

**IN THE UNITED STATES BANKRUPTCY COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI**

IN THE MATTER OF:

CHAPTER 13 NO.:

SAMUEL M. BROTHERS and LORA BROTHERS

10-10518-NPO

LOCKE D. BARKLEY, Chapter 13 Trustee

PLAINTIFF

VS.

A. P. NO. _____

**TRUSTMARK NATIONAL BANK;
BAC HOME LOANS SERVICING, L.P.,
Individually and as Servicer for THE BANK
OF NEW YORK MELLON TRUST COMPANY, N.A.,
AS TRUSTEE FOR CERTIFICATEHOLDERS
OF CWMBS 2005-R1; THE BANK OF NEW YORK MELLON
TRUST COMPANY, N.A., individually and as Trustee for
CERTIFICATEHOLDERS OF CWMBS 2005-R1;
and UNKNOWN DEFENDANTS 1 through 10.**

DEFENDANTS

**COMPLAINT TO DETERMINE SECURED STATUS,
REMOVE CLOUD FROM TITLE, SANCTIONS, AND OTHER RELIEF**

COMES NOW Trustee, Locke D. Barkley, by and through counsel, and files this Complaint to Determine Secured Status, Remove Cloud from Title, Sanctions, and Other Relief and in support thereof states as follows:

JURISDICTION & VENUE

1. This is an adversary proceeding brought pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure.
2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. §§ 105 and 542.
3. This contested matter is a core proceeding as defined by 28 U.S.C. § 157.
4. Venue is proper under 29 U.S.C. § 1409.

PARTIES

5. Trustee, as Plaintiff, has standing to bring this action pursuant to 11 U.S.C. §§ 323, 1302, and 1330.

6. Defendant Trustmark National Bank is a National Bank and FDIC-Insured Subsidiary of Trustmark Corporation with its principal place of business located at 248 East Capitol Street, Jackson, MS 39201. Defendant may be served with process of this Court upon its registered agent, T. Harris Collier, III, 248 E. Capitol Street, Jackson, Mississippi 39201. Individually this defendant will be referred to as “TNB” herein below.

7. Defendant BAC Home Loans Servicing, L.P. is a subsidiary of Bank of America, N.A. with its principal place of business located at 6400 Legacy Drive, Plano, Texas 75024. Defendant may be served with process of this Court upon any officer of the corporation by mailing a copy of the summons and complaint to the principal place of business. Defendant is being sued in its individual capacity and as Servicer for The Bank of New York Mellon, N.A. as Trustee for Certificateholders of CWMBS 2005-R1. Individually this defendant will be referred to as “BAC” herein below.

8. Defendant The Bank of New York Mellon Trust Company, N.A. is a National Bank with its principal place of business located at 700 South Flower Street, Suite 200, Los Angeles, California 90017. Defendant may be served with process of this Court upon any officer of the corporation by mailing a copy of the summons and complaint to the principal place of business. Defendant is being sued in its individual capacity and as Trustee for Certificateholders of CWMBS 2005-R1. Individually this defendant will be referred to as “BONY” herein below.

9. Unknown Defendants 1 through 10 are corporate entities and/or individuals that may have a legal interest in the promissory notes, deed of trust,

assignments or the real property which is the subject of this proceeding and/or who may be responsible for the acts complained of herein.

10. Collectively the defendants named above will be referred to as “Defendants.”

FACTS

The Brothers’ Mortgage

11. On or about October 31, 2000, Debtors, Samuel M. Brothers and Lora Brothers (“Brothers” or “Debtors”), executed a promissory note (the “Note”) payable to Realty Mortgage Corporation¹ and a deed of trust (the “Deed of Trust”) conveying their certain real property to RMC in trust to secure repayment of the Note. The Deed of Trust was recorded in the land records of Washington County, Mississippi in Book 2155 at Page 199. The Note and Deed of Trust are attached hereto as Exhibits “A” and “B,” respectively.

