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BANK OF AMERICA, NA, as successor by
merger to LaSalle Bank, NA as Trustee for
WaMu Mortgage Pass-Through
Certificates Series 2006-AR11 Trust,

Plaintiff,

vs.

JANETT ALVARADO,

Defendant.

**SUPERIOR COURT OF NEW JERSEY
CHANCERY – BERGEN COUNTY
DOCKET NO. BER-F-47941-08**

Civil Action

DECISION

Decided: January 7, 2011

Christopher Ford, Esq., Counsel for Plaintiff
Adam Deutsch, Esq., Counsel for Defendant

MARY F. THURBER, J.S.C.

This matter came before the Court on plaintiff, Bank of America's (BOA's), motion for summary judgment, seeking to strike defendant's answer, to dismiss her counterclaim, to enter default, and to transfer the case to the Foreclosure Unit. For the reasons set forth below, plaintiff's motion is granted.

Defendant does not dispute (1) that she executed a Note and Mortgage to Washington Mutual Bank in the amount of \$292,000.00, secured by property located at 79 North Avenue in Bogota, New Jersey, nor (2) that she defaulted on the loan on July 1, 2008. She challenges plaintiff's claim that it has the right to foreclose.

Defendant's initial challenge was based at least in substantial part on defendant's claim that plaintiff had not established it was in possession of the Note at the time the complaint was

filed. Plaintiff subsequently conceded (at oral argument on August 20, 2010) it was not in possession of the Note because the Note had been lost by Washington Mutual before the loan obligation was transferred. Plaintiff seeks to foreclose as the successor to Washington Mutual's right to enforce the lost Note.

The chain of ownership set forth by plaintiff was that the Note and Mortgage were sold by Washington Mutual, as part of a group of notes, to WaMu Asset Acceptance Corp, which was the depositor under a Pooling and Servicing Agreement whereby ownership of the Notes and Mortgages encompassed by the Agreement was transferred to LaSalle Bank, NA, as Trustee for WaMu Mortgage Pass-Through Certificates Series 2006-AR11 Trust. Bank of America claims the right to enforce the Note obligation as successor trustee to La Salle Bank by merger.

At oral argument on August 20, 2010, plaintiff brought forward for the first time an Affidavit of Lost Note, dated July 14, 2006. At the request of defendant the court adjourned the summary judgment motion and permitted discovery concerning the newly provided evidence. The motion was again adjourned at the request of plaintiff during a period of self-imposed suspension of enforcement. No supplemental briefs were provided concerning the issue of the Lost Note, but both counsel raised new legal arguments at oral argument in December 2010.

The pivotal issue, as both counsel agree, is whether the right to enforce a lost note or instrument can be transferred or assigned or, put differently, whether any person other than the person who lost the Note can enforce a lost Note. The original Note was certified as lost by the original lender. When a group of loans was pooled and securitized, the Affidavit of Lost Note was prepared for the lost Note, and the obligation the Affidavit represented was intended to be included in the pooled loans that were transferred. There is no genuine dispute regarding those facts, and nothing advanced to challenge them, even after additional discovery was permitted.

The Uniform Commercial Code (“UCC”) as adopted in New Jersey is set forth in Title 12A of the New Jersey Statutes. N.J.S. 12A:3-301 defines a person entitled to enforce an instrument as “the holder of the instrument, a nonholder in possession of the instrument who has the rights of the holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 12A:3-309” N.J.S. 12A:3-309 provides “A person not in possession of an instrument is entitled to enforce the instrument if the person was in possession of the instrument and entitled to enforce it when the loss of possession occurred” (emphasis added).

