**IN THE SUPREME COURT OF THE STATE OF NEVADA**

| | |
|---|---|
| NATIONSTAR MORTGAGE, LLC<br><br>Appellant,<br><br>v.<br><br>SFR INVESTMENTS POOL 1, LLC,<br><br>Respondent. | Case No. 69400 |



**APPEAL**
from the Eighth Judicial District Court, Clark County
The Honorable Michael P. Villani, District Judge
District Court Case No. A-13-684715-C

---

# APPELLANT'S NRAP 31(e) SUPPLEMENTAL AUTHORITIES
**(ORAL ARGUMENT: March 7, 2017 at 10:30 a.m.)**

---

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
AKERMAN LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
Telephone: (702) 634-5000
Email: ariel.stern@akerman.com

ROBERT L. EISENBERG, ESQ.
Nevada Bar No. 950
LEMONS, GRUNDY& EISENBERG
6005 Plumas Street, 3rd Floor
Reno, Nevada 89519
Telephone: (775) 786-6868
Email: rle@lge.net

*Attorneys for Appellant Nationstar Mortgage, LLC*

Appellant hereby submits the following supplemental authorities pursuant to NRAP 31(e). Oral argument is scheduled before the Court for Tuesday, March 7, 2017, at 10:30 a.m.

Pursuant to Rule 31(e), supplemental authorities may be filed "[w]hen pertinent and significant authorities come to a party's attention after the party's brief has been filed, but before a decision." Nev. R. App. P. 31(e). This notice should "state concisely and without argument the legal proposition for which each supplemental authority is cited," with the pages of the brief to which the supplemental authorities relate. *Id.*

In accordance with Rule 31(e), Appellant submits the following authorities regarding the ability of a record beneficiary of the deed of trust and servicer of a loan owned by Fannie Mae or Freddie Mac to bring a claim or assert a defense in litigation regarding that loan.

**1. *Saticoy Bay, Series 2714 Snapdragon LLC v. Flagstar Bank, FSB*, No. 2:13-CV-1589-JCM-VCF, 2016 WL 1064463 (D. Nev. Mar. 17, 2016)**

This case supplements the authorities cited in Appellant's Opening Brief at pages 11-12 and Appellant's Reply Brief at page 4. *Snapdragon* held that a party serving as the record beneficiary of a deed of trust and servicer of

a loan owned by Fannie Mae may assert a defense and counterclaim relying on 12 U.S.C. § 4617(j)(3)'s preemptive effect on state law in a case where Fannie Mae and FHFA were not parties. *Id.* at *4.

**2. *GMAC Mortg., LLC v. McKeever*, 651 Fed.Appx. 332 (6th Cir. 2016)**

This case supplements the authorities cited in Appellant's Opening Brief at pages 16-17. *McKeever* held that a loan servicer is a real party in interest and may bring claims regarding the loan because the loan servicer is at risk of losing compensation for servicing the loan, an interest that is "concrete and particularized." *Id.* at 337–38.

**3. *In re Carssow-Franklin*, No. 15-CV-1701 (KMK), 2016 WL 5660325 (S.D.N.Y. Sept. 30, 2016)**

This case supplements the authorities cited in Appellant's Opening Brief at pages 16-17. *In re Carssow-Franklin* held that a party acting as servicer for a loan owned by Freddie Mac has standing to "file the proof of claim on Freddie Mac's behalf" regarding the loan in a bankruptcy proceeding. *See id.* at *11-12.

**4. *In re Merritt*, 555 B.R. 471 (E.D. Pa. 2016)**

This case supplements the authorities cited in Appellant's Opening Brief at pages 16-17. *In re Merritt* held that there are typically "three actors in the mortgage lending process: the loan owner, holder and servicer," and

that "[t]he relevant inquiry" to determine whether a party has standing to file a proof of claim "is whether [a party] is the servicer and/or holder of the Note." *Id.* at 476-77. The court held that "even though Freddie Mac is the owner of the Note . . . PNC has standing to enforce the Proof of Claim as the holder and servicer." *Id.*

For the Court's convenience, copies of these decisions are attached to this notice.

DATED: March 1, 2017

ROBERT L. EISENBERG (NV Bar #0950)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
Email: rle@lge.net

ARIEL E. STERN (NV Bar #8276)
Akerman LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
702-634-5000
Email: ariel.stern@akerman.com

*ATTORNEYS FOR APPELLANT*

## CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Jacqueline Gilbert
Howard Kim
Allison Schmidt
Darren Brenner
Leslie Bryan-Hart
John Tennert
Ariel Stern

I further certify that on this date I served a copy of the foregoing, postage prepaid, by U.S. Mail to:

Michael Johnson
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, NW
Washington, DC 20001

Diana Cline Ebron
Karen Hanks
Kim Gilbert Ebron
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139

DATED: 3/1/17

Vicki Shapiro, Assistant to
Robert L. Eisenberg

**ATTACHMENT 1**

***Saticoy Bay, Series 2714 Snapdragon LLC v. Flagstar Bank, FSB***

2016 WL 1064463
Only the Westlaw citation is currently available.
United States District Court,
D. Nevada.

Saticoy Bay LLC, Series 2714 Snapdragon, Plaintiff(s),
v.
Flagstar Bank, FSB, et al., Defendant(s).

Case No. 2:13-CV-1589 JCM (VCF)
|
Signed March 17, 2016

**Attorneys and Law Firms**

Michael F. Bohn, Law Office of Michael F. Bohn, Las Vegas, NV, for Plaintiff(s).

Taylor A. Anello, Cynthia Alexander, Snell & Wilmer LLP, Las Vegas, NV, for Defendant(s).

ORDER

James C. Mahan, UNITED STATES DISTRICT JUDGE

*1 Presently before the court is defendant Flagstar Bank, FSB's ("Flagstar") motion for summary judgment. (Doc. #50). Plaintiff Saticoy Bay LLC Series 2714 Snapdragon ("Saticoy Bay") filed a response (doc. #52), and defendant filed a reply. (Doc. #56).

**I. Background**

This case involves a dispute over property that was subject to a homeowners' association ("HOA") superpriority lien for delinquent assessment fees. On May 19, 2005, Bryant and Katherine Sparks executed a deed of trust on their property located at 2714 Snapdragon Court, in Henderson, Nevada ("the property"). (Doc. #1)

The deed of trust listed Commonwealth Financial Corp as lender, Joan H. Anderson as trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary. (Doc. #7, Exh.1). On June 22, 2005, beneficial interest in the loan was transferred to the Federal National Mortgage Association ("Fannie Mae"), as the investor. (Doc. #56, Exhs. 1-2). The deed of trust securing the mortgage was assigned to defendant Flagstar on July 5, 2011, and re-recorded on August 8, 2011. (*Id.*). On August 26, 2011, defendant Quality Loan Service Corporation ("Quality") was substituted as trustee under the deed of trust. (*Id.*)

Bryant and Katherine Sparks stopped paying their HOA dues and mortgage payments. (Doc. #50). On January 25, 2012, the HOA recorded a notice of default and election to sell the property under its HOA lien. (Doc. #7, Exh. 7). The HOA recorded a notice of foreclosure sale on June 27, 2012. (Doc. #7, Exh. 8). On May 2, 2013, Quality recorded a notice of default and election to sell the property under the deed of trust on Flagstar's behalf. (Doc. #7, Exh. 9). On May 6, 2013, Flagstar sent Nevada Association Services a request for the nine-month priority demand statement in anticipation of satisfying the deficiency. (Doc. #50, Exh. 1). On May 17, 2013, the HOA held a foreclosure sale and sold the property to plaintiff for $10,000, and the foreclosure deed was recorded on May 20, 2013. (Doc. #7, Exh. 10).

Plaintiff filed the original complaint in state court on June 19, 2013, asserting three claims for relief: (1) injunctive relief; (2) quiet title; and (3) declaratory relief. (Doc. # 1-2). Plaintiff contends that the HOA foreclosure sale extinguished defendants' interests in the property. Defendants removed the action to federal court on August 30, 2013, under 28 U.S.C. §§ 1332, 1441, and 1446. (Doc. # 1). Defendant now moves for summary judgment.

**II. Legal Standard**

The Federal Rules of Civil Procedure provide for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at

trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

***2** In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

## III. Discussion

Defendant contends that because the loan in question is federally owned by Fannie Mae, plaintiff's claims are preempted by the property and supremacy clauses of the United States Constitution. (Doc. # 50).

Plaintiff alleges that defendant fails to produce any evidence that the loan at issue is federally owned. (Doc. # 52). These arguments will be addressed in turn. Plaintiff further argues that it is entitled to claims for quiet title and declaratory relief because the homeowners' association foreclosure sale extinguished defendant's interest in the property, citing to the Nevada Supreme Court's holding that the foreclosure of an HOA superpriority lien extinguishes a first deed of trust. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 409 (Nev. 2014).

### *i. Property and supremacy clauses*

Under the Property Clause of the United States Constitution, only "Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States ...." U.S. Const. Art. IV, § 3, cl. 2. The Supremacy Clause provides that the "Constitution ... shall be the supreme law of the land ...." U.S. Const. Art. VI, cl. 2. "State legislation must yield under the Supremacy Clause of the Constitution to the interests of the federal government when the legislation as applied interferes with the federal purpose or operates to impede or condition the implementation of federal policies and programs." *Rust v. Johnson*, 597 F.2d 174, 179 (9th Cir. 1979).

***3** In *Rust*, the Ninth Circuit held that a city's foreclosure on property insured by the Federal National Mortgage Association was invalid under the Supremacy Clause. The court reasoned that upholding the sale "would run the risk of substantially impairing the Government's participation in the home mortgage market and of defeating the purpose of the National Housing Act." *Id.*

On this basis, courts consistently apply federal law, ignoring conflicting state law, in determining rights related to federally owned and insured loans. *United States v. Stadium Apartments, Inc.*, 425 F.2d 358, 362 (9th Cir. 1970) (holding that federal law applies to FHA-

insured mortgages "to assure the protection of the federal program against loss, state law to the contrary notwithstanding"); *see also United States v. Victory Highway Vill., Inc.*, 662 F.2d 488, 497 (8th Cir. 1981) (citing Ninth Circuit case law) ("We note that federal law, not [state] law, governs the rights and liabilities of the parties in cases dealing with the remedies available upon default of a federally held or insured loan."). Foreclosure on federal property is prohibited where it interferes with the statutory mission of a federal agency. *See United States v. Lewis Cnty.*, 175 F.3d 671, 678 (9th Cir. 1999) (holding that the state could not foreclose on federal Farm Service Agency property for non-payment of taxes).

Other courts in this district have uniformly held that 12 U.S.C. § 4617(j)(3) precludes an HOA foreclosure sale from extinguishing Fannie Mae's ownership interest in property without proper consent. *See, e.g., LN Mgmt., LLC Series 5664 Divot v. Dansker*, No. 2:13-cv-01420-RCJ-GWF, 2015 WL 5708799, at *2 (D. Nev. Sept. 29, 2015); *Saticoy Bay, LLC Series 1702 Empire Mine v. Fed. Nat'l Mortg. Ass'n*, No. 2:14-cv-01975-KJD-NJK, 2015 WL 5709484, at *2 (D. Nev. Sept. 29, 2015); *Fed. Nat'l Mortgage Ass'n v. SFR Investments Pool 1, LLC*, No. 2:14-cv-02046-JAD-PAL, 2015 WL 5723647, at *3 (D. Nev. Sept. 28, 2015); *1597 Ashfield Valley Trust v. Fed. Nat'l. Mortg. Ass'n Sys.*, No. 2:14-CV-02123-JCM-CWH, 2015 WL 4581220, at *7 (D. Nev. July 28, 2015); *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1152 (D. Nev. 2015).

Indeed, federal district courts in this circuit have also set aside HOA foreclosure sales on property and supremacy clause grounds in cases involving federally insured loans. *Saticoy Bay LLC v. SRMOF II 2012-1 Trust*, No. 2:13-cv-1199-JCM-VCF, 2015 WL 1990076, at *1 (D. Nev. Apr. 30, 2015); *see also Sec. of Hous. and Urban Dev. v. Sky Meadow Ass'n*, 117 F. Supp. 2d 970, 982 (C.D. Cal. 2000) (voiding HOA's non-judicial foreclosure on HUD property, quieting title in HUD's favor based on property and supremacy clauses); *Yunis v. United States*, 118 F. Supp. 2d 1024, 1027, 1036 (C.D. Cal. 2000) (voiding HOA's non-judicial foreclosure sale of property purchased under veteran's association home loan guarantee program); *Washington & Sandhill Homeowners Ass'n v. Bank of Am., N.A.*, No. 2:13-cv-01845-GMN-GWF, 2014 WL 4798565, at *6 (D. Nev. Sept. 25, 2014) (holding that property and supremacy clauses barred foreclosure sale where mortgage interest was federally insured)

***ii. Plaintiff's opposition***

In response to defendant's motion for summary judgment, plaintiff first argues that defendant does not provide adequate proof that the loan at issue was federally insured or owned. (Doc. # 52). The court disagrees. Defendant attached an affidavit from Bella Kharson, the banking officer for Flagstar bank, verifying that on June 22, 2005, beneficial interest in the loan was transferred to Fannie Mae as the investor. (Doc. #56, Exh. 1). The MERS milestone report confirms Ms. Kharson's affidavit. (Doc. #56, Exh. 2). Furthermore, defendant provided a copy of the search results from Fannie Mae's "loan look up" website, which demonstrates that, as of the filing of defendant's reply brief, Fannie Mae is listed as the owner of the proerty. (Doc. #57, Exh. 12). [1] Plaintiff conducted no discovery nor provided any evidence to rebut defendant's claim. Therefore, court finds this sufficient to show that the loan at issue is federally owned.

1 A party may not file "new" evidence with a reply and then deprive the opposing party of an opportunity to respond to the new evidence. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). However, the court has examined the exhibits and concludes that they do not constitute new evidence. Rather, they rebut arguments first raised by plaintiff in its opposition to defendant's motion for summary judgment, and may therefore be considered by this court. *See, e.g., E.E.O.C. v. Creative Networks, LLC*, 2008 WL 5272780, at *2 (D. Ariz. Dec. 15, 2008).

***4** Plaintiff next argues that defendant lacks prudential standing to assert a preemption claim on behalf of a federal agency that is not a party to this action. (Doc. # 21). While the district courts appear to be divided on this issue, defendant cites to no binding authority, nor does the court know of any, limiting federal preemption arguments to government parties. *See SaticoyBayLLC,* 2015 WL 1990076 at *5; *Washington & Sandhill Homeowners,* 2014 WL 4798565 at *6. *But see Freedom Mortgage Corporation v. Las Vegas Development Group*, LLC, 2015 WL 2398402. *8 (D. Nev. May 19, 2015).

Plaintiff's argument ignores the underlying preemption question. The court has noted that the above-cited precedent forbids application of a state law that impedes a federal interest. Because the evidence supports a finding

that the property was federally owned at the time of the HOA foreclosure sale, the court concludes that the HOA foreclosure sale at issue was invalid. As a result, the regulations cited by plaintiff do not apply in the instant case.

Based on the foregoing, the court finds that the homeowners' association sale in the instant case is void. Accordingly, the court will enter summary judgment in favor of defendant as to the claims for quiet title and declaratory relief.

