Docket No. 1260003

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIANW. DAVIES, as Plaintiff-Appellant,

V.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Indymac Residential Asset Securitization Trust 2007-A5, under the Pooling and Servicing Agreement Dated March 1, 2007, Defendant-Appellee.

MOTION FOR CERTIFICATION OF QUESTIONS TO NEW YORK STATE COURT OF APPEALS

Appeal from Decisions of the:

- *Bankruptcy Appellate Court of the Ninth Circuit, No. 11-1221.*
- *Bankruptcy Court of the C.D. Cal. Case No. AP 01-01001.*

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I. MOTION TO CERTIFY QUESTIONS TO THE NEW YORK COURT OF APPEALS REGARDING NEW YORK TRUST LAWS.

A California Appeals Court determined that a Plaintiff [nonparty to PSA] has standing to challenge a securitized trust's ownership. *See Glaski v. Bank of America, N.A.,* 218 Cal. App. 4th 1079 (2013) which held:

> "We conclude that a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under N.Y. law) occurred after the trust's closing date. Transfers that violate the terms of the trust instrument are void under NY law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement."

However after Glaski, on October 10, 2013 in *Newman v. Bank of New York Mellon* - Case No. 1:12-CV-1629 AWI GSA, E.D. Cal., 2013, a non-published Motion to Dismiss. The court states:

> "Newman has submitted a recent published decision from the California Fifth District Court of Appeal. In *Glaski v. Bank of Am*., N.A., 218 Cal.App.4th 1079 (2013), the court held that a borrower like Newman has standing to assert a violation of a PSA. However, no courts have yet followed Glaski and Glaski is in a clear minority on the issue. Until either the California Supreme Court, the Ninth Circuit, or other appellate courts follow Glaski, this Court will continue to follow the majority rule. *See Toneman v. United States Bank,* 2013 U.S. Dist. LEXIS 98966, *30-*31 (C.D. Cal. June 13, 2013); *Jenkins*, 216 Cal.App.4th at 515.

Pursuant to Article VI Section 3(b)(9) of the New York State ("NY") Constitution, Brian Davies ("Appellant") hereby moves before this Court for an Order certifying the following questions to the NY State Court of Appeals.

1. Does Appellant have standing to challenge Appellee, Deutsche Bank National Trust Company as Trustee ("DB") failure to honor the specific delivery, time sensitive, and transfer requirements for notes and mortgages under the applicable Pooling and Servicing Agreement ("PSA"), the governing document for the trust supposedly holding Appellant's note and mortgage?

2. Does NY law control the enforceability of Appellant's note and mortgage?

3. Did the delivery and transfer of the Appellant's note to Appellee, DB, as trustee, after the trust's closing date render this transfer "void" as opposed to "voidable"?

4. Did the assignment of the Appellant's mortgage over two years after the purported trusts closing and contrary to the mandates of 26 U.S.C. Section 860D, render this assignment "void" as opposed to "voidable"?

5. Does the Appellant have the ability to challenge his loan with Mortgage Electronic Registration Systems, Inc. ("MERS") [not a party to the PSA] when the purported assignment listed MERS as a nominee of a non MERS member and not beneficial owner listed on the audit trail.

6. Does the Appellant have standing to challenge the securitization of his mortgage?

7. How do the laws of NY, the Uniform Commercial Code ("UCC"), and California contract and real estate laws prioritize in regards to the Mortgage [Deed of Trust (DOT")] and Note?

8. How is the security interest perfected prior to trust transfer, and how is it perfected from the Seller [Indymac Bank, FSB ("IMB")] to the Depositor [Indymac MBS] and to the Trustee DB?

9. Does the UCC § 3 control perfection of a real estate secured interest, i.e. does an endorsed note in blank, alone allow for security perfection [security interest follows the note], or must more be demonstrated to show real estate ownership is perfected i.e. UCC 9?

Appellant respectfully submits that these issues will be determinative of the pending Appeal, may be determinative of the entire action, and have not been decided by the NY State Court of Appeals, the jurisdiction of the controlling law. Accordingly, certification is appropriate pursuant to Article VI Section 3(b)(9) of the NY State Constitution which provides:

> The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of NY law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of NY.

II. INTRODUCTION

In May 2009 Congress urgently passed the 15 U.S.C. §1641 (g) amendment requiring Creditors to notify homeowners after obtaining recorded or unrecorded assignments of mortgages. The San Francisco Recorder reports that there are significant issues and frankly outright crimes on the land title records.[1] Today it is imperative to know the Creditor's identity and contact information. Such disclosure is of significant public importance. Servicer delays in processing may

[1] "Foreclosure in California A Crisis of Compliance" Phil Ting Accessor-Recorder February 2012. http://aequitasaudit.com/images/aequitassfreport.pdf

benefit the Servicer as their fees are maximized at 18 months of delinquent payments. [2] MERS further clouds the picture.