12. The subject real property is more particularly described as follows:

Lot 18 of Block 3 of the McCorkle Addition to the City of Greenville, Washington County, Mississippi, according to a map or plat of said addition, recorded at plat book 5 at page 15 of the land records of Washington County.

13. On or about October 31, 2000, the Note was endorsed by RMC without recourse to Trustmark National Bank.

14. The Deed of Trust was assigned by RMC to Trustmark National Bank by virtue of an assignment dated October 31, 2000, and recorded in Book 2155, Page 300 of the land records of Washington County, Mississippi. Such assignment is attached hereto as Exhibit “C.”

¹ Realty Mortgage Corporation (RMC) is a Mississippi corporation which was engaged in the business of mortgage origination and lending. RMC filed a petition for chapter 11 bankruptcy relief on February 7, 2009, in the United States Bankruptcy Court for the Southern District of Mississippi, case number 09-00544-NPO. The bankruptcy case remains active as of the filing of this complaint.

15. Several years after the execution of the Note, Debtors were asked and did execute a promissory note which was payable to Countrywide Home Loans, Inc. (referred to as "Countrywide") in the principal amount of \$68,244.81.

16. The promissory note was titled "Amended and Restated Note." Said promissory note stated that "[i]n return for a loan received from Lender [Countrywide], Borrower promises to pay the principal sum of ... \$68,244.81 ... plus interest, to the order of Lender." A copy of the Amended and Restated Note is attached hereto as Exhibit "D." Trustee alleges that no loan proceeds were received by the Borrowers/Debtors from Countrywide.

17. The Amended and Restated Note was dated October 31, 2000, however, the first payment due under the promissory note was January 1, 2007. Trustee alleges that the Amended and Restated Note was purposefully misdated, but executed in late 2006.

18. On December 28, 2009, a document entitled "Corporation Assignment of Deed of Trust/Mortgage" was executed by Courtney Bullard who was represented to be an Assistant Secretary of Trustmark National Bank. The document purportedly assigned the Deed of Trust to The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWMB5 2005-R1 (the "Trustmark-BONY Assignment"). Said document was recorded in the land records of Washington County, Mississippi, on December 30, 2009, in Book 2524 at Page 30369. A copy of the assignment is attached hereto as Exhibit "E."

19. The trust is controlled by and subject to the *Pooling and Servicing Agreement Dated as of March 1, 2005*, for "CWMB5 Reperforming Loan REMIC Trust Certificates, Series 2005-R1, between CWMB5, Inc., Depositor, Countrywide Home Loans, Inc., Seller, Countrywide Home Loans Servicing LP, Master Servicer, and the Bank of New York, Trustee and Custodian." A true and correct copy of the

fully executed Pooling and Servicing Agreement (“PSA”) is attached hereto as Exhibit “F.”

20. Article I of the PSA defines the term Cut-off Date as March 1, 2005, and Closing Date as March 31, 2005.² Section 2.01(a) states that “The Seller [Countrywide Home Loans, Inc.], concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Depositor [CWMBBS, Inc.], without recourse, all of the right, title and interest of the Seller in and to (i) the Mortgage Loans”³

21. The Trustmark-BONY Assignment was not executed and delivered prior to the Cut-off Date, or any possible contractual extension thereof.

The Brothers’ Bankruptcy

22. Debtors filed a chapter 13 petition and related schedules on February 3, 2010. The plan proposed, *inter alia*, that the pre-petition arrears and a continuing mortgage payment would be paid to Bank of America.

23. On April 5, 2010, BAC caused to be filed a proof of claim (Clm. #9-1) in the bankruptcy case. Said proof of claim identified the creditor as BAC Home Loans Servicing, L.P. as Servicer for The Bank of New York Mellon, N.A. The claim was signed by Michael Jedynak an attorney with the Louisiana law firm of Morris & Associates. A copy of the proof of claim is attached hereto as Exhibit “G.”

