

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

HSBC BANK USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR THE HOLDERS OF THE
DEUTSCHE ALT-A SECURITIES, INC.,
MORTGAGE LOAN TRUST, SERIES 2006-AB1,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-AB1,

Plaintiff,

vs.

CASE NO. 2008 CA 000630 NC

TERESA M. MARRA a/k/a TERRY M.
MARRA, et al.,

Defendants,

KAREN E. RUSHING
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL

2013 AUG 15 AM 8:54

FILED FOR RECORD

RECOMMENDED ORDER OF MAGISTRATE

This cause came on for hearing before Magistrate Deborah A. Bailey, on July 15, 2013, on the **Plaintiff's Renewed Motion for Leave to File Amended Complaint**. The Magistrate has jurisdiction pursuant to Rule 1.490 of the Florida Rules of Civil Procedure. Being fully advised in the premises, the Magistrate reports as follows:

Case History

1. This is a foreclosure action originally filed by the Law Offices of David J. Stern on or about January 11, 2008. The original Plaintiff was GreenPoint Mortgage Funding, Inc. ("GreenPoint"). The Complaint alleged in relevant part that GreenPoint owned and held the Note and Mortgage. No copy of the Note was attached to the Complaint; only the mortgage was attached. The Complaint did contain a "lost note" count. Defendant, Teresa M. Marra ("Marra") was served and filed an answer through counsel on February 7, 2008.

2. In May 2008, Plaintiff moved for summary judgment. Marra's counsel filed a Suggestion of Bankruptcy on her behalf on August 22, 2008. No substantial action occurred on the file until the beginning of 2009. GreenPoint noticed its Motion for Summary Judgment for March 11, 2009. In preparation for this hearing, GreenPoint filed the original Note and Mortgage on February 20, 2009. On the back side of what appears to be the last page of the Note there is an endorsement in blank from GreenPoint



Mortgage Funding, Inc. Ultimately, the summary judgment hearing on March 11 was cancelled, although no notice of same appears in the court docket.

3. On March 18, 2009, a copy of Marra's Discharge of Debtor from her bankruptcy case was filed in the court file. Marra's discharge was effective October 15, 2008. Her case was closed as fully administered as of February 10, 2009.

4. In July 2009, GreenPoint again noticed its Motion for Summary Judgment to be heard on July 24, 2009. On July 14, 2009, GreenPoint filed an Assignment of Mortgage purporting to assign both the Mortgage and the Note from Mortgage Electronic Registration Systems, Inc. ("MERS") to GreenPoint. The Assignment was executed on March 27, 2008 (after the filing of suit) and was not recorded in the Sarasota County Official Records until May 16, 2008. The Assignment of Mortgage was prepared by the Law Offices of David Stern.

5. Just days prior to the summary judgment hearing on July 24, Marra's counsel filed a Stipulation permitting him to withdraw as Marra's counsel. The Court ultimately cancelled GreenPoint's summary judgment hearing on July 24 because of GreenPoint's failure to abide by the Court's summary judgment procedures. Thereafter, no activity occurred in the file until July 2010.

6. On July 6, 2010, GreenPoint filed an *ex parte* Motion to Substitute Plaintiff. The relevant portion of this Motion stated: "Subsequent to filing its complaint, Plaintiff *became known as* HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AB1 which is now the real party in interest." (emphasis supplied) This Motion was entirely unsupported by any attachment showing any transfer in interest from GreenPoint to HSBC Bank USA, any merger between GreenPoint and HSBC Bank USA, or any other name change, etc. Despite this shortcoming, the Court entered an Order on July 7, 2010, substituting HSBC Bank USA as the Plaintiff and allowing the case style to be amended. No other docketed action took place during 2010.

7. In March 2011, the present firm representing the Plaintiff (Kahane & Associates or "Kahane") filed its Notice of Appearance. Kahane was substituted as Plaintiff's counsel in an Order entered on or about May 5, 2011. No other docketed action took place in this case during 2011.