Here the Appellant asks the NY Court is to look at the subpoenaed MERS audit trail, land title records of transfers, and other evidence of record.[3]

A. THE INDYMAC BANK, FSB FAILURE

NY Trust Laws and other States Law were ignored leading to the collapse. [4] In the Indymac Bank, FSB ("IMB") failure there was a material default of over 250 IMB Trusts, where IMB served as the 'Master Servicer'. Due to this failure [default], the PSA calls for Trustee to take over and appoint new Master Servicer. *See* PSA - Article 7 – DEFAULT – (PSA p. 94-96). [5]

In fact DB rightfully wanted to be paid, and filed an $8.1 B Proof of Claims to the FDIC for Breach of Reps and Warranties by IMB, including repurchase claims as a result of missing or defective documents.[6] The Federal Deposit Insurance Corporation ("FDIC") ignored DB. DB filed suit and states that IMB

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[2] "Mortgage Servicing" Georgetown Law, 2011 by Adam Levitin Georgetown University Law Center and Tara Twomey of National Consumer Law Center. http://scholarship.law.georgetown.edu/facpub/498/.

[3] Subpoenas from: DB (Ex. 149-159); MERS (Ex. 160-172) PSA (Ex. 190-233).

[4] The Office of Inspector General - OIG-09-032 IndyMac's failure due to its business strategy of originating/securitizing Alt-A loans on a large scale.

[5] DB terminated IMB and all authority and power of the Master Servicer became DB's responsible for all the records, and perfections of all collateral.

[6] *See Deutsche Bank National Trust Company as Trustee for certain residential mortgaged-backed securitization trusts sponsored by Indymac Bank, FSB v. Federal Deposit Insurance Corporation, as Receiver of Indymac Bank, FSB et al.* USCD Case No. CV 09-385, May 29, 2009. *See* complaint, Exhibit - FDIC POC, Page 57 under ¶ 14.

breached numerous provisions of the Governing Agreements ("PSA"). The complaint was clear IMB failed to deliver loan file documents, [7]

B. THE APPELLANTS APPEAL TO THE NINTH CIRCUIT

The excerpts of records ("Ex.") for the Ninth Circuit electronically prepared and submitted hereto as true and correct copies.[8] The record is available electronically. Appellant was granted a Stay. The inciting factor DB and its agent, Onewest Bank, FSB ("OWB") filed for a Third Motion for Relief from Stay ("MFRS") pending appeal. The BAP initially denied. Despite the Stay order, DB/OWB attempted to sell the property requiring an OSC filing.

III. STATEMENT OF FACTS

Davies [Appellant] is the Debtor, Plaintiff, and Appellant.[9] On 10.16. 2006, Plaintiff obtained a purported loan of $441,350 from Universal American Mortgage Company of California ("UAMCC"). Secured by a [defaced] DOT. On 8.10.2009, an Assignment DOT ("ADOT") from UAMCC [MERS] to DB, was recorded. Davies petitioned, on 8.31.2010. On 10.20.2010 a "2nd" unrecorded

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[7] Complaint @ ¶87. Numerous mortgage loans IndyMac sold into the Trusts did not comply with IndyMac's credit underwriting standards and origination process.(b) Many mortgage loans sold into the Trusts did not comply with the applicable requirements even before they were sold into the Trusts. (c) Many mortgage loan origination files did not contain required documentation.

[8] **Excerpts Volume 1** at: http://www.scribd.com/doc/90999699/VOL-1-FINAL-9TH-Circ-Appeal-Davies-vs-Deutsche-Bank. **Excerpts Volume 2** at: http://www.scribd.com/doc/91000416/VOL-2-FINAL-Davies-vs-Deutsche-Bank-9th-Circ-Appeal.

[9] Davies v. Deutsche Bank, 9th Circ. Case No. 12-6000. C. D. of California, Riverside Division, No. 6:10-bk-37900; Davies v. Deutsche Bank C.D. Cal. AP No. 6:11-01001; Davies v. Deutsche Bank, BAP 9th Case No 11-1221.