Defendant asserts a number of additional theories in support of its motion for summary judgment. (Doc. #50). In light of the above analysis, the court need not address these alternative arguments. The court will grant defendant's motion.

In light of the court's finding that the HOA foreclosure sale at issue was void, plaintiff, as a matter of law, cannot assert any claims against defendants Bryant and Katherine Sparks based on an interest in the property. While these defendants have not answered plaintiff's complaint, plaintiff has not moved for default against them. Based on the foregoing, the court will dismiss plaintiff's claims against these defendants and direct the clerk to close the case.

**IV. Conclusion**

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Flagstar's motion for summary judgment, (doc. # 50), be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff's remaining claims against defendants Bryant and Katherine Sparks be, and the same hereby are, DISMISSED.

The clerk shall enter judgment in favor of defendants and close the case.

**All Citations**

Slip Copy, 2016 WL 1064463

**End of Document**

**ATTACHMENT 2**

*GMAC Mortg., LLC v. McKeever*

651 Fed.Appx. 332
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

GMAC Mortgage, LLC, et al., Plaintiffs–Appellees,
v.
Heather McKeever, et al., Defendants–Appellants.

No. 12–5802
|
FILED June 02, 2016

**Synopsis**

**Background:** Servicer of $1 million loan secured by mortgage filed suit against borrower, seeking declaration that her purported rescission of mortgage on her home, pursuant to federal Truth in Lending Act (TILA), was invalid. After granting servicer's motion to substitute trustee as plaintiff, the United States District Court for the Eastern District of Kentucky granted trustee summary judgment. Borrower appealed.

**Holdings:** The Court of Appeals, Clay, Circuit Judge, held that:

[1] servicer had standing to pursue motion to substitute;

[2] law of the case doctrine did not apply to bar TILA rescission claim; but

[3] res judicata doctrine barred TILA rescission claim.

Affirmed.

West Headnotes (3)

**[1] Declaratory Judgment**
Subjects of relief in general

Servicer of loan secured by mortgage had Article III standing to pursue motion to substitute trustee as real party in interest, in servicer's action seeking declaration that borrower's purported rescission of mortgage on her home, pursuant to TILA, was invalid, since servicer suffered concrete and particularized injuries fairly traceable to borrower's conduct, as servicer was servicer of loan on behalf of trustee and stood to lose compensation for servicing loan as result of rescission. U.S. Const. art. 3, § 2, cl. 1; Truth in Lending Act § 102 et seq., 15 U.S.C.A. § 1601 et seq.; 12 C.F.R. § 226.23; Fed. R. Civ. P. 17(a)(3).

Cases that cite this headnote

**[2] Courts**
Other particular matters, rulings relating to

Prior determination by district court that borrower's purported rescission of mortgage loan pursuant to TILA was invalid was not law of the case precluding district court in consolidated case from issuing declaratory judgment that purported TILA rescission was invalid, since consolidated cases remained separate actions, and law of the case doctrine did not apply between separate actions. Truth in Lending Act § 102 et seq., 15 U.S.C.A. § 1601 et seq.; 12 C.F.R. § 226.23.

1 Cases that cite this headnote

**[3] Judgment**
Trustee and cestui que trust

Under federal common law doctrine of claim preclusion, final judgment in borrower's prior suit against servicer of loan secured by mortgage, ruling that borrower's claim for rescission of mortgage pursuant to

TILA was invalid, barred relitigation of borrower's TILA rescission claim in subsequent consolidated suit by trustee, although trustee was not named party in prior suit, since trustee was in privity with servicer that was servicing loan on behalf of trustee, as servicer was adequate representative of trustee in prior suit due to alignment of their interests regarding loan, borrower was on notice of such representation, and trustee was therefore entitled to benefits of prior judgment. Truth in Lending Act § 102 et seq., 15 U.S.C.A. § 1601 et seq.; 12 C.F.R. § 226.23.

Cases that cite this headnote

***333 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY**

**Attorneys and Law Firms**

Edmund Scott Sauer, Bradley Arant Boult Cummings, Nashville, TN, for Plaintiffs–Appellees GMAC Mortgage, LLC, Deutsche Bank Trust Company Americas, as Trustee.

Marc James Ayers, Bradley Arant Boult Cummings, Birmingham, AL, for Plaintiff–Appellee GMAC Mortgage, LLC.

David J. Kellerman, Middleton Reutlinger, Louisville, KY, for Plaintiff–Appellee Mortgage Electronic Registration Systems, Inc.

Heather Boone McKeever, Law Offices, Lexington, KY for Defendants–Appellants.

BEFORE: CLAY, GIBBONS, and STRANCH, Circuit Judges.

**Opinion**

CLAY, Circuit Judge.

Defendants Heather McKeever and Shane Haffey ("McKeever") [1] appeal from the district court's judgment in favor of Plaintiff Deutsche Bank. The original plaintiff in this action, GMAC Mortgage, LLC ("GMACM"), filed suit in federal district court seeking a declaration that McKeever's purported rescission of the mortgage on her home pursuant to the federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, was invalid. The district court later granted GMACM's motion to substitute Deutsche Bank as plaintiff; ***334** summary judgment in favor of Deutsche Bank followed. On appeal, McKeever argues that the district court erred by: (1) allowing GMACM to substitute Deutsche Bank as plaintiff; and (2) granting Deutsche Bank's motion for summary judgment. For the reasons set forth below, we **AFFIRM** the district court's judgment in full.

1 McKeever is a co-defendant along with her husband, Shane Haffey. For the sake of simplicity, and because McKeever served as her and Haffey's counsel in this case, we use McKeever's name to refer to both defendants collectively.

## BACKGROUND

### A. Civil Action No. 5:08–cv–00459 ("Case No. 08–459") and Appeal No. 12–5802

McKeever appeals from one of five consolidated cases litigated in federal district court, all of which concern the mortgage on her home located at 3250 Delong Road, Lexington, Kentucky (the "Property"). [2] The originating case for this appeal, Case No. 08–459, was filed by GMACM on November 7, 2008. GMACM's complaint alleged that in May 2007, McKeever entered into an agreement whereby she received a $1,000,000 loan secured by a mortgage on her home (the "Loan"). GMACM averred that it was currently the servicer of the Loan on behalf of Deutsche Bank. The complaint further stated that "[o]n or about October 15, 2008, [McKeever] sent correspondence to" GMACM purporting to rescind the Loan under the TILA and a regulation promulgated thereunder, 12 C.F.R. § 226.23 ("Regulation Z"). (No. 08–459, R. 1, PageID 2.)

2 These cases are: Civil Action No. 5:08–cv–00456; Civil Action No. 5:08–cv–00459; Civil Action No. 5:08–cv–00510; Civil Action No. 5:09–cv–00362; and Civil Action No. 5:11–cv–00188. Only those cases relevant to this appeal are discussed herein.

Regulation Z states, in pertinent part:

(a) Consumer's right to rescind.

> (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction....
>
> (2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication....
>
> (3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first....

12 C.F.R. § 226.23 (footnotes omitted).[3] GMACM's complaint maintained that "[McKeever] ha[s] not provided any specific detail as to any TILA violations that would give rise to the purported recission [*sic*], and ha [s] given no other legitimate basis for the recission [*sic*]." (No. 08–459, R. 1, PageID 3.)

3 The "material disclosures" to which Regulation Z refers "means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2)." 12 C.F.R. § 226.23(a)(3) n.48.

McKeever thereafter filed a motion for judgment on the pleadings noting that in a related federal district court action concerning the Property—Civil Action No. 5:08–cv–00510 ("Case No. 08–510")— *335 GMACM had argued that it was not the "real party in interest" to the Loan because it was merely "the current servicer of the loan on behalf of Deutsche Bank as trustee." (No. 08–459, R. 22, PageID 98–99.) McKeever argued that GMACM's claims against her should therefore be dismissed for lack of standing.

In response to McKeever's motion, the district court ordered GMACM to supply supplemental briefing on Federal Rule of Civil Procedure 17's requirement that an action be prosecuted in the name of the real party in interest. GMACM answered with a motion to substitute Deutsche Bank as plaintiff. In that motion, GMACM: (1) maintained that it had standing because it was the servicer of the Loan, and because McKeever sent her rescission letter to GMACM; and (2) requested that Deutsche Bank be substituted as plaintiff "in an abundance of caution." (No. 08–459, R. 39, PageID 243–44.) The district court granted GMACM's motion to substitute pursuant to Rule 17(a)(3) and denied McKeever's motion for judgment on the pleadings as moot.

Proceeding as Plaintiff, Deutsche Bank filed a motion for summary judgment. In that motion, Deutsche Bank argued that McKeever's TILA rescission claim in Case No. 08–459 was barred under the doctrines of res judicata and law-of-the-case because the district court's ruling in Case No. 08–510 already disposed of those claims. The district court agreed and issued an order granting summary judgment to Deutsche Bank. In its order, the district court held:

> This court ... has previously held that [McKeever's] allegation of a rescission is without merit. [McKeever's] rescission claim in [Case No. 08–510] was rejected when they asserted the claim as plaintiffs against GMAC.... Here, [McKeever] provide no new information on the issue that would constitute an extraordinary circumstance justifying a divergence from the court's prior holdings; therefore, the law-of-the-case doctrine makes the court's earlier rulings binding, and [McKeever's] rescission claim is invalid.

(No. 08–459, R. 135, PageID 1318–19.) McKeever timely appealed.

**B. Case No. 08–510**

As noted above, the district court order from which McKeever now appeals was decided on the basis of the "law-of-the-case" doctrine, citing a ruling in Case No. 08–510. We therefore discuss the relevant history of that case below.

McKeever filed Case No. 08–510 in Kentucky state court on November 21, 2008,[4] naming as defendants: (1) Mortgage Electronic Registration Systems, Inc. ("MERS"); (2) GMACM; and (3) "Concealed and Unknown Persons who are the 'Real Parties in Interest,' " for whom GMACM is "the Loan Servicing Agent." (No. 08–510, R. 1–4, PageID 12–13.) Case No. 08–510 concerned the same Loan secured by a mortgage on McKeever's home at issue in Case No. 08–459. McKeever's complaint made twelve claims against the named defendants in that case, including a claim for rescission under TILA and Regulation Z. Her complaint alleged, for example, that "[t]he Homeowners seek a remedy under ... TILA ... to obtain rescission recognition." (*Id.* at 14.)

4 Shane Haffey was again named as McKeever's co-party in Case No. 08–510.

McKeever's suit was removed to federal court, whereupon GMACM filed a motion to dismiss pursuant to 12(b)(6). In analyzing GMACM's motion, the district court observed that McKeever "claim[s] to have rescinded the Note and Mortgage under the [TILA]" via the October 2008 letters sent to GMACM and MERS. (No. 08–510, R. 17, PageID 134.) The court then found:

> The [October 2008] letters sought to rescind the Note and Mortgage and demanded ***336** a refund of all funds and interest paid. There are no statements in the letters that GMAC had violated any statute and no factual support for any role by GMAC, other than providing information upon request.

(*Id.* at 138.) On that basis, the district court granted GMACM's motion and dismissed all of McKeever's claims—including those relating to rescission under the TILA—against GMACM.

With McKeever's claims against GMACM dismissed, litigation in Case No. 08–510 continued against the remaining named defendant, MERS. The district court later granted MERS's motion for summary judgment and entered final judgment against McKeever. McKeever filed a motion to reconsider, arguing, *inter alia*, that the case should remain open so she could prosecute her claims against the " 'John Doe' Defendants, (the actual owners of McKeever's mortgage loan)." [5] (No. 08–459, R. 81, PageID 616–17.)[6] The district court denied that motion, holding that McKeever failed to follow the proper procedures for pursuing claims against unknown defendants.

5 Notably, GMACM notified McKeever that it was servicing the Loan on behalf of Deutsche Bank in its complaint for Case No. 08–459, filed on November 7, 2008—some two weeks before McKeever even filed Case No. 08–510.

6 Due to the consolidation of cases concerning the Property, some motions and orders for Case No. 08–510 were filed on the docket for Case No. 08–459.

McKeever appealed from the judgment in Case No. 08–510, but this Court later dismissed that appeal for lack of prosecution. McKeever's subsequent motions to reinstate the appeal were denied.

## DISCUSSION

### I. The District Court Did Not Err by Granting GMACM's Motion to Substitute Deutsche Bank as Plaintiff

#### Standard of Review

Questions regarding a plaintiff's Article III standing are reviewed *de novo*. *Schultz v. United States*, 529 F.3d 343, 349 (6th Cir. 2008).

#### Analysis

Below, McKeever moved for judgment on the pleadings, arguing that mortgage servicer GMACM lacked standing to bring claims related to the Loan because Deutsche Bank actually held the mortgage. The district court denied that motion as moot after granting GMACM's motion to substitute Deutsche Bank as plaintiff. On appeal, McKeever notes that "[t]he Order Granting the Motion to Substitute cites to Rule 17(a), but is silent as to the threshold issue of standing." (Pet'rs' Br. at 28.) She thereafter contends that the district court lacked jurisdiction to grant GMACM's Rule 17(a) motion because GMACM did not have standing to make that

motion in the first place. Although McKeever cites no cases in support of this argument, the argument has some merit.

Federal Rule of Civil Procedure 17(a)(1) requires that an action "be prosecuted in the name of the real party in interest." The Rule goes on to state:

> The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

Fed. R. Civ. P. 17(a)(3). Deutsche Bank argues that this language renders standing ***337** defects moot upon the substitution of the real party in interest. However, in *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002), we held that where a plaintiff "admittedly has not suffered injury in fact by the defendants, it had no standing ... to make a motion to substitute the real party in interest [under Rule 17]." *Id.* at 531.

In *Zurich*, the plaintiff insurance company filed a claim on behalf of its purported insured. *Id.* at 530. It was later discovered that the actual insurer was a sister company of the plaintiff—both insurance companies were under common ownership of a single "grandparent" entity. *See id.* at 533 (Gilman, J., concurring). The defendant moved to dismiss the plaintiff's suit for lack of standing; the plaintiff moved to substitute its sister company pursuant to Rule 17(a). *Id.* at 530. The district court granted the defendant's motion and dismissed the suit. *Id.* We affirmed dismissal of the action for lack of standing, holding that Rule 17(a) could not be used to allow the true insurer, "which was not vigilant in protecting its claims," the benefit of the plaintiff insurance company's mistake. *Id.* at 532. "The Federal Rules of Civil Procedure cannot expand the subject matter jurisdiction of federal courts," we explained, and Rule 17(a) "must be read with the limitation that a federal district court must, at a minimum arguably have subject matter jurisdiction over the original claims." *Id.* at 531.

*Zurich* thus establishes that in order for GMACM to have succeeded on its motion to substitute Deutsche Bank, it must have had standing to pursue that motion in the first instance. "The 'well established' law of Article III standing requires a plaintiff to 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 748 (6th Cir. 2012) (quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007)). The plaintiff's injury, moreover, must be "(a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations and quotation marks omitted). "We look to the complaint and any accompanying materials in deciding standing questions." *Murray*, 681 F.3d at 748.

