motion for Sanctions on May 21, 2010, against Lender Processing Services, Inc., f/k/a Fidelity National Information Services, Inc. and The Boles Law Firm. The Trustee alleged that Lender Processing Services misrepresented to the Court their knowledge of mortgage payments made by the Debtors during the course of Show-Cause proceedings initiated by the Court. The Trustee also alleged that Fidelity misrepresented to the Court whether it communicated with Boles about unposted payments made by the Wilsons and whether "Fidelity misrepresented that it did not function as a "go between" in this case, between Boles and Option [One], with respect to the unposted payments." The Court heard oral argument on the Trustee's Motion on December 1, 2010. The parties were given until February 1, 2011 to submit admitted exhibits on disc.

In In re Taylor, 2009 WL 1885888 (Bankr. E.D. Pa. 2009), an earlier case also involving sanctions against Lender Processing Services, Judge Diane Sigmund Weiss determined that sanctions were warranted. Judge Weiss made very specific findings regarding how the mortgage servicing and foreclosure systems operate. She described Lender Processing Services ("LPS") as the largest out-source provider in the United States for mortgage default services. She found that the LPS systems frequently resulted in incorrect information regarding mortgages reported to litigants and judges in foreclosure actions. The LPS network of national and local law firms were required to communicate directly with LPS, and not the

mortgage servicers, about any issues that arose in any given case. Likewise, the servicers were required to execute a 51-page Default Service Agreement with LPS that delegated to LPS all functions with respect to the default servicing work. LPS used a software communication system called “NewTrak” to deliver instructions and documents to the LPS network attorneys and to deliver any information to the servicers. LPS also had access to the servicers data-base platforms. The law firms were staffed primarily by paralegals with little supervision by attorneys. See In re Taylor, supra, at 1885889 to 1885891.

Judge Sigmund Weiss found that the LPS system was designed to minimize human involvement. She concluded, “When an attorney appears in a matter, it is assumed he or she brings not only substantive knowledge of the law but judgment. The competition for business cannot be an impediment to the use of these capabilities. The attorney, as opposed to the processor, knows when a contest does not fit the cookie cutter forms employed by the paralegals. At that juncture, the use of technology and automated queries must yield to hand-carried justice. The client must be advised, questioned and consulted. The thoughtless mechanical employment of computer-driven models and communications to inexpensively traverse the path to foreclosure offends the integrity of our American bankruptcy system. It is for those involved in the process to step back and assess how they can fulfill their professional obligations and responsibly reap the benefits of technology. Noting less should be tolerated.”...Ultimately, on August 18, 2010, Chief United States Bankruptcy Judge Stephen Raslavich denied the Debtors’ Motion to Penalize HSBC Mortgage Corp. for Securing a Claim by Violating the Automatic Stay Code.

In In re Nosek, 386 B.R. 374 (Bankr. D. Mass 2008), Ameriquest Mortgage Company (“Ameriquest”) claimed that it was the holder of Nosek’s mortgage, despite the fact that Ameriquest was the loan originator, had not held the note since November 30, 1997, and ended its mortgage servicer role as of March 31, 2005. Judge Joel B. Rosenthal placed blame on Ameriquest, the mortgage servicer, and Wells Fargo, the mortgage lender, for the mishandling of the Mortgage Assignment, stating: “It is the *creditor’s* responsibility to keep a borrower and the Court informed as to who owns the note and mortgage and is servicing the loan, not the borrower’s or the Court’s responsibility to ferret out the truth...That Ameriquest had no role after March 2005—well before the trial in Adversary Proceeding 04-4517, was unknown to the court.” Judge

Rosenthal also did not allow Ameriquest to claim that PSAs give banks the inherent power to act in their own name on filing proofs of claim: "Ameriquest also seeks to hide behind the Pooling and Servicing Agreement by arguing that the document gave Ameriquest the power to act in its own name, including for the purpose of filing proofs of claim. That may be true but proofs of claim filed under a written power of attorney MUST have the power of attorney attached. Fed. R. Bank. P. 3001 and Official Form 10. No part of the agreement was attached to the proof of claim." Judge Rosenthal also blamed Wells Fargo, the mortgage lender, for the mishandling of the Mortgage Assignment, stating "This Court will not allow Wells Fargo or any other mortgagee to shirk responsibility by pointing the finger at their servicers." Judge Rosenthal imposed sanctions of \$250,000 on Ameriquest and Wells Fargo, as well as sanctions on the law firms.

