

US Bank Nat'l Ass'n v. Wyman, No. 466-6-09 Rdcv (Cohen, J., Oct. 20, 2009)

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**STATE OF VERMONT
RUTLAND COUNTY**

US BANK NATIONAL ASSOCIATION,)	
As Trustee for MASTR Asset Backed)	Rutland Superior Court
Securities Trust, 2006-WMC2)	Docket No. 466-6-09 Rdcv
)	
Plaintiff,)	
)	
v.)	
)	
PETER JAY WYMAN,)	
JOANNA LYN WYMAN)	
a/k/a JOANNA LYN L. WYMAN,)	
CITIFINANCIAL, INC., and OCCUPANTS)	
RESIDING at [Redacted],)	
RUTLAND, VERMONT)	
)	
Defendants)	

ENTRY ORDER RE MOTION FOR DEFAULT JUDGMENT

This matter came on before the Court on plaintiff US Bank National Association's proposed Motion for Default Judgment, Issuance of Clerk's Accounting, and Order for Public Sale, filed July 31, 2009. Plaintiff is represented by Joshua B. Lobe, Esq.

In its Complaint, filed June 30, 2009, plaintiff asserts that on February 23, 2006, Peter Jay Wyman and Joanna Lyn Wyman (the "Wymans") purchased certain real property in Rutland, Vermont, and executed a Promissory Note (the "Note") in favor of WMC Mortgage Corporation ("WMC") in the original principal amount of \$133,200.00. Said Note is attached to the Complaint. The Note is secured by a Mortgage Deed dated

February 23, 2006, from the Wymans to Mortgage Electronic Registration Systems, Inc. (“MERS”), as nominee for WMC. This Mortgage Deed was recorded in the Land Records of the City of Rutland.

Plaintiff further asserts that the Note and Mortgage Deed were assigned from MERS, as nominee for WMC, to US Bank National Association (“US Bank”), as trustee for MASTR Asset Backed Securities Trust, 2006-WMC2, by an instrument dated June 22, 2009 and recorded in the Rutland City Land Records on or about June 30, 2009.

The attached Note is not payable to US Bank. Further, the attached Note is not indorsed by WMC, either to a US Bank or to bearer, and the assignment by MERS, purporting to assign the Mortgage Deed and Note to US Bank, is not attached. The attached Note appears to be a negotiable instrument.

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 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).

Even if the Court were to accept as fact the assignment from MERS, as nominee for WMC, purporting to transfer the Mortgage Deed and the Note to plaintiff, see Complaint ¶ 6, this still would not be adequate to “prove the transaction” by which plaintiff acquired possession of the Note, absent an establishment by plaintiff of MERS’s 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 WMC, 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 WMC is likewise not defined. See *Landmark National Bank v. Kesler*, 216 P.3d 158, 165 (Kan. 2009) (finding that in the absence of contractual definition, definition of “nominee” is left to judicial

interpretation).

The only legal definition of “nominee” appears to be from Black’s Law Dictionary, which defines the term 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).

MERS itself argued before the Nebraska Supreme Court that as “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 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 would suggest that MERS, as a “nominee,” is necessarily detached from the promissory note, therefore, its relationship to a transferee 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 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 *Id.* 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 9A V.S.A. § 3-301. Even if the Court were to accept the plead assignment of the Mortgage Deed from MERS to plaintiff as fact, 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, because plaintiff has not provided the purported assignment of the Note and Mortgage Deed from MERS to itself, there is no evidence that plaintiff has even been assigned the Mortgage Deed. As such, the plaintiff’s Motion for Default Judgment is denied. Since this is a matter involving title to property, this Court is obligated to ensure that the plaintiff is the real party in interest. Failure by a plaintiff mortgagee to show that it has standing to bring a foreclosure action could create title issues for future unsuspecting purchase of land.

Order

PLAINTIFF shall have 30 days to provide proof that it was assigned the Mortgage Deed and that it is entitled to enforce the Promissory Note pursuant to 9A V.S.A. § 3-301, otherwise the Court shall dismiss PLAINTIFF’S action for lack of standing.

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

Hon. William Cohen

Superior Court Judge