**[1]** We find that unlike the plaintiff in *Zurich*, GMACM has proffered facts sufficient to establish its own Article III standing and, therefore, to pursue its motion to substitute Deutsche Bank as plaintiff. GMACM's complaint alleged that it was the servicer of the McKeever's loan on behalf of Deutsche Bank. At least one of our sister circuits has found that the rights held by a loan servicer grant it standing to prosecute cases relating to the debt that it services. *See Greer v. O'Dell*, 305 F.3d 1297, 1302 (11th Cir. 2002) ("[T]he sole issue before us is whether a loan servicer is a 'real party in interest' with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services. We answer this question in the affirmative."); *see also In re Woodberry*, 383 B.R. 373, 376–79 (Bankr. D.S.C. 2008) (collecting cases and holding that a loan servicer with a contractual duty to collect payments and foreclose mortgages has standing to move for relief of stay in bankruptcy proceedings involving the loan being serviced).

GMACM's motion to substitute provided additional information establishing GMACM's standing to pursue that motion. Attached to the motion was the servicing agreement between Deutsche Bank and GMACM. That agreement states that as ***338** servicer of Deutsche Bank's loans, GMACM was entitled to certain compensation, including "assumption fees, late payment charges, [and] investment income...." (No. 08–459, R. 39–1, Decl. of Judy Faber, PageID 281.) GMACM necessarily stood to lose any such compensation that arose from

servicing McKeever's loan as a result of her purported rescission. GMACM therefore established "concrete and particularized" injuries that were "fairly traceable to" McKeever's conduct. *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (internal alterations and quotation marks omitted). Thus, GMACM had standing to pursue its motion to substitute Deutsche Bank as the real party in interest, and the district court did not err by addressing that motion on the merits.

## II. McKeever's TILA Rescission Claim in Case No. 08–459 is Barred by the District Court's Judgment in Case No. 08–510

### Standard of Review

Although a district court has some discretion to revisit an already-decided issue or let its decision stand as "law of the case," *see United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990), "[w]hether a prior decision constitutes law of the case is a legal issue that we review de novo." *Stewart v. Beach*, 701 F.3d 1322, 1329 (10th Cir. 2012); *see also* 36 C.J.S. *Federal Courts* § 602 (2016) ("[w]hether the law-of-the-case doctrine applies in a specific instance is a question of law"). Application of the doctrine of res judicata is also a question of law to be reviewed *de novo*. *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir. 2009).

### Analysis

Below, the district court held that McKeever's TILA rescission claim was barred by the court's prior ruling in consolidated Case No. 08–510. In so doing, the court cited to the "law-of-the-case" doctrine. On appeal, Deutsche Bank argues that the district court properly applied that doctrine; and, in the alternative, that the district court's judgment in Case No. 08–510 was res judicata, thus constituting another basis on which we may affirm. *See La. Sch. Emps.' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 477 (6th Cir. 2010) ("[W]e may affirm the judgment of the district court on any ground supported by the record."). For the reasons discussed below, we conclude that the law-of-the-case doctrine was inappropriately applied in this case, but we agree that res judicata provides another basis on which to affirm.

#### A. Law-of-the-Case Doctrine

The law-of-the-case doctrine "provides that the courts should not reconsider a matter once resolved in a continuing proceeding." *Howe v. City of Akron*, 801 F.3d 718, 739 (6th Cir. 2015) (internal quotation marks omitted). Describing the doctrine, the Supreme Court has stated:

> A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice."

*Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).[7] Thus, like the doctrines of claim and issue preclusion, ***339** law-of-the-case is designed to "prevent[ ] the relitigation of an issue once there has been a judgment on the merits." *Bowles v. Russell*, 432 F.3d 668, 676 (6th Cir. 2005) (citing 18 *Moore's Federal Practice* § 134.20 (Matthew Bender 3d ed.)); *see also Howe*, 801 F.3d at 740 (observing that law-of-the-case doctrine "is a prudential practice" intended "to encourage efficient litigation and deter indefatigable diehards" (internal quotation marks omitted)).

7 The term "law-of-the-case" is also used to describe the binding effect of appellate decisions on remand to the originating court. *See, e.g.*, *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990) (observing that one purpose of the doctrine is "to assure compliance by inferior courts with the decisions of superior courts").

Unlike claim or issue preclusion, however, the law-of-the-case doctrine is not used to prevent relitigation of the same issues across different cases; rather, "[t]he purpose of the law-of-the-case doctrine is to ensure that the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *Howe*, 801 F.3d at 739 (emphases in original) (internal quotation marks omitted); *see also Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) ("the [law-of-the-case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case"); 18B Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction & Related Matters* § 4478 (4th ed. 2015) ("Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once

decided during the course of a single continuing lawsuit. They do not apply between separate actions." (footnotes omitted)); Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation* ("*Law of the Case*"), 135 U. Pa. L. Rev. 595, 597–98 (1987) (describing law-of-the-case doctrine as "a concept that precludes the relitigation of issues within the context of a single case once they have been decided").

This raises the question of whether consolidated cases, like those at issue here, can be considered the "same case" for law-of-the-case purposes. In answering this question, we begin with the well-established principle "that consolidated cases remain separate actions." *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994). "[A]lthough consolidation is permitted as a matter of convenience and economy in administration, it does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 412 (6th Cir. 1998) (internal brackets and quotation marks omitted) (quoting *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496–97, 53 S.Ct. 721, 77 L.Ed. 1331 (1933)). Using the law-of-the-case doctrine to bar relitigation of similar issues across consolidated cases would therefore seem to implicate the bedrock principle of due process that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

We note, however, that this principle of due process is *not* offended when a judgment from one case is used to bar relitigation in a different case, so long as "the party against whom an estoppel is asserted had a full and fair opportunity to litigate" the precluded claim or issue in the first action. *Blonder–Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). This is the concept of res judicata, *see id.* which encompasses both the claim- and issue-preclusion doctrines. *Mitchell v. Chapman*, 343 F.3d 811, 818 n. 5 (6th Cir. 2003). What differentiates the preclusion doctrines from law-of-the-case, however, are their more rigorous analyses that ensure ***340** they are applied to bar only those claims or issues that have been fully and fairly litigated. *See Blonder–Tongue*, 402 U.S. at 329, 91 S.Ct. 1434 (describing the determination of a prior full and fair opportunity to litigate as "a most significant safeguard").

The common law rules governing use of the law-of-the-case doctrine are understandably less involved: because the doctrine presumes application within a single case, and thus an identity of parties and claims, *see Howe*, 801 F.3d at 739, the sole requirement for its application is that the court must have already "actually decided" the relevant issue. *Id.* at 739–40 (noting, for example, that an issue has not been "actually decided" where it was "assumed without decision for purposes of resolving another issue"). That limited inquiry, however, will not always be sufficient to protect the parties' rights when barring claims across consolidated cases. This is especially true in circumstances where the consolidated cases involve different parties or different underlying factual circumstances. In such instances, applying the more rigorous inquiries of claim or issue preclusion will better ensure that only fully and fairly litigated claims or issues are barred. *Cf. Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1317 (7th Cir. 1995) ("The doctrine that limits the relitigation of an issue in a subsequent suit, as opposed to a subsequent stage of the same suit, is collateral estoppel, not law of the case.").

**[2]** Based on the above, we hold that the district court erred by using the law-of-the-case doctrine to preclude McKeever's TILA rescission claim in Case No. 08–459 on the basis that the court had already decided that issue against her in consolidated Case No. 08–510. Although those two cases were consolidated for the sake of convenience and judicial economy, such consolidation did not merge them into a single cause. *Lewis*, 135 F.3d at 412. Moreover, as evidenced by our discussion in section II–B, *infra*, a more thorough analysis was needed to determine whether it was fair to preclude McKeever from relitigating her TILA rescission claim against Deutsche Bank where she previously litigated that claim against GMACM. Thus, the district court should have applied either claim or issue preclusion to analyze whether McKeever's TILA rescission claim was barred in Case No. 08–459. *See Rodriguez v. Passinault*, 637 F.3d 675, 689 n. 6 (6th Cir. 2011) (concluding in dicta that the law-of-the-case doctrine does not apply between consolidated cases because "consolidation under Fed. R. Civ. P. 42 does not render rulings in one case applicable to a consolidated action"); Steinman, *Law of the Case*, 135 U. Pa. L. Rev. at 626 ("[A] court faced with an apparent law of the case problem should first ask whether the requested

ruling is on an issue that has been previously decided in the particular case, and not merely in another component of the consolidation.").

**B. Res Judicata**

As noted above, Deutsche Bank argues that we may affirm the district court's judgment on alternative grounds: regardless of whether the district court appropriately applied the law-of-the-case doctrine to bar McKeever's TILA rescission claim in Case No. 08–459, that claim was barred because the district court's judgment in Case No. 08–510 constituted res judicata. "Res judicata generally includes two separate concepts—claim preclusion and issue preclusion." *Mitchell*, 343 F.3d at 818 n. 5. In this instance, Deutsche Bank relies on claim preclusion, which "refers to effect of a prior judgment in foreclosing a subsequent *claim* that has never been litigated, because of a determination that it should ***341** have been advanced in an earlier action." *Id.* McKeever, Deutsche Bank argues, *could and should have* fully litigated her TILA rescission claim in Case No. 08–510, and therefore that claim is barred.

"The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 891, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008). Under the federal common law doctrine of claim preclusion, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Bragg*, 570 F.3d at 776 (quoting *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)).

> Under this Court's articulation of [claim preclusion], a claim will be barred by prior litigation if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) *a subsequent action between the same parties or their "privies"*; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.

*Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir. 1997) (emphasis in original).

In this case, there is no dispute that Case No. 08–510 ended in a final decision on the merits by a court of competent jurisdiction. Moreover, Case No. 08–459 involved an issue —namely, whether McKeever's letters effected a valid rescission of the Loan—which either was or should have been fully litigated in Case No. 08–510. Finally, both cases arose out of McKeever's mortgage on the Property and therefore involved the same causes of action. *See Browning v. Levy*, 283 F.3d 761, 773–74 (6th Cir. 2002) (holding identity of causes of action element satisfied where "the claims arose out of the same core of operative facts"). Thus, the primary issue is whether Deutsche Bank is entitled to the benefits of the district court's judgment against McKeever on her TILA rescission claim in Case No. 08–510, even though Deutsche Bank was not a named party in that case.

As the above recitation of the elements of claim preclusion indicates, a party in a subsequent action may receive the benefit of a prior judgment if it is in "privity" with a named party. *Bittinger*, 123 F.3d at 880. We note, however, that the term "privity" by itself is not particularly instructive. *See, e.g.*, Restatement (Second) of Judgments § 62 cmt. c (1982) ("[T]he term 'privity,' unless it refers to some definite legal relationship ... is so amorphous that it often operates as a conclusion rather than an explanation."); 18A Wright et al., *Federal Practice & Procedure: Jurisdiction & Related Matters* § 4449 (4th ed. 2015) ("[I]t has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper."); *Taylor*, 553 U.S. at 894 n. 8, 128 S.Ct. 2161 (noting that the term "privity" has "come to be used ... as a way to express the conclusion that nonparty preclusion is appropriate on any ground"). Rather, an examination of "privity" involves determining whether the circumstances of a particular case fit within discrete exceptions to the general rule against nonparty preclusion. *See Taylor*, 553 U.S. at 898, 128 S.Ct. 2161 (rejecting an "amorphous balancing test" for allowing nonparty preclusion in favor of "discrete exceptions that apply in limited circumstances" (internal quotation marks omitted)).

In *Taylor*, the Supreme Court provided a non-exhaustive list of such exceptions. *Id.* at 893–95, 128 S.Ct. 2161. Relevant here, the Court in *Taylor* noted that "in certain limited circumstances, a nonparty may be bound by a judgment because she ***342** was adequately represented by someone with the same interests who was a party to

the suit." *Id.* at 894, 128 S.Ct. 2161 (internal brackets and quotation marks omitted) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996)); *see also* Restatement (Second) of Judgments § 41 (1982) ("A person who is not a party to an action but who is represented by a party is bound by *and entitled to the benefits of* a judgment as though he were a party." (emphasis added)). *Taylor* went on to provide a rule for this exception's application:

> A party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.

*Id.* at 900, 128 S.Ct. 2161.

**[3]** These requirements are met in this case. GMACM's briefing on its motion to dismiss in Case No. 08–510 reveals that its interests with regard to the Loan were, unsurprisingly, aligned with Deutsche Bank's. In that briefing, GMACM argued that McKeever's claims against GMACM failed because the claims were premised on the allegedly fraudulent acts of nonparty Bank of the Bluegrass ("BOTB") in originating the Loan. GMACM thereafter asserted that McKeever could not maintain her claims—including her claim for rescission under the TILA—based on BOTB's fraudulent conduct because "GMACM did not originate [McKeever's] loan, was not present at the closing table, and cannot have liability for the allegations set forth against BOTB." (*See* Case. No. 08–510, R. 7–2, PageID 97.) These arguments by GMACM necessarily concerned the same interest in the Property—i.e., the right to collect on the Loan or foreclose on the Property despite McKeever's purported rescission —as held by Deutsche Bank. And because GMACM's arguments were germane to both Deutsche Bank's and its own interests, nothing in the record leads us to believe that GMACM did not understand itself to be acting as a representative of Deutsche Bank in Case No. 08–510.

McKeever's own complaint in Case No. 08–510 makes clear that she, too, understood GMACM to be acting as a representative of another party. For example, paragraph three of her complaint states that

> [t]he Defendant GMAC Mortgage, LLC, ... is served as a Defendant in several capacities: As a corporate Defendant in its own right ... and as both the Loan Servicing Agent and Agent for Service of Process for the Defendants named as the Concealed and Unknown Persons who are the "Real Parties in Interest," who are the Concealed True Lender(s) and/ or Holder(s) in Due Course as to Claim any Interest [in the Property].

(No. 08–510, R. 1–4, PageID 13.) Notably, GMACM identified Deutsche Bank as the entity on whose behalf GMACM was servicing the Loan in its complaint in Case No. 08–459, filed some two weeks *before* McKeever filed the above-quoted complaint in Case No. 08–510.

The record thus contains ample evidence indicating that GMACM served as an adequate representative of Deutsche Bank in Case No. 08–510, that McKeever was on notice of such representation, and that Deutsche Bank is therefore entitled to the benefits of the judgment in Case No. 08–510.

This conclusion is supported by the Supreme Court's reasoning in *Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757 (1926). In *Schendel*, the Court addressed the relationship between two actions arising out of the ***343** death of a single railway employee. *Id.* at 612, 46 S.Ct. 420. The first action was initiated by the administrator of the employee's estate for the benefit of his widow. *Id.* at 614, 46 S.Ct. 420. The second action was a state administrative proceeding brought by the railway company under a state workmen's compensation law. *Id.* The employee's widow was made a party to the administrative action as the sole beneficiary of any resulting workmen's compensation. *Id.* The second-filed action concluded first, resulting in judgment and an award of benefits to the widow. *Id.* The Supreme Court held that the judgment in the second-filed action precluded further litigation in the first, even though the first action was brought by the administrator of the employee's estate. *Id.* at 618, 46 S.Ct. 420.

