MERS Case law summmary [2010-01-25]

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MERS case law notes

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n Typical scenarios in foreclosure of MERS loan:

o Non-MERS: MERS assigns the mortgage to the servicer or lender/noteholder (i.e., Owner) and that party will proceed in its own name (so Owner becomes mortgagee and must also be holder of the note); or,

o MERS: Owner proceeds in MERS' name. Owner must transfer note to MERS or endorse in blank (so MERS, already the mortgagee/nominee, becomes holder of note). In some jurisdictions, OWNER must also be plaintiff/movant.

n MERS standing issues: general categories

o Substantive: Can MERS seek to foreclose or lift stay in its own name, on behalf of the Owner?

o Procedural: What documentation and/or testimony must be presented to satisfy standing requirements?

o Many cases involve MERS or other movant totally failing to document.

n **How much/what kind of documentation is required?**

o Some courts want movant to explain serial assignments resulting in the movant becoming the holder of the note and/or mortgage.

§ In re Hayes, 393 B.R. 259, 269 (Bankr. D. Mass. 2008) ("The Court and the Debtor are entitled to insist that the moving party establish its standing in a motion for relief from stay through the submission of an accurate history.

· Hayes Blurb: Servicer sought stay relief, failed to satisfy burden of tracing mortgage from the original mortgagee to entity for which it was allegedly acting as trustee, and did not have standing, as party in interest, to pursue stay relief; mortgage lender, its affiliates, assignees, and agents, through convoluted process of securitization, by submitting a 191-page, incomplete pooling and servicing agreement (PSA), and by relying on back-dated, unrecorded assignments, had confounded identity of current holder of mortgage for purpose of filing motion for relief from stay

§ In re Maisel, 378 B.R. 19, 22 (Bankr. D. Mass. 2007) ("If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant.").

§ Other courts may require less: Unclear because movants did not get to square one with documentation. See, e.g., Sheridan, Vargas, infra.

o But documenting who holds the note may be enough: In re Jacobson, 402 B.R. 359 (Bankr. W.D. Wash. 2009).

§ Under WA law, the "security follows the obligation secured" not the other way around. "[T]ransfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."

§ Still, court was troubled by MERS' "nominee" status. See n.9.

o From In re Revoredo, infra, which holds that MERS has standing:

§ "In accordance with the usual practice, MERS was only the holder (by delivery) of the note." (Citation omitted.) "Although it was called the 'mortgagee' in the instrument and acted on behalf of the most recent purchaser-assignee-lender, however, MERS was not—again, as usual—its 'owner.' We simply don't think that this makes any difference. See Fla. R. Civ. P. 1.210(a) (action may be prosecuted in name of authorized person without joining party for whose benefit action is brought); 37 Fla. Jur.2d Mortgages § 519 (2007) (mortgage security follows the note)."

o Nevada Case: In re Mitchell, No. 07-16226 (Bankr. D. Nev., Mar. 31, 2009)

§ Court couldn't figure out whether MERS was noteholder or nominee/agent of noteholder. MERS status as mortgagee/nominee under DOT not good enough.

§ "For there to be a valid assignment for purposes of foreclose both the note and the deed of trust must be assigned * * * * A person holding only a note lacks the power to foreclose because it lacks

the security, and a person holding only a deed of trust suffers no default because only the holder of the note is entitled to payment on it. (citation omitted).

§ "This distinction between judicial and non-judicial foreclose states, or deficiency and non-deficiency ones, is one which MERS has designed out of whole cloth." (citations to restatement and Vargas omitted)

§ **Mitchell re MERS' Standing:** "Motions brought by MERS as nominee could meet the threshold test of standing, and MERS might be the 'real party in interest' under FED. R. CIV. P. 17, if MERS is the actual nominee of the present Member who is entitled to enforce the note."

"While … MERS may really be contending that is it entitled to enforce the note in its own right through possession, or as the nominee of the transferee, the motion was brought instead as nominee of an entity that no longer has any ownership interest in the note." Affidavit re status of note and who holds it, given by someone who had 'reviewed the file' was insufficient re personal knowledge. No bus. record exception.

