2011

Commonwealth Property Advocates, LLC. v. JPMorgan Chase Bank, National Association, and John Does of Unknown Number : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

COMMONWEALTH PROPERTY ADVOCATES, LLC., Plaintiff and Appellant, vs. JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AND JOHN DOES OF UNKNOWN NUMBER, Defendants and Appellees.	Case No. 20110367-CA

BRIEF OF APPELLANT

Nature of the Proceeding: Appeal

Trial Court and Judge: Appeal from the Third District Court, Salt Lake County, Case No. 100404018, Judge Andrew Stone.

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction of this matter pursuant to §§ 78A-3-102(4), 78 A-4-103(2)(j), UCA (1953).

ISSUES ON APPEAL

1. Where it is admitted that, shortly after the making of a note secured by a trust deed, the loan was sold in a securitization, but the parties to the securitization are concealed, may the district court:

   a. presume that a subsequent quitclaim of lender's portfolio conveys the subject loan?

   b. enforce the note on behalf of anyone in possession of it, and foreclose the security, without inquiring into the circumstances of such possession or the ownership of the debt?

   c. presume that the debt has been accelerated, as a prerequisite to foreclosure, without evidence of acceleration by anyone?

All of the foregoing issues were presented and preserved on defendant's Motion to Dismiss, converted to one for summary judgment. See Record, pp. 63-149; 167-189; 190-205.

STANDARD OF REVIEW

All of the foregoing issues raise questions of law, which are reviewed de novo, without deference. *Geisdorf v. Doughty,* 972 P. 2d 67, 69-70 (Utah 1998); *Robinson v. State,* 20 P.3d 396, 398 (Utah 2007). Upon motion to dismiss, the fac-

tual allegations of a complaint are deemed true, and the issue is whether such allegations constitute a cause of action. *Mackey v. Cannon,* 996 P. 2d 1801, 1804 (U. Apps. 2000); *Richardson Irr. Co. v. Karen*, 880 P. 2d 6, 9 (Utah 1994); *Bailey v. Utah State Bar,* 846 P. 2d 1278, 1279-80 (Utah 1993). All inferences from such facts are drawn in favor of complainant. *Krouse v. Bower*, 20 P. 3d 895, 897 (Utah 2001).

STATEMENT OF FACTS

Lawrence McNeill, plaintiff's predecessor, obtained a mortgage loan from Washington Mutual Bank in October, 2003. The note was secured by a trust deed on local property. A second line of credit loan was obtained at the same time, secured by a trust deed on the same property.

The loans were promptly sold in a securitization in 2003.

In 2008, the U.S. Office of Thrift Supervision, treating Washington Mutual as a failed bank, obtained a quitclaim of "all right, title, and interest of the Receiver in and to all of the assets - - - of the Failed Bank - - -" Defendant bank asserts succession to the interest of the regulator.

In 2009, McNeill creased to make payments on the loans. There is no evidence in the record that anyone thereafter took the steps required by the notes to accelerate the loans.

Defendant J.P. Morgan Chase Bank, N.A., now asserts possession of the first Note, and has initiated foreclosure by the filing of a notice of default.

The foregoing facts are all set out, or conceded, in defendant's statement of facts contained in its Motion to Dismiss. Record, pp. 70-74; 167.

STATEMENT OF THE CASE

The Complaint in this matter alleges that plaintiff's predecessor's loan was sold by lender promptly upon being made, and, together with similar loans, securitized. The effect, under § 57-1-35, UCA (1953), was to transfer the security for the loan, a trust deed, to the transferee(s) of the loan. Defendant, as successor to the original lender as a result of a receivership, therefore, could not show that it ever owned the loan, or had power to foreclose the trust deed. Further, there was no evidence that the loan was ever accelerated, by anyone, permitting a foreclosure.

The district court, on motion to dismiss, which it converted to one for summary judgment, held that because defendant had possession of the note, with an undated endorsement in blank, it could foreclose, notwithstanding it could show no ownership of the debt.

SUMMARY OF ARGUMENT

Mere possession of a note may allow "enforcement" (collection) thereof; foreclosure of a security, however, requires a showing of ownership of the debt. The Uniform Commercial Code (UCC) contains an exception for this purpose. Further, even enforcement (collection) of the debt under the terms of the UCC is subject to objection that possession of the note was wrongfully obtained.