In so holding, the Court in *Schendel* concluded that the widow and the administrator of her husband's estate were functionally the same party. *See id.* at 620, 46 S.Ct. 420 ("Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different; and parties nominally different may be, in legal effect, the same."); *see also* 47 Am. Jur. 2d Judgments § 595 ("For the purpose of res judicata or collateral estoppel, the courts will look beyond the nominal parties of record to determine the real parties in interest."). "[E]ssential" to the Court's conclusion was the fact that "it is the right of the widow, and of no one else, which was presented and adjudicated in both courts." *Schendel*, 270 U.S. at 618, 46 S.Ct. 420. The Court explained that because both actions involved the same right, the widow would have been bound no matter which action had concluded first. *Id.* This parity in potential outcome rendered the widow and the administrator of her husband's estate the same party for preclusion purposes. *Id.*

The same is true in this case. Case Nos. 08–459 and 08–510 both concerned Deutsche Bank's right to collect on the Loan and foreclose on the Property despite McKeever's purported rescission under the TILA. We have no reason to doubt that regardless which case resulted in final judgment first, that judgment would have been conclusive as to Deutsche Bank's interest in the Property. This is so, even though GMACM acted as the representative of Deutsche Bank's right to continue collecting on the Loan in Case No. 08–510. In sum, applying claim preclusion in this case comports with the principle "that questions of preclusion by representation 'must be determined as a matter of substance and not of mere form,' according to an identification of the interests advanced in the first action." 18A Wright et al., *Federal Practice & Procedure: Jurisdiction & Related Matters* § 4454 (4th ed. 2015) (quoting *Schendel*, 270 U.S. at 618, 46 S.Ct. 420); *see also* 47 Am. Jur. 2d Judgments § 595 ("Privity involves a person so identified in interest with another that he or she represents the same legal right."); *R.G. Fin. Corp. v. Vergara–Nunez*, 446 F.3d 178, 185–187 (1st Cir. 2006) (holding mortgage servicer and mortgage holder were sufficiently identical under Puerto Rico law to justify precluding action by mortgagors to rescind under TILA where mortgage servicer had already secured a default judgment against the mortgagors in a foreclosure action).

Finally, McKeever argues that the Supreme Court's decision in *Jesinoski v. Countrywide Home Loans*, —— U.S. ——, 135 S.Ct. 790, 190 L.Ed.2d 650 (2015), rendered the judgment in Case No. 08–510 "void." Without commenting on *Jesinoski*'s effect on the district court's holding in Case No. 08–510, we note that the principles of claim preclusion apply "even if an intervening decision effects a change in the law which bears directly on the legal theory advanced in the second suit." ***344** *Harrington v. Vandalia–Butler Bd. of Ed.*, 649 F.2d 434, 437 (6th Cir. 1981); *see also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981) ("[A]n erroneous conclusion reached by the court in the first suit does not deprive the defendants in the second action of their right to rely upon the plea of *res judicata*." (internal quotation marks omitted)); *In re Tenn. Cent. Ry. Co.*, 498 F.2d 904, 906 (6th Cir. 1974) ("The principles of res judicata would govern disposition of this case, even if there had been ... a change in controlling case law."). "The purpose of res judicata is to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources." *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981). This purpose would be frustrated by allowing McKeever to collaterally attack a judgment from which she forfeited her right to appeal by failing to prosecute. [8]

8 On September 15, 2015—nearly five years after the district court entered final judgment in Case No. 08–510—McKeever filed a motion to vacate the judgment in that case pursuant to Federal Rule of Civil Procedure 60. McKeever argued in that motion, as she does in this appeal, that the district court's judgment in Case No. 08–510 was rendered void by *Jesinoski*. We have no occasion to comment upon that motion, except to note that it was denied by the district court on March 24, 2016. Thus, in any event, that motion has no bearing on our reasoning in this case.

We therefore conclude that the district court improperly applied the law-of-the-case doctrine to bar McKeever's rescission claims in Case No. 08–459. Even so, we affirm because McKeever's claims were barred under the doctrine of claim preclusion by the court's judgment in Case No. 08–510.

## CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's judgment in full.

**All Citations**

651 Fed.Appx. 332

End of Document

**ATTACHMENT 3**

***In re Carssow-Franklin***

2016 WL 5660325
United States District Court,
S.D. New York.

In re: Cynthia Carssow-Franklin, Debtor.
Wells Fargo Bank, N.A., Appellant,
v.
Cynthia Carssow-Franklin, Appellee.

Case No. 15-CV-1701 (KMK)
|
Signed September 30, 2016

**Synopsis**

**Background:** Chapter 13 debtor objected to proof of claim filed by financial institution for balance owing on debtor's deed of trust loan based on financial institution's alleged lack of standing and moved for summary judgment on standing issue. The Bankruptcy Court granted motion and entered order disallowing claim, and financial institution appealed.

**Holdings:** The District Court, Kenneth M. Karas, J., held that:

[1] evidence that Chapter 13 debtor presented was sufficient to overcome presumptive authenticity of endorsement in blank on debtor's deed of trust note, and to shift to financial institution in possession of note the burden of showing, by preponderance of evidence, that this endorsement was genuine;

[2] financial institution's failure to present evidence regarding authenticity of endorsement prevented it from relying on its physical possession of note to assert status of holder thereof and to establish its standing, as holder, to file proof of claim; but

[3] genuine issue of material fact as to whether financial institution was authorized servicer of deed of trust loan precluded entry of summary judgment.

Affirmed in part and reversed in part.

West Headnotes (12)

[1] **Bankruptcy**
⇦ Conclusions of law;de novo review

**Bankruptcy**
⇦ Clear error

District court reviews bankruptcy court's findings of fact for clear error and reviews conclusions of law de novo. Fed. R. Bankr. P. 8013.

Cases that cite this headnote

[2] **Bankruptcy**
⇦ Conclusions of law;de novo review

Bankruptcy court's decision to grant summary judgment is reviewed de novo.

Cases that cite this headnote

[3] **Bills and Notes**
⇦ Title to Sustain Action

Under Texas law, holder of a note indorsed in blank has standing to enforce the note.

Cases that cite this headnote

[4] **Bills and Notes**
⇦ Nature and grounds in general

Under Texas law, in order to recover on promissory note, plaintiff must prove (1) the existence of note in question, (2) that the party sued signed the note, (3) that plaintiff is the owner or holder of note; and (4) that a certain balance is due and owing on the note.

Cases that cite this headnote

[5] **Mortgages**
⇦ Assignment by indorsement on mortgage

**Mortgages**
⇦ Transfer of Debt or Obligation Secured

If blank endorsement on deed of trust note was authentic, then financial institution in

  

possession of note was holder and was entitled to enforce note under Texas law.

Cases that cite this headnote

[6] **Bankruptcy**
⇦ Presumptions and burden of proof

**Mortgages**
⇦ Evidence

Evidence that Chapter 13 debtor presented was sufficient to overcome presumptive authenticity of endorsement in blank on debtor's deed of trust note, and to shift to financial institution in possession of note the burden of showing, by preponderance of evidence, that this endorsement was genuine and that it was holder of note; debtor showed that version of note attached to financial institution's initial proof of claim did not contain blank endorsement, that financial institution, despite allegedly possessing a note endorsed in blank, had taken steps to improve its appearance of standing by arranging to have deed of trust assigned to it, and that financial institution had demonstrated a willingness in past to manufacture documentary evidence after the fact.

Cases that cite this headnote

[7] **Bankruptcy**
⇦ Presumptions and burden of proof

**Mortgages**
⇦ Evidence

Once presumptive authenticity of endorsement in blank on deed of trust note had been rebutted, financial institution's failure to present evidence regarding authenticity of endorsement prevented it from relying on its physical possession of note to assert status of holder thereof and to establish its standing, as holder, to file proof of claim for balance owing on deed of trust note.

Cases that cite this headnote

[8] **Bankruptcy**
⇦ Who May File

To file proof of claim, claimant must be a real party in interest, which means that claimant must be either a creditor or creditor's authorized agent.

Cases that cite this headnote

[9] **Bankruptcy**
⇦ Who May File

Real party in interest with standing to file proof of claim for mortgage debt is party entitled to enforce the note and its accompanying mortgage.

Cases that cite this headnote

[10] **Bankruptcy**
⇦ Who May File

Financial institution was real party in interest with standing to file proof of claim for deed of trust debt if it was either an entity entitled to enforce deed of trust note or its authorized agent.

Cases that cite this headnote

[11] **Bankruptcy**
⇦ Parties;standing

**Bankruptcy**
⇦ Who May File

Mortgage servicers are authorized agents with standing to file proofs of claim for mortgage debt or seek stay relief as to mortgaged property.

Cases that cite this headnote

[12] **Bankruptcy**
⇦ Judgment or Order

While financial institution failed to produce an executed loan servicing agreement or evidence of any payments that it had made to Freddie Mac in its alleged role as servicer of deed of trust loan, other evidence that it produced, including its "hello" letter to Chapter 13 debtor advising debtor

that it would begin servicing her loan and correspondence between itself and Freddie Mac, was sufficient to create genuine issue of material fact, of kind sufficient to preclude summary judgment as to whether it was servicing agent for deed of trust loan, and was thus authorized to file proof of claim for deed of trust debt in that capacity.

Cases that cite this headnote

**Attorneys and Law Firms**

Linda M. Tirelli, Esq., Linda M. Tirelli and Westchester Legal Credit Solutions Inc., White Plains, NY, Counsel for Debtor-Appellee.

David Dunn, Esq., Nicole E. Schiavo, Esq., Hogan Lovells US LLP, New York, NY, Counsel for Appellant.

OPINION AND ORDER

KENNETH M. KARAS, District Judge:

*1 Wells Fargo Bank, N.A., ("Wells Fargo" or "Appellant") appeals from the bankruptcy court's "Order Disallowing and Expunging Claims of Wells Fargo Bank, NA," ("Disallowance Order"), dated February 9, 2015. (*See* Dkt. No. 1.) More specifically, Wells Fargo challenges the bankruptcy court's May 21, 2012 Order granting the partial summary judgment motion of Cynthia Carssow-Franklin ("Debtor") on the issue of Wells Fargo's standing to file a proof of claim on behalf of Freddie Mac, and the bankruptcy court's January 28, 2015 decision granting Debtor's claim objection on the ground that Wells Fargo was not a holder of Debtor's note. (*Id.*) For the reasons given herein, the judgment of the bankruptcy court is affirmed in part and reversed in part.

I. Factual and Procedural Background

On or about October 30, 2000, Debtor executed a promissory note (the "Note") in the principal amount of $145,850, in favor of Mortgage Factory Inc. ("Mortgage Factory"). (A108-A110.)[1] The loan was secured by a deed of trust on real property located in Round Rock, Texas (the "Deed of Trust"). (A111-A126.)[2] An "Assignment of Lien," dated October 30, 2000, purports to assign the Deed of Trust from Mortgage Factory to ABN Amro Mortgage Group, Inc. ("ABN Amro"). (A139-A140.)[3]

1 While October 30, 2000 appears as the date on both the Note and Deed of Trust, a notary acknowledgement indicates that the Deed of Trust was signed on November 2, 2000, and Debtor testified that she signed the Note on November 2, 2000. (*See* Br. for Appellee Cynthia Carssow-Franklin ("Appellee Br.") 22 n.3 (Dkt. No. 22).) The exact date is immaterial to this Appeal.

2 Citations beginning with the letter "A" are citations to the Appellant's Appendix, filed with its opening brief, at Dkt. No. 19, unless otherwise noted.

3 Debtor has questioned the validity of this assignment. After Wells Fargo filed its initial proof of claim, Debtor's counsel notified Wells Fargo's counsel that the Assignment of Lien, dated October 30, 2000, "pre-dates the notarized signature of ... Debtor on the [N]ote and [D]eed of [T]rust by three days." (Appellee Br. 2.)

At the heart of much of this appeal is the Parties' dispute over what happened next. According to Wells Fargo, Mortgage Factory, in addition to assigning the Deed of Trust, also specifically indorsed the Note to ABN Amro. (Br. for Appellant Wells Fargo Bank, N.A. ("Appellant Br") 3 (Dkt. No. 19).) ABN Amro further transferred Debtor's loan to Washington Mutual Bank, N.A. ("Washington Mutual"), "indorsing the [N]ote in blank and executing a written assignment of [Debtor's] [D]eed of [T]rust, including 'all beneficial interest in and title to said Deed of Trust' to the Mortgage Electronic Registration Systems, Inc. ('MERS') as nominee." (*Id.* at 3-4 (citing A110, A141-A142).) Later, Wells Fargo obtained the servicing rights to Debtor's loan, effective February 16, 2007, from Washington Mutual. (*Id.* at 4.) Wells Fargo maintains that it services the loan for Freddie Mac, the owner of Debtor's loan. (*Id.* at 4, 13-14.) Around that time, Wells Fargo sent Debtor what it calls a "Hello" letter, which advised Debtor that Wells Fargo would begin servicing her loan on February 16, 2007. (*Id.* at 4 (citing A286).) In conjunction with the servicing transfer, the Note, "bearing the in-blank indorsement from ABN Amro," and the Deed of Trust, were delivered to Wells Fargo. (*Id.*) A written assignment, which was not

executed until July 12, 2010, memorialized the Deed of Trust's transfer from MERS to Wells Fargo. (*Id.* (citing A143-A145).) Finally, about a year after Wells Fargo began servicing the loan, Debtor and Wells Fargo agreed to modify the loan. (*Id.* (citing A134-A136).) The loan-modification agreement states that Debtor "requested, and [Wells Fargo] has agreed, ... to a modification in the payment" of Debtor's loan, and that Debtor promises "to pay the unpaid principal balance plus interest, to the order of [Wells Fargo]." (A135.)

***2** Debtor disputes much of this narrative. Most pertinent to the pending appeal, Debtor argued, and the bankruptcy court agreed, both that the blank indorsement was actually forged, that is, the indorsement was stamped on the Note after Wells Fargo filed its initial proof of claim in Debtor's bankruptcy in an attempt to improve the record with respect to Wells Fargo's standing to enforce the Note, and that Wells Fargo had failed to provide sufficient evidence that it was the servicer of Debtor's loan authorized to file a proof of claim to enforce the Note. (*See generally* Br. for Appellee Cynthia Carssow-Franklin ("Appellee Br") (Dkt. No. 22).) Although Debtor notes that "[t]he original loan modification was never produced and never authenticated," (Appellee Br. 24), she does not dispute that she entered into a loan modification with Wells Fargo.