Defendant argues BOA cannot enforce the Alvarado note because it was never in possession of the Note, and therefore it is not under this provision the person who “was in possession and entitled to enforce it when the loss of possession occurred.” Plaintiff, on the other hand, contends the Affidavit of Lost Note was properly executed by the entity that was in possession and entitled to enforce it when the loss occurred, and that it has the same right to enforce the original Note that Washington Mutual had when the Affidavit was executed.¹

No New Jersey state court case has been found that addresses this issue under this provision of the UCC and none was provided to the court by counsel. Defendant relies on a decision by Judge Wizmur in Kemp v. Countrywide Home Loans, Inc., _____ B.R. _____ 2010 WL 4777625 (Bkrptcy D.N.J. 2010). In that case the court disallowed a creditor’s claim to enforce an obligation because the creditor had never come into possession of the underlying note. The creditor advanced several arguments. With respect to its claim of a lost note, the bankruptcy court declined to consider the lost note certification because its factual predicate

¹ In response to a question from the court plaintiff’s counsel intimated that the court could consider the Affidavit an instrument that could be transferred pursuant to N.J.S. 12A:2-203, but offered no support for that proposition. Review of the Code definition of instrument as well as all discovered cases addressing the issue of lost instruments satisfied this court that the Affidavit is not an instrument within the meaning of the UCC.

conflicted with other facts presented, and thus the legal issue of entitlement to enforce a lost note was not before the court. The court then discussed a recent Massachusetts District Court case in which a creditor was barred from relying on Section 3-309A of the Massachusetts UCC because it had never been in possession of a note then claimed to be lost. That case was relevant for the policy concern of exposing debtors to multiple enforcement claims, but the reference to it by Judge Wizmur does not appear to this court to comprise a ruling by the New Jersey Bankruptcy Court that N.J.S. 12A:3-309(a) precludes enforcement of a lost note or instrument by any person other than the one who originally lost it -- rather, the Bankruptcy court declined to consider the lost note claim.

After promulgation of UCC §3-309, courts were divided on the issue of whether as originally drafted this section precluded enforcement of a lost note by a successor or assignee of the person who lost it. An early case, Dennis Joslin Co., L.L.C. v. Robinson Broadcasting Corp., 977 F. Supp. 491 (D.D.C. 1997), held that it did preclude enforcement:

While there does not appear to be a logical reason to distinguish between a person who was in possession at the time of the loss and one who later comes into possession of the rights to the note, the plain language of the provision mandates that the plaintiff suing on the note must meet two tests, not just one: it must have been both in possession of the note when it was lost and entitled to enforce the note when it was lost.

977 F. Supp. at 495.

Thereafter a number of courts followed the Dennis Joslin decision, while others veered from it, either by finding that enforcement rights could be transferred to non-possessors pursuant to UCC §3-203 (allowing for transfer of rights), or by incorporating common law principles of assignment as a gap-filler deemed permitted by UCC §1-103. Timothy R. Zinnecker, Extending Enforcement Rights to Assignees of Lost, Destroyed, or Stolen Negotiable Instruments Under

U.C.C. Article 3: A Proposal for Reform, 50 U. Kan. L. Rev. 111, 112 and ns. 7 and 8 (2001); White and Summers, Uniform Commercial Code, 5th Ed., Vol. 2, Sec. 18-2, at 241 and n. 1.

Section 3-309 of the Uniform Commercial Code was amended in 2002 to eliminate the requirement of possession, specifically including as one with the right to enforce a lost instrument a person who “has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.” White and Summers, *supra*, at 241, n.2. The official comment states this was intended to reject the holding in Dennis Joslin. “A transferee of a lost instrument need prove only that its transferor was entitled to enforce, not that the transferee was in possession at the time the instrument was lost.” N.J.S. 12A:3-309, Uniform Commercial Code cmt. 2.

New Jersey has not adopted the 2002 amendment. Our version of UCC Section 3-309 is as originally adopted in 1995. Therefore, consideration of whether plaintiff can enforce the lost note leads this court to consider the pre-amendment cases from other jurisdictions (collectively discussed in the Zinnecker article and White and Summers treatise, *supra*).

