

DIRT Periodic Development for Tuesday, March 18, 2014
In re Dorsey

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SYNOPSIS: If the note is unendorsed, the party possessing it must prove the purpose for which it was delivered.

In re Dorsey, 6th Cir BAP, March 7, 2014 (2014 WL 888917)

The Dorseys, mortgage borrowers in this case, filed bankruptcy, and their trustee in bankruptcy objected to the claim of Vanderbilt, which claimed the right to foreclose the mortgage on the Dorseys mobile phone.

The original loan had been made by Popular Financial Services LLC, and Vanderbilt had acquired the note by a Purchase and Sale Agreement with Equity One, which was apparently Popular's subsidiary. Vanderbilt held the original note in its possession, but the note was unendorsed. This meant that Vanderbilt had to show that it had the right to enforce the note as a "nonholder with the rights of a holder" under UCC 3-301(2). And under UCC 3-203(1), this status is available only upon proof that the note was delivered "for the purpose of giving to the person receiving delivery the right to enforce the instrument."

Unfortunately, Vanderbilt didn't make the necessary proof. It could point to the Purchase and Sale Agreement to establish the purpose of the second delivery, from Equity One to Vanderbilt, but it provided no proof of the purpose of the first delivery, from Popular to Equity One.

There was a mortgage assignment from Popular to Equity One, but the assignment said nothing at all about the note. Other courts have accepted mortgage assignments for this purpose, but only when they expressly referred to the fact that the note was also being transferred; see *Federal Home Loan Mortg. Corp. v. Schwartzwald*, 957 N.E.2d 790 (Ohio App. 2011) (mortgage assignments proved that purpose of delivering note was to transfer right of enforcement). But this mortgage assignment didn't contain such language.

One would have thought that Vanderbilt could have obtained an affidavit from one of the officers of Popular, averring that Popular delivered the note to Equity One for the purpose of transferring the right of enforcement. This would also certainly have done the trick for Vanderbilt; see *Ulster Sav. Bank v. 28 Brynwood Lane*, 41 A.3d 1077, 1085 (Conn.App. 2013). There's no clear explanation as to why Vanderbilt couldn't have

obtained such an affidavit; perhaps Popular was now out of business and its officers couldn't be located.

The moral of the story is, of course, to endorse the note when it's delivered; this eliminates the need to prove the purpose of the delivery, and simplified life enormously.

So far, the court's analysis seems correct. But it winds the opinion up by saying, "As neither a holder of the Note nor a non-holder with the rights of a holder, Vanderbilt cannot enforce the Note. Because "a mortgage is valid and enforceable only if the underlying debt continues to be an enforceable obligation," the Mortgage is no longer enforceable under Kentucky law."

But this doesn't follow at all. If the right of enforcement wasn't properly transferred, it remains with the originating lender, Popular. So Popular in theory can still enforce the note and the mortgage (notwithstanding the mortgage assignment, since the mortgage always follows the note.) It's really unsound for the court to say that "the mortgage is no longer enforceable."

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