

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:)	Bankruptcy No. 08-18700
)	
JOHN T. KEMP,)	
)	
Debtor.)	
-----)	
)	
JOHN T. KEMP,)	Adversary No. 08-02448
)	
Plaintiff,)	
)	
vs.)	
)	Camden, NJ
COUNTRYWIDE HOME LOANS,)	September 24, 2009
)	10:04 a.m.
Defendant.)	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JUDITH H. WIZMUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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1 (The following was heard in open court at 10:04
2 a.m.)

3 THE COURT: Please be seated. Good morning.

4 MR. LEVITT: Good morning.

5 MR. KAPLAN: Good morning, Judge.

6 THE COURT: Appearances, please.

7 MR. LEVITT: Bruce Levitt on behalf of the
8 plaintiff.

9 MR. KAPLAN: Harold Kaplan for Frenkel Lambert on
10 behalf of Countrywide.

11 THE COURT: All right. I have the supplemental and
12 second supplemental submissions of Countrywide and the reply.
13 Mr. Kaplan, I look to you first. I am, frankly, appalled at
14 the confusion and lack of credibility of Countrywide's
15 response to the issue of the note -- the possession of the
16 note.

17 We started out with Ms. DeMartini's testimony that
18 the note never leaves the servicer. She says that she saw a
19 Federal Express receipt whereby the actual note, the physical,
20 original note was transferred to the Foreclosure Department
21 internally in the same building, but that the note had not yet
22 been located. That's where we stood at that point.

23 Then we had a submission, the supplemental
24 submission saying the original note has been found and can be
25 available for inspection. It doesn't say where it was found,

1 who had possession or the like, but it was found and is
2 available for inspection.

3 And then without any explanation, there is a lost
4 note affidavit presented dated February of 2007 indicating
5 that the note cannot be found. No explanation provided. What
6 do I do with that, Mr. Kaplan?

7 MR. KAPLAN: I don't know, Your Honor. I do -- I
8 can state to the Court that I am in possession of the original
9 note and the original allonge, and it's here for inspection.
10 It was provided to me by the offices of Frenkel, Lambert, Ms.
11 Scovish. What transpired in the -- in the interim, the
12 testimony was that it was internally moved to the Foreclosure
13 Department, I recall that. Apparently, the Foreclosure
14 Department found it, transmitted it to counsel. I now
15 physically have it in my possession.

16 THE COURT: What's the lost note affidavit about?

17 MR. KAPLAN: I did see a reference to that in
18 counsel's papers. I was actually unaware that there was an
19 affidavit e-filed with the Court. Apparently, it's --

20 THE COURT: It's not an affidavit --

21 MR. KAPLAN: -- there's some -- there is confusion,
22 because while Ms. DeMartini said she believed based upon the
23 Federal Express document that it was in the possession of the
24 Foreclosure Department, apparently, somebody thought it was
25 lost. They were having significant difficulty finding it.

1 Ultimately, it was found.

2 THE COURT: But that doesn't explain the 2007 lost
3 note affidavit, and --

4 MR. KAPLAN: I understand, Your Honor.

5 THE COURT: -- and do you have testimony to back up
6 what this is, and is the allonge signed?

7 MR. KAPLAN: The allonge was presented to Your Honor
8 at the last hearing.

9 THE COURT: That's the new allonge?

10 MR. KAPLAN: That's correct. This allonge --

11 THE COURT: Now attached.

12 MR. KAPLAN: -- that's correct, now attached. Ms.
13 DeMartini testified about this allonge.

14 THE COURT: Indeed, she did. The allonge that was
15 prepared in connection with this litigation --

16 MR. KAPLAN: Correct, Your Honor.

17 THE COURT: -- and attached thereafter. So the
18 offer of proof, without testimony, do you have somebody on the
19 phone to testify that this is the original document and that
20 -- you know, it was found?

21 MR. KAPLAN: Ms. DeMartini is available for
22 testimony. I hope that she has knowledge as to what
23 transpired as far as the --

24 THE COURT: You hope. You don't know?

25 MR. KAPLAN: Well, I'm not -- don't specifically

1 know that the Foreclosure Department sent it or she
2 specifically sent it to counsel. Okay. I'm sure the debtor
3 can identify his signature on this document as being the
4 original.