MERS appealed to USDC. **District Court Upholds Bankruptcy Court's Opinion**
MERS appealed the bankruptcy court's ruling against it in one of the 27 cases to the U.S. District Court for the District of Nevada, asserting that the bankruptcy court mistakenly found that it was not the beneficiary under the deeds of trust. It asserted that the express language in the mortgage agreements stating that MERS was the beneficiary of the mortgage gave it standing to enforce rights under the mortgage. *See In re Medina*, No. 09-00670-KDF-GWF, 2009 WL 4823387, *2 (D. Nev. Dec. 4, 2009).

The district court affirmed the bankruptcy court's order denying MERS' standing to enforce rights under the mortgages. In doing so, it focused on the requirement of Federal Rule of Civil Procedure 17(a)(1) that requires a "real party in interest" bring an action. According to the district court, MERS was not an actual beneficiary of the mortgage agreements in the case. *Id*. at 3 (noting that "MERS admits that it does not actually receive or forfeit money when borrowers fail to make their payments").

Since MERS was not a beneficiary, the district court held that in order for MERS to enforce the mortgages, it would have needed to provide evidence of its agency relationship with the real party in interest. *Id.* The district court, however, found that MERS failed to provide the requisite evidence because it did not show that it was the agent for the *current* beneficial owner of the mortgage. Instead it presented documents showing that it was the agent for the *original* lender. *Id.*

Significantly, the district court limited its holding to the "specific facts and procedural posture of the case." It explicitly stated that its opinion made no finding that MERS would not be able to establish itself as the real party in interest, had it supplied other documentation or evidence. *Id*.

n Cases addressing MERS' legal standing (Substantive issue):

o In re Huggins, 357 B.R. 180 (Bankr. D. Mass. 2006). MERS filed MFRS as nominee for noteholder and mortgagee. MERS had "customary rights of a mortgagee" under Mass. law with right to act on lender's behalf to foreclose under power of sale, thus had standing to go forward on MFRS.

o LaSalle Bank Nat. Ass'n v. Lamy, 12 Misc.3d 1191(A) (N.Y. 2006) ("this court and others have repeatedly held that a nominee of the owner of the note and mortgage, such as [MERS], may not

prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action.").

§ Lamy cites 4 cases in support of foregoing but none appears to hold that MERS as nominee mortgagee may not prosecute a foreclosure action:

· MERS v. Burek, 4 Misc.3d 1030(A), 798 N.Y.S.2d 346 (N.Y. 2004) (factual disputes regarding default and standing)

· MERS v. Bastian, 12 Misc.3d 1182(A), 2006 WL 1985461 (N.Y. 2006) (factual disputes regarding alleged assignment)

· Fairbanks Capital Corp. v. Nagel, 289 A.D.2d 99, 735 N.Y.S.2d 13 (1st Dept. 2001) (foreclosure by servicing agent allowed)

· Merscorp., Inc. v. Romaine, 24 A.D.3d 673, 808 N.Y.S.2d 307 (2d Dept. 2005) ("mortgages, assignments and discharges which name MERS as the lender's nominee or the mortgagee of record are acceptable for recording and indexing").

o The below cases hold that MERS, as nominee for Owner, has standing to seek foreclosure:

§ MERS v. Revoredo, 955 So.2d 33 (Fl. App. 2007)

§ MERS v. Azize, 965 So. 2d 151 (Fla. Dist. Ct. App. 2007)

§ MERS v. Coakley, 41 A.D. 3d 674 (N.Y. App. 2007)

§ In re Huggins, supra (stay relief motion)

§ In re Sina, 2006 WL 2729544 (Minn.Ct.App. Sept. 26, 2006)

§ MERS v. Ventura, 2006 WL 1230265 (Conn.Super.Ct., Apr. 20, 2006)

§ MERS v. Leslie, 2005 WL 1433922 (Conn.Super.Ct., May 25, 2005)

§ See also, Trent v. MERS, 288 Fed.Appx. 571 (11th Cir., Jul. 11, 2008) ("[MERS] has the authority to file foreclosure actions.") (citing Revoredo and Azize).

