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IT IS SO ORDERED.



Burton Perlman
Burton Perlman
United States Bankruptcy Judge

Dated: June 01, 2012

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	:	Case No. 11-14365
Jennifer Price	:	Judge Burton Perlman
Debtor.	:	Chapter 13
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Jennifer Price,	:	Adversary Case No. 11-1177
Plaintiff,	:	
vs.	:	
Wells Fargo Bank, N.A.	:	
Defendant.	:	

DECISION AS TO CROSS MOTIONS FOR SUMMARY JUDGMENT

The present adversary proceeding arises in a chapter 13 case. The debtor, Jennifer

Price, is the plaintiff. Wells Fargo Bank, N.A. is the defendant. Plaintiff filed an Amended Complaint to Determine Secured Status of Mortgage held by defendant. The Amended Complaint contains three causes of action, the first of which is for avoidance of mortgage due to defective notary clause.

Defendant filed a Motion to Dismiss plaintiff's first cause of action. Plaintiff did not respond to this Motion to Dismiss. The Court entered an order dismissing the first cause of action. Accordingly, the Motion for Summary Judgment filed by defendant on the first cause of action is moot.

I. The Present Controversy.

Now before the Court is plaintiff's Motion for Summary Judgment on her second and third causes of action. Defendant filed a brief in opposition, and also filed a cross Motion for Summary Judgment on the second and third causes of action. Plaintiff did not respond.

The second cause of action in the Amended Complaint is entitled:

Second Cause of Action
(11 U.S.C. § 544 and Ohio Revised Code §
5301.01(A) and § 5301.32 - Invalid Assignment
of Mortgage)

In this cause of action, plaintiff asserts that under Ohio law the assignments to defendant were defective. The second cause of action also asserts that the Chapter 13 Trustee could not exercise her strong arm powers under § 544(a), because she could not have had constructive notice of the proper party. In addition, it is asserted that the assignments were defective because they were filed post-petition.

The third cause of action is entitled:

Third Cause of Action
(11 U.S.C. §§ 501, 502, and 506 - Disallowance
of Claims)

Under this cause of action, plaintiff asserts that defendant must produce the note on which its claim is based, and if it fails to do so, the claim of defendant should be disallowed.

II. Jurisdiction.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the general order of reference entered in this district. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

III. Facts.

There is no dispute as to the following facts between the parties. Plaintiff is the owner of real property located at 1309 Burdett Avenue, Cincinnati, Ohio 45206 (the "Property"). Defendant is the holder of a first mortgage on the Property. On January 26, 2005, plaintiff and her ex-spouse executed a mortgage on the Property in favor of Argent Mortgage Company, LLC in the amount of \$139,500. This mortgage was recorded in the appropriate county.

Defendant acquired its interest in the mortgage pursuant to two assignments, each recorded in the Hamilton County Recorder's Office. The first assignment purported to transfer the Property from Argent Mortgage Company, LLC to Ameriquest Mortgage Company ("Assignment One"). The second assignment purported to transfer the Property from Ameriquest Mortgage Company to Wells Fargo ("Assignment Two") (together, the

"Assignments").

IV. Positions of the Parties.

A. Plaintiff's Motion for Partial Summary Judgment

Plaintiff argues that defendant's mortgage is defective because the Assignments were defective. This is the nub of plaintiff's second cause of action. The alleged defects in the Assignments are: "(a) they were recorded post petition and (b) the identifying trust cannot readily be identified which makes it impossible for a bona-fide purchaser . . . to readily identify the proper party" (doc. 23, p. 4). Plaintiff also argues that the mortgage is defective, because Assignment Two does not identify the proper party. Plaintiff states that Assignment Two lists the assignor as "Wells Fargo Bank, N.A., Trustee, Pooling and Servicing Agreement, dated as of April 1st, 2005, Asset-Backed Pass-Through Certificates, Series 2005-WHQ2" (doc. 23, p. 6). Plaintiff's counsel states that a review of the SEC Edgar System shows that the trust is in fact "Park Place Securities, Inc. Series 2005-WHQ2" (doc. 23, p. 6).

Plaintiff centers her argument regarding the second cause of action on the doctrine of constructive knowledge of the mortgage. In effect, plaintiff argues that because the Assignments were not properly recorded at the time of the filing of the bankruptcy petition, a bona fide purchaser would not have had constructive knowledge of an interest or encumbrance. Debtor relies primarily for her argument on In re Williams, 395 B.R. 33 (Bankr. S.D. Ohio 2008).

As to her third cause of action, plaintiff says that unless defendant can produce the original mortgage note, defendant's claim should be disallowed.

B. Defendant's opposition and cross Motion for Summary Judgment

In its brief in opposition to plaintiff's Motion for Summary Judgment, and as a basis for its Motion for Summary Judgment as to causes of action two and three, defendant first states that plaintiff does not have standing to challenge the validity of the mortgage based on the Assignments as contemplated by the second cause of action. Wells Fargo cites Ohio law for the proposition that borrowers cannot establish "injury in fact" as a result of assignments, because borrowers are neither a party nor a third-party beneficiary to assignments of mortgages. Furthermore, defendant argues that even if a borrower was somehow construed to be a party to an assignment, nothing substantive in a note or mortgage changes as a result of an assignment. Therefore, there can be no injury alleged.