5 THE COURT: Well, let's -- let's understand that if
6 we accept the proposition that the lost note affidavit is of
7 no moment, that the original document stayed in the possession
8 of Countrywide Home Loan Servicing and was not endorsed as of
9 the date that the proof of claim was filed, that is, no
10 allonge was -- no executed allonge was attached, you have
11 neither possession by the owner of the note nor endorsement by
12 the transferor, by Countrywide Home Loans, Inc., how do you
13 get over that? How do you solve that -- those two problems?

14 MR. KAPLAN: Your Honor, I don't know specifically
15 -- I do know -- we do know that the -- there was an allonge
16 prepared because it was needed. I can only tell you that this
17 note, this -- the back page of the mortgage appears to have an
18 endorsement on it. It doesn't say -- it says "pay to the
19 order of." It's blank. "Without recourse, Countrywide Home
20 Loans," and it's signed, and it's a rubber stamp, it says
21 "David A. Spector, Managing Director."

22 THE COURT: What's that?

23 MR. KAPLAN: Your Honor, I can only tell you what
24 the document says. I don't know who Mr. Spector is. I would
25 simply state, Your Honor, that, obviously, the intention of

1 Countrywide to transfer the stock -- the ownership interest to
2 Bank of New York as Trustee, to the extent that that did not
3 happen, then I would submit that Countrywide is still the
4 holder of this paper and the party entitled to payment.

5 And while the Court may find that the proof of claim
6 is -- may be stricken because the party that allegedly filed
7 it doesn't have some type of standing, certainly, I think
8 there's still a party out there that has a right to enforce
9 the document, no --

10 THE COURT: Well, is there a difference between
11 enforcing the obligation and enforcing it as a secured
12 obligation? In other words, Countrywide presumably could
13 amend the proof of claim to reflect Countrywide Home Loans now
14 -- Inc. -- now operating as, whatever their new --

15 MR. KAPLAN: Bank of America, right.

16 THE COURT: -- Bank of America, so they would have
17 an obligation due to them, but that obligation would not
18 translate to a secured obligation, isn't that right, at least
19 for our purposes in terms of this case?

20 MR. KAPLAN: Well, they are -- they have a security
21 interest, Your Honor. There's a validly perfected mortgage.

22 THE COURT: Yes, but the mortgage --

23 MR. KAPLAN: The debtor testified he signed the
24 mortgage.

25 THE COURT: -- is in the name -- the mortgagee is

1 Bank of New York as Trustee for CWA whatever.

2 MR. KAPLAN: Well, I -- obviously, Your Honor, there
3 was a -- to the extent that the documents weren't transferred
4 in the ordinary course pursuant to the Uniform Commercial
5 Code, there is an issue.

6 I don't -- I don't understand maybe why the document
7 -- the mortgage effectively can't be assigned back to
8 Countrywide. They're still the holder of the note. The
9 debtor acknowledges that he signed the note and mortgage. He
10 doesn't contest the validity of the note and the mortgage.

11 THE COURT: So I'm to hypothesize that there could
12 be a reassignment?

13 MR. KAPLAN: Well, I believe that the parties
14 involved need to remediate the problem so long as the Court is
15 of the mind to allow them to do that, and either Countrywide
16 needs to have the mortgage reassigned to it, because it
17 shouldn't have assigned the mortgage to Bank of New York in
18 that it didn't transfer the note in accordance with the
19 Uniform Commercial Code, and, therefore, both note and
20 mortgage need to be sent back to Countrywide so that they can
21 enforce their obligation and mortgage.

22 THE COURT: There's been no motion to that effect,
23 no --

24 MR. KAPLAN: I understand, Your Honor. I'm simply
25 saying that that seems to be a way to remediate or to allow at

1 least Countrywide, if not Bank of New York, to proceed
2 accordingly.

3 THE COURT: Well, that's hypothetical, and I -- I
4 don't rule on it.

5 MR. KAPLAN: Well, I understand, Your Honor. But
6 all I'm saying is, if you're asking -- if your ruling was to
7 disallow the claim, I assume that that is -- I'm assuming, but
8 I may be wrong, a hundred percent wrong -- that that is not
9 invalidating the mortgage and the right of a party to enforce
10 that mortgage at some point, maybe not in this Court as far as
11 payment of a claim, but as far as expungement from the county
12 record that there's no longer a lien on the property, that
13 would be a complete lack of equity in the sense of unjustly
14 enriching the debtor.