24. Attached to the proof of claim were the Note, the Amended and Restated Note, and the Deed of Trust. From the proof of claim and its attachments, it was unclear who held the underlying debt or the Deed of Trust.

² See Ex. “F,” pages 23 and 19.

³ See Ex. “F,” page 51.

25. On April 19, 2010, Trustee filed an Objection to Proof of Claim of BAC. In the objection Trustee alleged that BAC caused to be filed a proof of claim which included and attempted to recover duplicate amounts for escrow shortages.

26. A hearing was scheduled for June 23, 2010; however, on the *ore tenus* motion of counsel for BAC it was continued and rescheduled for August 18, 2010.

27. BAC, by and through Michael Jedynak and Morris & Associates, filed an Amended Proof of Claim (Clm. #9-2) herein on August 2, 2010. A copy of the Amended Proof of Claim is attached hereto as Exhibit "H."

28. Attached to the Amended Proof of Claim was a document entitled "Assignment of Deed of Trust" which had been executed by Roberta Hook who presented herself as an Assistant Vice President of RMC. The document was dated May 5, 2010, and recorded in the land records of Washington County, Mississippi, in Book 2525 at Page 5502.

29. Said document purported to assign the Deed of Trust from RMC to The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Certificateholders of CWMBS 2005-R1. The document was executed and recorded after the date of the petition, the original proof of claim and the objection by the Trustee. The purported assignment set forth in the document did not occur before the Cut-off Date of the PSA, or any contractual extension thereof. Furthermore, RMC had nothing to assign as of May 5, 2010.

30. Based upon the Amended Proof of Claim and the "assignment" by RMC, Trustee filed an Amended Objection to Proof of Claim alleging among other things that BAC lacked standing as a secured creditor to file the Proof of Claim or Amended Proof of Claim.

31. On August 18, 2010, a hearing was held by this Court where the Trustee presented the objection and amended objection to the proof of claim. In

support thereof, Trustee offered documents which were entered into evidence. Defendant offered the testimony of Joy Mason, litigation specialist employed by BAC, and certain documents which were allowed and entered into evidence.

32. Having considered all matters properly presented the Court ruled that BAC failed to prove that BONY held both the Note and the Deed of Trust, therefore, it was not a secured creditor and did not have standing to file a secured claim in this matter.

COUNT I - DETERMINATION OF SECURED STATUS

33. The allegations set forth in paragraphs 1 through 32 above are incorporated herein by reference.

34. As determined by this Court following an evidentiary hearing on Trustee's Amended Objection to Proof of Claim, neither BAC nor BONY hold a perfected secured claim upon Debtor's residence.

35. In addition to this Court's prior findings, the Note and Deed of Trust were not transferred into the Trust prior to the Cut-off Date, or any contractual extension thereof, as set forth in the PSA.

36. At no time relevant hereto did BONY or the CWMBBS Reperforming Loan REMIC Trust Certificates, Series 2005-R1 hold both the Note and Deed of Trust. Therefore, the loan could not have been serviced by Countrywide or its successor BAC, and BAC did not have standing to file the Proof of Claim or Amended Proof of Claim.

37. Pursuant to 11 U.S.C. § 506(d) the lien is void. Therefore, any claim of Defendants should be deemed unsecured and the deed of trust void and/or satisfied.

COUNT II - REMOVE CLOUD FROM TITLE

38. The allegations set forth in paragraphs 1 through 37 above are incorporated herein by reference.

39. Based upon the foregoing allegations, Trustee alleges that the Deed of Trust recorded at Page 2155, Book 199, in the land records of Washington County, Mississippi secures nothing for its alleged holder BONY and, is therefore, a cloud on the title.

40. Trustee requests an order of this Court finding that the Deed of Trust is a cloud upon the title of Debtors and that it shall be stricken from the land records of Washington County, Mississippi. Further, Trustee requests such other relief to which she or this bankruptcy estate may be entitled.

