H

United States Bankruptcy Court,
D. New Jersey.
In the Matter of John T. **KEMP**, Debtor.
John T. **Kemp**, Plaintiff
v.
Countrywide Home Loans, Inc., Defendant.

Bankruptcy No. 08-18700-JHW.
Adversary No. 08-2448.
Nov. 16, 2010.

Background: Chapter 13 debtor brought adversary proceeding, seeking to expunge proof of claim filed on bank's behalf by loan servicer.

Holdings: The Bankruptcy Court, Judith H. Wizmur, Chief Judge, held that:
(1) bank was not "holder" entitled to enforce debtor's promissory note under New Jersey's version of Uniform Commercial Code (UCC);
(2) bank did not satisfy indorsement element of negotiation of note;
(3) bank could not enforce note as non-holder in possession with rights of holder;
(4) bank could not enforce note as person not in possession of note who was entitled to enforce note pursuant to certain state statutes;
(5) written mortgage assignment did not establish bank's entitlement to enforce note; and
(6) servicer, as bank's agent, had no greater right to enforce note than did bank.

Claim disallowed.

West Headnotes

[1] Bills and Notes 56 150(1)

56 Bills and Notes
56VI Negotiability
56k148 Nature and Form of Instrument
56k150 Promissory Notes
56k150(1) k. In general. Most Cited Cases

Bills and Notes 56 164

56 Bills and Notes
56VI Negotiability
56k164 k. Conditions and restrictions in instrument. Most Cited Cases

Promissory note that was made payable to lender and provided for interest and an unconditional promise to pay lender was "negotiable instrument" under New Jersey's version of Uniform Commercial Code (UCC). N.J.S.A. 12A:3-104.

[2] Bills and Notes 56 443(1)

56 Bills and Notes
56XI Actions
56k441 Right of Action
56k443 Title to Sustain Action
56k443(1) k. In general. Most Cited Cases

Mere ownership or possession of a promissory note is insufficient to qualify an individual as a "holder" within meaning of provision of New Jersey's Uniform Commercial Code (UCC) permitting negotiable instrument to be enforced by holder of instrument. N.J.S.A. 12A:1-201, 12A:3-301.

[3] Bankruptcy 51 2578

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2578 k. Mortgages and pledges. Most Cited Cases

Bills and Notes 56 443(1)

56 Bills and Notes
56XI Actions
56k441 Right of Action
56k443 Title to Sustain Action
56k443(1) k. In general. Most Cited Cases

Mortgages 266 ⚿235

266 Mortgages
266V Assignment of Mortgage or Debt
266k234 Transfer of Debt or Obligation Secured
266k235 k. In general. Most Cited Cases

Mortgages 266 ⚿241

266 Mortgages
266V Assignment of Mortgage or Debt
266k241 k. Operation and effect in general. Most Cited Cases

Bank serving as trustee pursuant to mortgage pooling and servicing agreement was not "holder" entitled to enforce mortgagor's promissory note, in mortgagor's bankruptcy case, under New Jersey's version of Uniform Commercial Code (UCC), where bank, despite being buyer of note as trustee, never came into physical possession of note, as required for negotiation of instrument to transferee. N.J.S.A. 12A:1-201(20), 12A:3-201(a, b).

[4] Bankruptcy 51 ⚿2578

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2578 k. Mortgages and pledges. Most Cited Cases

Bankruptcy 51 ⚿2921

51 Bankruptcy
51VII Claims
51VII(E) Determination
51k2921 k. In general. Most Cited Cases

Bills and Notes 56 ⚿183

56 Bills and Notes
56VII Transfer
56VII(A) By Indorsement
56k183 k. Formal requisites. Most Cited Cases

Bills and Notes 56 ⚿443(4)

56 Bills and Notes
56XI Actions
56k441 Right of Action
56k443 Title to Sustain Action
56k443(4) k. Indorsees and assignees for collection. Most Cited Cases

Mortgages 266 ⚿235

266 Mortgages
266V Assignment of Mortgage or Debt
266k234 Transfer of Debt or Obligation Secured
266k235 k. In general. Most Cited Cases

Mortgages 266 ⚿241

266 Mortgages
266V Assignment of Mortgage or Debt
266k241 k. Operation and effect in general. Most Cited Cases

Bank, as buyer of mortgagor's promissory note in its capacity as trustee under mortgage pooling and servicing agreement, did not satisfy indorsement element of negotiation of note, and thus did not attain status as "holder" entitled to enforce note under New Jersey's version of Uniform Commercial Code (UCC), where note lacked proper indorsement and no allonge had been executed at the time that proof of claim was filed on bank's behalf in mortgagor's bankruptcy case. N.J.S.A. 12A:3-201(a, b), 12A:3-204.