ADOT from UAMCC [MERS] to DB. Davies initiated his Compliant on 1.2.2011. (Ex. 249-271) On 2.4.2011 DB Answered. (Ex. 235-248) Two contested MFRS were "Denied". [10] On 4.5.2011 Davies and DB submitted Motions for Judgment on the Pleadings ("MJOP"). Both Opposed. Davies Objected to DB's RJN 6, 7, and motioned to Strike for Failure to Comply with FRCP 7.1. The parties replied. The MJOP were heard. Orders entered on 5.10.2011. DB's motion was granted. Davies' Motion was denied with prejudice. Davies' RJN 1[11], RJN 2[12], RJN 3[13] , RJN 4[14] [DB objected] [32], RJN 5[15], DB RJN 6, 7 [Davies objected] were granted.[16] Davies appealed to BAP on 5.6.2011.[17] Opening Brief 6.6.2011, both timely replied. Davies RJN 1, 2, 3 were denied. On 1.12.2012 the BAP affirmed. Davies requested Rehearing. The Court denied. Davies timely Appealed to the Ninth Circuit on 1.31.2012. Briefing - arguments heard on 2.10.2013. 9th Circuit granted a stay.

IV. THE EVIDENCE AND ARGUMENTS OF OWNERSHIP

A. THE CERTIFIED COPIES OF THE SEC DOCUMENTS

Davies noticed certified SEC documents to support his contentions that his Note/DOT were not properly contained in the MBS Trust. The loan file Schedule II

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[10] Findings of fact: 1.) OWB and OWB as Agent for DB lack standing. 2.) Movant's Declaration lacks credibility, having signed both as an employee of Movant and as an agent for MERS. (Ex. 145-146) No new evidence was presented to the Court.
[11] PSA for RAST 2007-A5 from SEC. (Ex. 190-233)
[12] Prospectus for RAST 2007-A5 from SEC.
[13] "Audit Trail" by MERS Subpoena. (Ex, P. 160-173)
[14] Subpoena Deutsche National Bank as Trustee. (Ex. 234-248)
[15] C. D. of California Riverside Bankruptcy Case No. 6:10-bk-37900.
[16] The land title records are identical.
[17] Bankruptcy Appellate Court ("BAP") as Bap Case No. CC-11-1221

was not filed with the SEC. Appellant is not attempting to intermeddle, but use the SEC documents to complement and support his allegations regarding ineffective transfers and delivery to the trust.[18] The record, includes the complaint and those documents which were judicially noticed.

B. THE MERS AUDIT TRAIL (Ex.160-173)

The MERS Audit trail fails to list the Original Lender Universal American Mortgage Company of California ("UAMCC") period, and certainly not as a Beneficial Owner [that is Bank One]. The MERS subpoena asked if UAMCC was a MERS member. MERS was silent. MERS does list Bank One as the Beneficiary [and not an endorsee]. (Ex. 169) MERS membership rules would not support UAMCC to instruct MERS as nominee to assign any note. Davies MERS Audit Trail and MERS Transfers does not support other evidence of record. MERS uses unique ID numbers for identification: DB is 1001425. The same number is used for over 250 different trusts. No RAST 2007-A5 unique number. UAMCC is a separate legal entity, from OT Trustee and initial servicer Universal American Mortgage Co. LLC., a Florida

[18] The Court in *Rodenhurst v. Bank of America*, 773 F.Supp.2d 886, 899 (D. Haw. 2011) stated that "[t]he overwhelming authority does not support a cause of action based upon improper securitization." However, the discussion cited in that case centers on plaintiffs who claim that securitization itself violates the agreement between the mortgagor and mortgagee. Ninth Circuit district courts have come to different conclusions when analyzing a plaintiff's right to challenge the securitization process. *See Schafer v. CitiMortgage*, Inc., 2011 WL 2437267 (C.D. Cal. 2011) (denying defendants' MTD declaratory relief claim, which was based on alleged improper transfer due to alleged fraud in signing of documents); *See also; Vogan v. Wells Fargo Bank,* Case No. 2:11-02098, E.D. Cal. November 16, 20011 denied MTD on securitization failure.

Corporation ("UAM"); number 1000956**.** Multiple NY case have involved MERS and its creative way of transferring mortgages. [19], [20]

C. THE PSA, SECTION 2.0, CONVEYANCE OF MORTGAGE LOANS. ONE OF THE 250 IMB TRUSTS DB IS TRUSTEE. ***See PSA Section 2.01.***

> (a) In connection with the transfer and assignment of each Mortgage Loan, the Depositor has delivered (or, in the case of the Delay Delivery Mortgage Loans, will deliver to the Trustee within the time periods specified. ...each Mortgage Loan so assigned:
>
> (i) The original Mortgage Note, endorsed by manual or facsimile signature in blank in the following form: "Pay to the order of _____without recourse," with all intervening endorsements showing a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note (each endorsement being sufficient to transfer all interest ...together with a copy of the Mortgage Note;
>
> (ii)(Except .. the original recorded Mortgage or ...complete copy of the Mortgage (or) and in the case of each MERS Mortgage Loan, the original Mortgage, noting the presence of the MIN of the...Mortgage Loan is a MOM Loan if the Mortgage Loan is a M