In view of the admission of securitization in this case, defendant can neither show that it obtained possession of the note properly for purposes of collection, nor that it has the ownership of the debt required by Utah law to foreclose. Nothing in the UCC forecloses inquiry into these matters.

Finally, there is no showing that anyone having authority to do so accelerated the debt as required by the note, a pre-requisite to foreclose.

ARGUMENT

The district court's ruling is set out in a single paragraph of its March 24, 2011 Memorandum and Decision:

> Plaintiff's arguments are answered by statute. Utah's Uniform Commercial Code defines who is entitled to enforce an instrument such as the note at issue in this case:
>
> > "Person entitled to enforce" an instrument means the holder of the instrument ... A person may be a person entitled to enforce the instrument even though he is not the owner of the instrument or is in wrongful possession of the instrument.
>
> Utah Code Ann. § 70A-3-301. Plaintiff invites the Court to speculate that Chase may be a mere custodian of the note. The statute does not contemplate such speculation, nor do the standards on a motion to dismiss or a motion for discovery under rule 56(f) require it. Chase's possession of the note resolves the question whether the loan has been validly called into default, makes moot the question of how Chase came to possess the note, and entitles Chase to enforce its terms. Moreover, because the security follows the debt under Utah Code Ann. § 57-1-35, Chase has the benefit of the trust deed securing the note.

The court is wrong on all points.

WHO OWNS THE DEBT?

As a preliminary matter, it appears that the loan in issue was transferred, together with its security, to participants in the securitization scheme, in 2003. It was not in Washington Mutual's portfolio to be conveyed to Chase Bank at the time of receivership. This means that someone else owns this loan and its security. Such persons alone would have authority to accelerate the loan. Moreover, ownership of the loan by others raises questions of the propriety and effect of Chase's present possession of the note.

POSSESSION

The district court has presumed that mere possession of a note, even if wrongful, makes the possessor the "holder" of the note with right of enforcement. This is incorrect.

A person becomes a "holder" by "negotiation" of the instrument. § 70A-3-201(1), UCA (1953). Negotiation of an instrument payable to a particular person requires both "transfer of possession of the instrument and its indorsement by the holder." §70A-3-201(2), UCA (1953). "Holder" in the latter section may mean the payee, or a person to whom the note has been previously transferred.

In the present case, the original payee was Wa-Mu. The note now claimed by defendant is not endorsed. (The second note contains an undated endorsement in blank by Wa-Mu.) Further, an undated endorsement by Wa-Mu would not suf-

fice if it was made to transfer the note to a trustee of a securitization trust. The further endorsement of the trustee, or any further transferee(s) of the note would be required.

"Transfer" of an instrument is effective where "for the purpose of giving to the person receiving delivery the right to enforce the instrument." § 70A-3-203(1), UCA (1953). Where there has been no "negotiation," one can become a "holder" only by a transfer intending to provide a right of enforcement.

It is common in securitizations to place notes in a "custodianship" for administrative purposes. It may be possible to retrieve a note from the custodian in order to enforce it on behalf of the trustee of the trust pool (at least until the pool sells the pooled loans as "certificates" to investors) or the investors in the pooled loans (if one has a separate agreement for the purpose executed by such investors). One who is neither the trustee nor the agent of the investors cannot obtain possession of a note to enforce it in his own name.

In the present case, the district court had no evidence that Chase was the securitization trustee or the agent of the investors.

Finally, negotiation is subject to rescission, or to other remedies when obtained improperly. In such case, only a bonafide purchaser without notice is protected. §§70A-3-202, 70A-3-306, UCA (1953). The latter is the gist of the provision that one in wrongful possession may enforce the note: one who gets the note even from a thief may enforce it if he was without notice that the possession was

wrongful. One with notice gets no title to the instrument, or right to enforce it. As a matter of practicality, there can be no bonafide purchasers without notice at a foreclosure such as that intended by Chase, because the recorded trust deed recites that the debt may be sold and re-sold. This puts purchasers on notice to inquire who is the actual owner of the debt and holder of the note. See, generally, *U.P.C., Inc. v. R.O.A. General, Inc.,* 990 P.2d 945 (U. Apps. 1959).

FORECLOSURE REQUIRES OWNERSHIP OF THE DEBT.