15 THE COURT: Well, clearly, there's a real issue
16 about what happens down the road. I rule on what's
17 immediately in front of me.

18 MR. KAPLAN: I understand.

19 THE COURT: And that's my task. Are you aware, Mr.
20 Kaplan, that the brief that was submitted cited the wrong UCC
21 provision? By that I mean, 3-309 was cited as a basis for the
22 opportunity of Countrywide as master servicer to enforce this
23 obligation, and the New Jersey version of 3-309 is different
24 than the UCC version that was cited.

25 MR. KAPLAN: No, I'm not aware of that, Your Honor.

1 THE COURT: It's amazing how sloppy this
2 presentation was, and I'm very disappointed about that.
3 Anyway -- all right. Well, thank you, Mr. Kaplan. Do you
4 want to present testimony? Does it matter, you know, because
5 there is no testimony regarding possession by Bank of New York
6 as Trustee, correct?

7 MR. KAPLAN: That's correct, Your Honor. I'm not
8 disputing that. That's what Ms. DeMartini testified to, that
9 the note -- she had no record of this note leaving and going
10 across country, across wherever, to Bank of New York.

11 THE COURT: And you do understand as well that the
12 Pooling and Servicing Agreement requires that transfer, that
13 physical transfer of the note in accordance with -- and
14 endorsement -- in accordance with UCC requirements?

15 MR. KAPLAN: I understand that, Your Honor. I'll
16 simply say for the sake of edification, but this is -- and I
17 was told it was all e-filed -- this is apparently the index to
18 this Master Servicing Agreement showing all the loans and it
19 does reference the Kemp loan. It's a double-side document,
20 includes all the loans.

21 And I can say that, although Your Honor is right and
22 the UCC and the Master Servicing Agreement apparently requires
23 that, procedure seems to indicate that they don't physically
24 move documents from place to place because of the fear of loss
25 and the trouble involved and the people handling them. They

1 basically execute the necessary documents and retain them as
2 long as servicing's retained. The documents only leave when
3 servicing is released.

4 THE COURT: They take their chances.

5 MR. KAPLAN: I understand, Your Honor.

6 THE COURT: Understood. Thank you.

7 Counsel, the proof of claim was filed -- let's see
8 -- it was filed by Countrywide Home Loans, Inc., servicer for
9 Bank of New York -- now, that's wrong. We understand that.
10 Can the -- can these problems be corrected post-petition? In
11 other words, we know that claims can be transferred post-
12 petition.

13 What about if the note, the original note now that
14 has seemingly appeared, is now transferred to the Bank of New
15 York as Trustee and amended, it wouldn't have to -- well, it
16 would be amended to reflect that Countrywide Home Loans, Inc.,
17 is not the right party, but Countrywide Home Loans, Master
18 Servicing or servicing whatever that name is, as servicer for
19 Bank of New York, Trustee, is filing this proof of claim,
20 what's wrong with that?

21 MR. LEVITT: Your Honor, I'm not -- first of all, we
22 have issues as far as -- as far as transfer of claim in this
23 case, any claim that would be transferred would be -- be an
24 incorrect false claim, improper claim that was filed with this
25 Court, so I don't think the transfer of the claim is going to

1 alleviate any of these issues. The question is can a new
2 claim be filed?

3 The bar date is past. We've got issues under
4 Section 544 of the Bankruptcy Code which will involve the
5 Standing Trustee asserting the rights of the hypothetical lien
6 creditor and the bona fide purchaser of a piece of property
7 that on the date of the filing the petition, the note was in
8 one hand, the mortgage was in the other hand. There are a
9 whole host of issues.

10 And I don't -- I'm not -- I can't pretend to speak
11 for the Trustee, although I know what I will tell the Trustee,
12 but I don't think those are issues for the Court at this
13 point.