COUNT III - VIOLATION OF THE AUTOMATIC STAY

41. The allegations set forth in paragraphs 1 through 40 above are incorporated herein by reference.

42. Despite having its claim disallowed by this Court, BAC continues to attempt to collect the underlying indebtedness from Debtors. Such collection would come from the property of the estate.

43. The automatic stay of 11 U.S.C. § 362 has neither been terminated nor otherwise modified with respect to any of the Defendants or property of the estate.

44. BAC's efforts to collect the underlying debt is a prior and continuing violation of the automatic stay.

45. Trustee is entitled to an award of actual damages in the amount of any funds wrongfully collected from the estate, punitive damages in an amount sufficient to punish BAC and the costs associated with this action, including reasonable attorneys' fees.

COUNT IV - FRAUD UPON THE COURT

46. The allegations set forth in paragraphs 1 through 45 above are incorporated herein by reference.

47. On August 2, 2010, with the intent to defraud this Court, the Trustee and the Debtors, BAC caused to be filed an Amended Proof of Claim (Cln. #9-2), in which it included, as an attachment, a document which it hoped would support its claim as being secured. Said document was a purported Assignment of Deed of Trust executed by Roberta Hook who misrepresented herself to be an Assistant Vice President of RMC. Said assignment was executed on May 5, 2010, and purported to assign to BONY the underlying deed of trust and the indebtedness secured thereby.

48. Roberta Hook is not and has never been employed by RMC. Upon information and belief, Roberta Hook was employed by BAC as of May 5, 2010.

49. The assignment was prepared by Morris & Associates, a Louisiana law firm. The addresses for the Grantor, RMC, and Grantee, BONY were stated as being the same, being 7105 Corporate Drive, Plano, Texas 75024, which is an office location of BAC.

50. At the hearing on Trustee's objection to proof of claim, counsel for BAC, Michael Jedynak of Morris & Associates, identified this assignment as a "wildcard assignment." As Mr. Jedynak described, the "wildcard assignments" were created by his firm and used for the benefit of their clients when his firm received a file from the lender or servicer where the client was not identified as the beneficiary under the deed of trust or assignee under any assignment of deed of trust.

51. As agents and counsel of BAC, Michael Jedynak and Morris & Associates, presented to this Court a paper (i.e. the proof of claim) which was signed by Mr. Jedynak and who, in doing so, certified "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, - (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing

law ...; and (3) the allegations and other factual contentions have evidentiary support”⁴

52. However, as stated by Mr. Jedynak at the hearing on Trustee’s objection to proof of claim, his firm did not conduct (and do not regularly conduct) searches of the land records to determine the status of the underlying mortgage obligation.

53. Trustee requests that Court invoke its powers granted to it by 11 U.S.C. § 105(1) and issue such order, process or judgment necessary to address the fraud of BAC and BONY and to prevent any future fraud or abuse of process.

WHEREFORE, PREMISES CONSIDERED, Trustee, Locke D. Barkley, prays that this Court enter its order granting judgment for the following:

A. A determination that neither BAC nor BONY hold both the Note and Deed of Trust;

B. A finding that the Deed of Trust is either void or satisfied and an order to the clerk to strike it from the land records;

C. A finding that BAC has violated the automatic stay of 11 U.S.C. § 362 and order an award of actual damages in the amount of any funds wrongfully collected from the estate, punitive damages in an amount sufficient to punish BAC and the costs associated with this action, including reasonable attorneys’ fees;

D. A finding that BAC and BONY purposefully committed fraud upon this Court and order such sanctions and other remedies necessary to address such fraud and to prevent any future fraud or abuse of process; and

E. Such other relief to which the Trustee and this bankruptcy estate may be entitled.

⁴ Fed. R. Bankr. P. 9011(b).

Dated: January 7, 2011

Respectfully submitted,
LOCKE D. BARKLEY, TRUSTEE

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