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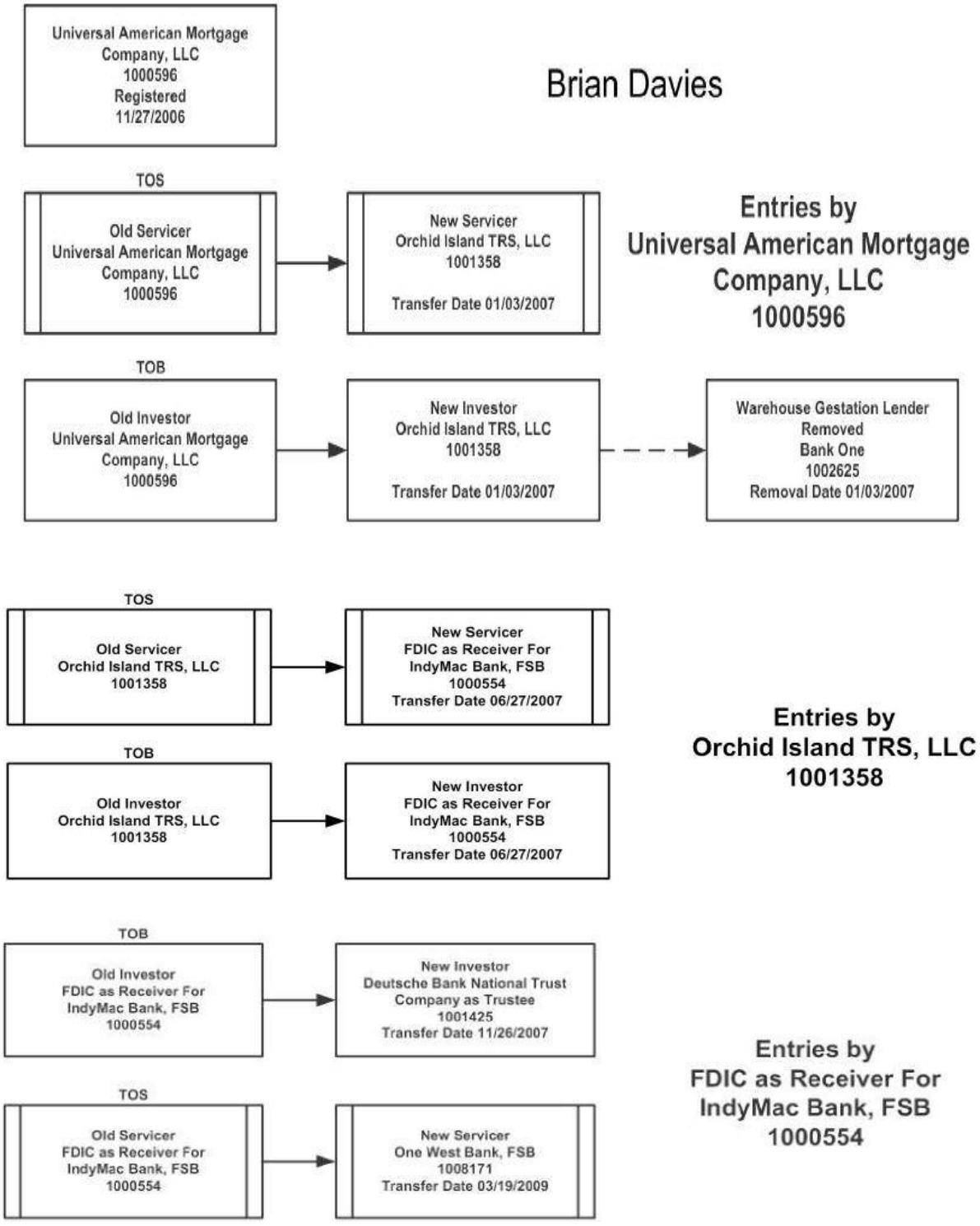
[19] The Maine Supreme Judicial Court recognized that MERS assigned the mortgage but this assignment did not and could not transfer the note. *HSBC v. Gabay*, No. Cum 10-581, 2011 ME 101 (Me. Sup. Jud. Ct. Sept. 15, 2011). *See: Bank of New York v. Silverberg*, No. 17464-08 (Sup. Ct. N.Y. App. Div. 2d Jud. Dept.) ; *Aurora Loan Services, LLC v. Weisblum*, 2011 N.Y. Slip. Op. 04184. In Silverberg, the Court found that MERS did not have the authority to transfer the note to the lender. In its decision the Court stated that the MERS mortgage assignment is a "nullity". *Bank of N.Y. v. Alderazi*, 28 Misc. 3d 376, 2010 N.Y. Slip Op. 20167 (N.Y. Sup. Ct. 2010). ("Plaintiff has submitted no evidence to demonstrate that the original lender, the mortgagee America's Wholesale Lender, authorized MERS to assign the secured debt to plaintiff.'" 28 Misc. 3d at 379-380 (emphasis added).; *In re Agard*, 2011 LEXIS 488 (Bankr. E.D. N.Y. 2011) (MERS' role as mortgagee did not provide MERS with the authority to "effectuate a valid assignment of mortgage."). In both of these cases the original lender no longer owner of the Note so MERS has no nominee interest to assign.