[5] Bankruptcy 51 ⚿2578

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2578 k. Mortgages and pledges. Most Cited Cases

Bills and Notes 56 ⚿441.1

56 Bills and Notes
56XI Actions

56k441 Right of Action
56k441.1 k. In general. Most Cited Cases

Mortgages 266 ⚿235

266 Mortgages
266V Assignment of Mortgage or Debt
266k234 Transfer of Debt or Obligation Secured
266k235 k. In general. Most Cited Cases

Mortgages 266 ⚿241

266 Mortgages
266V Assignment of Mortgage or Debt
266k241 k. Operation and effect in general. Most Cited Cases

Bank to which, as trustee under mortgage pooling and servicing agreement, mortgagor's promissory note was sold could not enforce note, in mortgagor's bankruptcy case, as non-holder in possession with rights of holder under New Jersey's version of Uniform Commercial Code (UCC) where bank did not have, and never had, possession of note. N.J.S.A. 12A:3-301.

[6] Bankruptcy 51 ⚿2578

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2578 k. Mortgages and pledges. Most Cited Cases

Bills and Notes 56 ⚿441.1

56 Bills and Notes
56XI Actions
56k441 Right of Action
56k441.1 k. In general. Most Cited Cases

Mortgages 266 ⚿235

266 Mortgages
266V Assignment of Mortgage or Debt
266k234 Transfer of Debt or Obligation Secured
266k235 k. In general. Most Cited Cases

Mortgages 266 ⚿241

266 Mortgages
266V Assignment of Mortgage or Debt
266k241 k. Operation and effect in general. Most Cited Cases

Under New Jersey's version of Uniform Commercial Code (UCC), bank that was buyer of note and mortgage, in its capacity as trustee under mortgage pooling and servicing agreement, but never had possession of note could not enforce note, in mortgagor's bankruptcy case, as person not in possession of note who was entitled to enforce note pursuant to state statutes addressing enforcement of lost, destroyed, or stolen instruments and payment or acceptance by mistake. N.J.S.A. 12A:3-309, 12A:3-418.

[7] Bills and Notes 56 ⚿221

56 Bills and Notes
56VII Transfer
56VII(B) Without Indorsement
56k219 Operation and Effect as to Title
56k221 k. Transfer for collection. Most Cited Cases

Bills and Notes 56 ⚿443(4)

56 Bills and Notes
56XI Actions
56k441 Right of Action
56k443 Title to Sustain Action
56k443(4) k. Indorsees and assignees for collection. Most Cited Cases

Mortgages 266 ⚿235

266 Mortgages
266V Assignment of Mortgage or Debt
266k234 Transfer of Debt or Obligation Secured
266k235 k. In general. Most Cited Cases

Mortgages 266 ⚿241

266 Mortgages
266V Assignment of Mortgage or Debt
266k241 k. Operation and effect in general. Most Cited Cases

Under New Jersey law, written mortgage assignment that purported to assign both mortgagor's promissory note and mortgage gave bank, as assignee, valid claim of ownership over note, but did not establish bank's entitlement to enforce note. N.J.S.A. 12A:3-203 comment.

[8] Bankruptcy 51 2891

51 Bankruptcy
51VII Claims
51VII(D) Proof; Filing
51k2891 k. In general. Most Cited Cases

Loan servicer acted only as agent of bank, as owner of Chapter 13 debtor's promissory note, in filing proof of claim on bank's behalf, and thus had no greater right to enforce note than did bank. Fed.Rules Bankr.Proc.Rule 3001(b), 11 U.S.C.A.

[9] Bankruptcy 51 2895.1

51 Bankruptcy
51VII Claims
51VII(D) Proof; Filing
51k2895 Who May File
51k2895.1 k. In general. Most Cited Cases

A loan servicer has standing to file a proof of claim on behalf of a creditor.

