Daily Development for Wednesday, September 9, 2010
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BANKRUPTCY; RELIEF FROM STAY; STANDING: Neither MERS assignment of the note (along with the mortgage) nor alleged mortgagee's affidavit that the note was assigned to it, together with a copy of the note, are sufficient, as against challenge to establish that Mortgagee has standing in bankruptcy to obtain relief from automatic stay on foreclosure.

In re Box 2010 Westlaw 2228289 (Bkrtcy W. D. Mo. 6/20/10)

BAC sought relief from the automatic stay in this Chapter 7 proceeding to foreclose on Debtor's home pursuant to a deed of trust. When the loan had been made originally, the note had been give to Taylor and Bean and the mortgage to MERS as the nominee of the lender.

BAC claimed to be the assignee of both the note and mortgage and submitted an affidavit in the bankruptcy court to that effect. The affidavit contained a statement of a BAC official that BAC was the owner of the note and mortgage and that both had been assigned to BAC of even date in August of 2009. But the only document attached to the affidavit was an assignment by MERS, which purported to assign both the note and the mortgage. That assignment was dated February of 2010. It stated that MERS assigned the mortgage "together with any and all notes therein described or referred to [and] the debt respectively secured thereby."

The bankruptcy court noted that a prior Missouri case, Bellistri v. Ocwen Servicing, LLC., 284 S.W. 3d 219 (Mo. App. 2009) had held that in another MERS related transaction, MERS did not become the owner of the note, either individually or as nominee, notwithstanding the presence of an assignment by MERS (which had not been discussed in Ocwen). Further, although the Box court was quite clear that transfer of the note will accomplish transfer of the mortgage without more, the opposite is not true. Transfer of the mortgage alone does not transfer ownership of the note.
Here, again, the court held that there was no evidence that MERS owned own the note or authority to transfer to note. As to the affidavit, the court commented:

[T]Affidavit does not state with any specificity how BAC purportedly became the "holder" of the Note and Deed of Trust or how the documents were "transferred" to BAC. Although I overruled the Trustee's objection to the admission of the Affidavit and admitted it into evidence at the hearing, the Affidavit, in and of itself, is self-serving, lacks credibility, and is entirely unpersuasive on the question of whether the Note and Deed of Trust were properly assigned to BAC. [citing authority]

As the Trustee suggests, the Affidavit is hearsay. In addition, the Federal Rules of Evidence provide that, generally, to prove the content of a writing, the original is required. Fed.R.Evid. 1002. Duplicates are permitted unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. Fed.R.Evid. 1003. Although I received the Affidavit into evidence at the hearing, I emphasize that, since the Affidavit has been challenged, it cannot substitute for production of the Note.

The court noted that the only actual evidence of any assignment at all in this case is the February 18, 2010 assignment which was attached to the Affidavit submitted at the hearing. It stated that the fact that the February 18, 2010 Assignment was made after the bankruptcy case was filed does not render it per se invalid in that there is no rule prohibiting a creditor from assigning its claim postpetition. However, the February 18 "assignment" contradicts the date stated in the Affidavit and, particularly since no August 25 documents were attached, made the Affidavit even more suspect.

Further, the 2010 affidavit suffered from the same defect noted above - it was an assignment by MERS and the court noted no evidence that MERS owned the note or had authority to assign it. It wittheld judgment on whether MERS had authority to assign the deed of trust as nominee for the lender, since it was the record owner of the deed of trust. That question was not necessary to decide here, since the case is mostly about the note.

Apparently, by the time of the hearing, a copy of the note, endorsed in blank by Taylor Bean, had been produced in court. The court ruled that although sometimes a copy of the note may suffice, it will not be enough when challenged as here. BAC could solve its standing problem, the court noted, by producing the original note. It did suggest that a recent Kansas case Landmark had suggested that MERS lacked authority to assign the mortgage, but the Box court's earlier citation of Missouri authority that the mortgage follows the note would appear to render that problem moot in Missouri.

Comment: 1 Although a MERS related assignee lost here, the court provides significant clarity on some important issue that may assist MERS in conforming behavior to court expectations in the future. Most important, probably, is the focus on the possession of the note (if endorsed in blank or endorsed to the assignee). If this possession carries with it the ownership of the mortgage, then lengthy assignment chains can be avoided in some cases. Of course, where state law restricts foreclosure rights to the record owner of the mortgage, there still may be problems.

Another issue address by the court is the post-default assignment. Here the court, at least for bankruptcy purposes, appears to have no problem with this set of facts.

Comment 2: Missouri is a deed of trust state, so most foreclosures do not find their way to court. Therefore, this bankruptcy decision will not have the same effect on Missouri foreclosures as it might have in another state. But it might provide some support for wrongful foreclosure suits, should borrowers see fit to bring them.

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