While a holder of a note may enforce it, this does not automatically provide authority to foreclose a security. A note is "enforced" by collection. Authority to foreclose is governed by other law than the Uniform Commercial Code. See §70A-9a-109(3)(b), (4)(k), UCA (1953), regarding perfection of a security interest. Authority to foreclose would follow *transfer* of the Note to the transferee under §57-1-35, UCA (1953). This, however, would not put such authority into the hands of a mere possessor of the Note, without a showing of proper transfer of ownership of the debt.

It is fundamental Utah law that a mortgage or trust deed is simply an incident to a note, having no separate existence. *Smith v. Jarman,* 211 Pac. 962, 967 (Utah 1922); *Carpenter v. Longan,* 83 U.S. 271, 275 (1872). As a result, no one may foreclose a mortgage or trust deed who does not own the underlying debt. *Bangerter v. Poulton,* 663 P. 2d 100, 101 (Utah 1983); *Dugan v. Jones,* 615 P. 2d 1239, 1243 (Utah 1980). Enforcement of notes under the UCC notwithstanding,

perfection and foreclosure of a security, such as a trust deed, requires a showing that the party who would foreclose owns the underlying debt. *Dugan, supra; U.S. v. Loosley,* 551 P. 2d 506, 508 (Utah 1976). Nothing in the UCC cancels the rule that a security, such as a trust deed, in the hands of one who does not own the debt secured, is a nullity.

Furthermore, foreclosure requires a showing of proper acceleration of the debt by one having authority to do so.

CONCLUSIONS

Because of the admitted sale and securitization of the note in this case, defendant is unable to show:

1. transfer to it of the note;
2. negotiation of the note to it;
3. ownership of the debt;
4. acceleration of the debt by a proper party; or
5. right to foreclose.

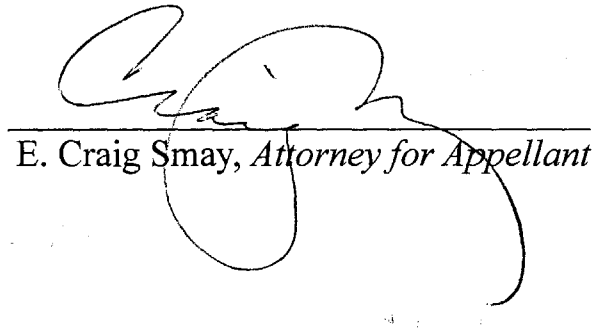
Mere possession of the note, under the terms of the UCC, does not answer, or foreclose, any of these questions.

Dismissal or summary judgment, allowing foreclosure were wholly improper in this case, and must be reversed.

ORAL ARGUMENT REQUESTED

Appellant requests oral argument because, though the rules on summary judgment are well-defined and familiar, the practice of securitization underlying this matter is very recent, and the law respecting it is new and developing, raising issues as to which oral argument may be helpful.

Respectfully submitted this 3rd day of August, 2011.



E. Craig Smay, *Attorney for Appellant*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "**OPENING BRIEF OF APPELLANT",** was sent this 3rd day of August, 2011, postage pre-paid to the following by U.S. Mail:

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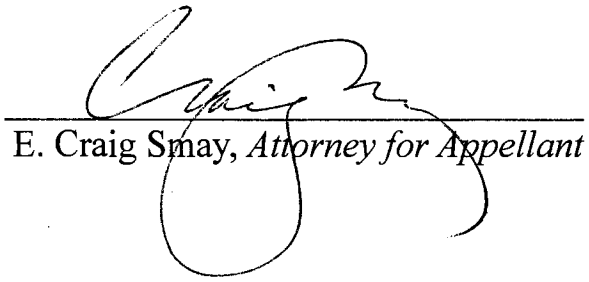

E. Craig Smay, *Attorney for Appellant*

THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
WEST JORDAN DEPARTMENT, STATE OF UTAH

CPA	)	Memorandum
	)	and
vs	)	Decision
	)	
	)	Case: 100404018
J P Morgan Chase Bank National	)	Judge Andrew Stone
	)	
	)	

Before the Court are several papers stemming from the Court's prior Memorandum decision dated November 29, 2010. Plaintiff has filed a petition to rehear that decision and the parties have exchanged briefing on that motion. Plaintiff's Petition is based in part on a pending Rule 56(f) affidavit, seeking to continue the Motion for Summary Judgment until specified discovery may be had. Summary Judgment was granted by the Memorandum Decision after the Court converted Defendant's Motion to Dismiss to a Motion for Summary Judgment pursuant to Rule 12(b) in a decision dated August 18, 2010. After that decision, the parties were given the opportunity to address the Motion as one made under Rule 56. The Memorandum Decision of November 29, 2010 decided the case on that basis. Defendant, pursuant to the Memorandum Decision has submitted a proposed Order, as well as a proposed form of Judgment.