***625** Bruce H. Levitt, Esq., Levitt & Slafkes, PC, South Orange, NJ, for Debtor.

Harold Kaplan, Esq., Dori L. Scovish, Esq., Frenkel, Lambert, Weiss, Weisman ***626** & Gordon, LLP, West Orange, NJ, for Defendant.

OPINION

JUDITH H. WIZMUR, Chief Judge.

Before the court for resolution is the debtor's adversary complaint seeking to expunge the proof of claim filed on behalf of the Bank of New York by Countrywide Home Loans, Inc. as servicer. The debtor challenges the creditor's opportunity to enforce the obligation alleged to be due, based primarily on the fact that the underlying note executed by the debtor was not properly indorsed to the transferee, and was never placed in the transferee's possession. Under the New Jersey Uniform Commercial Code, the note, as a negotiable instrument, is not enforceable by the Bank of New York under these circumstances. The plaintiff/debtor's challenge to the proof of claim is sustained on this record.

PROCEDURAL HISTORY

On May 9, 2008, the debtor, John T. Kemp, filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. The debtor scheduled an ownership interest in several properties, including one located at 1316 Kings Highway, Haddon Heights, New Jersey, the property at issue in this proceeding. Schedule D of the debtor's petition, listing creditors holding secured claims, listed Countrywide Home Loans as both the first and second mortgagee, with claims of $167,000 and $42,000, respectively, against the 1316 Kings Highway property. The debtor's Chapter 13 plan proposed to make payments over 60 months to satisfy priority claims and to cure arrearages on three separate mortgages, including the two Countrywide mortgages.[FN1]

FN1. The debtor filed an amended plan on October 3, 2008 which was confirmed on December 11, 2008 at $2,081 for 54 months. The modified plan increased the arrearage to be paid to Countrywide from $18,000 to $34,000, and maintained the second Countrywide mortgage arrears at $6,000. A second modified plan was filed on April 15, 2010 and is currently scheduled for confirmation on December 8, 2010. The latest modified plan does not list Countrywide as a creditor to be treated under the plan.

On June 11, 2008, the defendant herein, Coun-

trywide Home Loans, Inc. (hereinafter "Countrywide"), identifying itself as the servicer for the Bank of New York, filed a secured proof of claim in the amount of $211,202.41, including $40,569.69 in arrears, noting the property at 1316 Kings Highway as the collateral for the claim.[FN2] The debtor filed this adversary complaint on October 16, 2008 against **Countrywide**, seeking to expunge its proof of claim.[FN3] The debtor asserts that the Bank of New York cannot enforce the underlying obligation.

FN2. Although the debtor listed two mortgages held by **Countrywide** against 1316 Kings Highway in his schedules, **Countrywide** only filed one proof of claim regarding one mortgage and note.

FN3. In 2008, **Countrywide** Financial Corporation, the umbrella organization for **Countrywide** Home Loans, Inc., was purchased by the Bank of America Corporation. Effective April 27, 2009, **Countrywide** Home Loans, Inc. changed its name to BAC Home Loan Servicing, L.P. ("BAC Servicing"). Motion to Dismiss, Van Beveren Certif. at 1. On July 1, 2010, a "Transfer of Claim for Security" was filed on the debtor's claim register, transferring the claim from "Countrywide Home Loans, Inc., servicer for Bank of New York" to "BAC Home Loan Servicing, LP". In this opinion, I will continue to refer to the defendant as Countrywide.

FACTS

In his complaint, the debtor does not dispute that he signed the original mortgage***627** documents in question. The note and mortgage were executed by the debtor on May 31, 2006. The note, designated as an "Interest Only Adjustable Rate Note", listed the lender as "Countrywide Home Loans, Inc." No indorsement appeared on the note. Accompanying the note was an unsigned "Allonge to Note" dated the same day, May 31, 2006, in favor of "America's Wholesale Lender", directing that the debtor "Pay to the Order of Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender."[FN4]

FN4. The record does not reflect whether the unsigned allonge was physically affixed to the note.