8. On or about February 8, 2012, Marra filed a Motion to Dismiss with prejudice, alleging that the Plaintiff committed a fraud on the court when it filed the MERS Assignment of Mortgage in July 2009. Marra noticed her Motion for hearing on May 29, 2012. At the time of the hearing, the Magistrate advised Marra that to resolve the issue of fraud on the court she would have to set an evidentiary hearing. At the time of that hearing, the Magistrate questioned the substitution of HSBC as Plaintiff based on nothing more than the bare allegation of GreenPoint's Motion back in July 2010. The Magistrate noted that the Court should possibly vacate the Order of Substitution, given the lack of any support for the assertion that GreenPoint "became known as" HSBC Bank

USA. Nevertheless, because the Magistrate did not rule on Marra's Motion, no recommendation was issued that day.¹

9. After the May 2012 hearing, on July 11, 2012, HSBC filed a "Motion for Leave to File Amended Complaint to Verify the Complaint." Interestingly, the Motion asserted that subsequent to the filing of the initial complaint, GreenPoint "assigned the Note and Mortgage" to HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE DEUTSCHE ALT-A SECURITIES, INC., MORTGAGE LOAN TRUST, SERIES 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AB1."² (Motion at ¶ 3) The Motion additionally asserts that the Plaintiff believed it was "best to clarify the standing allegation in the Complaint pertaining to Plaintiff's capacity to bring this lawsuit." (Motion at ¶ 4)

10. Of even greater interest, Plaintiff's Motion attached yet another Assignment of Mortgage, prepared by Kahane & Associates. This Assignment purports to assign the Mortgage and Note from GreenPoint Mortgage Funding, Inc. to HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE DEUTSCHE ALT-A SECURITIES, INC., MORTGAGE LOAN TRUST, SERIES 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AB1 and was executed on August 10, 2011, by GreenPoint's purported servicer, Bank of America, N.A. The copy of the Assignment attached to the proposed Amended Complaint is not recorded.

11. In response to Plaintiff's Motion for Leave to Amend, Marra filed a Response in which she argued she would be prejudiced if the Plaintiff were granted leave to amend because the Plaintiff previously alleged in July 2010 that GreenPoint "became known as" HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AB1; therefore, GreenPoint had no ability to execute another Assignment of Mortgage in 2011.

12. The Plaintiff's Motion came on for hearing before the Magistrate on October 8, 2012. At that time, Plaintiff's local counsel stated that the Motion should probably be continued unless the Magistrate was willing to entertain an *ore tenus* motion to substitute because the Plaintiff's Amended Complaint not only amended the complaint, but also substituted a different named Plaintiff. Again, the Magistrate noted several problems with the Plaintiff's Motion and the case as a whole and declined to rule on the Plaintiff's insufficient Motion.³

13. This resulted in the Plaintiff's filing of the instant Renewed Motion for Leave to File Amended Complaint and Memorandum of Law in Support Thereof, which

¹ There is, however, an oral record of the hearing because the hearing was recorded through the Court's digital recording system.

² Of note, this named Plaintiff does not match the name of the Plaintiff substituted in on the Court's Order of July 7, 2010.

³ Again, no ruling was made, but an oral record of the hearing was made through the Court's digital recording system.

attempts to explain what has happened in this case. Again, however, Plaintiff's attempt falls short as will be set forth below. After hearing argument on the Motion, the Magistrate took the matter under advisement in order to determine what should be done with this Motion and this case.

Renewed Motion to Amend

14. First, the procedural history recounted by the Plaintiff in its Motion is inaccurate. Paragraph 3 states that prior counsel filed an *ex parte* motion to substitute in July 2010, which was based on an assignment of mortgage, which transferred the mortgage to the current Plaintiff, which the Plaintiff denominates as HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE DEUTSCHE ALT-A SECURITIES, INC., MORTGAGE LOAN TRUST, SERIES 2006-AB1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AB1. The Court has never given permission for this substitution. Plaintiff, however, contends that the above named entity is the same entity as noted in the Court's Order of July 7, 2010, allowing the *ex parte* substitution. According to Plaintiff's counsel, the entity named in the July 7, 2010 Order was "an abbreviated version."

15. Plaintiff then asserts that after being transferred from Stern's office to Kahane's office, in May 2011 the matter was placed on hold due to Bank of America's "extended review of foreclosure documentation."⁴ This hold continued for some 10 months, after which the Bank instructed Kahane to proceed with the foreclosure. Upon a file review, Kahane determined that an amended complaint should be filed to do the following: (a) verify the pleading; (b) include the "complete name" of the Plaintiff; (c) drop the lost note count; and (d) clarify the standing allegations "as it relates to the correct Plaintiff."

16. In its accompanying Memorandum of Law, Plaintiff contends that it has standing as the holder of the Note and Mortgage and has filed the original Note and two Assignments in the court file. Plaintiff then argues that the dates on the Assignments mean nothing so long as the Note was transferred prior to suit. Although this is ultimately a matter of proof, it is less than clear that at the time this suit was filed, GreenPoint was in possession of the Note. No copy of the Note was attached to the initial Complaint. Moreover, it was not until the Motion to Amend filed on July 11, 2012 (*over four years after suit was filed*), that the Plaintiff asserted "[s]ubsequent to the filing of the Complaint and Amended Complaint, *Plaintiff has confirmed possession of the original Note which note is endorsed in blank.*" (emphasis supplied) Finally, as the ensuing discussion reveals, it is not even likely that GreenPoint was the "owner and holder" of Marra's loan documents at the time this case was filed in 2008, as was alleged in the original Complaint.