On June 1, 2010, Debtor petitioned for Chapter 13 bankruptcy relief in the United States Bankruptcy Court for the Southern District of New York. (*See* A1-A2.) On July 15, 2012, Wells Fargo filed a proof of claim, Claim No. 1-1, asserting an indebtedness of $170,072.60, including prepetition arrears of $38,163.16. (*See* Mem. of Decision on Debtor's Objection to Claim of Wells Fargo Bank, NA ("Order") 1 (Dkt. No. 109, 10–20010 Dkt. (Bankr. S.D.N.Y.)).) The proof of claim attached a number of documents, including a copy of the Note, dated October 30, 2000, payable to Mortgage Factory in the amount of $145,850, which was signed by Debtor. (*See* Order 2; *see also* A67-A105.) The version of the Note attached to Claim No. 1–1 bears a specific indorsement by Mortgage Factory to ABN Amro and no other indorsements. (*Id.*; *see also* A71.) Claim No. 1–1 also attached the aforementioned assignments, including the Assignment of Lien, dated October 30, 2000, pursuant to which Mortgage Factory assigned its rights under the Note and related liens to ABN Amro, and the "Assignment of Deed of Trust" by ABN Amro, dated June 20, 2002, pursuant to which ABN Amro assigned "all beneficial interest in" the Deed of Trust securing the Note, "together with the [N]ote," to MERS, "as nominee for Washington Mutual Bank, FA." (*See* A100-A102; Order 2.) Also attached to Claim No. 1–1 was an "Assignment of Mortgage," pursuant to which MERS purported to assign to Wells Fargo "a certain mortgage" made by Debtor pertaining to the Note. (*See* A104-A105.) The Assignment of Mortgage is dated July 12, 2010, which is three days before Wells Fargo filed Claim No. 1–1, and is executed on behalf of MERS "as nominee for Washington Mutual," by John Kennerty ("Kennerty"), who is identified only as an "Assistant Secretary." (*See* A105; *see also* Order 3.)[4]

4 It is undisputed that when he executed the Assignment of Mortgage, Kennerty was an employee of Wells Fargo and MERS. (*See* Order 3 & n.3.)

In the underlying Claim Objection, Debtor's counsel represented without dispute that after reviewing Claim No. 1–1, she contacted Wells Fargo's then-counsel with questions regarding Wells Fargo's standing to assert Claim No. 1–1. (Order 3.) Eventually, on September 23, 2010, Wells Fargo filed another proof of claim, amended Claim No. 1–2, which was the same as Claim No. 1–1 in all respects, except that the copy of the Note attached to Claim No. 1–2 had a second indorsement (in addition to the specific indorsement from Mortgage Factory to ABN Amro): a blank indorsement, signed by Margaret A. Bezy, Vice President, for ABN Amro. (Order 4; *compare* A110, *with* A71.)

Debtor filed a Claim Objection, asserting a number of reasons as to why Claim No. 1–2 should be disallowed under 11 U.S.C. § 502 and Fed. R. Bankr. P. 3007. (Order 4; *see also* A20-A57.) The two arguments relevant to this appeal are that Wells Fargo lacked standing to assert the claim because it did not own the loan upon which the claim was based, yet filed the claim on its own behalf, and that the blank indorsement that appears in the version of the Note attached to Claim No. 1–2 was forged to solidify Wells Fargo's right to enforce the Note. (Order 4–5.)

***3** With discovery ongoing, Debtor moved for summary judgment under Fed. R. Bankr. P. 7056, primarily on the grounds that Wells Fargo did not own the Note and yet had not filed Claim No. 1–2 in a representative capacity. (Order 5–6; *see also* A360.) In a bench ruling on March 1, 2012, memorialized by an Order dated May 21, 2012, the bankruptcy court granted in part and denied

in part Debtor's summary judgment motion. (Order 6–7; *see also* A908-A979.) The motion was granted to the extent that Claim No. 1–2 sought to assert the claim in a representative capacity on behalf of Freddie Mac; the bankruptcy court found, as a matter of law, that Wells Fargo was "not the servicer of the loan" and, thus, that Claim No. 1–2 was "not filed in Wells Fargo['s] ... capacity as servicer or agent for the holder of the Claims or the underlying [N]ote and [D]eed of [T]rust, including, without limitation, on behalf of Freddie Mac." (A428.) However, the bankruptcy court denied Debtor's motion for an order declaring that Wells Fargo lacked standing to assert Claim No. 1–2, finding that Debtor did not establish, as a matter of law, that Wells Fargo lacked standing to bring Claim No. 1–2 "*as principal and holder* of the Claims, the [N]ote[,] and the [D]eed of [T]rust." (*Id.* (emphasis added).) Rather, the bankruptcy court concluded that, under Texas law, if Wells Fargo was the holder of the Note properly indorsed in blank by ABN Amro, Wells Fargo could personally enforce the Note and Deed of Trust. (Order 6.) Because discovery on the issue had not yet been completed, the bankruptcy court further scheduled an evidentiary hearing to address the bona fides of the blank indorsement. (*Id.* at 7–8.)

After the completion of discovery and an evidentiary hearing, the bankruptcy court issued a Memorandum of Decision on Debtor's Objection to Claim of Wells Fargo Bank, NA, ruling that, on the evidence provided by the Parties, Wells Fargo did not satisfy its burden to show that the blank indorsement on the Note attached to Claim No. 1–2 was genuine. (*Id.* at 29-30.) As a result, on February 9, 2015, the bankruptcy court issued an Order disallowing and expunging Claim No. 1–1 and Claim No. 1–2. (A564–A565.)

Wells Fargo filed a Notice of Appeal, appealing the bankruptcy court's order disallowing and expunging the proofs of claim. (Notice of Appeal (Dkt No. 1).)

## II. Discussion

### A. Standard of Review

#### 1. Review of Bankruptcy Court's Order

**[1]** The Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a). A district court reviews a bankruptcy court's findings of fact for clear error and reviews conclusions of law de novo. *See In re Bayshore Wire Prods. Corp.*, 209 F.3d 100, 103 (2d Cir. 2000) ("Like the [d]istrict [c]ourt, we review the Bankruptcy Court's findings of fact for clear error, [and] its conclusions of law de novo ...." (citation and italics omitted)); *In re Enron Corp.*, 307 B.R. 372, 378 (S.D.N.Y. 2004) ("A bankruptcy court's conclusions of law are reviewed de novo and its findings of fact for clear error." (italics omitted)).

**[2]** "A bankruptcy court's decision to grant summary judgment is reviewed de novo because the existence of issues of material fact is a question of law." *In re Enron N. Am. Corp.*, 312 B.R. 27, 28–29 (S.D.N.Y. 2004) (italics omitted); *see also Baranek v. Baranek*, No. 12–CV–5090, 2013 WL 4899862, at *4 (E.D.N.Y. Sept. 11, 2013) (same), *aff'd sub nom. In re Baranek*, 579 Fed.Appx. 57 (2d Cir. 2014).

Under the clear error standard, "[t]here is a strong presumption in favor of a trial court's findings of fact if supported by substantial evidence," and a reviewing court will not upset a factual finding "unless [it is] left with the definite and firm conviction that a mistake has been committed." *Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1574 (2d Cir. 1994) (first alteration in original) (internal quotation marks omitted); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) ("[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (internal quotation marks omitted)); *Ceraso v. Motiva Enters., LLC*, 326 F.3d 303, 316 (2d Cir. 2003) (stating that an appellate court should not overturn a trial judge's choice "between permissible competing inferences"). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Travellers Int'l*, 41 F.3d at 1574–75 (internal quotation marks omitted); *see also UFCW Local One Pension Fund v. Enivel Props., LLC*, 791 F.3d 369, 372 (2d Cir. 2015) (same); *In re CBI Holding Co., Inc.*, 419 B.R. 553, 563 (S.D.N.Y. 2009) ("In reviewing findings for clear error, [an appellate court] is not allowed to second-guess ... the trial court's ... choice between competing inferences. Even if the appellate court might have weighed the evidence differently, it may not overturn findings that are not clearly erroneous." (alterations in original) (internal quotation marks omitted)).

2. Summary Judgment Standard

***4** Summary judgment is appropriate where the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 123–24 (2d Cir. 2014) (same).[5] "In determining whether summary judgment is appropriate," a court must "construe the facts in the light most favorable to the non-moving party and ... resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (internal quotation marks omitted); *see also Borough of Upper Saddle River v. Rockland Cty. Sewer Dist. No. 1*, 16 F.Supp.3d 294, 314 (S.D.N.Y. 2014) (same). Additionally, "[i]t is the movant's burden to show that no genuine factual dispute exists." *Vt. Teddy Bear Co. v. 1–800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004); *see also Aurora Commercial Corp. v. Approved Funding Corp.*, No. 13–CV–230, 2014 WL 1386633, at *2 (S.D.N.Y. Apr. 9, 2014) (same).

5 Fed. R. Bankr. P. 7056 makes Fed. R. Civ. P. 56 applicable in bankruptcy cases.

"However, when the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim," in which case "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs., L.P. v. Pricewaterhouse Coopers LLP*, 735 F.3d 114, 123 (2d Cir. 2013) (alteration and internal quotation marks omitted). Further, "[t]o survive a [summary judgment] motion ..., [a nonmovant] need[s] to create more than a 'metaphysical' possibility that [her] allegations were correct; [s]he need[s] to 'come forward with specific facts showing that there is a genuine issue for trial,' " *Wrobel v. Cty. of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) (emphasis omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)), and "cannot rely on the mere allegations or denials contained in the pleadings," *Walker v. City of N.Y.*, No. 11–CV–2941, 2014 WL 1244778, at *5 (S.D.N.Y. Mar. 26, 2014) (internal quotation marks omitted) (citing, inter alia, *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009)).

B. Analysis

Wells Fargo's Statement of Issues Presented on Appeal lists the following five issues:

1. Whether the Bankruptcy Court improperly sustained Debtor's objection to Wells Fargo's claim, and based thereon disallowed and expunged that claim.

2. Whether the Bankruptcy Court erred in concluding that the Debtor had overcome the presumption of authenticity that attaches to a signed [i]ndorsement on commercial paper.

3. Whether the Bankruptcy Court erred in concluding that Wells Fargo did not have standing to enforce the Debtor's note because it had not authenticated the indorsements on the note.

4. Whether the Bankruptcy Court erred in concluding that Wells Fargo had waived or failed to assert its claim of equitable estoppel, thus precluding a finding that the Debtor was estopped from contesting the enforceability of her note, or Wells Fargo's entitlement to enforce it as holder and servicer for the owner.

5. Whether the Bankruptcy Court erred in concluding that Wells Fargo was not the servicer of Debtor's note.

(Designation of Record and Statement of Issues Presented on Appeal ("Statement of Issues") at unnumbered 1-2 (Dkt. No. 2).) Put more directly, the appeal challenges the bankruptcy court's ruling as to (1) the authenticity of the blank indorsement, and (2) whether Wells Fargo established its standing to assert a claim on behalf of Freddie Mac as the servicer of Debtor's loan. The Court will consider each in turn.

1. Indorsement Authenticity

***5** **[3]** As explained by the bankruptcy court, and not disputed by Debtor on appeal, under Texas law, a holder of a note indorsed in blank has standing to enforce the note. (Order 6–7.)[6] Accordingly, the critical question before the bankruptcy court was the authenticity of the

blank indorsement on the Note attached to Claim No. 1–2; if the indorsement is authentic, Wells Fargo has standing to enforce the Note. The bankruptcy court first found that Debtor provided sufficient evidence to overcome the Texas UCC's presumption in favor of the authenticity of indorsements. (*See* Order 12–22.) Having found the presumption defeated, the bankruptcy court then determined that Wells Fargo did not carry its burden to establish the authenticity of the indorsement. (*Id.* at 22–30.)[7] The factual findings underpinning the bankruptcy court's ruling on the authenticity issue are reviewed for clear error, but its application of those facts to draw its conclusion that Debtor overcame the presumption is reviewed de novo. *See United States v. Aumais,* 656 F.3d 147, 154 (2d Cir. 2011) (reviewing district court's findings of fact for clear error, but reviewing "de novo a district court's application of the facts to draw conclusions of law, including a finding of liability" (alteration and internal quotation marks omitted)).

6 The Deed of Trust contains a Texas choice-of-law provision, (A120), and thus the claim objection is governed by Texas law. Regardless, because the Note and Deed of Trust were signed in Texas and concern property located in Texas, under New York conflict of law principles, Texas law would govern even in the absence of the choice of law provision. *See, e.g., Cavendish Traders, Ltd. v. Nice Skate Shoes, Ltd.,* 117 F.Supp.2d 394, 398-99 (S.D.N.Y. 2000) (noting that, "[u]nder New York conflict of law rules, the law of the jurisdiction having the greatest interest in the litigation will be applied," and that "choice of law clauses in contracts and loan documents are generally honored in New York" (internal quotation marks omitted)).

7 Wells Fargo does not challenge this finding on appeal. Although one of the issues on appeal identified by Wells Fargo is "[w]hether the Bankruptcy Court erred in concluding that Wells Fargo did not have standing to enforce ... Debtor's note because it had not authenticated the indorsements on the note," (Statement of Issues at unnumbered 2), which could possibly be read as challenging the bankruptcy court's finding with respect to Wells Fargo's burden described above, Wells Fargo's briefing challenges *only* the bankruptcy court's decision at step one of the analysis, (*see, e.g.,* Appellant Br. 2 (stating as the relevant issue "[w]hether the Bankruptcy Court erred in concluding that [Debtor] had rebutted the presumption of authenticity that attaches to signatures on commercial paper"); Reply Br. for Appellant Wells Fargo Bank, N.A. 6 (Dkt. No. 24) ("[B]ecause the presumption was unrebutted, [Debtor's] claim that Wells Fargo did not prove the indorsement's authenticity ... has no relevance to the case.")); *see also In re Residential Capital, LLC,* 552 B.R. 50, 62 n.9 (S.D.N.Y. 2015) (noting that issues not included in argument section of appellant's brief are waived).

a. Applicable Law

**[4]** **[5]** Under Texas law, "[t]o recover on a promissory note, the plaintiff must prove: (1) the existence of the note in question; (2) that the party sued signed the note; (3) that the plaintiff is the owner *or the holder of the note*; and (4) that a certain balance is due and owing on the note." *SMS Fin., Ltd. Liab. Co. v. ABCO Homes, Inc.,* 167 F.3d 235, 238 (5th Cir. 1999) (emphasis added); *see also Roberts v. Roper,* 373 S.W.3d 227, 232 (Tex. App. 2012) (same). Accordingly, an entity can enforce a note so long as it is the "holder" of the note, even if it does not own the note. *See* Tex. Bus. & Com. Code ("BCC") § 3.301 (" 'Person entitled to enforce' an instrument [includes] the holder of the instrument ... [and a] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument ...."). A "holder" of a note includes "the person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession." BCC § 1.201(b)(21)(A). A person may become the holder of a note either at issuance or negotiation. *See Johnson v. JPMorgan Chase Bank, N.A.,* No. 12–CV–285, 2013 WL 2554415, at *11 (E.D. Tex. June 7, 2013), *aff'd,* 570 Fed.Appx. 404 (5th Cir. 2014). When the instrument is payable to an identified entity, negotiation of the instrument requires transfer of possession of the instrument and its indorsement by the holder. BCC § 3.201(b). However, "[i]f an instrument is payable to bearer, it may be negotiated by transfer of possession alone." *Id.* An instrument bearing a "blank indorsement" is payable to bearer and, accordingly, may be transferred by possession alone. BCC § 3.205(b). Thus, if the blank indorsement that appears on the Note attached to Claim No. 1–2 is authentic, Wells Fargo is the holder of an instrument payable to bearer and is entitled to enforce the Note. *See In re Pastran,* No. 06–CV–34728, 2010 WL 2773243, at *3 (N.D. Tex. July 30, 2010) ("Thus, since AMHS is in possession of a promissory note indorsed in 'blank,' it is, by definition, a 'holder,' under

[§] 3.201(a)[,] ... assum[ing] that all of the indorsements on the [n]ote are authentic and authorized.").