The mortgage, in the amount of $167,000, listed the lender as "America's Wholesale Lender". Mortgage Electronic Registration Systems, Inc., or "MERS", is named as "the mortgagee", and is authorized to act "solely as the nominee" for the lender and the lender's successors and assigns. The mortgage references the promissory note signed by the borrower on the same date. The mortgage was recorded in the Camden County Clerk's Office on July 13, 2006.

Shortly after the execution by the debtor of the note and mortgage, the instruments executed by the debtor were apparently pooled with other similar instruments and sold as a package to the Bank of New York as Trustee. On June 28, 2006, a Pooling and Servicing Agreement ("PSA" or "the Agreement") was executed by CWABS, Inc. as the depositor, with Countrywide Home Loans, Inc., Park Monaco, Inc. and Park Sienna, LLC as the sellers, Countrywide Home Loans Servicing LP ("Countrywide Servicing") as the master servicer, and the Bank of New York as the Trustee. Pursuant to the Agreement, the depositor was directed to transfer the Trust Fund, consisting of specified mortgage loans and their proceeds, including the debtor's loan, to the Bank of New York as Trustee, in return for certificates referred to as Asset-backed Certificates, Series 2006-8. The sellers sold, transferred or assigned to the depositor "all the right, title and interest of such Seller in and to the applicable Initial Mortgage Loans, including all interest and principal received and receivable by such Seller." PSA § 2.01(a) at 52. In turn, the depositor immediately transferred "all right title and interest in the Initial Mortgage Loans," including the debtor's loan, to the Trustee, for the benefit of the certificate holders. *Id.*

The Agreement expressly provided that in connection with the transfer of each loan, the depositor was to deliver "the original Mortgage Note, endorsed by manual or facsimile signature in blank in the following form: 'Pay to the order of _____ without recourse', with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note." PSA § 2.01(g)(i) at 56. Most significantly for purposes of this discussion, the note in question was never indorsed in blank or delivered to the Bank of New York, as required by the Pooling and Servicing Agreement.

On March 14, 2007, MERS, as the nominee for America's Wholesale Lender, assigned the debtor's mortgage to the Bank of New York as Trustee for the Certificateholders CWABs, Inc. Asset-backed Certificates, Series 2006-8. The assignment purported to assign "a certain mortgage dated May 31, 2006 ... [t]ogether with the Bond, Note or other obligation described in the Mortgage, and the money due and to become due thereon, with the interest." The assignment provided further that the "Assignor covenants that ***628** there is now due and owing upon the Mortgage and the Bond, Note or other obligation secured thereby, the sum of $167,199.92 Dollars principal with interest thereon to be computed at the rate of 9.530 percent per year." The assignment was recorded with the County Clerk on March 24, 2008.

At the trial of this matter, Countrywide produced a new undated "Allonge to Promissory Note", which directed the debtor to "Pay to the Order of Bank of New York, as Trustee for the Certificateholders CWABS, Inc., Asset-backed Certificates, Series 6006-8." [FN5] The new allonge was signed by Sharon Mason, Vice President of Countrywide Home Loans, Inc., in the Bankruptcy Risk Litigation Management Department. Linda DeMartini, a supervisor and operational team leader for the Litigation Management Department for BAC Home Loans Servicing L.P. ("BAC Servicing"), [FN6] testified that the new allonge was prepared in anticipation of this litigation, and that it was signed several weeks before the trial by Sharon Mason.

FN5. The allonge misidentifies the Asset-backed Certificates as "Series 6006-8" rather than "Series 2006-8."

FN6. Ms. DeMartini testified that **Countrywide** Home Loans, Inc., the originator of the note and mortgage at issue here, and **Countrywide** Home Loans Servicing LP, the servicer of the loan both before and after the sale of the loan, were and are two different legal entities under one corporate umbrella. Her understanding that the entity known as **Countrywide** Home Loans Servicing LP became BAP Home Loans Servicing LP when Bank of America took over the **Countrywide** entities differs from the representation made in papers submitted by the defendant herein that the entity known as **Countrywide** Home Loans, Inc. became BAP Home Loan Servicing LP. See n. 3.

As to the location of the note, Ms. DeMartini testified that to her knowledge, the original note never left the possession of **Countrywide**, and that the original note appears to have been transferred to **Countrywide's** foreclosure unit, as evidenced by internal FedEx tracking numbers. She also confirmed that the new allonge had not been attached or otherwise affixed to the note. She testified further that it was customary for **Countrywide** to maintain possession of the original note and related loan documents.