Adopting the holding of Dennis Joslin would lead to the result that no entity now exists that can enforce defendant’s defaulted Note obligation, thereby leading to a windfall to defendant. That result would not be equitable. The pass-through trust created in 2006 was intended to include acquisition of defendant’s Note and Mortgage obligation to Washington Mutual. This court is persuaded that Bank of America, as successor to La Salle National Bank, Trustee of the pass-through trust, has the right to enforce the obligation represented by the Lost Note.

A number of courts have held that the Code (in the pre-2002 language that remains in effect in New Jersey) is silent on the issue of assignability of rights under a promissory note that

has been lost, and therefore courts can look to common law principles of law and equity that were not displaced by specific provisions of the Code. N.J.S. 12A:1-103. Several courts have relied on the common law legal doctrine of assignment, while others have looked to the equitable doctrine of unjust enrichment.² In Atlantic National Trust, LLC v. McNamee, 984 So. 2d 375 (AL 2007), the Alabama Supreme Court majority adopted the view that because Article 3 of the UCC as enacted in Alabama did not address the assignability of rights under a promissory note after it had been lost, stolen, or destroyed, the legal doctrine of assignment was not preempted and therefore under Section 1-103 of the Code it could be relied on to fashion a remedy. The concurrence adopted the reasoning of Professor Zinnecker and relied instead on the equitable doctrine of unjust enrichment.

The doctrine of unjust enrichment is well-established in New Jersey. See, e.g., Goldsmith v. Camden County Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div. 2009); Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966) (“The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.”). When a person receives a benefit and it would be inequitable to permit that person to retain the benefit without paying fair compensation or consideration for it, the doctrine of unjust enrichment permits courts of equity to fashion a remedy. Defendant Janett Alvarado admittedly has not paid her obligations under the Note and Mortgage since 2008. To preclude enforcement of that obligation by plaintiff, whose predecessor

² Timothy Zinnecker argues with persuasion that when UCC §§3-301, 3-309, and 3-203 are read collectively, they describe with particularity the parties who enjoy enforcement rights and therefore there is no gap to be filled by common law legal doctrine. However, even he advocates that courts should find the equitable doctrines of unjust enrichment and subrogation are not preempted by the Code, and should rely on those to permit enforcement by a successor in interest. Zinnecker, *supra*, 50 U. Kan. L. Rev. at 129-30, and Section C “Using the Code to Reach a Proper Result: Section 1-103 Revisited” at 134-36.

paid valuable consideration to acquire that right from Washington Mutual, would unjustly enrich defendant. This court will not cause that result.

Similarly, BOA (as successor to LaSalle) is the assignee of the rights possessed by Washington Mutual, who sold them to WaMu Asset Acceptance Corp., who deposited those rights into the pass-through trust, intending to transfer or assign to the trustee all rights to enforce and collect the loan obligations so transferred. The common law doctrine of assignment is sufficiently broad to permit assignment of the right to enforce a lost note. This court does not necessarily read N.J.S. 12A:3-309 and the related provisions as preempting the common law of assignment. Although, as previously indicated, Professor Zinnecker makes a forceful argument that the Code is preemptive of the legal remedy of assignment, New Jersey recognizes an equitable assignment when the equities of a circumstance so compel. Sheeran v. Sitren, 168 N.J. Super. 402 (Law Div. 1979). Even if a higher court determined that common law assignment were preempted by the Code, the equitable remedy of unjust enrichment would still compel the result reached here.

N.J.S. 12A:3-309(b) requires as a condition of entering judgment in favor of plaintiff that the court find defendant is adequately protected against the loss that might occur if another person should seek in the future to enforce the note. This court finds that the combination of several factors, including the passage of more than four years since the note was lost, the circumstance that it was lost almost immediately after execution in 2006, and the total absence of any person or entity making demand for payment from defendant to date, make it unlikely that defendant would be faced with a demand for payment from another source hereafter. In the unlikely event any such action is filed in the future, Bank of America shall be required to

intervene and participate in the defense so that defendant shall not be liable twice for the same obligation.

Plaintiff is entitled to enforce the Note obligation of defendant, and is entitled to summary judgment. An Order accompanies this Decision.