17. Plaintiff's standing argument takes another turn for the worse when it refers the Court to the Pooling and Servicing Agreement ("PSA") for the Deutsche Alt-A

⁴ Plaintiff does not explain what connection Bank of America has with this action. The Magistrate believes that BOA may be the servicer of the mortgage in question.

Securities, Inc. Mortgage Loan Trust, Series 2006-AB1 for “further clarification” of the Plaintiff’s standing in this action. The Magistrate accepted the Plaintiff’s invitation and researched the PSA on www.secinfo.com. That research revealed the following:

- The PSA is dated January 1, 2006. The Closing Date as defined by the PSA was January 31, 2006. The Cut-Off Date as defined by the PSA was January 1, 2006, except for Substitute Loans where the Cut-Off Date is the date the loan is substituted in the Trust.
- Deutsche Alt-A Securities, Inc. was depositor, Wells Fargo Bank, N.A. was Master Servicer and HSBC Bank, USA, National Association, was Trustee.
- The Preliminary Statement of the PSA reflects that as of the Closing Date (January 31, 2006), the Depositor (Deutsche Alt-A Securities, Inc.) was the owner of the Loans and other property being conveyed by it to the Trustee for inclusion in the Trust Fund.
- Under § 2.1 of the PSA, all Loans identified in the Loan Schedule were to be conveyed to the Trustee by the Depositor for the benefit of the Trust concurrent with the execution of the PSA. This included the transfer of all Loan Documents. The definition of Loan Documents includes all documents evidencing or relating to each Loan delivered to the Custodian under the Custodial Agreement on behalf of the Trustee. The Custodial Agreement was a separate agreement entered into between Deutsche Bank National Trust Company, the Trustee and GMAC.
- Section 2.3 of the PSA provides for repurchase or substitution of loans under certain circumstances.
- Exhibit J to the PSA is the Mortgage Loan Purchase Agreement (“MLPA”), which provides for the purchase of the Mortgage Loans as of the Closing Date of January 31, 2006. The Seller was DB Structured Products, Inc., and the Purchaser was Deutsche Alt-A Securities, Inc.
- Section 4 of the MLPA provides for the delivery of the Loan Documents (including the Note and Mortgage) as of the Closing Date. Under the MLPA, Notes are required to have a full chain of endorsements, and the MLPA requires the provision of an original Assignment of Mortgage in blank, along with originals of all intervening assignments.
- Section 11 of the MLPA deals with the servicing of the Mortgage Loans and provides for servicing by, *inter alia*, GreenPoint Mortgage Funding, Inc., pursuant to separate Servicing Agreements referred to in the PSA and assigned to the Purchaser at closing.


18. After taking into consideration the above-cited information from the PSA, it appears that the transfers that have been variously asserted by the Plaintiff in several Motions and/or documents attached to those Motions as conferring standing upon it could not possibly have occurred as the Plaintiff represents. Further, the Magistrate cannot conceive of any manner in which the Plaintiff could possibly create additional documentation in an effort to manufacture standing in this action. At the very least, the instant Renewed Motion to Amend must be denied and the Magistrate so recommends.

Based upon the above-stated findings, the Magistrate submits the following Recommended Order for approval by the Court:

Recommended Order

Plaintiff's Renewed Motion for Leave to File Amended Complaint is **DENIED**.

Please take notice that pursuant to Rule 1.490(h), the parties to this cause have ten (10) days from the date of service of this Recommended Order to serve exceptions to its contents. The party filing exceptions is required to send copies of the exceptions directly to the Judge assigned to this case, as well as to the undersigned Magistrate. The party filing exceptions will be required to provide the Court with a record sufficient to support their exceptions or the exceptions will be denied. A record ordinarily includes a written transcript of all relevant proceedings. The party filing the exceptions must have the transcript prepared for the court's review. If exceptions are timely filed, they shall be heard on reasonable notice by either party or the court. If no exceptions are filed within ten (10) days from the date of service, the Court shall take appropriate action on the report.

BY: 
Deborah A. Bailey, Magistrate
Twelfth Judicial Circuit

cc: Marjorie DeCastro-Hirsch, Esq.
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Sent to Clerk for filing on 8/14/12

Mailed to parties on 8/14/12



2008 CA 630

HSBC V. MARRA

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