In a supplemental submission dated September 9, 2009, the defendant asserted that "the Defendant/Secured Creditor located the original Note. The original Note with allonge and Pooling and Servicing Agreement are available for inspection." [FN7] When the matter returned to the court on September 24, 2009, counsel for the defendant represented to the court that he had the original note, with the new

allonge now attached, in his possession. No additional information was presented regarding the chain of possession of the note from its ***629** origination until counsel acquired possession.

> FN7. In a bizarre twist, in the same September 9, 2009 submission, Countrywide produced a copy of a "Lost Note Certification," dated February 1, 2007, which indicated that the original note had been delivered to the lender on the origination date and thereafter "misplaced, lost or destroyed, and after a thorough and diligent search, no one has been able to locate the original Note." The defendant asserted for the first time that the "whereabouts of the Note could not be determined" at the time that the proof of claim was filed. Def. Suppl. Subm. at 6. As a result, Countrywide claimed that it was unable to affix the allonge to the note until after the original note had been rediscovered. At the next hearing on September 24, 2009, counsel was not able to explain the inconsistencies between the lost note certification, Ms. DeMartini's testimony, and the "rediscovery" of the note, and asked that the lost note certification be disregarded. T13-15 to 16 (9/24/2009).

In sum, we have established on this record that at the time of the filing of the proof of claim, the debtor's mortgage had been assigned to the Bank of New York, but that Countrywide did not transfer possession of the associated note to the Bank. Shortly before trial in this matter, the defendant executed an allonge to transfer the note to the Bank of New York; however, the allonge was not initially affixed to the original note, and possession of the note never actually changed. The Pooling and Servicing Agreement required an indorsement and transfer of the note to the Trustee, but this was not accomplished prior to the filing of the proof of claim. The defendant has now produced the original note and has apparently affixed the new allonge to it, but the original note and allonge still have not been transferred to the possession of the Bank of New York. **Countrywide**, the originator of the loan, filed the proof of claim on behalf of the Bank of New York as Trustee, claiming that it was the servicer for the loan. Pursuant to the PSA, **Countrywide** Servicing, and not **Countrywide**, Inc., was the master servicer for the transferred loans.[FN8] At all relevant times, the original note appears to have been either in the possession of **Countrywide** or **Countrywide** Servicing.[FN9]

> FN8. According to a Prospectus Supplement dated June 30, 2006, filed by **Countrywide**, Inc. with the Securities and Exchange Commission, *see www. sec. gov*, **Countrywide** Servicing was created to service the loans originated by **Countrywide**, Inc. The Prospectus notes that "**Countrywide** Home Loans expects to continue to directly service a portion of its loan portfolio," while transferring new mortgage loans to **Countrywide** Servicing. *Prospectus Supplement* at 40. In addition, because "certain employees of **Countrywide** Home Loans became employees of **Countrywide** Servicing, **Countrywide** Servicing has engaged **Countrywide** Home Loans as a subservicer to perform certain loan servicing activities on its behalf." *Id.* Because **Countrywide** Home Loans, Inc. designated itself as the servicer for the Bank of New York on the proof of claim at issue here, I assume for these purposes that it is acting in that capacity on this loan.
>
> FN9. The record is unclear about whether the original note has been in the possession of **Countrywide** Home Loans, Inc. or **Countrywide** Home Loans Servicing LP. Ms. DeMartini testified both that the original note was always located in the **Countrywide** origination file (presumably at **Countrywide** Home Loans, Inc.) and that the servicer actually retained possession of

the original note (presumably **Countrywide** Home Loans Servicing LP). She also testified that the "Documents Department" was charged with imaging and storing the original documents, but the record is not clear about which of the two entities housed the Documents Department.

DISCUSSION

With this factual backdrop, we turn to the issue of whether the challenge to the proof of claim filed on behalf of the Bank of New York, by its servicer Countrywide, can be sustained. Under the Bankruptcy Code, a claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). If an objection to a claim is made, the claim is disallowed "to the extent that ... such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1).

