

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-003595

02/16/2011

HON. EDWARD O. BURKE

CLERK OF THE COURT
L. Nixon
Deputy

RYAN R LEVI

DOUGLAS C RHOADS

v.

U S BANK HOME MORTGAGE, et al.

LEONARD J MCDONALD
KEVIN P NELSON

STATE BAR OF ARIZONA

MINUTE ENTRY

The court has had the issues raised in plaintiff Ryan R. Levi's Application For Issuance Of A Temporary Restraining Order to restrain defendants from conducting a trustee's sale of plaintiff's property until a trial on the merits can be held on the issues raised in his complaint under advisement, and enters the following ruling.

Facts

1. November 7, 2001. Mark Rudisill, a mortgage documentation officer for U.S. Bank, N.A. ("US Bank"), executed a limited power of attorney appointing Lisa Rogers of National Default Servicing Corporation, to execute documents on behalf of US Bank in connection with deeds of trust, deeds in lieu of foreclosure, notices of sale, etc. (Exhibit 12). All exhibit references are to those received in evidence at the February 14, 2011 temporary restraining order hearing.
2. February 18, 2004. Plaintiff purchased a home located at 3014 East Enid Avenue, Mesa, Arizona 85204 (the "Property") by borrowing \$100,000.00 from Downey Savings and Loan Association, F.A. ("Downey").

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3. February 18, 2004. Plaintiff signed a \$100,000.00 adjustable rate note payable to Downey. (the "Note", Exhibit 5).
4. February 19, 2004. Plaintiff signed a deed of trust (the "Deed of Trust") conveying the Property to DSL Service Company, a California corporation as trustee with the power of sale of the Property for the benefit of Downey to secure the Note. (Exhibit 6).
5. March 3, 2004. The Deed of Trust was recorded in the Maricopa County Recorder's Office as instrument number 2004-0220889.
6. April 20, 2009. The FDIC, as Downey's receiver, executed a Bill of Sale to US Bank, pursuant to a November 21, 2008 Agreement, in which it sold and conveyed to US Bank certain assets, including the Note. (Exhibit 1).
7. Plaintiff made payments on the Note for approximately 5 1/2 years (Exhibit 18). Exhibit 18 pointed out to plaintiff's counsel that US Bank owns the servicing rights to the loan which it acquired from the FDIC as receiver of Downey. The letter further states that US Bank acquired the loan from the FDIC, that it has been owned and serviced by US Bank since the day of its origination, and that the Note has been and remains in US Bank's possession.
8. March 25, 2010. Lisa Rogers, as "director for National Default Servicing Corporation as attorney in fact for US Bank," executed a Substitution of Trustee appointing Michael A. Bosco, Jr. ("Bosco") as successor trustee under the Deed of Trust. (Plaintiff's complaint, paragraph 19, and Exhibit 11). The Substitution of Trustee was recorded in the Maricopa County Recorder's office at instrument number 2010-0260909.
9. March 25, 2010. Lisa Rogers signed a Statement of Breach or Non-Performance stating that plaintiff had failed to make the monthly payments on the Note since December 1, 2009. (Exhibit 8).
10. March 29, 2010. Bosco executed a Notice of Trustee's Sale for June 28, 2010, on behalf of US Bank which was recorded in the Maricopa County Recorder's Office at instrument number 2010-0260910. (Exhibit 13).
11. Plaintiff's complaint alleges, on information and belief, that the Note was scanned and intentionally destroyed to facilitate securitization into a mortgage backed security. (Complaint, paragraph 12).

