

March 18, 2013

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U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

FILED

MAR 18 2013

UNITED STATES BANKRUPTCY COURT
United States Bankruptcy Court
San Jose, California
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

In re

MICHEAL S. GREY and
SUSAN P. GREY,

Debtors.

MICHEAL S. GREY and
SUSAN P. GREY,

Plaintiffs,

vs.

DEUTSCHE BANK TRUST COMPANY
AMERICAS AS TRUSTEE, FOR
CERTIFICATE HOLDERS OF BEAR STEARNS
ASSET BACK SECURITIES, INC. ASSET
BACKED CERTIFICATES SERIES 2003-
QS13, LITTON LOAN SERVING LP, and
DOES 1-100,

Defendants.

Case No. 09-60930-ASW

Chapter 13

Adv. Proc. No. 10-05288

MEMORANDUM DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment. One is a motion filed by Plaintiffs Micheal S. Grey and Susan P. Grey,

1 who are not represented by counsel.¹ The Plaintiffs' motion is
2 opposed by Defendants Deutsche Bank Trust Company Americas as
3 Trustee, for Certificate Holders of Bear Stearns Asset-Backed
4 Certificate Series 2003-QS13 ("Deutsche Bank"), and by Litton Loan
5 Servicing LP ("Litton"). Both of these Defendants are represented
6 by attorneys Eric Houser and Robert W. Norman, Jr. Defendants have
7 also filed a summary judgment motion, which Plaintiffs have
8 opposed.

9 Except as noted, from the cross-motions, it is evident that
10 the parties agree on the universe of facts. There are two issues
11 before the Court on these two motions: (1) whether Deutsche Bank
12 has standing to enforce a lost promissory note executed by
13 Plaintiffs in favor of National City Mortgage Co. dba Commonwealth
14 United Mortgage Company ("National City Mortgage") on April 28,
15 2003; and (2) whether Litton had standing as the loan servicer to
16 seek relief from the automatic stay and file a proof of claim on
17 behalf of Deutsche Bank. For the reasons which follow, the Court
18 denies both motions.

19
20 **Standard of Review**

21 A court shall grant summary judgment if the pleadings and any
22 filed affidavits, discovery responses and deposition testimony show
23 that there is no genuine issue as to any material fact and that the
24 moving party is entitled to a judgment as a matter of law. Fed. R.
25 Bankr. P. 7065 (incorporating Fed. R. Civ. P. 56); Matsushita Elec.
26 Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 584-85
27 (1986). Material facts are those that may affect the outcome of

28

¹ Plaintiff Susan P. Grey is currently an active member of the California State Bar.

1 the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
2 (1986). A dispute as to a material fact is genuine if there is
3 sufficient evidence for a reasonable jury to return a verdict for
4 the non-moving party. Id. at 248. When determining whether such a
5 factual dispute exists, the Court may not weigh the evidence or
6 make credibility determinations. Id. at 255; see also Bravo v.
7 City of Santa Maria, 665 F.3d 1076, 1083 (9th Cir. 2011). Instead,
8 "the evidence of the non-movant is to be believed, and all
9 justifiable inferences are to be drawn in [the non-movant's]
10 favor." Anderson, 477 U.S. at 255 (citing to Adickes v. S.H. Kress
11 & Co., 398 U.S. 144, 158-159 (1970)). If a genuine dispute as to a
12 material fact exists, then summary judgment must be denied. Id.
13 at 249-50.

14 Although Rule 56 is silent as to how the Court must
15 analyze simultaneous cross-motions for summary judgment, the Ninth
16 Circuit Court of Appeals instructs that when parties submit cross-
17 motions for summary judgment, each motion must be considered on its
18 own merits. The Fair Housing Counsel of Riverside County, Inc. v.
19 Riverside Two, 249 F.3d 1132, 1135-1136 (9th Cir. 2011) (citing
20 William W. Schwarzer, et al., The Analysis and Decision of Summary
21 Judgment Motions, 139 F.R.D. 441, 499 (Feb. 1922)); see also 10A
22 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal
23 Practice and Procedure, § 2720, at 335-36 (3d ed. 1998) (stating
24 "the court must rule on each party's motion on an individual and
25 separate basis, determining, for each side, whether a judgment may
26 be entered in accordance with the Rule 56 standard."). Separate
27 consideration of each motion is required, because for each motion,
28 the Court construes the evidence in a light most favorable to the
non-moving party while considering whether the party with the

burden of proof has satisfied such party's burden of production.
Anderson, 477 U.S. at 260 n.2; Celotex Corp v. Catrett, 477 U.S.
317, 322-323 (1986).