***6** Under Texas law (and the UCC more generally), indorsements on negotiable instruments are presumed to be authentic. Specifically:

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument are admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but *the signature is presumed to be authentic* and authorized ....

BCC § 3.308(a) (emphasis added). The presumption of authenticity "rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant." BCC § 3.308 cmt. 1. To the extent "that a fact is 'presumed,' the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence." BCC § 1.206. Thus, in the context of indorsements, the bankruptcy court was required to find the blank indorsement to be authentic "unless and until evidence [was] introduced that support[ed] a finding of" inauthenticity. *Id.* Because the ultimate "burden of establishing validity [of the indorsement] is on the person claiming validity," BCC § 3.308(a), if sufficient evidence is introduced by Debtor to overcome the presumption, the burden shifts back to Wells Fargo to establish the validity of the indorsement "by a preponderance of the total evidence," *id.* cmt. 1; *see also In re Pastran,* 2010 WL 2773243, at *3 ("[The claimant] is not required to prove that the indorsements on the [n]ote are valid and authentic unless and until the [d]ebtor overcomes the presumption by putting on evidence that supports a finding that the indorsements on the [n]ote were somehow forged or unauthorized."). The showing necessary to overcome the presumption of authenticity is described in the official comment as "some sufficient showing." BCC § 3.308 cmt. 1. The evidence "need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor." *Id.*

b. Analysis

**[6]** **[7]** The bankruptcy court's conclusion that Debtor overcame the presumption of authenticity afforded to the blank indorsement was based on the following evidence: (1) that the version of the Note attached to Wells Fargo's initial Claim No. 1–1 did not contain the blank indorsement, (Order 15–16), (2) the existence of the Assignment of Mortgage from MERS to Wells Fargo, executed by Kennerty, an officer of Wells Fargo, only three days before Claim No. 1–1 was filed, (*id.* at 16-17), and (3) testimony by Kennerty of the general indorsement and assignment practices of the Wells Fargo indorsement and assignment teams, which showed "a general willingness and practice on Wells Fargo's part to create documentary evidence, after–the-fact, when enforcing its claims," (*id.* at 17-20).[8] Wells Fargo contends that, despite this evidence, Debtor "produced no actual proof that the ABN Amro indorsement was forged." (Appellant Br. 11.) Rather, according to Wells Fargo, the bankruptcy court "relied on inferences drawn from circumstantial evidence, but those inferences were either not probative, unsupported by the record, or wholly speculative." (*Id.*)

8 Although Wells Fargo states in its brief that it objected to the admission of the Kennerty deposition and that the bankruptcy court "never actually admitted it" and should not have admitted it because the testimony "was not relevant to the issue being tried, and clearly was more prejudicial than it was probative," (Appellant Br. 16, 20), Wells Fargo does not directly challenge the use of the testimony in its Statement of Issues Presented on Appeal. Regardless, the testimony was relevant to the issue of whether the indorsement was authentic. Seeing as he signed the Assignment of Mortgage, Kennerty obviously had some role with respect to Debtor's loan. He also testified based on personal knowledge as to the practices of the assignment and indorsement teams at Wells Fargo. The fact that Wells Fargo had assignment and indorsement teams that, as the bankruptcy court found, would act to improve the record with respect to various notes and deeds of trust in Wells Fargo's possession, makes the fact that the indorsement at issue here was added after-the-fact to improve Wells Fargo's standing more probable

"than it would be without the evidence." Fed. R. Evid. 401(a).

*7 As discussed above, Texas's version of the UCC required the bankruptcy court to accept the validity of the blank indorsement on the Note unless Debtor made "some sufficient showing" that the indorsement is invalid. BCC § 3.308 & cmt. Debtor's evidence "must be enough to support the denial [of validity] by permitting a finding in the defendant's favor." *Id.* As the bankruptcy court concluded, and neither party appears to challenge, the comment "suggests that the required evidentiary showing to overcome the presumption is similar to that needed to defeat a summary judgment motion: the introduction of sufficient evidence so that a reasonable trier of fact in the context of the dispute could find in [Debtor's] favor." (Order 13–14.) *Cf. Romano's Carryout, Inc. v. P.F. Chang's China Bistro, Inc.,* 196 Ohio App.3d 648, 964 N.E.2d 1102, 1107 (2011) (explaining that, under Ohio's identical provision, "[t]o rebut the presumption, the defendant need not present the quantum of evidence necessary for the grant of a directed verdict; rather, the defendant must only present evidence sufficient to permit the trier of fact to make a finding in the defendant's favor"); *Guardian Bank v. San Jacinto Sav. Ass'n,* 593 S.W.2d 860, 862–63 (Tex. App. 1980) ("In the absence of ... competent summary judgment evidence contesting [an indorsement's] genuineness, the presumption [under the Texas Business Code] that the [i]ndorsements are genuine stands."); *Freeman Check Cashing, Inc. v. State,* 97 Misc.2d 819, 412 N.Y.S.2d 963, 964 (Ct. Cl. 1979) (under identical language in New York's version of the UCC, overcoming the presumption of validity is not a question of "substantial evidence" or quantity of evidence, but rather that of "legal sufficiency").

Wells Fargo contends that the evidence relied upon by the bankruptcy court consisted entirely of unjustified speculation and conclusory allegations that cannot serve as the competent evidence necessary to overcome the indorsement's presumption of validity. (*See, e.g.,* Appellant Br. 20 ("The Bankruptcy Court's assumption ... that Kennerty must have forged indorsements is precisely the sort of speculation that cannot rise to the level of 'competent evidence' that the [blank] indorsement ... was forged."); Reply Br. for Appellant Wells Fargo Bank, N.A. ("Reply Br.") 2 (Dkt. No. 24) ("Speculative and conclusory assertions are all that the Bankruptcy Court and [Debtor] could point to.").) Wells Fargo is correct that if Debtor's evidence merely raised some "metaphysical doubt" as to the validity of the indorsement, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), Debtor would not have satisfied its burden and thus would not have overcome the presumption of validity in § 3.308, *see, e.g., In re Connelly,* 487 B.R. 230, 244 (Bankr. D. Ariz. 2013) (holding that the plaintiff, who challenged the authenticity of a deed of trust and other relevant documents but only "promised to bring forth additional evidence at a later date," relied on "metaphysical doubt [rather] than evidence deserving all reasonable inference").

Here, however, Debtor has not relied on mere speculation and conclusory assertions to overcome the presumption. Rather, Debtor offered specific evidence from which the bankruptcy court found that a reasonable juror could draw the inference that the blank indorsement was not genuine. Wells Fargo's arguments to the contrary are not persuasive.

First, Wells Fargo contends that "a difference in copies [of notes attached to various court filings] is not probative evidence of forgery." (Appellant Br. 15.) Although Wells Fargo is correct that some courts have held that evidence of differences among notes attached to various court filings, on its own, and in certain circumstances, does not constitute a sufficient showing to overcome the presumption of genuineness, the Court disagrees that the sequence of events in *this case* is not in any way probative evidence of forgery, particularly in conjunction with the other evidence relied upon by the bankruptcy court. It is undisputed that Wells Fargo's first proof of claim, Claim No. 1–1, contained a copy of the Note containing no blank indorsement. (*See* A71.) Wells Fargo does not dispute the bankruptcy court's finding that Debtor's counsel contacted Wells Fargo's counsel after reviewing Claim No. 1–1, "with questions regarding Wells Fargo's standing to assert the claim." (Order 3.) Wells Fargo eventually filed the amended proof of claim, Claim No. 1–2, which was the exact same as the previous claim in all respects except that the copy of the Note attached to the claim contained the blank indorsement. (*Id.* at 4.) While certainly not conclusive of forgery, this sequence of events sufficiently distinguishes the present case from others in which the later-filed note containing the relevant indorsement appeared in filings *before* any issues were raised with respect to the claimant's standing. For example, in *In re Phillips,* 491 B.R. 255 (Bankr. D. Nev. 2013), relied upon by Wells Fargo, the entity seeking

to enforce a note did not attach a copy of the note or the relevant allonge to its initial proof of claim, but did attach the note and allonge to later filings. *See id.* at 259. The debtor argued that since the note and allonge were not produced at filing, and since the proof of claim was never amended formally, the subsequent appearance of the allonge later in the proceeding meant that the allonge was forged at some point in between. *Id.* at 273. The court found that the relevant "sequence of events ... d[id] not constitute a threshold showing of fraud or forgery." *Id.* Of particular note, although the initial proof of claim did not include the note or allonge, a separate motion to lift a stay *did* attach copies of the note and allonge, and the motion to lift the stay "was filed ... long before [the debtor] objected to the [p]roof of [c]laim." *Id.* Thus, in that case, the relevant indorsement appeared before doubts had been raised as to the standing of the entity seeking to collect. *See also In re Stanley,* 514 B.R. 27, 40 (Bankr. D. Nev. 2012) (same sequence of events as *In re Phillips*).

***8** The Court need not determine, however, whether the particular sequence of events here is sufficient on its own to overcome the presumption of genuineness because the bankruptcy court relied on evidence beyond just the different versions of the Note, including the Assignment of Mortgage signed by Kennerty purporting to assign the Deed of Trust securing Debtor's loan from MERS to Wells Fargo. (*See* Order 16–17.) The bankruptcy court was troubled by the following aspects of the Assignment of Mortgage: (1) the Assignment of Mortgage authorizing the assignment from MERS to Wells Fargo was signed by Kennerty, who was an employee of Wells Fargo; (2) the earlier assignment of the Deed of Trust by ABN Amro to MERS assigned the Deed of Trust to MERS "as nominee" of Washington Mutual (without mention of Washington Mutual's successors and assigns), an entity that had since ceased to exist, and so MERS and/or Kennerty were unauthorized to assign the Deed of Trust to Wells Fargo; and (3) the Assignment of Mortgage was dated July 12, 2012, just three days before Wells Fargo filed Claim No. 1–1. (*Id.* at 3, 6 n.7, 16.) To the bankruptcy court, this assignment was evidence of efforts to improve the record surrounding Wells Fargo's standing to file a proof of claim enforcing the Note.

Wells Fargo objects to Debtor's and the bankruptcy court's reliance on the Assignment of Mortgage. Wells Fargo stresses that employees of MERS member entities often sign documents on MERS's behalf and that there was, therefore, nothing untoward about Kennerty's execution of the Assignment of Mortgage. (Appellant Br. 16-17.) Even granting Wells Fargo this point, the Assignment of Mortgage remains probative evidence of the possible invalidity of the blank indorsement because of MERS's apparent lack of authority to assign the Deed of Trust in light of Washington Mutual's non-existence and, more importantly, the assignment's timing. The Assignment of Mortgage was signed July 12, 2010, just three days before Proof of Claim No. 1–1 was filed. (*See* A104-A105; *see also* A67.) If Wells Fargo already possessed the Note with a blank indorsement, which would be sufficient to confer standing to enforce the Note three days later, what would have necessitated the Assignment of Mortgage three days before filing the proof of claim? The decision to execute such an assignment is even more unusual given the likelihood that MERS lacked authority to assign a Deed of Trust as nominee for a defunct entity. Based on the timing of the Assignment of Mortgage and the lack of authority (as well as Kennerty's deposition testimony, discussed below), the Court cannot find that the bankruptcy court's factual finding that the Assignment of Mortgage "was prepared by Wells Fargo's then counsel to 'improve' the record supporting Wells Fargo's right to file a secured claim," (Order 16), was clearly erroneous.

The situation here is quite similar to that in *In re Tarantola,* No. 09–BK–9703, 2010 WL 3022038 (Bankr. D. Ariz. July 29, 2010). In that case, Deutsche Bank filed a motion for relief from stay on December 8, 2009, on the grounds that the debtor was in default and that Deutsche Bank was the holder of the relevant note secured by debtor's property. *Id.* at *1. Deutsche Bank attached to that filing a note containing no indorsements and no allonges. *Id.* at *2. Just under a month later, Deutsche Bank filed a new exhibit in support of its motion that included an allonge that purported to assign the note from the originator of the loan to Deutsche Bank. *Id.* at *2. Finally, at an evidentiary hearing on the issue of Deutsche Bank's standing, Deutsche Bank introduced the original note, which now bore two indorsements, the later-dated indorsement being a blank indorsement. *Id.* At the hearing, a Deutsche Bank witness admitted that the allonge was "created after the [motion was filed] to 'get the attorneys the information they needed.' " *Id.* at *3. Addressing whether the blank indorsement provided Deutsche Bank with standing to seek relief from the stay, the court chose not to "apply the usual evidentiary

presumptions of validity to the [i]ndorsements" because the claimant failed to provide a "credible explanation" for differences between various versions of the relevant note filed with the court and because Deutsche Bank admitted that the allonge was created after the fact to improve the record with respect to its standing. *Id.* at *4.

***9** The Court acknowledges that the circumstances in this case are not identical to those in *In re Tarantola.* Unlike the allonge in that case, which was created *after* the motion for relief from stay was filed, the Assignment of Mortgage executed by Kennerty was filed three days *before* Claim No. 1–1 was filed. However, such assignment, like the allonge in *In re Tarantola,* remains evidence of the fact that Wells Fargo felt compelled to create a better record regarding its standing, despite purportedly possessing a note indorsed in blank, which, under Texas law, provided Wells Fargo standing to enforce the Note as a holder. [9]

9 Also, as with MERS's/Kennerty's lack of authority to assign the Deed of Trust in light of the fact Washington Mutual had ceased to exist, the *In re Tarantola* court found that the after-the-fact allonge would have been ineffective to transfer the note because the party executing it "had no authority to do so." *In re Tarantola,* 2010 WL 3022038, at *4. It stands to reason that a claimant who is willing to execute an unauthorized document to create standing is more likely willing to forge a blank indorsement to create standing as well.

Finally, although Kennerty did not expressly testify that the Assignment of Mortgage was executed to improve the record with respect to Debtor's loan, the bankruptcy court did find that his deposition testimony established that Wells Fargo had a "general willingness and practice ... to create documentary evidence, after-the-fact, when enforcing its claims," (Order 17–18; *see also id.* at 22 (concluding that, based on Kennerty's testimony, "[it] is more reasonable to infer ... that ... Wells Fargo was improving its own position by creating new documents and indorsements *from third parties to itself* to ensure that it could enforce its claims")), a finding that this Court does not believe is clearly erroneous. Kennerty repeatedly testified to a process whereby Wells Fargo's outside enforcement counsel would inquire of Kennerty and his "assignment team" whether or not a certain assignment existed and if it did not the attorney would draft the assignment and someone, possibly Kennerty, would sign it. (*See, e.g.,* A1191 ("[I]f the assignment needed to be created they would have advised the ... requesting attorney.... that we did not have the assignment in the collateral file, then they needed to draw up the appropriate document."); A1231 ("[I]f there was not an assignment in there then they would ... advise the attorney that we did not have it, that they would need to draft the ... appropriate document."); A1236 ("[I]f it's something that was not in the file or it was something that was in the file, but couldn't be used[,] then they would advise the requesting attorney to go ahead and draft the actual document."); A1238 ("The attorney would ... determine that an assignment was needed, then they would reach out to the assignment team to request an assignment for A to B, [and if] we d[idn't] have it, [we would tell the attorney], you need to prepare it.").) Kennerty also testified to a seemingly similar process with respect to indorsements. "The request would come in" and the indorsement team "would check to see if [they] had the collateral file" and the note and once they located the note they would "check to see if there was any [i]ndorsement on the back of the note." (A1250.) Kennerty did not specifically recall how the indorsement team would go about indorsing the note if there was no indorsement, but, to the best of his recollection, "a stamp was involved but then it had to be signed." (A1251.)