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12. Plaintiff alleges: “These Defendants, LPS, T&B, Michael Bosco, and US Bank were intermediaries without authority. They were not the Lender and they cannot produce a legitimate document that evidences that they were empowered to act for the Lender or the beneficiaries.” (Complaint, paragraph 32).
13. Plaintiff alleges: “Defendants have failed to show competent proof that U.S. Bank was a valid beneficiary at the time T&B issued the Notice of Sale or ever.” (Complaint, paragraph 33).
14. Plaintiff also alleges that: “Neither U.S. Bank, LPS, Downey nor Bosco are the proper beneficiary or lender under the Deed of Trust. In pursuing non-judicial foreclosure Defendants have represented that they have the right to payment under the Note, payment of which is secured by the security instrument. The truth is, Defendants were not entitled to enforce the Note and never were either holders of the Note or entitled to enforce it.” (Complaint, paragraph 39).
15. Plaintiff claims: “There is not a single recorded assignment evidencing conveyance of the Note from the Loan Originator, to the Seller, to the Depositor, or to the Trustee on file with the Maricopa County Recorder’s Office.” (Complaint, paragraph 56).
16. Plaintiff alleges that defendants breached their contract with plaintiff by entering into a pooling and servicing agreement with third-parties, and not plaintiff, which governs plaintiff’s loan and effectively takes away material bargained for terms of paragraph 22 of the Deed of Trust. (Complaint, paragraph 41).
17. Plaintiff’s second claim for relief is that he was misled by DOES 1-100 and other Downey agents, that Downey’s underwriters did not examine plaintiff’s evidence of actual income, and, by misrepresenting that Downey was the actual lender and not disclosing that the true lenders were investors in a REMIC Trust, Downey had no risk.
18. Plaintiff’s third claim for relief alleges that Downey is intentionally presenting itself as the true lender in violation of Arizona’s Consumer Fraud Act, A.R.S. § 44-1521 et seq.
19. Plaintiff’s fourth claim for relief seeks an accounting of his account with defendants to see whether the loan was in lawful compliance of all laws governing disclosure and to see if monies are owed him by way of setoff to the balance of the mortgage.
20. Plaintiff’s fifth claim for relief seeks to quiet title in the Property barring the defendants from having or claiming any right or title to the Property adverse to plaintiff. Plaintiff seeks compensatory and general damages, rescission of the contracts, punitive damages, an

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accounting, and a judgment that the defendants have no interest in the Property adverse to plaintiff.

21. Plaintiff's Application for Issuance of a Temporary Restraining Order alleges that the Note was intentionally destroyed to facilitate the securitization of the income stream which he claims legally voided the debt obligation of the Note and the security interest under the Deed of Trust. Plaintiff further alleges that the planned trustee's sale should be temporarily enjoined and restrained because US Bank is not the lender or current beneficiary which allegedly retained/substituted Bosco as its' agent to conduct the trustee's sale and further, that US. Bank is not the holder of the properly endorsed assigned Note.

Ruling

Plaintiff's application for a temporary restraining order is DENIED.

Discussion

"Public policy favors honesty and validity of recorded documents and the verification and disclosure of the true facts." (Plaintiff's Application for Issuance Of A Temporary Restraining Order And Memorandum Of law In Support Thereof, p.10, lines 1-2).

"A lawyer shall not knowingly: ... (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client ..." (Rule 42 of the Supreme Court, E.R. 3.3).

Plaintiff cites *Nosek v. Ameriquest Mortgage Company*, 286 B.R. 374 (Bankr.D. Mass. 2008); *Deutsche Bank National Trust Co. v. Steele*, 2008 WL 111227 (S.D. Ohio) January 8, 2008; *BAC Funding Consortium Inc. v. Jean-Jacques et al*, Florida 2d DCA Case No. 2D08-3553; *HSBC Bank USA, N.A. v. Valentin*, 21 Misc. 3d 1124 (A), 2008 WL 4764816 (N.Y. Supp. November 3, 2008); *Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480 (1982); *Baron v. Colonial Mortgage Service Corporation*, 111 Cal. App.3d 316; *Bank of Seoul & Trust Co. v. Marcione*, 198 Cal. App. 3d 113 in support of his contention that because the Note was destroyed and it cannot be or has not been produced by the trustee, the trustee's sale must be enjoined. Plaintiff's counsel well knows that these out-of-state cases are not the law in Arizona.