Statement of Material Facts

Except as noted below, none of the material facts are
disputed. However, the parties dispute the legal significance of
these facts.

At the heart of the parties' dispute is a lost promissory
note. The promissory note came into being when Plaintiffs
refinanced real property located at 12 Bigos Road, Litchfield,
Connecticut 06759 (the "Property") in April 2003,² and the
\$400,000 note was executed in favor of National City Mortgage.³
Grey Decl. at ¶ 1, 4; Gubran Decl. at ¶ 3; Comstock Decl. at ¶ 3;
Yan Decl. at ¶ 4. What Defendants refer to as a "photocopy" of the
note⁴ shows that the note was endorsed twice thereafter.

² Defendants characterize the Property as rental property, but a
rider to the mortgage indicates that the Property is a second home.

³ In her declaration, Ms. Grey repeatedly refers to National City
Bank, a non-existent entity, but it appears that Ms. Grey intends
to refer to National City Mortgage.

⁴ A photocopy of the note, which is declared to be a true and
correct copy of the note, appears many times in the exhibits. For
example, the note is attached as Exhibits 1 and 9 to the
Declaration of Diane Gubran, Vice President of Residential Funding
Co., fka Residential Funding Corp., and is also Plaintiffs' Exhibit
A. Plaintiffs argue that the endorsements are not authenticated,
the note is irrelevant, the note is hearsay, and the copy of the
note is not best evidence of the note. However, the photocopy --
if true and accurate -- is highly relevant. Plaintiffs have
offered no evidence to rebut Defendants' statement in their
declarations that this is a true and correct photocopy of the note.
The note is also not hearsay, because the note is not offered to
show the truth of the matter asserted in the note, but is offered
to show that the note was made. See Fed. R. Evid. 801(c). Also, the

(continued...)

1 Grey Decl., Ex. A "Note,"; Gubran Decl., Ex. 1-9. Neither
2 endorsement is dated, but the Declaration by Wentong Yan -- a
3 former Delivery Shipper at National City Mortgage and a current
4 Loan Support Specialist II with PNC Mortgage⁵ -- shows that both
5 endorsements were made within a few months after the note was
6 executed. Ms. Yan made the first endorsement and signed an
7 endorsement paying the note to the order of Residential Funding
8 Corporation without recourse. Yan Decl. at ¶ 5; Yan Decl. Ex. 38
9 "Note." The second endorsement was by Judy Faber, Vice President
10 of Residential Funding Corporation, who endorsed the note to the
11 order of Deutsche Bank without recourse. Yan Decl. at ¶ 5; Yan
12 Decl. Ex. 38 "Note." Deutsche Bank has not been able to locate the
13 original note, and in this regard has executed a "Lost Note
14 Affidavit," discussed infra. Grey Decl. at ¶ 15.

15 Along with the note, Plaintiffs also executed a mortgage in
16 favor of National City Mortgage on April 28, 2003.⁶ Gubran Decl.,
17 Ex. 2 "Mortgage Deed." The mortgage deed states that the note, or
18 a partial interest in the note, could be sold together with the
19 mortgage to one or more entities without prior notice to
20 Plaintiffs. Id. The mortgage advises that if the note and
21 mortgage are sold, such sale could result in a change of the "Loan

22 _____
(...continued)

23 note is a document affecting an interest in property. See Fed. R.
24 Evid. 803(14). Regardless, the Court reserves all rulings on the
admissibility of any evidence for trial.

25 ⁵ According to the Declaration of Christian S. Martin, now the Vice
26 President and Director of Operations at PNC Mortgage, National City
27 Mortgage merged into PNC Bank in November 2009, and PNC Mortgage is
a division of PNC Bank.

28 ⁶ The parties do not dispute the authenticity of the photocopy of
the mortgage.

1 Servicer" which collects payments due under the note and "performs
2 other mortgage loan servicing obligations." Gubran Decl., Ex. 2
3 "Mortgage Deed." Id. The mortgage further states that if there is
4 a change in the identity of the loan servicer, Plaintiffs would be
5 given written notice of the change. Id.