n **As of WHEN Must Movant/FP Have Right to Proceed?** Most Courts hold movant/foreclosing party must have right to proceed as of filing of foreclosure action or MFRS – post-commencement assignments of rights are trouble:

o Wells Fargo v. Jordan, Case No. 91675 (Ohio App., Mar. 12, 2009)

o LaSalle Bank v. Ahearn, 2009 NY Slip op 01388 (N.Y. Sup., Feb. 26, 2009)

o New Century Mortg., 2009 NY Slip op 50175 (N.Y. Sup., Feb. 2, 2009)

o Wash. Mut. v. Patterson, 08 NY Slip Op 52507(U), (N.Y. Sup., Dec. 15, 2008)

o HSBC Bank v. Alvalle 2008 NY Slip Op 33555(U) (N.Y. Sup., Nov. 18, 2008)

o BONY v. Cerullo, 2008 NY Slip Op 32194(U) (N.Y. Sup., Jul. 11, 2008)

o Deutsche Bank v. Peabody, 2008 NY Slip Op 51286(U) (N.Y. Sup., Jun. 26, 2008)

o Wells Fargo v. Reyes, 2008 NY Slip Op 51211(U) (N.Y. Sup., Jun. 19, 2008)

o Countrywide Home Loans, Inc. v Taylor, 17 Misc 3d 595 (N.Y. Sup. 2007)

o Countrywide Home Loans, Inc. v Hovanec, 15 Misc 3d 1115(A) (N.Y. Sup. 2007)

o Aurora Loan v. Sattar, 2007 NY Slip Op 51895(U) (N.Y. Sup., Oct. 9, 2007)

o **Contra** Fremont Inv. & Loan v. Laroc, 2008 NY Slip Op 52166(U), *3-4 [N.Y. Sup., Jun. 4, 2008) ("This court, however, is of the opinion that a written assignment may convey a legal interest, and also may serve to acknowledge an equitable interest which was transferred at earlier time by reciting that the assignment took effect at date prior to the date of its execution") (internal citations omitted). The post-facto transfer was done merely "to avoid any objection to the standing of MERS as a nominee for the lender to bring a foreclosure action"). Id.

n **More re No Ex Post Assignments**:

o *In re Maisel*, 378 B.R. 19 (Bankr. D. Mass. 2007), lift stay movant acquired rights 4 days after filing MFRS. No conceptual problem with agent/servicer standing, "so long as movant traces title to itself or, if an agent or servicer, it must also identify itself as an authorized agent for the holder." Maisel, 378 B.R. at 22 (citing In re Parrish, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005)).

o *In re Foreclosure Cases*, 2007 WL 3232430 (N.D. Ohio) ("The Court [required] each Plaintiff to submit a copy of the Assignment of the Note and Mortgage, executed as of the date of the Foreclosure Complaint [but] none of the Assignments show the named Plaintiff to be the owner of the rights, title and interest under the Mortgage at issue as of the date of the Foreclosure Complaint.")

§ Accord, In re Foreclosure Cases 521 F. Supp.2d 650 (S.D. Ohio 2007) (plaintiff could not proceed because they could not trace title).

n In lift of stay motions, movant must be "party in interest" and "real party in interest"

o Special standing requirements in lift stay matters.

o Party in Interest: Not defined in Code but broad. See In re Sobczak, 369 B.R. 512, 517-18 (9th Cir. BAP 2007) ("a 'party in interest' may be one who has an actual pecuniary interest in the case, one who has a practical stake in the outcome of the case, or one who will be impacted in any significant way in the case).

o Real Party In Interest – FROWNER 7017, cases hold RPII to be "the entity that is entitled to payment from the debtor and to enforce security for such payment." See In re Sheridan, infra.

o "Purely derivative" standing does not confer "real party in interest" status. In re Refco, 505 F.3d 109, 115 fn. 10 (2nd Cir.2007).

n "Real Party in Interest" must be joined in MFRS: In re Sheridan, Case no. 08-20381 (Bankr. D. Id., Mar. 12, 2009).

o MERS (movant) deemed not a 'real party in interest' for purposes of FROWNER 7017 because MERS not entitled to payment as principal.

o Principal must bring motion or, if servicer or nominee brings it, motion must identify and be prosecuted in the name of principal.