[20] MERS Signing Officers were not properly appointed by the Board of Directors of MERS and did not have the authority to execute mortgage assignments [ADOT] to the lender on behalf of MERS. *See* the April 7, 2010 deposition testimony of former MERS Corporate Secretary William Hultman ("Hultman") in the case of *Bank of New York v. Ukpe*, No. F¬10209-08 (N.J. Atl. Cty. Sup. Ct.). Due to the invalidity contained prior to Oct. 2010, the MERS Board of Directors secretly acted and on October 19, 2010, passed resolutions adopting, ratifying, confirming and approving of all the MERS Secretary's Signing Officer appointments from the date of MERS' incorporation. In June 2011 a second MERS Board Resolution ratifying such signing Officer. Davies' [2] ADOT were prior to each of the secret meetings, and Petition filing.

Davies MERS Audit Trail

TOS- Servicing Rights **TOB**- Beneficial Ownership



IV. THE REASON FOR THE CERTIFIED QUESTIONS.

A. OUTSIDE COURTS NEED DIRECTION AS TO THE VALIDITY OF NON-CONFORMING ACTS IN CONTRAVENTION OF THE PSA.

- NY's Estates, Powers & Trusts Law ("EPTL") Section 7-2.4 states:

> If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust...is void.

- NY's Estates, Powers & Trust Law Section 1-1.5 further provides that "the provisions of this chapter apply to the estates...of persons." Person is described in Section 1-2.12 as follows:

> The term -person" includes a natural person, an association, board, any corporation, whether municipal, stock or non-stock, court, governmental agency, authority or subdivision, partnership or other firm and the state."

The provisions of EPTL Section 7-2.4 are therefore applicable to the PSA governing the note and perfection of the security interest at issue. Any transfer to that trust in contravention of the governing PSA would appear to be void under NY law - the law that was chosen to govern by Appellees. NY Trust Laws suggest that - no trust under the common law until there is a valid delivery of the asset in question to the trust. [21], [22]

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[21] "Until the delivery to the trustee is performed by the settlor, or until the securities are definitely ascertained by the declaration of the settlor, when he himself is the trustee, no rights of the beneficiary in a trust created without consideration arise" *Riegel v. Central Hanover Bank & Trust Co.*, 266 App. Div. 586 (N.Y. App. Div. 2d Dep't 1978).

[22] If a trust fails to acquire the property, then there is no trust over that property that may be enforced. According to the public filings of the RAST 2007-A5, PSA all promissory notes transferred to the Trust are required to have a complete chain of endorsements from the original payee thereof to either "Blank" or to the Trustee for the specific Trust. [22] (Ex.190-195 Discussion) (Ex.207-210 Section 2.01, Conveyance of Mortgage Loans.) The PSA requires the complete chain of endorsements to be in place by the Trust's closing date [March 1, 2007], or later [90 day] with a letter from the Attorney stating that there will be no impact on the tax status. In addition, after the closing date of the PSA, the trustee has a cleanup period of three

Glaski v. Bank of America, N.A.

Pursuant to an extremely important and recent California Appeals case, the Plaintiff has standing to challenge a securitized trust's ownership pursuant to the decision of the California Court of Appeal of *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079 (2013) which held:

> "We conclude that a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under N.Y. law) occurred after the trust's closing date. Transfers that violate the terms of the trust instrument are void under NY law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement."

See Glaski at 1083 (emphasis added)

Thus, any alleged assignment or transfer to Deutsche Bank is void.

The facts in *Glaski* are on "all-fours" with Debtor's case.

> In July 2005, *Glaski* purchased a home in Fresno and executed a promissory note and a deed of trust that granted WaMu a security interest in his property. The *Glaski* deed of trust identified WaMu as the lender and the beneficiary, defendant California Reconveyance as the trustee, and *Glaski* the borrower. *Id.* at 1083.
>
> In late 2005, the WaMu Mortgage Pass-Through Certificates Series 2005-AR12 Trust was formed as a common law trust ("WaMu Trust") under NY law. The corpus of the WaMu Trust consisted of a pool of residential mortgage notes purportedly secured by liens on residential real estate. The closing date for the WaMu

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months in which to transfer all mortgages — as mandated by U.S. Treasury Regulations governing REMICs (26.U.S.C. Section 860D). Since the terms of the PSA require that the trustee not take any action or omit to take any action that would jeopardize REMIC status. Never later than 720 days after the Trust's closing date can any documents be validly delivered. (Ex. 209) Davies ADOT was Aug. 10, 2009, and Sept. 20, 2010. (Ex. 188-189) PSA, Sect. 2.01 outlines the proper conveyance of the Mortgage Loans. (Ex. 207-210) The PSA, Section 2.02 (Ex. 210-212) details the Trustee's responsibility to confirm proper conveyances and a complete chain of title.