6 Within a few months of Plaintiffs' execution of the original
7 note and mortgage, the loan was sold. Yan Decl. at ¶ 6; Yan Decl.,
8 Ex. 39 "Assignment of Mortgage and Promissory Note." On June 26,
9 2003, National City Mortgage issued an "Assignment of Mortgage and
10 Promissory Note" ("the Assignment") which assigned the mortgage and
11 note directly to Deutsche Bank.⁷ Yan Decl. at ¶ 6; Yan Decl., Ex.
12 39 "Assignment of Mortgage and Promissory Note." However,
13 according to the Declarations⁸ of Ms. Gubran and Ms. Yan, on July
14 15, 2003, National City Mortgage sold the loan to Residential
15 Funding Corporation -- not to Deutsche Bank -- for \$412,460.07, and

16 ⁷ As for the Assignment, Plaintiffs argue that the document is not
17 authenticated, lacks foundation, is not relevant, is not the best
18 evidence, and is hearsay. However, Ms. Yan's Declaration is
19 sufficient to authenticate the document for purposes of a
20 determination on motions for summary judgment. The best evidence
21 and hearsay arguments also miss the mark, because the Assignment is
22 offered to show that the Assignment was made, a photocopy can be
competent evidence, and the Assignment affects an interest in
property. See Fed. R. Evid. 801(c), 803(14). Regardless, the
Court reserves all rulings on the admissibility of any evidence for
trial.

23 ⁸ Plaintiffs have asserted evidentiary challenges to most of the
24 declarations submitted by Defendants. For instance, Plaintiffs
25 have contended that the declarants lack personal knowledge of the
26 facts stated in the declarations. However, the declarants have
27 sworn to personal knowledge of the stated facts; therefore, the
28 Court must treat declarants as having personal knowledge at this
juncture. Thus, Plaintiffs' challenges are more properly raised to
the competence of these witnesses to testify at trial. As
previously stated, the Court reserves all evidentiary rulings for
trial.

1 endorsed the note to Residential Funding Corporation at that time.
2 Gubran Decl. at ¶ 4; Yan Decl. at ¶ 5. Ms. Yan also declared that
3 Ms. Yan was acting with the authority and direction of National
4 City Mortgage when Ms. Yan placed the stamp and signed the
5 endorsement to Residential Funding Corporation. Yan Decl. at ¶ 5.

6 Ms. Yan's Declaration explains that the note was endorsed to
7 Residential Funding Corporation because Residential Funding
8 Corporation was the sponsor and master servicer under a pooling and
9 servicing agreement ("PSA") for which Deutsche Bank is the trustee.
10 Id. Ms. Gubran's Declaration further explains that Plaintiffs'
11 loan had been transferred into the trust for which Deutsche Bank
12 was the trustee. Gubran Decl. at ¶ 5. Ms. Gubran also states that
13 on July 30, 2003, the note was finally endorsed to Deutsche Bank
14 pursuant to the PSA. Id. at ¶ 6; Gubran Decl., Ex. 8 "Pooling and
15 Servicing Agreement." Thus, as of July 30, 2003, both the note and
16 mortgage had been transferred -- either by way of assignment or
17 endorsement -- to Deutsche Bank.

18 Ms. Grey states in her Declaration that until the commencement
19 of this bankruptcy case, Plaintiffs never saw, or learned of, the
20 document entitled "Assignment of Mortgage and Promissory Note"
21 dated June 26, 2003, or of the stamped endorsed transfers of their
22 note. Grey Decl. at ¶ 17, 18. Ms. Grey also declares that
23 Plaintiffs were never informed about the sale of the loan or the
24 endorsement of the note to Deutsche Bank. Id. at ¶ 23.

25 The loan servicer has changed several times. Under the terms
26 of the PSA, the Master Servicer was Residential Funding
27 Corporation. Gubran Decl., Ex. 8 "Pooling and Servicing
28 Agreement." However, it appears that National City Mortgage
serviced the loan until at least November 2007. Pursuant to a long

1 standing Special Servicing Agreement between Residential Funding
2 Corporation and Litton dated December, 23, 1998, Litton was
3 designated as an approved servicer for Residential Funding
4 Corporation to service and administer loans. Comstock Decl., Ex.
5 22 "Special Servicing Agreement." Further, according to the
6 Declaration of Diane Comstock ("Ms. Comstock") -- a loan analyst at
7 Ocwen Loan Servicing, LLC ("Ocwen"), the current servicer of the
8 subject note -- the board of Residential Funding Corporation
9 adopted the Special Servicing Agreement with Litton and appointed
10 Litton with signature authority in relation to the foreclosure or
11 "the completion of judicial or non-judicial foreclosure" along with
12 other authorized activities in relation to mortgage activities.
13 Comstock Decl. at ¶ 8. Ms. Comstock's Declaration also states that
14 according to Litton's Welcome Letter, Residential Funding
15 Corporation transferred the loan servicing obligation to Litton
16 effective December 1, 2007. Id. at ¶ 9; Comstock Decl., Ex. 24
17 "Litton's Welcome Letter."