§ Citing for support: In re Jacobson, 402 B.R. 359 (Bankr. W.D. Wash. 2009); In re Hwang, 396 B.R. 757, 767 (Bankr. C.D. Cal. 2008) (servicer/movant was party in interest but motion denied because real party in interest -- trustee of securitization trust – not joined); In re Vargas, 396 B.R. 511, 521 (Bankr. C.D. Cal. 2008) (but see Reusser v. Wachovia Bank, 525 F.3d 855 (9th Cir. 2008) (lift stay obtained by servicer only deemed effective as to lender/OWNER)

n Contra Hwang – In re Woodberry, 383 B.R. 373 (Bankr. D.S.C. 2008).

o Court held servicer had standing to pursue relief w/o joining OWNER.

o Under SC law, servicer, which had possession of note and mortgage at time it moved for stay relief, was "creditor" for purposes of determining whether it had standing to seek relief.

o Court accepted testimony of servicer/movant's 'default litigation specialist' who determined chain of title by viewing computer screens showing transfers. MERS assigned mortgage to securitization trust – after MFRS was filed.

o Under trust agreement, a public document on filed with the SEC, servicer /movant was contractual agent empowered to pursue remedies on behalf of OWNER.

o Note, in possession of movant, was endorsed in blank and therefore movant was holder, because not was bearer paper enforceable by one who possesses it.

o In SC, "'The plaintiff in a foreclosure suit should be the real, beneficial owner of the mortgage debt.'" Woodberry, 383 B.R. at 379 (internal citation omitted). No SC law was found, but court cited cases holding servicer is both party in interest and real party in interest. In re Tainan, 48 B.R. 250, 252 (Bankr. E.D. Pa. 1985); see also Bankers Trust (DE) v. 236 Beltway Inv., 865 F.Supp. 1186, 1191 (E.D. Va. 1994) (Both lender and servicer have standing to foreclose even if servicer is not the holder of the mortgage); In re O'Dell, 268 B.R. 607, 618 (N.D. Ala. 2001) (Servicer allowed to defend a proof of claim on behalf of principal), aff'd, 305 F.3d 1297, 1302 (11th Cir. 2002) ("A servicer is a party in interest in proceedings involving loans which it services"); In re Miller, 320 B.R. 203, 206 n.2 (Bankr. N.D. Ala. 2005) (Servicer had standing to prosecute MFRS).

n MERS can't proceed where it's acting on behalf of **unnamed** lender and/or its successors and assigns and offers no evidentiary support: In re Vargas, 396 B.R. 511 (Bankr. C.D. Cal. 2008), opinion amended and superseded on other grounds on reconsideration, 2008 WL 4899273 (Bankr. C.D. Cal. 2008).

o MERS supported motion with declaration of "low level clerk" who just "compare[d] the financial numbers on his evidentiary declaration with those on a computer screen." Court found MERS presented no admissible evidence.

o Court also sanctioned MERS under Rule 9011 for bringing motion with no evidentiary support. MERS purported to join as moving parties 'its assignees and/or successors in interest,' which court found also to be improper.

n Bonus Case: Trustee could not avoid a mortgage on grounds of faulty assignment record: In re Williams, 395 B.R. 33 (Bankr. S.D. Ohio 2008)

o "Under Ohio law, holder of the note carries equitable ownership of the mortgage." Citing In re Gemini, 350 B.R. 74, 81 (Bankr. S.D. Ohio 2006).

o "Further, for purposes of mortgage avoidance, it is irrelevant whether Wells Fargo or a third party holds the Note. The Mortgage was properly recorded in favor of MERS, as agent for UWM, its successors and assigns. MERS holds the legal interest in the Mortgage, as agent for the Note holder, whomever it may be, who, under Ohio law, because security follows the debt, holds the equitable title thereto." Citing Gemini, 350 B.R. at 82.

o Trustee is appealing. Pending in USDC, SD Ohio. Case No. 3:08-CV-0403-WHR. Briefing complete as of 03/30/2009.