Since the Memorandum Decision, this case has been re-assigned to the undersigned. In addressing the above pending matters, the undersigned has reviewed all matters submitted to the Court in connection with Defendant's original Motion to Dismiss, all matters submitted to the Court after the Court converted that motion to a Motion for Summary Judgment, including Plaintiff's Rule 56(f) Affidavits and memoranda filed by both parties in connection with that filing, as well as the audio transcript of the August 16, 2010 hearing held on the original Motion To Dismiss. Having reviewed all these materials, the Court is now prepared to rule on the pending matters.

This case involves a trust deed ("Trust Deed")on real estate and accompanying promissory note (the "Note"). While multiple notes were originally at issue, this action concerns one that was executed, along with the Trust Deed, by Plaintiff's alleged predecessor in interest

with respect to title to the subject property. These were executed in connection with a loan made by Washington Mutual Bank. The original Trustor under the Trust Deed and Borrower under the Note later purported to quit claim the property to the Plaintiff here. Defendant J.P. Morgan Chase Bank ("Chase") is the current holder of the Note, evidently (though not, as explained below, necessarily) through a sale of the assets of Washington Mutual Bank FSB.

As the Court recognized in its prior Memorandum Decision, there are three critical undisputed facts in this case that bear repeating:

1. The loan in question is in default.
2. Chase purchased the loan and note when it purchased all of Washington Mutual's assets.
3. Chase has possession of the endorsed-in-blank original note.

Plaintiff's Motion for Reconsideration takes issue with these facts. First, Plaintiff questions whether the loan is actually in default, suggesting that the ability to enforce the note has somehow been transferred away via securitization of the note. Second, Plaintiff questions whether the note was purchased when Chase purchased "all of" Washington Mutual's assets. Plaintiff provides no explanation as to how these particular assets might have been left out of those purchased, and does not take issue with the fact that Chase now possesses the Note. Third, Plaintiff dismisses the possession of Chase of the endorsed in blank original note by suggesting that perhaps Chase holds it only as a custodian, and requests discovery to determine what Chase's rights might be by virtue of its possession of the note.

Plaintiff's arguments are answered by statute. Utah's Uniform Commercial Code defines who is entitled to enforce an instrument such as the note at issue in this case:

> "Person entitled to enforce" an instrument means the holder of the instrument ... A person may be a person entitled to enforce the instrument even though he is not the owner of the instrument or is in wrongful possession of the instrument.

Utah Code Ann. § 70A-3-301. Plaintiff invites the Court to speculate that Chase may be a mere custodian of the note. The statute does not contemplate such speculation, nor do the standards on a motion to dismiss or a motion for discovery under rule 56(f) require it. Chase's possession of the note resolves the question whether the loan has been validly called into default, makes moot the question of how Chase came to possess the note, and entitles Chase to enforce its terms. Moreover, because the security follows the debt under Utah Code Ann. § 57-1-35, Chase has the benefit of the trust deed securing the note.

Plaintiff asserted four separate claims. First, Plaintiff sought a declaratory judgment based

on estoppel, alleging the conduct of certain servicers of the notes at issue in this case, as the agents of the Note holder, bars Chase from enforcing the Note and Trust Deed. The Court questions whether this is even a cognizable claim. No reliance by Plaintiff on Defendant or its agents' actions is asserted. Though Plaintiff alleges what it views as the failure of certain servicers to disclose Chase's ownership of the note, Plaintiff offers no explanation of how such actions can invalidate the rights under the Note and Trust Deed. With respect to any asserted rights of the Borrower under the Note, Plaintiff is not a party thereto. In any event, the Court holds that no facts alleged in this claim that would justify setting aside the Note or the Trust Deed or declaring them unenforceable. On this basis the First Cause of Action was properly dismissed on Summary Judgment.