***10** The Court agrees with the bankruptcy court that, while "it is conceivable that all of Wells Fargo's newly created mortgage assignments and newly created indorsements were proper ... that interpretation certainly does not leap out from ... Kennerty's testimony." (Order 21.) As such, the Court cannot say that it is "left with the definite and firm conviction that a mistake has been made," *Travellers,* 41 F.3d at 1574 (internal quotation marks omitted), and thus cannot say that the bankruptcy court's findings with respect to the testimony were clearly erroneous. Although on its own this testimony as to the general practices of We lls Fargo's assignment and indorsement teams may not have been especially probative as to whether the blank indorsement on the Note in particular was forged, the sequencing of the two claims and the versions of the attached Notes and the dubious, last-minute Assignment of Mortgage make it plausible that Wells Fargo's general efforts to "improve the record" with respect to its various mortgages led to the forgery of the blank indorsement on the Note.

Therefore, when the evidence is considered together, the Court concludes that the bankruptcy court did not err in finding that Debtor does not rely merely on speculation or conjecture, and that a reasonable fact-finder could infer that the blank indorsement was not genuine, eliminating the indorsement's presumption of validity. *Cf., e.g., Nguyen v. Fed. Nat'l Mortg. Ass'n,* 958 F.Supp.2d 781, 788–89 (S.D. Tex. 2013) (holding that "no genuine fact issue material to determining the [i]ndorsements' validity arises" based on the debtor's allegations that the alleged indorsements "appear very different and contain glaring discrepancies" (internal quotation marks omitted)); *Patrick v. Bank of N.Y. Mellon,* No. 11–CV–1304, 2012 WL 934288, at *12 (D. Colo. Mar. 1, 2012) (finding that the fact that the debtor "is 'suspicious' and 'has doubts' about" the validity of a signature is insufficient to overcome presumption of validity); *Nw. Bank Minn. v. Diaz,* No. 96–CV–5335, 1998 WL 30677, at *4 (N.D. Ill. Jan. 21, 1998) (concluding that the debtor did not overcome the presumption of genuineness where the evidence "consisted of a self-serving denial that he had signed the Guaranty along with a far-fetched story about how other unknown or unnamed individual(s) might have forged his signature"); *In re Bass,* 366 N.C. 464,738 S.E.2d 173, 177 (2013) (the debtor's "bare assertion," that "We don't know who had authority" and that "You have to have something more than a mere stamp" was insufficient to overcome the presumption in favor of the signature (alteration and internal quotation marks omitted)). [10] As such, the evidence shifted the burden to Wells Fargo to establish the authenticity of the blank indorsement by a preponderance of the evidence. [11]

10 Though not directly analogous to the situation here, the Court notes that some courts have found that merely a defendant's denial that he or she signed the document along with alleged differences in signatures was sufficient to overcome the presumption. *See, e.g., Mortgage Lenders Network, USA, Inc. v. Adkins,* No. 04–CV–7767, 2007 WL 963212, at *4–5 (N.D. Ohio Mar. 28, 2007) (noting that signatures are "presumptively valid" but holding that "the burden [to establish validity] now shifts to [the] [p]laintiff to provide evidence that [the defendant's] signatures are in fact valid," based on the defendant's deposition testimony which "repeatedly stated that [someone] 'forged my name, forged my signature,' " and "detailed the way in which the signatures on the appraisals differ from her bona fide signature" (alterations, italics, and internal quotation marks omitted)); *First Nat'l Bank v. A.A. Blackhurst,* 176 W.Va. 472, 345 S.E.2d 567, 572 (1986) ("In the present case, [the defendant] denied the genuineness of his signature and introduced a financial statement bearing his signature into evidence. Accordingly, this evidence was substantial enough to remove the presumption in favor of the bank.").

11 Moreover, it bears noting that the justifications underpinning the presumption of validity are not particularly apt in situations like Debtor's. As noted earlier, the official comment to the BCC explains that the presumption is warranted because (1) "in ordinary experience forged or unauthorized signatures are very uncommon," and (2) "normally any evidence is within the control of, or more accessible to, the [party challenging the signature's authenticity]." BCC § 3-308 cmt. 1. In the wake of the recent foreclosure crisis, and the dubiousness of the common robo-signing practices of various banks and other foreclosing entities, *see, e.g.,* Matthew Petrozziello, *Who Can Enforce? The Murky World of Robo-Signed Mortgages,* 67 Rutgers U. L. Rev. 1061, 1068-70 (2015), it may be time to reconsider whether "forged or unauthorized signatures" remain "very uncommon," *see* Eric A. Zacks & Dustin A. Zacks, *A Standing Question: Mortgages, Assignments, and Foreclosure,* 40 J. Corp. L. 705, 706 (2015) ( "[I]n the face of an overwhelming volume of foreclosures to be processed, mortgagees and their assignees often failed to assign the mortgages properly, and, in some instances, committed fraud or other unauthorized acts in order to correct the assignment paper trail."). Also, this is not a case where evidence regarding the validity of the indorsement would be in the control of, or more accessible to, Debtor. One would expect that a large banking and financial services company would have readily accessible evidence by which it could establish the timing and validity of the blank indorsement.

***11** This is not a finding that Wells Fargo did, in fact, forge the blank indorsement, or that Wells Fargo has a general practice of forging indorsements in situations akin to this one. Rather, the Court has only found that the bankruptcy court's factual findings with respect to the blank indorsement are sufficient to overcome the relatively modest presumption of validity that attaches to the indorsement. The burden thus shifted to Wells Fargo to establish, by a preponderance of the evidence, that the indorsement was genuine. The bankruptcy court found that Wells Fargo failed to do so. As noted above, Wells Fargo did not argue in its briefing before this Court that

it made such a showing in the event the presumption of authenticity was overcome. Accordingly, the Court affirms the bankruptcy court's ruling that Wells Fargo lacks standing to file its proof of claim as a holder of the Note.

2. Servicer Standing

Despite not being a holder of the Note, Wells Fargo argues that it can still file a proof of claim in a representative capacity on behalf of Freddie Mac, as a servicer of Debtor's loan. Ruling from the bench, Judge Drain held that there was no genuine issue of material fact that "dispute[s] the proposition that Wells Fargo is not the servicer of th[e] loan or that it is, in fact, a loan owned by Freddie Mac, either based on its ownership of the [N]ote or the ... [D]eed of [T]rust." (A960.) In support of this ruling, Judge Drain noted that Wells Fargo did not sign the relevant claims as Freddie Mac's agent, but actually named itself as the creditor, and that Wells Fargo was unable to produce either an "enforceable servicing agreement or contract between it and Freddie Mac," or any evidence of "any record of having any payments [made] by Wells Fargo to Freddie Mac in connection with collections on this loan." (A958-A960.) Considering Wells Fargo's evidence in support of the servicing relationship, Judge Drain was not swayed by "a letter, apparently from Freddie Mac, ... authorizing a loan modification ... that Wells Fargo ha[d] negotiated," as well as "very general testimony by Wells Fargo's 30(b)(6) witness that there is in fact a loan servicing relationship between Freddie Mac and Wells Fargo." (A959–A960.) [12]

12 With respect to the letter, Judge Drain stated that the letterhead "doesn't look like any letterhead I've ever seen before." (A959.)

a. Applicable Law

**[8]** **[9]** **[10]** To file a proof of claim, a claimant must be a real party in interest, which means that the claimant is "a 'creditor or the creditor's authorized agent.' " *In re Minbatiwalla,* 424 B.R. 104, 108 (Bankr. S.D.N.Y. 2010) (quoting Fed. R. Bankr. P. 3001(b)); *see also In re Thalmann,* 469 B.R. 677, 683 (Bankr. S.D. Tex. 2012) (same); *In re Simmerman,* 463 B.R. 47, 59 (S.D. Ohio 2011) (same). In other words, "[t]o have an allowed proof of claim, the claimant must prove an initial fact: that it is the creditor to whom the debt is owed or, alternatively, that it is the authorized agent of the creditor." *In re Parrish,* 326 B.R. 708, 719 (Bankr. N.D. Ohio 2005). The real party in interest "with respect to a mortgage proof of claim is the party entitled to enforce the note and its accompanying mortgage." *In re Simmerman,* 463 B.R. at 59 (internal quotation marks omitted); *see also In re Hunter,* 466 B.R. 439, 448 (Bankr. E.D. Tenn. 2012) (same); *In re Wright,* No. 10–3893, 2012 WL 27500, at *2 (Bankr. D. Haw. Jan. 5, 2012) (same), *reconsideration denied,* 2012 WL 260744 (Bankr. D. Haw. Jan. 27, 2012). Accordingly, Wells Fargo is a real party in interest with standing to assert the proof of claim if it is either an entity entitled to enforce the Note or it is the "authorized agent" of an entity that is entitled to enforce the Note.

**[11]** Wells Fargo contends that it was "entitled to file [the] proof of claim on behalf of Freddie Mac as the servicer of [Debtor's] loan." (Appellant Br. 12.) "Mortgage servicers have been determined to constitute authorized agents with standing to file proofs of claim or seek stay relief." *In re Sia,* No. 10–41873, 2013 WL 4547312, at *12 (Bankr. D. N.J. Aug. 27, 2013); *see In re Minbatiwalla,* 424 B.R. at 109 (same); *In re Conde–Dedonato,* 391 B.R. 247, 250 (Bankr. E.D.N.Y. 2008) ("A servicer of a mortgage is ... a creditor and has standing to file a proof of claim against a debtor pursuant to its duties as a servicer."); *see also 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.").

b. Analysis

***12** **[12]** Wells Fargo does not dispute that it failed to produce any executed agreement governing its servicing relationship with Freddie Mac or evidence of any payments made from Wells Fargo to Freddie Mac in its alleged role as servicer. Rather, Wells Fargo argues that it was not required to produce any servicing agreement or remittance reports, (*see* Appellant Br. 23-24; Reply Br. 6), and points to a host of other evidence that it argues establishes that Wells Fargo "was Freddie Mac's servicer" with respect to Debtor's loan, (*see* Appellant Br. 23). In particular, Wells Fargo relies on: (1) the deposition testimony of Ellen Brust, Wells Fargo's corporate representative, (*see* A568-A878); (2) a loan modification between Wells Fargo and Debtor, (*see* A134-

A136); (3) a letter purportedly from Freddie Mac to Wells Fargo that identified Debtor's loan and approved the loan modification between Wells Fargo and Debtor, (*see* A137-A138); and (4) correspondence dated after Claim No. 1–1 was filed: an email from the address "web_inquiries @freddiemac.com," dated July 27, 2010, stating that Freddie Mac's "records show that Freddie Mac is the owner of [Debtor's] mortgage," (*see* A226), and an August 18, 2010 letter, in which Wells Fargo informs Debtor's counsel that "[t]he investor of the loan is Freddie Mac," (*see* A222).

The Court acknowledges that Wells Fargo's evidence is not overwhelming, and, indeed, its inability to produce the servicing agreement outlining the exact contours of its relationship with Freddie Mac with respect to Debtor's loan is troubling. However, at the summary judgment stage, Wells Fargo need only proffer "evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs.*, 735 F.3d at 123 (internal quotation marks omitted). The Court finds that, based on the evidence submitted, Wells Fargo has satisfied its burden. Wells Fargo has provided some evidence indicating that it operated in a servicer role with respect to Debtor's loan, including that Wells Fargo sent Debtor the "Hello" letter advising Debtor that Wells Fargo would begin servicing her loan on February 16, 2007, (A286), and a loan modification agreement subsequently entered into by Wells Fargo and Debtor, (A134–A136). Moreover, a reasonable factfinder could conclude that Wells Fargo serviced the loan *for* Freddie Mac, based on the letter from Freddie Mac to Wells Fargo referencing and approving the loan modification. (*See* A137-A138.) In that letter, Freddie Mac lists Debtor as the "Borrower[ ]" of the loan, and the loan is identified with a "Freddie Mac Loan [Number]" and a "Servicer Loan [Number]." (A137.) Therefore, a reasonable factfinder could conclude that Wells Fargo serviced Debtor's loan for Freddie Mac, and therefore could determine that Wells Fargo had standing to file the proof of claim on Freddie Mac's behalf. *See, e.g., In re Sia,* 2013 WL 4547312, at *12; *In re Minbatiwalla,* 424 B.R. at 109.

Ultimately, Wells Fargo has submitted sufficient evidence to create a genuine issue of fact as to its authorization to act on Freddie Mac's behalf in the context of Debtor's loan. The bankruptcy court's decision granting Debtor's partial summary judgment motion dismissing Wells Fargo's claim insofar as it is brought in a representative capacity on behalf of Freddie Mac is reversed. [13]

13 The Court notes that Judge Drain's bench ruling observed that, apart from its inability to establish that it was the servicer of Debtor's loan, Wells Fargo failed to properly file Claim No. 1–2 in a representative capacity. (*See* A958.) Wells Fargo concedes that Claim No. 1–2 does not expressly state that the claim is being filed by Wells Fargo on behalf of Freddie Mac, but argues that a ruling disallowing its claim on that "hyper-technical basis" would be in error because Debtor "would not be prejudiced by an amendment of Wells Fargo's proof of claim." (Appellant Br. 12.) As Wells Fargo points out, courts have the discretion to allow late-filed amendments to proofs of claim in certain circumstances, *see, e.g., In re Enron Corp.,* 419 F.3d 115, 133 (2d Cir. 2005) (detailing criteria for considering late-amended proofs of claim), including where the amendment would indicate the filer's representational capacity and identify the true creditor, *see In re Unioil,* 962 F.2d 988, 992–93 (10th Cir. 1992). Thus, to the extent the argument remains available to Wells Fargo and relevant to the issue of its standing, Wells Fargo can consider seeking leave to amend Claim No. 1–2.

## III. Conclusion

***13** For the reasons given herein, the judgment of the Bankruptcy Court is affirmed in part and reversed in part. The Clerk of the Court is respectfully requested to close this case.

SO ORDERED.

**All Citations**

--- F.Supp.3d ----, 2016 WL 5660325, 90 UCC Rep.Serv.2d 830

**End of Document**

**ATTACHMENT 4**

***In re Merritt***

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re Brooks, Bankr.W.D.N.Y., April 15, 2016

555 B.R. 471
United States District Court,
E.D. Pennsylvania.

In re Linda Merritt, Debtor.
Linda Merritt, Appellant
v.
PNC Bank, National Association, Appellee.
Linda Merritt, Appellant
v.
PNC Bank, National Association, Appellee.

CASE NO. 11-18134
|
CIVIL ACTIONS NOS. 15-04282, 15-04937
|
Signed March 15, 2016
|
Filed 03/16/2016

**Synopsis**

**Background:** Chapter 13 debtor objected to proof of claim filed by servicing agent for mortgage loan based on servicer's alleged lack of standing and also sought to cram claim down to value of real property securing it. The Bankruptcy Court denied both the claim objection and cram-down request, as well as debtor's motion for reconsideration, and debtor appealed.