Countrywide's claim here must be disallowed, because it is unenforceable under New Jersey law on two grounds. First, under New Jersey's Uniform Commercial Code ("UCC") provisions, the fact that the owner of the note, the Bank of New York, never had possession of the note, is fatal to its enforcement. Second, upon the sale of the note and mortgage to the Bank of New York, the fact that the note was not properly***630** indorsed to the new owner also defeats the enforceability of the note.

[1] Under New Jersey law, the enforcement of a promissory note that is secured by a mortgage is governed by the UCC. The note, at issue here, made payable to Countrywide, providing for interest and an unconditional promise to pay the lender, is a "negotiable instrument" under the New Jersey UCC, which defines a negotiable instrument as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time." N.J.S.A. 12A:3-104. A party is entitled to enforce a negotiable instrument if it is "the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 12A:3-309 or subsection d. of 12A:3-418." N.J.S.A. 12A:3-301. In this case, the creditor may not enforce the instrument under any of the three statutory qualifiers.

1. *Holder.*

[2] A "holder" is defined as "the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." N.J.S.A. 12A:1-201(20). "Mere ownership or possession of a note is insufficient to qualify an individual as a 'holder'." *Adams v. Madison Realty & Dev. Inc.*, 853 F.2d 163, 166 (3d Cir.1988). Where, as here, the ownership of an instrument is transferred, the transferee's attainment of the status of "holder" depends on the negotiation of the instrument to the transferee. N.J.S.A. 12A:3-201(a). The two elements required for negotiation, both of which are missing here, are the transfer of possession of the instrument to the transferee, and its indorsement by the holder. N.J.S.A. 12A:3-201(b).

[3] As to the issue of possession, we are not certain on this record whether the party in possession of the note is Countrywide or Countrywide Servicing.[FN10] What we do know is that the note was purchased by the Bank of New York as Trustee, but never came into the physical possession of the Bank. Because the Bank of New York never had possession of the note, it can not qualify as a "holder" under the New Jersey UCC. *See Dolin v. Darnall*, 115 N.J.L. 508, 181 A. 201 (E & A 1935) ("Since the plaintiff was not 'in possession of' the notes in question, he was neither the 'holder' nor the 'bearer' thereof.").[FN11]

FN10. See n. 9.

FN11. If Countrywide was in possession of the note, then it would have had "holder"

> status as of the date of the petition filing date, because the note was payable to Countrywide, no indorsement or allonge had been executed, and Countrywide was in possession of the original note. However, Countrywide did not file the claim on its own behalf. Rather, it filed the claim as "servicer for Bank of New York." The qualification of the Bank of New York, rather than Countrywide, to enforce the note is at issue.

[4] The second element required to negotiate an instrument to the transferee, i.e., indorsement of the instrument by the holder, is also missing here. An indorsement means "a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument." N.J.S.A. 12A:3-204. The indorsement may be on the instrument itself, or it may be on "a paper affixed to the instrument." ***631** *Id.* Such a paper is called an "allonge", defined as "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." *See* Black's Law Dictionary at 88 (9th Ed. 2009).

The significance of indorsement and affixation requirements to achieve holder status, and thereby qualify to enforce a note against the maker, was explained by the Third Circuit in *Adams v. Madison Realty & Dev. Inc., supra.* The court explained that the maker of the note must have certainty regarding the party who is entitled to enforce the note.

> From the maker's standpoint, therefore, it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title. Consequently, plaintiffs here, as makers of the notes, may properly press defendant to establish its holder status.
>
> 853 F.2d at 168.

At the time of the *Adams'* decision, the New Jersey UCC provided in relevant part that "[a]n indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." N.J.S.A. 12A:3-202(2) (1961).[FN12] The UCC Commentary explained that this language was in conformance with those

> FN12. The New Jersey Study Comment noted that the "wording in reference to indorsements [was] changed from 'or upon a paper attached thereto', to 'so firmly affixed thereto as to become a part thereof'. This change merely implement[ed] the ancient doctrine of allonge."

decisions holding that a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not sufficient for negotiation. The indorsement must on the instrument itself or on a paper intended for the purpose is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge.