The Second Cause of Action seeks declaratory judgment that Chase may not enforce the Note or Trust Deed based upon asserted violations of Utah Code Ann. § 57-1-22 regarding the appointment of successor trustees. In addition, this claim challenges the asserted securitization of the Note. Neither the Complaint nor Plaintiff's briefing offers any explanation of how the alleged improper filing of a substitution of Trustee in conjunction with the filing of a Notice of Default has affected Plaintiff's rights, or how securitization affects the rights under the Note. And again, Plaintiff is not a party to or successor to any rights under the Note. Whether viewed under the lens of a Rule12(b)(6) motion, a summary judgment motion, or a Rule 56(f) motion for continuance, the Court is not required to indulge in speculation as to what may have been done with respect to the Note in the supposed securitization process. Utah law rejects Plaintiff's theory that securitization separates the Trust Deed from the underlying Note. Utah Code Ann. § 57-1-35. Moreover, the Utah Legislature has set out a detailed method for the protection of Trustors and their successors, in Utah Code Ann. §§ 57-1-31 and 57-1-31.5. In this Cause of Action, Plaintiff complains of an inability to discharge the Note's obligations. These complaints ignore these statutory provisions. The Court rejects the notion that mere allegation of "securitization" somehow overcomes Utah law specifying the rights of a holder of the Note, Utah law that security follows the underlying debt, or Utah law setting forth the remedies for owners of land subject to Trust deeds securing notes in default. Whatever collateral agreements a holder may have entered with respect to securitization (if any), Utah law says that the right to enforce the note rests with the holder, and the security follows that underlying debt. For these reasons, summary judgment was appropriate on the Second Cause of Action.

The Third Cause of Action is for Quiet Title based on these same theories, and the Fourth Cause of Action is for refund of attorney's fees and other fees based on the same theories. For the reasons stated above, summary judgment was properly granted on these claims.

The Court is mindful that Plaintiff, in response to the Court having converted this Motion to Dismiss to a Motion For Summary Judgment, has submitted a Rule 56(f) affidavit seeking discovery on whether the note in question was securitized, and whether Chase holds the note as a custodian. As can be seen from the above discussion, the Court's decision is not based on a determination that the Note was or was not, in fact, securitized, or that Chase is or is not holding the Note as a custodian. Chase has the right to enforce the note as its holder. Discovery will not

advance the case and a continuance for purposes of discovery is not warranted.

The Motion to Reconsider is denied. The Motion for a Continuance under Rule 56(f) is denied. Summary Judgment is granted to Defendant. The Court will sign the Judgment proposed by Defendant and no further Order is necessary.

Dated 21st day of March, 2011

Judge Andrew Stone

Utah Code Annotated

57-1-35. Trust deeds -- Transfer of secured debts as transfer of security.

The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor.

70A-3-201. Negotiation.

(1) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(2) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

70A-3-202. Negotiation subject to rescission.

(1) Negotiation is effective even if obtained from an infant, a corporation exceeding its powers, a person without capacity, by fraud, duress, or mistake, or in breach of duty or as part of an illegal transaction.

(2) To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

70A-3-203. Transfer of instrument -- Rights acquired by transfer.

(1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(3) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(4) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

70A-9a-203. Attachment and enforceability of security interest -- Proceeds -- Supporting obligations -- Formal requisites.

(1) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(2) Except as otherwise provided in Subsections (3) through (9), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(a) value has been given;

(b) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(c) one of the following conditions is met:

(i) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(ii) the collateral is not a certificated security and is in the possession of the secured party under Section **70A-9a-313** pursuant to the debtor's security agreement;

(iii) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section **70A-8-301** pursuant to the debtor's security agreement; or

(iv) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, or electronic documents, and the secured party has control under Section **70A-7a-106**, **70A-9a-104**, **70A-9a-105**, **70A-9a-106**, or **70A-9a-107** pursuant to the debtor's security agreement.

(3) Subsection (2) is subject to Section **70A-4-210** on the security interest of a collecting bank, Section **70A-5-118** on the security interest of a letter-of-credit issuer or nominated person, Section **70A-9a-110** on a security interest arising under Chapter 2 or 2a, and Section **70A-9a-206** on security interests in investment property.

(4) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this chapter or by contract:

(a) the security agreement becomes effective to create a security interest in the person's property; or

(b) the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(5) If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(a) the agreement satisfies Subsection (2)(c) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(b) another agreement is not necessary to make a security interest in the property enforceable.

(6) The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section **70A-9a-315** and is also attachment of a security interest in a supporting obligation for the collateral.

(7) The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(8) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(9) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.