> Trust was December 2, 2005, or 90 days thereafter. *Id.* at 1084. This is exactly like the Trust formed here, which had a June 6, 2005 closing date.

Just like our case, years after the [RAST 2007-A5] Trust closed on March 1, 2007[OWB] recorded an ADOT [> 2 years post-closing]. *Id.* at 1083. Even the MERS Audit Trail demonstrated 270 days.

As in *Glaski* where the "chain of title was broken", the Appellate Court found the assignments void. Here the chain of title is completely lacking. Not only were any assignment and deliveries done years after the Trust closed but there are numerous intervening parties (e.g., Opteum, Indymac MBS).

The *Glaski* Court made it clear that a borrower can challenge standing in a securitized transaction by holding:

> "We reject the view that a borrower's challenge to an assignment must fail once it is determined that the borrower was not a party to, or third party beneficiary of, the assignment agreement. Cases adopting that position "paint with too broad a brush." *(Culhane v. Aurora Loan Services of Nebraska, supra,* 708 F. 3d at p. 290.) Instead, courts should proceed to the question whether the assignment was void."

Id. at 1095.

The *Glaski* Court then addressed the void act of the WaMu Trust attempting to accept a loan after the closing date by stating:

> "Because the WaMu Securitized Trust was created by the pooling and servicing agreement and that agreement establishes a closing date after which the trust may no longer accept loans, this statutory provision provides a legal basis for concluding that the trustee's attempt to accept a loan after the closing date would be void as an act in contravention of the trust document."

Id. at 1096

The *Glaski* Court also addressed certain District Court rulings that dealt with post-closing transfer arguments and distinguished them as follows:

> "We are aware that some federal district courts sitting in California have rejected the post-closing date theory of invalidity on the grounds that the borrower does not have standing to challenge an assignment between two other parties. *(Aniel v. GMAC Mortgage, LLC* (N.D.Cal., Nov. 2, 2012, No. C 12-04201 SBA) 2012 WL 5389706 [joining courts that held borrowers lack standing to assert the loan transfer occurred outside the temporal bounds prescribed by the pooling and servicing agreement]; *Ahnutarreb v. Bank of New York Trust Co., N.A.* (N.D.Cal., Sept. 24, 2012, No. C 12-3061 EMC) 2012 WL 4371410.) These cases are not persuasive because they do not address the principle that a borrower may challenge an assignment that is void and they do not apply NY trust law to the operation of the securitized trusts in question."

Id. at 1099.

In sum, *Glaski* is the precise same situation as here (i.e., a trust with a closing date and efforts by the lender to assign the deed of trust years after the trust closed). Based on *Glaski,* the DB Claim is void. Other Courts have come to similar conclusions. [23]

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[23] *Schwartz v. HomEq Servicing (In re Schwartz*) (Bankr. D. Mass. 2011), 461 B.R. 93, 97-99 (dismissed on the grounds that he had acquired no title or separate control of the goods, hence, there was no actual trust over the property to breach.
Kermani v. Liberty Mut. Ins., 4 A.D.2d 603 (N.Y. App. Div. 3d Dep't 1957) (did not acquire mortgage where they failed to follow PSA conveyance requirements);
Kemp v. Countrywide Home Loans, Inc. (In re Kemp) (Bankr. D.N.J. 2010), 440 B.R. 624, 628-34 (bank's claim disallowed, failed to follow PSA conveyance requirements);
Parker v. U.S. Nat'l Bank Ass'n (In re Parker) (Bankr. D. Vt. 2010), A.P. No. 09-1022, 2010 Bankr. LEXIS 3491, at *8-*10 (MSJ denied where bank did not comply with PSA);
Hendricks v. US Bank Nat'l Ass'n (Mich. Trial Ct. June 6, 2011), Case No. 10-849-CH, slip op. at 5-7 (bank's foreclosure claim barred where did not comply with PSA);
Horace v. LaSalle Bank Nat'l Ass'n (Ala. Circuit Ct. Mar. 30, 2011), Case No. CV 08-362 (bank permanently enjoined from foreclosing on property where failed to comply with PSA);
Johnson v HSBC, 2012 WL 928433 (S.D. Cal. 2012): (court recognizes importance of establishing ownership/holder status of notes and chain of assignments in foreclosure cases).