In 1995, Chapter 3 of Title 12A was amended and subsection 2 of 12A:3-202 was revised, renumbered, and included as the last sentence in N.J.S.A. 12A:3-204(a). As revised, the provision now states that "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." N.J.S.A. 12A:3-204(a).

In this case, we had neither a proper indorsement on the note itself, nor an allonge that was executed at the time the proof of claim was filed. An allonge purporting to negotiate the note to the Bank of New York was not executed until shortly before

the original trial date, and was not affixed to the original note until the second trial date. Even if the newly executed allonge is recognized as a valid indorsement of the note, under these circumstances, the Bank of New York does not qualify as a holder, because it never came into possession of the note. FN13

FN13. As an additional argument in support of the proposition that the Bank of New York qualifies as a holder who may enforce the note, the claimant cites to *Mulert v. National Bank of Tarentum*, 210 F. 857, 860 (3d Cir.1913) for the proposition that it had constructive possession of the note because Countrywide intended to transfer possession, and that constructive possession is sufficient to permit the transferee to enforce the note. This proposition is not sustainable in light of the actual possession required under the New Jersey UCC. *See* N.J.S.A. 12A:1-201(20).

***632** 2. *Nonholder in Possession.*

[5] Nor does the claimant qualify as a nonholder in possession who has the rights of a holder. "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." N.J.S.A. 12A:3-301. The Official Comment to section 3-301 adds that this definition:

> includes a person in possession of an instrument who is not a holder. A nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under Section 3-203(a). It also includes both a remitter that has received an instrument from the issuer but has not yet transferred or negotiated the instrument to another person and also any other person who under applicable law is a successor to the holder or otherwise acquires the holder's rights.

Id. at UCC Comment to § 3-301. Countrywide, the originator of the loan and the original "holder" of the note, sold the note to the Bank of New York as Trustee. In this way, the Bank of New York is a successor to the holder. As a successor to the holder of the note, the Bank of New York would qualify as a non-holder in possession who could enforce the note by its servicer if it had possession of the note. Because the Bank of New York does not have possession of the note, and never did, it may not enforce the note as a nonholder in possession.

3. *Non-holder Not in Possession.*

[6] The third category that would enable a claimant to enforce the note would be a person not in possession of the note who is entitled to enforce the note pursuant to N.J.S.A. 12A:3-309 or subsection d. of N.J.S.A. 12A:3-418. Section 12A:3-309 concerns the enforcement of lost, destroyed or stolen instruments.FN14 The defendant presented a lost note certification to this court, but the factual predicate of the certificate conflicted with other facts presented on this record, and we have determined to disregard the certificate.FN15 Section 12A:3-418, concerning payment or acceptance by mistake, does not apply here.

FN14. N.J.S.A. 12A:3-309 provides:

> a. A person not in possession of an instrument is entitled to enforce the instrument if the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> b. A person seeking enforcement of an instrument under subsection a. of this section must prove the terms of the instrument and the person's right to en-

> force the instrument. If that proof is made, 12A:3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

FN15. See n. 7.

In a recent District Court decision from the District of Massachusetts, the court rejected the enforcement of a note where the assignee of the note and accompanying mortgage did not have possession of the note. *Marks v. Braunstein,* 439 B.R. 248 (D.Mass.2010). In *Marks,* the assignee of the note and mortgage purchased the collateral for the note, a commercial building, ***633** from the Chapter 7 trustee, filed a secured proof of claim, and sought to enforce the note and mortgage against the proceeds from the sale. When the matter first came on to be heard, the claimant confirmed that he was not in possession of the note and was unaware of who was in possession of it. FN16 Because the claimant acknowledged that he was never in possession of the note, he was precluded from reliance on Section 3-309A of the Massachusetts UCC, which permits enforcement of a lost, destroyed or stolen instrument, but requires possession of the instrument at some point. Citing to *Premier Capital, LLC v. Gavin,* 319 B.R. 27, 33 (1st Cir. BAP 2004), the *Marks* court reflected that "[t]he purpose of the possession requirement in Article 3 is to protect the Debtor from multiple enforcement claims to the same note." *Id.* at 251. Acknowledging that conflicting enforcement claims were not a concern in the case before it, the court nevertheless applied the statutory requirements to hold that the note could not be enforced by the claimant to collect proceeds otherwise due to the claimant from the sale of the collateral on account of his secured claim.