14 I think -- there's a record before this Court, and I
15 thank Your Honor because I was equally as dumbfounded as you,
16 and I would go further with -- and suggest fraud on the Court,
17 fraud on me, fraud on my client, because of certain statements
18 that were made that are completely contradictory to documents
19 that have been previously filed before this Court such as a
20 proof of claim attaching a note which we now find out they
21 didn't even have; a motion for summary judgment with the
22 certification --

23 THE COURT: What do you mean they didn't have? They
24 did have.

25 MR. KAPLAN: They had photocopies.

1 MR. LEVITT: But, Your Honor, they made
2 representations that they had a note. These papers say all
3 they had was a lost note affidavit that they didn't have a
4 note.

5 THE COURT: Well, the lost note affidavit appears to
6 have been incorrectly appended and incorrectly made out. In
7 other words --

8 MR. LEVITT: But it wasn't -- it wasn't appended to
9 anything, Your Honor. I've never seen a lost note. I'm
10 proceeding with -- and, again, I came into this case very
11 late, but I'm proceeding based upon a record and discovery and
12 Rule 26 disclosures in this case, never, ever mentioning a
13 lost note affidavit, which could have changed this entire case
14 or at least certainly would have required certain discovery.

15 THE COURT: Well, we're actually asked to disregard
16 that lost note affidavit.

17 MR. LEVITT: No question, but, Your Honor, I'm just
18 making a point that there's certain -- dealing with the record
19 before Your Honor, and, again, let's deal with what we have
20 now, and Your Honor has dealt with those issues.

21 What's before Your Honor now is -- is a proof of
22 claim and a request that -- for a determination from this
23 Court that this creditor, acting on behalf of the servicer,
24 because, again, there's -- there is a Pooling and Servicing
25 Agreement. Counsel's argued that they have the right to act

1 on behalf of the mortgage holder.

2 So this Court can determine that the proof of claim
3 is disallowed. This Court can determine based upon the record
4 before this Court that the Trustee is not a valid secured
5 creditor because it's acting through its servicer pursuant to
6 the Pooling and Servicing Agreement, make that determination
7 in this Court and then I will take it up with the Trustee as
8 to whether or not she wants me -- wants to retain me, first of
9 all -- whether or not she believes its appropriate for us to
10 file an action in this Court to actually get a Court order
11 voiding that mortgage or, quite frankly, just go to the State
12 Court and say the Bankruptcy Court's already made this
13 determination.

14 And now, it's up to you, State Court, to decide
15 whether or not you want to remove this lien against the
16 property. That's for another day, and I'm sure we'll have
17 another set of arguments and another round of litigation.

18 But the reality is, that's the record. And, again,
19 we can talk about what if, but up until this day, I haven't
20 seen any attempt to amend the proof of claim. I haven't seen
21 any attempt to transfer a proof of claim. So the record is
22 the record. The record is crystal clear here.

23 THE COURT: Thank you, sir.

24 I certainly agree. I think in light of the lack of
25 precedent here in New Jersey for this kind of circumstance, it

1 behooves me to write on this, and I will do that. There is
2 recognition of lack of possession and lack of endorsement as
3 of the time this case was filed and as of the time the proof
4 of claim was filed. Those things are uncontested.

5 Regardless of the difficulties in proofs, the
6 machinations of where the note was and whether it was lost and
7 so forth, let's assume that it's now found but never in the
8 possession of the transferee, the Bank of New York as Trustee.
9 It doesn't look like 3-309 gives the -- at least New Jersey's
10 version -- gives the mortgagee any opportunity to overcome the
11 failure to have possession and the failure to endorse.

12 And I think that counsel is correct that -- counsel
13 for the debtor -- that it is what it is and my view should be
14 limited.

15 Having said all of that, I will review, scrutinize
16 and carefully lay out the bases of the decision. I assume --
17 you can tell where I'm going -- I assume that's where I will
18 end up. I don't guarantee it, but I'm -- it's fairly
19 straightforward at this point.

20 Now that I understand it and I've cleared away the
21 underbrush if you will, it seems to me that it has to be laid
22 out carefully and completely, and that's what I aim to do. So
23 I will hold onto this, and I thank you both for your
24 presentations.

25 MR. LEVITT: Thank you, Your Honor.

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MR. KAPLAN: Thank you, Your Honor.

(Proceedings concluded at 10:24 a.m.)

* * *

C E R T I F I C A T I O N

I, Lois A. Vitarelli, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

 /s/Lois A. Vitarelli January 5, 2010

LOIS A. VITARELLI

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