18 Plaintiffs were informed of the change in loan servicer by
19 multiple letters, one from National City Mortgage dated November
20 15, 2007, and another from Litton dated December 8, 2007,
21 confirming the change and giving instructions on how payments
22 should be directed. Grey Decl. at ¶ 10; Grey Decl., Ex. K "Letter
23 from National City Mortgage," Ex. L "Letter from Litton."
24 Plaintiffs acknowledge receipt of these letters. Litton continued
25 to service the loan until November 1, 2011, when Ocwen began to
26 service the loan. Comstock Decl. at ¶ 19; Comstock Decl., Ex. 36
27 "Welcome Letter." On January 5, 2012, Litton transferred Litton's
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1 claim in the Plaintiffs' bankruptcy case to Ocwen.⁹ Comstock Decl.
2 at ¶ 20; Comstock Decl., Ex. 37 "Transfer of Claim." After the
3 servicing of the loan was transferred to Litton, but before the
4 servicing obligation was transferred to Ocwen, National City
5 Mortgage sent a letter to Plaintiffs dated October 1, 2009,
6 informing Plaintiffs that National City Mortgage would be known as
7 PNC Mortgage, a division of PNC Bank. Grey Decl., Ex. P "Letter
8 from National City Mortgage." The letter also instructed
9 Plaintiffs to make mortgage loan payment checks to PNC Mortgage and
10 to mail the payments to PNC Mortgage at a specific address. Id.
11 An attachment to the letter states that National City Mortgage --
12 not Litton -- was the present servicer, and that the servicing of
13 the loan was being assigned to PNC Mortgage. Id. Defendants do
14 not dispute that the October 1, 2009 letter was sent to
15 Plaintiffs.¹⁰

16 Litton began to service the loan in December 2007, when the
17 loan was about to go into foreclosure. Comstock Decl. at ¶ 8, 9.

18 ⁹ The Court takes judicial notice of the electronic case file,
19 which shows that Litton first filed a proof of claim on January 11,
20 2010, and filed an amended claim on September 23, 2010. The proof
21 of claim was filed on behalf of Deutsche Bank, and allegedly
22 included a copy of the promissory note at issue in this litigation.
The amount of the claim listed in the proof of claim is
\$453,827.63.

23 ¹⁰ On October 29, 2012, the Court had an opportunity to hear
24 the parties' oral arguments concerning the letter from National
25 City Mortgage dated October 1, 2009. Plaintiffs' position was
26 that the letter unequivocally identifies National City Mortgage as
27 the loan servicer because the letter clearly states that National
28 City Mortgage would be known as PNC Mortgage and instructs
Plaintiffs to mail payments to PNC Mortgage. Defendants argued
that the purpose of the letter was to identify a name change, not
to inform of any change of loan servicer. The Court presented a
copy of the October 1, 2009 letter to both parties, and Defendants'
attorney conceded, "I would not have liked this letter to go out."

1 According to the Declaration of Kaitlyn Q. Thinh -- an attorney
2 with the law firm of Houser & Allison which represents Defendants
3 -- Plaintiffs had fallen behind on payments because Mr. Grey had
4 been injured in two unrelated motor vehicle accidents caused by
5 uninsured drivers, putting a financial strain on Plaintiffs. Thinh
6 Decl. at ¶ 2; Thinh Decl., Ex. 40 "Letter Dated August 20, 2007."
7 According to Ms. Comstock's Declaration, the records show that on
8 December 6, 2007, Litton contacted Plaintiffs by phone to discuss
9 loss mitigation options. Comstock Decl. at ¶ 10. Notes show that
10 during the phone call, Plaintiffs expressed interest in a repayment
11 plan. Id.

12 In December 2007, Plaintiffs were served with documents
13 pertaining to a foreclosure action commenced by Deutsche Bank in a
14 Connecticut state court. Grey Decl. at ¶ 13. According to Ms.
15 Grey, it was the foreclosure action which first made Plaintiffs
16 aware that Deutsche Bank claimed an interest in the Property. Id.
17 Ms. Grey states that Plaintiffs believed, up until the time of the
18 foreclosure action, that National City Mortgage was the holder of
19 the note. Id. at ¶ 7.

20 After the foreclosure action was commenced by Deutsche Bank,
21 Plaintiffs contacted National City Mortgage to determine the
22 standing of Deutsche Bank. Id. at ¶ 14. National City Mortgage
23 informed Plaintiffs that all of the documents contained in National
24 City Mortgage's file pertaining to the note had been transferred¹¹
25 in November 2007. Id. Plaintiffs were also told that National
26 City Mortgage had no information to attest to the standing of
27 Deutsche Bank. Id.

28 ¹¹ Ms. Grey's Declaration does not state to whom the documents were
purportedly transferred.