On May 28, 2009, U.S. District Court Judge William G. Young upheld the sanctions against Ameriquest, but overturned the sanctions against Wells Fargo. Judge Young's harshest criticisms were for the lawyers involved:

"After 43 years at the bar, the saddest thing about this case is the conduct of the lawyers – all the lawyers. A careful reading of the briefs in this case reveals only a single recognition that counsel did anything amiss in their misrepresentations to the Bankruptcy Court. There's blame aplenty, of course, each one blaming everyone else – including the hapless bankrupt homeowner. ... How is it that our profession, the legal profession – which could have and should have strongly counseled against the self interested excesses that set up the collapse – instead has eagerly aided and abetted those very excesses? How could we (all of us who profess to be lawyers) have fallen so low?"

In a footnote regarding the arguments of Ameriquest's national law firm, Judge Young stated: "This argument is singularly unpersuasive. It is tantamount to saying, 'We've been making these misrepresentations for years. Until 2005, no one seemed to care.'"

In In re Hayes, 393 B.R. 259 (Bankr. D. Mass. 2008), Deutsche Bank, as Trustee of Argent Mortgage Securities, Inc. Asset-Backed Pass through Certificates Series 2004-W11, filed a Motion without Recourse for Relief from Stay against Hayes, claiming that it had standing to seek relief

because Hayes' mortgage transferred from Argent Mortgage Securities to them. The Court used the "real party in interest" rule under Section 362 of the Bankruptcy Code to determine standing, stating that a "real party in interest" is 1) the party with the legal right to bring suit, and 2) a party who is not seeking to assert another party's rights. *Id.* at 371, citing *In re Woodberry*, 383 B.R. 373 (Bankr. D.S.C. 2008). The Court determined that Deutsche Bank was not a "real party in interest" because it never proved that Hayes assigned its mortgage to Argent Mortgage Company, LLC or Argent Securities, Inc., the trust's depositor, in the Pooling and Servicing Agreement ("PSA") of the Trust. In addition, the Court asserted that Deutsche Bank "submitted no evidence that the November 3, 2004 mortgage was included in the PSA or was subject to Section 2.09 of the PSA." Judge Joan M. Feeney ordered Deutsche Bank to show cause, as to why they should not be sanctioned under Fed.R.Bankr.P.9011 for filing without competent evidence that they had standing. The Court subsequently released the order to Show Cause because the parties reported in open court that the matter was resolved.

In *In re Nuer*, Case No. 08-17106 (REG), Diane G. Adams, the United States Trustee for the Southern District of New York, in a *Memorandum of Law of the United States Trustee in Support of Sanctions Against J.P.Morgan Chase Bank National Association*, filed January 4, 2010, alleged that "Chase has filed documents that appear to be either patently false or misleading in connection with the Motion for Stay Relief...Chase took the position that it was acting only as the servicer of the Mortgage. Chase at the same time attached documents which supported a different position."

The Trustee reviewed the testimony of Mr. Herndon, a witness for Chase, who testified that the chain of title for the property in question passed through three entities. Previously, however, Chase had submitted contrary documents. In particular, Chase had submitted an assignment "that appeared to show that Chase assigned its right as mortgagee to Deutsche, as trustee for Long Beach Mortgage Trust 2006-2. The Assignment was signed by Scott Walter as "Attorney in Fact for Chase (the "Walter November 1 Assignment")... It was signed on November 1, 2008, after the Filing Date. This 2008 Assignment to a trust that closed in 2006 signed by an individual who did not in fact work for Chase has become the focus of the sanctions debate. Regarding the Walter Assignment, the Trustee states: "Here, the misconduct of Chase includes the attachment of the Walter November 1 Assignment...Chase's own witness could not explain the Walter November 1 Assignment..." [Walter was actually an employee in

the Minnesota office of Lender Processing Services.]