More than thirty opinions of the United States District Court for the District of Arizona have rejected the "show me the note" theory. See, *In re Mortgage Elec. Registration Systems (MERS) Litigation*, 2011 WL 251453 (D.Ariz. January 25, 2011); *Vollmer v. Present*, 2011 WL 11415 (D.Ariz. January 4, 2011) (NO. CV 10-1182-PHX-MHM); *Diessner v. Mortgage Elec. Registration Sys.*, 618 F. Supp.2d 1184, 1187 (D.Ariz. 2009); *Ciardi v. Lending Co.*, 2010 WL

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2079735 (D.Ariz. May 24, 2010); *Cettolin v. GMAC*, 2010 WL 5151334 (D.Ariz. December 13, 2010) (NO. CV 10-8036-PCT-JAT); *Kane v. Bosco*, 2010 WL 4879177 (D.Ariz. November 23, 2010) (NO. 10-CV-01787-PHX-JAT); *Nichols v. Bosco*, 2010 WL 4716757 (D.Ariz. November 15, 2010) (NO. CV-10-01872-PHX-FJM); *Brosnahan v. JP Morgan Chase Bank*, 2010 WL 4269562 (D.Ariz. October 25, 2010) (NO. CV 09-8224-PCT-JAT); *Salazar v. Lehman Bros. Bank*, 2010 WL 3998047 (D.Ariz. October 12, 2010) (NO. CV-10-0099-PHX-DGC); *Nichols v. Bosco*, 2010 WL 3909205 (D.Ariz. October 1, 2010) (NO. CV 10-1872-PHX-FJM); *In re Mortgage Electronic Registration Systems (MERS) Litigation*, 2010 WL 4038788 (D.Ariz. September 30, 2010) (NO. 09-2119-JAT); *Cettolin v. GMAC*, 2010 WL 3834628 (D.Ariz. September 24, 2010) (NO. CV 10-8036-PCT-JAT); *Rodriguez v. Quality Loan Service Corp.*, 2010 WL 3522287 (D.Ariz. September 2, 2010) (NO. CV-09-1853-PHX-FJM); *Nordeen v. America's Wholesale Lender*, 2010 WL 3168638 (D.Ariz. August 10, 2010) (NO. CV-10-0568-PHX-NVW); *Dumont v. HSBC Mortg. Corp., USA*, 2010 WL 3023885 (D.Ariz. August 2, 2010) (NO. CV-10-1106-PHX-MHM); *Lavenue v. Edmunds*, 2010 WL 2838383 (D.Ariz. July 20, 2010) (NO. CV 10-1479-PHX-DGC); *Maxa v. Countrywide Loans, Inc.*, 2010 WL 2836958 (D.Ariz. July 19, 2010) (NO. CV10-8076-PCT-NVW); *Haskins v. Moynihan*, 2010 WL 2691562 (D.Ariz. July 6, 2010) (NO. CV-10-1000-PHX-GMS); *Steiniger v. Gerspach*, 2010 WL 2671767, (D.Ariz. July 2, 2010) (NO. CV-10-8087-PCT-GMS); *Brosnahan v. Bank of America*, 2010 WL 2629422 (D.Ariz. June 30, 2010) (NO. CV-10-8056-PCT-FJM); *Earl v. Wachovia Mortgage FSB*, 2010 WL 2336191 (D.Ariz. June 10, 2010) (NO. CV09-2198PHXMHM); *Sundell-Bahrd v. Tiffany & Bosco, P.A.*, 2010 WL 2595083 (D.Ariz. June 24, 2010) (NO. CV 108096PCTMHM); *Robinson v. Wells Fargo Bank, N.A.*, 2010 WL 2534192 (D.Ariz. June 18, 2010) (NO. CV 09-2066PHXJAT); *Brosnahan v. JPMorgan Chase Bank*, 2010 WL 2181490 (D.Ariz. May 26, 2010) (NO. CV09-8224-PCT-JAT); *Przybylski v. Stumpf*, 2010 WL 2025393 (D.Ariz. May 19, 2010) (NO. CV-10-8073-PCT-GMS); *Grey v. First American Title Ins. Co.*, 2010 WL 1962323 (D.Ariz. May 14, 2010) (NO. CV09-1807-PHX-JAT); 2010 WL 1742536 (D.Ariz. April 29, 2010) (NO. CV-09-1593-PHX-FJM); *Italiano v. Concord Mortg. Co.*, 2010 WL 1531054 (D.Ariz. April 8, 2010) (NO. CV-10-685-PHX-MHM); *Rhoads v. Washington Mut. Bank, F.A.*, 2010 WL 1408888 (D.Ariz. April 7, 2010) (NO. CV10-0197-PHX-NVW); *Dumesnil v. Bank of America, N.A.*, 2010 WL 1408889 (D.Ariz. April 7, 2010) (NO. CV 10-0243-PHX-NVW); *Garcia v. ReconTrust Co.*, 2010 WL 1268136 (D.Ariz. March 30, 2010) (NO. CV-08-8113-PHX-MHM); *Atkins v. Chevy Chase Bank, F.S.B.*, 2010 WL 832293 (D.Ariz. March 5, 2010) (NO. CV-09-2264-PHX-FJM); *Contreras v. U.S. Bank as Trustee for CSMC Mortg. Backed Pass-through Certificates, Series 2006-5*, 2009 WL 4827016 (D.Ariz. December 15, 2009) (NO. CV09-0137-PHX-NVW); *Levine v. Downey Sav. and Loan F.A.*, 2009 WL 4282471, (D.Ariz. November 25, 2009) (NO. CV-09-1656-PHX-JAT); *Blau v. America's Servicing Co.*, 2009 WL 3174823 (D.Ariz. September 29, 2009) (NO. CV-08-773-PHX-MHM); *Goodyke v. BNC Mortg., Inc.*, 2009 WL 2971086 (D.Ariz. September 11, 2009) (NO. CV09-0074-PHX-MHM); *Garcia v. GMAC Mortg., LLC*, 2009 WL 2782791 (D.Ariz. August 31,

