

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION: CASE NO. 51-2009-CA-7656-ES; DIVISION J4

BAC HOME LOANS SERVICING, LP F/K/A
COUNTRYWIDE HOME LOANS SERVICING, L.P.,

Plaintiff,

vs.

BILL R. STENTZ AKA WILLIAM R. STENTZ, et al.,

Defendant(s).

ORDER

This cause came upon Defendants' Motions Directed to Complaint and Notice of Intent to Dismiss under Florida Statutes Section 57.011, attorney Gregory D. Clark, Esq. appeared on behalf of the Defendants, BILL R. STENTZ AKA WILLIAM R. STENTZ and JACKLYN L. STENTZ¹.

The Court having heard argument from counsel and considered the case, statutory, and procedural law of Florida as hereinafter set forth, and the Court otherwise being duly advised in the premises enters this order based upon the following findings and conclusions:

1. Defendants sought dismissal of the complaint or alternatively, an order for more definite statement of it. Additionally, at hearing Defense counsel advised the Court that the cost bond under F.S. § 57.011 had been posted by Plaintiff and that that portion of Defendants' motions was moot.

¹ Although the hearing was duly noticed by the Plaintiff, the Plaintiff did not appear for the matter, which was scheduled for 2:15 p.m. November 8th, 2010, and at 2:31 p.m., the conclusion of the hearing, Plaintiff had still not shown up.

2. The complaint filed by Plaintiff is an *in rem* action in equity to enforce a mortgage, not an *in personam* action at law for enforcement of the note for money damages, see SunTrust Mortgage v. Fullerton, FLWSUPP, 1612, (6th Judicial Circuit, Pinellas County, October, 2009).

3. The copy of the note filed by Plaintiff shows upon it that it has been indorsed in blank. Thus, though Plaintiff may be a “holder” it is not by virtue of such an open indorsement, an *owner* of it. See F.S. § 673.2031, Comment 1: “a thief who steals a check payable to bearer becomes the holder of the check ... but does not become the owner of it.”

4. The complaint fails to satisfy the allegations set forth in Fla. R. Civ. P. Form 1.944 for pleading foreclosure actions, to wit: Paragraph 3 of Form 1.944 states: “Plaintiff *owns* and holds the note and mortgage.”²

5. The Plaintiff failed to plead that it is the *owner* of the note nor did it plead who is the owner. Indeed, Plaintiff seems to identify itself as a “loan servicer” in the caption and introductory paragraph of the complaint.

6. The Plaintiff has failed to plead in its complaint that it is the owner of the mortgage; and contrary to Plaintiff’s allegations, it is not the holder of the mortgage as that instrument is vested in the name of MERS and there is no attachment of an assignment to Plaintiff.

ACCORDINGLY, IT IS HEREBY ADJUDGED:

A. Defendants’ motion to dismiss is GRANTED.

B. Plaintiff shall be granted 30 days to amend its complaint and in so doing must:

1. Allege additional ultimate facts, not conclusions of law, that specifically set forth and identify the present owner of the note and mortgage and the present holder of the note and mortgage and in so doing deraign the chain of ownership/holdership since the loan’s

² Furthermore, the Supreme Court of Florida in its recent Administrative Order AOSC09-54 recognizes that Plaintiff must document that they are the owner and holder in due course of the note and mortgage.

inception.

2. Allege ultimate facts why the note is indorsed in blank and specifically deny, if that be the case, that it or an interest in has been pledged or given to another. If such an interest has been so assigned or pledged, whether whole or partial, specific additional ultimate facts must be pled, e.g. paragraph 20 of the attached mortgage specifies that partial interests in the note may be sold (such as into a securitized trust instrument vehicle). If this is true Plaintiff must set forth the details of such with specific ultimate fact allegations.

3. Plaintiff must specifically plead and identify both the owner and holder of the note and mortgage. It is not enough for Plaintiff to only plead that it holds the note and mortgage and in this regard its allegation in paragraph 4 of its complaint is insufficient, Plaintiff must ultimately prove ownership as well, see: Dykes v. TrustBank Savings, 567 So. 2d 958 (Fla. 2nd DCA, 1990) which holds that to grant a judgment of foreclosure in favor of Plaintiff the trial court would have to find among other things, that the Plaintiff owned the mortgage. Dykes at page 959.

4. If Plaintiff is not the owner of the note it must specifically plead ultimate facts identifying the owner and Plaintiff's authority to act as a representative for same attaching such proof of said representative authority whether it be by power of attorney or other written agency agreement.

5. Allege and identify all documents, by attachment, upon which Plaintiff relies to establish the ownership of the note and mortgage.

6. The Court finds that although the original note was held by Countrywide KB Home Loans, a Countrywide Mortgage Ventures, LLC Series, the mortgage was specifically made to and held by a separate entity, MERS, and therefore equitable assignment under Johns V.

Gillian, 184 So. 140 (Fla. 1938) and WM Specialty Mortgage, LLC v. Salomon, 874 So. 2d 680 (Fla. 4th DCA 2004) is unavailable to Plaintiff as the mortgage was, by agreement, vested in a different entity than Plaintiff's predecessor holder of the note.

7. Plaintiff shall have 30 days to amend and file a new complaint. That said complaint must be verified per F.S. § 92.525(2) and Muss v. Lennar Florida Partners, 673 So 2d 84 (Fla. 4th DCA, 1996) and that any allegation in the verification containing "best knowledge and belief" language is insufficient. The verification cannot be signed by the attorney of record but must be signed by a duly authorized corporate representative/officer for the Plaintiff, BAC Home Loans Servicing, LP. Defendants shall have 20 days to respond to Plaintiff's amended complaint.

DONE AND ORDERED, in Chambers at Dade City, PASCO County, Florida, on this day of _____, 2010.

**Done and Ordered
at Dade City,
Pasco County, Florida**

CIRCUIT JUDGE

DEC 01 2010

cc: Gregory D. Clark, Esq.
Robert P. Roeper, II, Esq.

Lynn Tepper,
Circuit Judge