One of the first and most important cases involving the lack of standing in foreclosure cases involving securitized trusts is In re Foreclosure Cases, which involved Deutsche Bank attempting to foreclose upon 19 defaulted homeowners in Ohio. In re Foreclosure Cases, 2007 WL 3232420 (N.D. Ohio Oct. 31, 2007). On October 10, 2007, Judge Boyko issued an order to Deutsche Bank to show cause for their filed complaint, demanding that Deutsche Bank file copies of the Assignments showing that they were the holder and owner of the Notes and Mortgages, *as of the date the complaint was filed*, which was July 27, 2007. The Assignments would prove that Deutsche Bank had standing to file its complaints against the homeowners. For one of the cases, Deutsche Bank filed an assignment on October 10, 2007, that was dated August 13, 2007, even though the trust on the Mortgage was closed in 2006. To the Court, this revealed that Deutsche Bank did not have the particular assignment at the date of the complaint, and created Assignments for trial. U.S. District Judge Christopher Boyko, Northern District of Ohio, Eastern Division, rendered a decision dismissing 14 of the foreclosure cases in In re Foreclosure Cases without prejudice, due to the filing of executed Assignments *after* the date of the filed complaint for 10 of the cases, and the lack of Assignments for four of the cases.

In an early 2007 decision of Massachusetts Bankruptcy Court Judge, Hon. Joel B. Rosenthal, In re Sima Schwartz, Case No. 06-42476-JBR, Judge Rosenthal denied the Motion for Relief of Stay filed by HomEq Servicing Corporation. Again, Assignments were at issue. According to the Court, Deutsche Bank “simply assumes that the mortgage was properly assigned to it prior to the foreclosure. Deutsche produced an Assignment, signed by Liquenda Allotey, who was represented to be a Vice President of MERS [but who was actually an employee of Lender Processing Services]. (In footnote six, the Court described Allotey’s signature as “a very large check mark attached to a downward line.”) Deutsche also argued that there was no requirement that the Assignment be recorded prior to the foreclosure. Judge Rosenthal stated: “While this is a correct statement of the law...it ignores that the assignment it provided to the Court was not *signed* until *after* the foreclosure sale. In denying the Motion for Relief of Stay, Judge Rosenthal stated: “While “mortgagee” has been defined to include assignees of a mortgage, in other words the current mortgagee, there is nothing to suggest that one who expects to receive the mortgage by

assignment may undertake any foreclosure activity.” The court concluded that Deutsche was confused as to when it acquired the mortgage.

In each of the bankruptcy decisions discussed above, the Bankruptcy Judges and Trustees demonstrated a thorough understanding of mortgages, notes, mortgage servicers and assignments. Unsupported allegations by parties seeking to set aside the automatic stay and foreclose were rejected. These cases also illustrate, however, that such unsupported and even contradictory allegations are being made frequently. Many issues remain unresolved, but the most frequent decision to be made by bankruptcy courts in 2011 may well be the amount of the appropriate monetary sanction against the banks and mortgage servicing companies.

ⁱ BAC Home Loans Servicing, LP was formerly known as Countrywide Home Loans Servicing, LP is a mortgage servicing company owned by Bank of America and located in Collin County, Texas.

ⁱⁱ Countrywide Home Loans, Inc. was the Assignee on the Bechakas Assignment. BAC Home Loans Servicing, LP was the successor to a different, but related entity, the servicing company, Countrywide Home Loans Servicing, LP.

ⁱⁱⁱ The most often cited new York state Court decision regarding Assignments signed by Elpiniki Bechakas from The Baum Firm was written by the Honorable Judge Arthur M. Schack, Kings County, New York: U.S. Bank, N.A. as Trustee for SG Mortgage Securities Asset backed Certificates, Series 2006-FRE2 v. Emmanuel, 27 Misc.3d 1220(A), 2010 WL 1856016 (N.Y.Sup.).