> FN16. Following the disallowance of the proof of claim by the court, the claimant discovered the location of the note. However, the bankruptcy court denied his motion for reconsideration of the disallowance. The denial was affirmed by the District Court. *Marks v. Braunstein,* 2010 WL 3622111 at *5.

Similarly, in this case, the purchaser of the note and mortgage, the Bank of New York, never had possession of the note. Therefore, under the Uniform Commercial Code as adopted in New Jersey, the Bank of New York as Trustee may not enforce the instrument.

[7] On behalf of the Bank of New York, Countrywide contends that the written mortgage assignment in this case, which purports to assign both the note and mortgage in this case, and which was properly executed and recorded with the appropriate county clerk's office, serves to properly transfer the note to the new owner, enabling the new owner to enforce both the note and the mortgage. The recorded assignment of mortgage does include provision for the assignment of the note as well. However, the recorded assignment of the mortgage does not establish the enforceability of the note. As discussed above, the UCC governs the transfer of a promissory note. *See* 29 Myron C. Weinstin, New Jersey Practice, Law of Mortgages, § 11.2 at 749. The attempted assignment of the note in the assignment of mortgage document, together with the terms of the Pooling and Servicing Agreement, created an ownership issue, but did not transfer the right to enforce the note.

> The right to enforce an instrument and ownership of the instrument are two different concepts.... Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to

> deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.

N.J.S.A. 12A:3-203 (UCC Cmt. 1). Accordingly, the Bank of New York has a valid claim of ownership, but may not enforce the note on the basis of the reference ***634** to the note in the recorded assignment of the mortgage.

[8][9] The fact that the proof of claim in question was filed by "Countrywide Home Loans, Inc., as servicer for Bank of New York, Trustee" does not alter the enforceability of the note. Bankruptcy Rule 3001(b) provides that a proof of claim may be filed by either the creditor "or the creditor's agent." FED.R.BANKR.P. 3001(b). Here, Countrywide, Inc. was the originator of the note and mortgage, but sold both the note and mortgage to the Bank of New York as Trustee, and filed the proof of claim as the "servicer" for the Bank of New York. A servicer has standing to file a proof of claim on behalf of a creditor. *See, e.g., Greer v. O'Dell,* 305 F.3d 1297, 1302 (11th Cir.2002) ("A servicer is a party in interest in proceedings involving loans which it services."); *In re Viencek,* 273 B.R. 354, 358 (N.D.N.Y.2002); *In re Gulley,* 436 B.R. 878, 891 (Bankr.N.D.Tex.2010) ("many courts have held that a mortgage servicer has standing to participate in a debtor's bankruptcy case by virtue of its pecuniary interest in collecting payments under the terms of a note"); *In re Minbatiwalla,* 424 B.R. 104, 109 (Bankr.S.D.N.Y.2010); *In re Conde-Dedonato,* 391 B.R. 247, 250 (Bankr.E.D.N.Y.2008) ("A servicer of a mortgage is clearly a creditor and has standing to file a proof of claim against a debtor pursuant to its duties as a servicer."). But Countrywide, as the servicer, acts only as the agent of the owner of the instrument, and has no greater right to enforce the instrument than its principal. *See, e.g., Greer v. O'Dell,* 305 F.3d at 1303. Because the Bank of New York has no right to enforce the note, Countrywide as its agent and servicer cannot enforce the note.[FN17]

> FN17. As noted, Countrywide Home Loans, Inc. is listed as the servicer on the debtor's loan. However, there is serious question raised about the authority of that entity to file a proof of claim on behalf of the Bank of New York. A Power of Attorney dated November 15, 2005 was submitted, affording Countrywide Home Loans Servicing LP, not Countrywide Home Loans, Inc., the limited opportunity to perform all necessary acts to foreclose mortgage loans, dispose of properties and modify or release mortgages, presumably including the authority to file a proof of claim in a bankruptcy case.

CONCLUSION

Because the claim filed by "Countrywide Home Loans, Inc., servicer for Bank of New York" cannot be enforced under applicable state law, the claim must be disallowed under 11 U.S.C. § 502(b)(1).

Bkrtcy.D.N.J.,2010.
In re Kemp
440 B.R. 624

END OF DOCUMENT