B. SPECIFIC PSA DOCUMENTS ARGUED ON THE RECORD.

1. **The PSA - certifying information to confirm rigid compliance**. [24]
2. **PSA- 10.02. Recordation of Agreement; Counterparts.**

This Agreement is subject to recordation in all appropriate public offices for real property records.

3. **Section 10.04 Intention of Parties**

Appellants' mortgage states that it is subject to California law, the law to be used to assess the validity of the transfer of the Appellants' note/DOT into the trust. By participating in transactions under the PSA, NY law is applicable to determine the validity of the transfers to the trust. *Bank of America, NA. v. Bassman,* 981 N.E.2d 1 (111. App. Ct. 2012). [25], [26] Thus, for an action filed in California, its law would be consulted for its choice of law rules, and under those rules, California law would give effect to the parties' choice of law as specified

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Johnson has a summary on viability of attacks utilizing the failure of securitization and cites to cases upholding the borrower's right to attack standing.

[24] Exhibit G-1 (Ex. 224-225)); Form of Initial Certification of Trustee; Exhibit G-2 (Ex. 226-227) Form of Delay Delivery Certification; Exhibit H (Ex. 229-230) Form of Final Certification of Trustee which specifically states that the Trustee certifies that it has received all the documents required to convey a complete chain of title and in accordance with Section 2.02. Promissory notes are defined in UCC 9-102, and the PSA creates a valid security interest. *See* PSA Schedule III definition (34) The PSA uses the UCC of NY. *See:* PSA p. 40.

[25] It is the express intent - that the conveyance (i) of the Mortgage Loans by the Seller to the Depositor and (ii) of the Trust Fund by the Depositor to the Trustee each be, and be construed as, an absolute sale thereof. *See* (PSA p. 108).

[26] 9-102 (a)(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

in the contract or DOT. So for the DOT it is California, and for the parties to the PSA, NY Law was chosen and the NY UCC.

C. PRINCIPLES OF CALIFORNIA REAL PROPERTY LAW

1. WHAT IS A VALID ASSIGNMENT?

California Code ("CCP") § 1624 sets forth certain types of agreements that must be in writing including contracts to sell an interest in real property. The Statute of Frauds prevents the possibility of a nonexistent agreement between two parties being "proved" by perjury or Fraud. CCP §1626. In California in determining the validity of the DOT involved we must consider not only the intent of the grantor but also whether the deed was delivered to and accepted by the grantee as an unequivocal transfer of title to him. *Reina v. Erassarret*, 90 Cal. App. 2d 418, 426 [203 P.2d 72, 7 A.L.R.2d 1309].

2. DEFENDANTS DID NOT HAVE A VALID ASSIGNMENT.

Because defendants did not originate plaintiffs' loan, their claimed right to enforce plaintiffs' mortgage is based on being assignees of the note and DOT. Parties claiming rights under an assignment bear the burden of proving they received valid assignments. *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284,; *Mata v. Citimortgage, etc., et al.* (C.D. Cal. 2011) 2011 WL 4542723; In *re Veal* (9th Cir. B.A.P. 2011) 450 B.R. 897, 908, 913. One who fails to prove a valid assignment has "no standing to complain" about not receiving proceeds of the note or a sale of property securing it. *Cockerell, supra*, 42 Cal.2d at p. 293.[27]

[27] Every assignment in the chain must be valid or the party claiming the note cannot enforce it. *In re Gavin*, 319 B.R. 27, 32 (B.A.P. 1st Cir. 2004); *In re Wells*, 407 B.R. 873 (Bankr. N.D.

3. CALIFORNIA LAW AND PERFECTION [28]

The question of delivery or non-delivery of a deed is a question of fact to be determined from the surrounding circumstances of the transaction and to constitute a valid, effective delivery, it must be shown that the grantor intended to divest himself of title. (*Miller v. Jansen*, 21 Cal. 2d 473, 477 [132 P.2d 801]; *Williams v. Kidd*, 170 Cal. 631, 638, 639 [151 P. 1, Ann.Cas. 1916E 703].)

The act of the delivery of the deed must be accompanied with the intent that it shall become presently operative as such and presently pass title. (*Fay v. Norquist*, supra, p. 223; *Williams v. Kidd*, supra, pp. 638, 639.) Whether or not the [112 Cal. App. 2d 396] requisite intent exists is a question of fact for the trial court or jury. (*Counter v. Counter,* 104 Cal. App. 2d 786, 789 [232 P.2d 551].)