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2009) (NO. CV-09-0891-PHX-GMS); and *Mansour v. Cal-Western Reconveyance Corp.*, 618 F.Supp.2d 1178 (D.Ariz. April 21, 2009).

In *Dumont v. HSBC Mortgage Corporation, USA*, 2010 WL 3023885 (D.Ariz. August 2, 2010) plaintiff's counsel represented a similarly situated plaintiff and was admonished and threatened with sanctions by United States District Court Judge Mary H. Murgia for failing to cite local authority which controverted his "show me the note" theory. See, *supra*, FN3.

Although plaintiff's counsel cited seven out-of-state cases to this court, he failed to cite even one of the above controverting cases from the U.S. District Court for the District of Arizona, which this court believes violates E.R. 3.3. This failure can't be an oversight as he was counsel of record in two of the above cases, *Dumont and Dumesnil, supra* and the self-represented plaintiff in a third, *Rhoads, supra*. For this reason, the court has endorsed the State Bar of Arizona.

Plaintiff claims that this is not a "show me the note" case, but his arguments and the evidence he presented belie that position. As Judge Martone said in footnote no. 1 in *Nichols v Bosco, supra*:

"Plaintiff claims he is not advancing a **show-me-the note** theory, but rather is simply asking the court to protect his property rights. *Motion to Sequester* ¶ 7. However, by asking this court to require defendants to produce the original trust deed note, plaintiff is essentially arguing that production of the note is required for non-judicial foreclosure, which it is not. Plaintiff continues to advance a "**show-me the note**" legal argument whether he requests the note be produced for the court to see or for himself to see."

Plaintiff in this case demands that defendants "show me the assignment" of the Note, which this court finds no different in legal analysis than the "show me the note" theory.

Plaintiff presented Charles Joseph Deal, a "mortgage auditor" who opined that there is no indication that anything was signed by US Bank. to give Bosco the authority to conduct a trustee's sale. Exhibit 1 directly contradicts Mr. Deal's testimony.

William McCaffrey, a 30 year veteran of the mortgage banking business, testified that for Bosco to conduct a trustee's sale, an assignment by an FDIC employee is required. Although the court could find an assignment of the Note in Exhibit 1, the court finds that no such requirement in Arizona law. Mr. McCaffrey further testified that in 500 notes he has examined, he has never seen one that was properly endorsed. On cross-examination he was compelled to admit that

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Exhibit 1 contains information indicating that Terance R. Dolan assigned the FDIC's interest to US Bank.

To obtain a preliminary injunction, plaintiff must establish that he has a strong likelihood of success on the merits along with the possibility of irreparable harm. *LaFaro v. Cahill*, 203 Ariz. 482, 56 P.3d 56 (App. 2002). Contrary to plaintiff's arguments the court does not find that plaintiff has any likelihood of success on the merits, let alone a strong likelihood. The court believes that this case is governed by the Arizona cases which refuse to give credence to either the "show me the note" theory or plaintiff's "show me the assignment" permutation of that theory.