Defendant also argues that In re Williams, supra, stands for the proposition of law that defective assignments are only relevant to the avoidance analysis to the extent that they suggest that a property is unencumbered.

Defendant contends that it is properly identified on Assignment Two as well as on the negotiated and indorsed note. In support of this contention, defendant attaches a copy of the original note as well as an affidavit of defendant's counsel attesting to the validity of the note.

Defendant's cross Motion for Summary Judgment largely tracks its opposition summarized above. In addition, however, it cites Ohio law stating that borrowers lack standing to assert rights and defenses pursuant to pooling and servicing agreements (or similar documents). Defendant also reiterates that the doctrine of constructive notice, as relevant to § 544, deals only with the trustee's knowledge that there is any (as opposed to

a particular) encumbrance on given property. Defendant notes that the parties do not dispute that there is an underlying, perfected mortgage on the Property.

Finally, defendant concludes that because the mortgage should not be avoided, and because it has supported proof of its ownership of the properly negotiated note, the Assignments, and an affidavit of its counsel as to the authenticity of the note, it is entitled to summary judgment on plaintiff's third cause of action.

V. Summary Judgment Standard.

As set forth in Federal Rule of Civil Procedure 56(a), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7056, "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." With regard to what is material, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The filing of cross motions for summary judgment does not change the analysis:

"The filing of cross-motions does not alter the standards governing the determination of summary judgment motions." Drown v. Countrywide Home Loans, Inc. (In re Peed), 403 B.R. 525, 529-30 (Bankr. S. D. Ohio 2009). But "cross motions for summary judgment do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." [Id. (quoting Greer v. United States, 207 F.3d 322, 326 (6th Cir. 2000))].

Menninger v. Mortgage Electronic Registration Systems, Inc., et al. (In re Earl), 09-1097

(Bankr. S.D. Ohio July 2, 2010).

VI. Discussion and Decision.

A. As to standing

Defendant in its Motion for Summary Judgment urges that plaintiff lacks standing to question validity of the mortgage based on assignments of the mortgage. In her briefing, plaintiff does not address the issue. In her Amended Complaint, however, plaintiff does say that she brings her complaint “under standing granted to debtor under In re Dickison, 10-ap-5580, (6th Cir., August 26th, 2011).” The Court holds that plaintiff lacks standing to assert invalidity of mortgage based on subsequent assignment transactions. Whatever faults there may be in assignment transactions following execution of a valid mortgage, they do not affect the validity of the mortgage transaction. We agree with the court in Bridge v. Aames Capital Corp., et al., 2010 WL 3834059 at *3 (N.D. Ohio 2010):

Courts have routinely found that a debtor may not challenge an assignment between an assignor and assignee. See, e.g., Livonia Property Holdings v. Farmington Road Holdings, No. 10-1159, slip op., 2010 WL 1956867 1, 7 (E.D. Mich. May 13, 2010) (holding that the plaintiff borrower did not have standing to dispute the validity of an assignment between assignor and assignee because plaintiff was “a non-party to those documents.”).

B. As to plaintiff's second cause of action

Plaintiff's second cause of action asserts invalidity of the mortgage note because, subsequent to the execution of that note, invalid assignments occurred.

Relevant Ohio law states that, “[a] mortgage may be assigned . . . by a separate instrument of assignment.” O.R.C. § 5301.32. The significance of this provision of the Ohio Revised Code is that an assignment or assignments of a note subsequent to execution of

the note is a transaction separate from that of execution of the note. In this case there is no dispute that the original note was properly executed and recorded. What happened by way of assignment subsequently cannot affect the validity of the original note. Plaintiff's message seems to be that a hypothetical bona fide purchaser for the property would be misled by the Assignments. A hypothetical bona fide purchaser would not, however, be misled as to whether the property is encumbered, for the original mortgage has been recorded.

Our decision is in accord with In re Williams, 395 B.R. 33 (Bankr. S.D. Ohio 2008). Plaintiff's reliance on that case is mistaken.

Defendant therefore is entitled to summary judgment on plaintiff's second cause of action, and plaintiff's Motion for Summary Judgment on that cause of action is denied.

C. As to plaintiff's third cause of action

In her third cause of action, plaintiff seems to be requiring that defendant produce the original mortgage note. Defendant has done so. Plaintiff is therefore entitled to summary judgment on Plaintiff's Third Cause of Action. Plaintiff's Motion for Summary Judgment on its third cause of action is denied.

VII. Conclusion.

On the basis of the foregoing, plaintiff's Motion for Partial Summary Judgment as to the second and third causes of action of the Amended Complaint will be DENIED and

defendant's Motion for Summary Judgment as to second and third causes of action will be

GRANTED.

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