4. THE CALIFORNIA UNIFORM COMMERCIAL CODE

Civil Code § 1642 provides: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." As a result of Civil Code § 1642, every California real property mortgage note includes obligations that are, in part, stated in the DOT, and every California real property DOT includes obligations that are, in part, stated in the mortgage note. Accordingly, all California real property mortgage notes secured by deeds of trust are outside the scope of § 3104(a). 4

Ohio 2009). *In re Wilhelm*, 407 B.R. 392, 402 (Bankr. D. Idaho 2009); *Chicago Title Ins. Co. v. Alljirst Bank*, 905 A.2d 366, 374 (Md. 2006). DB here never stated it has the note.

[28] Restatement Property 3d, § 5.4(c), Transfer of Mortgages and Obligations Secured By Mortgages.

Miller & Starr (2d ed. 1989), *Cal. Real Estate*, Deeds of Trust and Mortgages, § 9:154, p. 512 "A note and DOT, although two instruments, form parts of one transaction and must be read and construed together." [29] Furthermore, "the note, 'being inseparably connected with the mortgage, and affected by the conditions therein, is not negotiable," even though such notes may be negotiable under the laws of some other states. [30]

The REMIC Status

The Trust was formed as a REMIC trust. Under the REMIC provisions of the Internal Revenue Code ("IRC") the closing date of the Trust is also the startup day for the Trust. The closing date/startup day is significant because all assets of the Trust were to be transferred to the Trust on or before the closing date to ensure that the Trust received its REMIC status. The IRC provides in pertinent part that:

> "Except as provided in section 860G(d)(2), 'if any amount is contributed to a REMIC after the startup day, there is hereby imposed a tax for the taxable year of the REMIC in which the contribution is received equal to 100 percent of the amount of such contribution."

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[29] *Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 230; accord *Huckell v. Matranga* (1979) 99 Cal.App.3d 471, 481 (note, mortgage, and agreement of sale constitute one contract where part of same transaction); *Nevin v. Salk* (1975) 45 Cal.App.3d 331, 338 (same); *Lilly-Brackett Co. v. Sonnemann* (1910) 157 Cal. 192, 200 ("note and mortgage are one inseparable contract"). In *Central Savings Bank of Oakland v. Coulter* (1925) 72 Cal.App. 78, 82, relying on Civil Code § 1642, the Court of Appeal wrote: "[I]t has consistently been held that a note and mortgage are to be construed together as constituting one agreement or instrument . . . ."

[30] *Central Savings, supra*, citing *Meyer v. Weber* (1901) 133 Cal. 681; see also *Musto v. Grosjean* (1929) 208 Cal. 453, 458 (promissory note for purchase of real property secured by mortgage "is not a negotiable instrument").

26 U.S.C. §860G (d)(1). A trust's ability to transact is restricted to the actions authorized by its trust documents. The specific method of transfer to the Trust, set forth in Section 2.01 which requires the Depositor to provide the Trustee with the original Mortgage Note, endorsed in blank or endorsed with the following: -Pay to the order of DB under the applicable agreement, without recourse." All prior and intervening endorsements must show a complete chain of endorsement from the originator to the Trustee.

Under NY Estates Powers and Trusts Law §7-2.1(c), property must be registered in the name of the trustee for a particular trust in order for transfer to the trustee to be effective. Trust property cannot be held with incomplete endorsements and assignments that do not indicate that the property is held in trust by a trustee {Or a specific beneficiary trust.

V. GROUNDS FOR CERTIFICATION

Article VI Section 3(b)(9) of the NY State Constitution provides:

> The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of NY law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of NY.

In the appeal at bar, a central and potentially determinative issue is whether Appellants have standing to challenge the transfers of their note and mortgage, and the Appellees' noncompliance with the applicable PSA. There is

uncontroverted evidence that the Appellees did not comply with the terms of the PSA in transferring the Appellants' note and mortgage. Neither the NY State Appellate Division nor the NY State Court of Appeals have considered these issues accordingly, this Court may certify the questions to the NY State of Appeals. This procedure would appear appropriate in light of the novelty of the issues and the recent case law which support the Appellants' position. Only a decision of the NY State Court of Appeals would be binding on this Court. *Johnson v. Fran/cell,* 520 U.S. 91 1, 916 (1997); 28 U.S.C. Section 1652. Absent certification, this Court would have to make a determination without the input of the controlling jurisdiction. The United States Supreme Court, in the case of *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741 (1974), which involved Florida law attempting to interpret NY law, noted:

> ...When federal judges in NY attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

There is obviously a difference of opinion on this issue which has far reaching consequences for the homeowners of California. It is therefore respectfully requested that this Court certify the following questions to the NY State Court of Appeal.

Respectfully Submitted, October 29, 2013

Attorney for Brian Davies

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/dianebeall

Diane Beall