**Holdings:** The District Court, Pappert, J., held that:

[1] loan servicer that was holder of mortgage note had standing to file proof of claim for mortgage debt;

[2] loan servicer did not commit a fraud on the court when, in apparent effort to comply with the redaction protocol articulated in Bankruptcy Rule, it redacted name of owner of mortgage loan from proof of claim; and

[3] mere fact that, at time that her Chapter 13 case was pending, debtor was renting out the real property that secured mortgage note and regarded other property in Florida as her homestead did not permit debtor to modify mortgagee's rights by cramming down its claim to value of real property securing it.

Affirmed.

West Headnotes (7)

[1] **Bankruptcy**
⇦ Discretion

Bankruptcy court's denial of motion for reconsideration is reviewed for abuse of discretion.

Cases that cite this headnote

[2] **Bankruptcy**
⇦ Who May File

Loan servicer that was holder of mortgage note had standing to file proof of claim for mortgage debt, regardless of whether it was also the "owner" of mortgage loan.

Cases that cite this headnote

[3] **Bankruptcy**
⇦ Judgment or Order

Servicer of Chapter 13 debtor's mortgage loan did not commit a fraud on the court when, in apparent effort to comply with the redaction protocol articulated in Bankruptcy Rule, it redacted name of owner of mortgage loan from proof of claim which it filed for amounts owing on mortgage note in its possession; even assuming that servicer, in redacting owner's name, had perpetrated an intentional fraud, bankruptcy court was not deceived thereby, a prerequisite for any fraud on the court.

Cases that cite this headnote

[4] **Bankruptcy**
⇦ Judgment or Order

To demonstrate a fraud on the court, party must show (1) an intentional fraud, (2) by

officer of court, (3) which is directed at court itself, and (4) which in fact deceives the court.

Cases that cite this headnote

[5] **Bankruptcy**
⇦ Reconsideration

Bankruptcy court did not abuse its discretion in denying Chapter 13 debtor's motion for reconsideration of order denying her request to "cram-down" mortgagee's claim to value of residential property securing it, where debtor's request for reconsideration was untimely, and debtor made no showing of any newly discovered evidence, change in the law, or manifest injustice.

Cases that cite this headnote

[6] **Bankruptcy**
⇦ Security interests in principal residences

Critical time for determining whether creditor is creditor whose claim is secured solely by interest in real property that is Chapter 13 debtor's principal residence, such that creditor is protected by anti-modification provision from having its rights modified, is when creditor takes security interest in property. 11 U.S.C.A. § 1322(b)(2).

1 Cases that cite this headnote

[7] **Bankruptcy**
⇦ Liens securing claims not allowed

**Bankruptcy**
⇦ Security interests in principal residences

Mere fact that, at time that her Chapter 13 case was pending, debtor was renting out the real property that secured mortgage note and regarded other property in Florida as her homestead did not permit debtor to modify mortgagee's rights by cramming down its claim to value of real property securing it, where debtor, in connection with mortgage loan, had indicated that she intended to occupy mortgaged property as her principal residence and did not disclose any rental income from property or any anticipated rental income. 11 U.S.C.A. § 1322(b)(2).

Cases that cite this headnote

**Attorneys and Law Firms**

***472** Barry F. Penn, Penn & Robinson, Philadelphia, PA, Eugene A. Camposano, Plymouth Meeting, PA, Thomas D. Schneider, Wallingford, PA, for Appellant/ Debtor.

Matthew Summers, Ballard Spahr LLP, Wilmington, DE, Nicole B. LaBletta, Udren Law Offices PC, Cherry Hill, NJ, for Appellee.

Sarah Schindler-Williams, Ballard Spahr LLP, Philadelphia, PA.

## MEMORANDUM

PAPPERT, District Judge.

Before the Court are two appeals from the United States Bankruptcy Court for the Eastern District of Pennsylvania, both involving Appellant Linda Merritt ("Merritt") and Appellee PNC Bank, National Association ("PNC"). After Merritt defaulted on her mortgage held by PNC and filed for Chapter 13 bankruptcy protection, PNC filed a proof of claim in the bankruptcy proceeding. Merritt asserted that PNC did not have standing to file a proof of claim because it was not the owner of the mortgage loan. She also sought to modify the terms of the loan in bankruptcy such that the value of PNC's claim was reduced to the value of her house.

The Bankruptcy Court found in favor of PNC on both of those claims: it held that PNC had standing to file a proof of claim (the "Claim Objection Order") and that Merritt could not "cram-down" her outstanding mortgage to the value of her home (the "Cram-Down Order"). Merritt sought reconsideration of those two decisions, which the Bankruptcy Court denied. She now appeals the decisions denying her two motions for reconsideration. She contends that the Bankruptcy Court abused its discretion by: (1) incorrectly granting PNC standing to file its proof of claim; and (2) not allowing her to "cram-down" the mortgage on her home. PNC contends that

the Bankruptcy Court came to the correct conclusion on both the proof of claim and *473 "cram-down" issue. For the reasons discussed below, the Court affirms the order denying reconsideration of the Bankruptcy Court's Claim Objection Order and Cram-Down Order.

## I.

Merritt owns improved residential real property located at 699 West Glen Rose Road, Coatesville, PA 19320 (the "Property"), which she uses as her primary residence. (R-368.)[1] In approximately October 2004, Merritt contacted National City Mortgage Company ("National City") and initiated the process for refinancing a then-existing mortgage loan secured by the Property. (*See* Appellee's Brief at 3, No. 15-cv-04937, ECF No. 8.) On November 5, 2004, she executed and submitted to National City a Uniform Residential Loan Application (the "Loan Application"), on which she stated that the Property was her "Primary Residence." (R-397 § II.) She also stated that her mailing address was the Property's address and that she was not receiving any rental income from the Property. (R-398 §§ III, V.)

1 The pages in the Appendix to the Record in Case No. 15-cv-04937 are labeled with a prefix of "R-." For ease of reference, the Court maintains this numbering scheme when citing to the Record.

On November 24, 2004, National City approved the Loan Application. (R-413–15.) Merritt delivered a note (the "Note") payable to National City and a mortgage (the "Mortgage," collectively with the Note, the "Mortgage Loan") granting it a lien against the Property. (R-413–33.) The Mortgage stated that Merritt agreed to "occupy, establish, and use the Property as [her] principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as [her] principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing...or unless extenuating circumstances exist which are beyond [Merritt's] control." (R-424 at § 6.) Section 8 of the Mortgage stated that an event of default occurs if Merritt provided "materially false, misleading, or inaccurate information or statements to PNC...in connection with the Loan," which was defined to include "representations concerning [Merritt's] occupancy of the Property as [her] principal residence." (R-418.) The Mortgage did not contain a "Second Home," "1-4 Family" or "Other" rider. (R-418.)

PNC became the successor-in-interest to the Mortgage after it acquired National City in 2008 and is the current servicer of the Mortgage. (R-360, 479.)

### A. State Foreclosure Litigation and Bankruptcy Litigation

On May 11, 2010, after Merritt defaulted on a series of payments on the Mortgage Loan, PNC commenced a foreclosure proceeding (the "Foreclosure Action") against Merritt in the Chester County Court of Common Pleas. (R-27.) PNC stated in its complaint that it is "the legal holder of the Mortgage that is the subject of this action." (C.R. 187.)[2] The state court entered a default judgment in PNC's favor after Merritt failed to respond to the complaint. (R-28.)

2 Citations to "C.R." are to PNC's Counter-Record submitted in connection with its response brief in Case No. 15-cv-04282.

Merritt then filed a "Petition to Open Judgment and Answer and New Matter Counterclaim" (the "Petition to Open Judgment") asserting, among other things, that PNC failed to produce any evidence that it was the holder of the Note and Mortgage. (C.R. 6–14.) On October 28, 2010, the state court denied the Petition to *474 Open Judgment. (C.R. 5.) Merritt appealed that decision, which the Superior Court of Pennsylvania dismissed on January 10, 2011, due to her failure to prosecute the appeal. (C.R. 165, 180.)

On October 10, 2011, Merritt filed a voluntary petition for Chapter 13 bankruptcy (the "Bankruptcy Case") in the United States Bankruptcy Court for the Eastern District of Pennsylvania (the "Bankruptcy Court"). *See In re Linda Merritt*, No. (Bankr. E.D. Pa. filed Oct. 11, 2011). On November 14, 2011, PNC filed a proof of claim (the "Proof of Claim") in the Bankruptcy Case asserting a claim for $358,866.71 secured by the Property. (R-1285–1313.) The Proof of Claim stated that the Mortgage Loan was $86,790.27 in arrears as of the date of Merritt's bankruptcy filing and attached a copy of the Note and Mortgage. PNC redacted certain personal information on the Note and Mortgage, including the Freddie Mac loan identifier. (C.R. 118, 135.) The Note states that it is payable to National City and the Mortgage identifies

National City as the lender. (C.R. 118–38.) PNC did not redact from the Note and Mortgage a label stating that the form used for each is the "Fannie Mae/Freddie Mac Uniform Instrument." (C.R. 118, 135.)

On September 25, 2012, PNC filed a motion for relief from the automatic stay as a result of Merritt's failure to make post-petition payments due under the Mortgage Loan (the "Lift Stay Motion"). (R-4–9.) In her response, Merritt claimed that PNC lacked standing as a "true creditor" due to PNC's disclosure that Freddie Mac was the investor in the Mortgage Loan. (R-10–25.) On November 29, 2012, Merritt filed a complaint against PNC in the Bankruptcy Case, asserting against PNC claims of fraud, abuse of process, and violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"). (C.R. 140–59.) She claimed that PNC lacked standing to prosecute the Foreclosure Action because it was not the owner of the Note and Mortgage and that PNC had misrepresented its status as owner of those instruments to the state court. (R-150–58.) She premised her RESPA violation on PNC's alleged failure to inform Merritt that the servicer of the Mortgage Loan changed after PNC acquired National City. (C.R. 140–59.)

PNC moved to dismiss the complaint on the grounds that it had only represented it was the holder of the Note and Mortgage in the Foreclosure Action and not that it was the owner of the Mortgage Loan. (C.R. 171–72.) On March 25, 2013, the Bankruptcy Court dismissed all of Merritt's claims in the Adversary Proceeding: it dismissed her fraud and RESPA claims with prejudice but granted her leave to amend her abuse of process claim. (C.R. 181.) On July 2, 2013, Merritt filed an amended complaint reasserting her abuse of process claim. (C.R. 182–93.) She premised that claim on the allegation that PNC misrepresented itself as the "holder" of the Mortgage Loan in the Foreclosure Action and Bankruptcy Case even though Freddie Mac was, in fact, the investor/owner. (C.R. 182–93.) After briefing on the issue, the Bankruptcy Court dismissed Merritt's amended complaint with prejudice on December 12, 2014. (C.R. 194–200.) It held that Merritt had not pled a viable claim for abuse of process because the Bankruptcy Court had previously dismissed with prejudice Merritt's claims that PNC mispresented its status in the Foreclosure Action. (C.R. 198 n.5.)

Merritt twice requested reconsideration of the Bankruptcy Court's dismissal of Adversary Proceeding, which the Bankruptcy Court denied on December 22, 2013, and January 5, 2015. (C.R. 207, 239.) Merritt did not appeal from the Bankruptcy ***475** Court's dismissal of her claims or its denial of her motions for reconsideration.

**B. The Claim Objection and Cram Down Motion**

On January 7, 2015, Merritt filed a cross-motion to PNC's Lift Stay Motion in which she sought a determination of the value of the Property and to "cram-down" PNC's secured claim to the value of the Property (the "Cram-Down Motion"). (R-357–62.) Merritt contended that the Mortgage Loan could be crammed-down to the fair market value of the property pursuant to 11 U.S.C. § 1322(b) because: (1) she rented a single room of the Property; (2) the Property was not her "domicile;" and (3) the Mortgage Loan was eligible for modification under Freddie Mac's post-foreclosure sale buy-back initiative. (R-359–60; R-479–81.)

She also filed an objection to PNC's Proof of Claim (the "Claim Objection") on February 17, 2015, despite the Bankruptcy Court's ruling in the Adversary Proceeding dismissing her assertions that PNC lacked standing. Merritt argued that PNC lacked standing to file the Proof of Claim because it was not the "owner" of the Note and Mortgage, though she recognized that "PNC admittedly is the mortgage servicer." (C.R. 256.) She also alleged that PNC's redaction of the Freddie Mac loan identifier was an attempt to hide Freddie Mac's involvement as an investor in the Mortgage Loan and was a "fraud" on the Bankruptcy Court. (C.R. 252–57.) PNC responded that Merritt's Claim Objection was an improper attempt to relitigate matters already decided in both the Foreclosure Action and Adversary Proceeding and therefore barred by the *Rooker-Feldman* doctrine and *res judicata*. (C.R. 1–4, 160–81.)

On June 16, 2015, the Bankruptcy Court held a hearing on both Merritt's Claim Objection and Cram-Down Motion. (C.R. 73–110.) At the hearing, Merritt stated that the sole basis for her Claim Objection was that PNC was not the "owner" of the Note and Mortgage. (C.R. 82–83.) The Bankruptcy Court denied the Claim Objection and issued the Claim Objection Order, finding that PNC's status as servicer of the Mortgage Loan was sufficient to confer standing to file the Proof of Claim. (*Id.*) It also found that it was not "deceived" by PNC's redaction of Freddie Mac's loan identifier on the Proof of the Claim: "Your argument that there was a fraud perpetrated on the Court doesn't

stand because I wasn't—if for no other reason, I wasn't deceived, which is a requirement for that." (R-1329–32.)

The Bankruptcy Court then heard argument and testimony on the Cram-Down Motion. It denied the Cram-Down Motion on the record because PNC's sole collateral was the Property and Merritt stated in her Loan Application and Mortgage that the Property was her principal residence. (R-13, 54–58.) The Bankruptcy Court denied the Cram Down Motion and issued the Cram-Down Order on June 23, 2015. (R-717–18.)

**C. Merritt's Motions for Reconsideration and Appeal**

Merritt filed a motion for reconsideration of the Claim Objection Order, which the Bankruptcy Court denied on July 22, 2015. (C.R. 262–72.) On August 4, 2015, Merritt filed a notice of appeal of the Bankruptcy Court's Order denying her motion for reconsideration (the "Claim Objection Appeal"), though she did not appeal the underlying Claim Objection Order. [3] (C.R. 274.)

3 The text of Merritt's Notice of Appeal unequivocally states that she is appealing the Bankruptcy Court's Order denying her motion for reconsideration of the Claim Objection Order, not the Claim Objection Order itself. Specifically, it states that she is appealing the "order...entered in this matter on July 22, 2015 denying Debtor's Motion for Reconsideration of the Order Overruling the Objection of the Debtor to PNC Bank, N.A.'s Proof of Claim [ ] of the Court's Order entered on June 16, 2015 [ ]." (No. 15-cv-04282, ECF No. 1.)

***476** On July 8, 2015, fifteen days after the entry of the Cram-Down Order, Merritt filed a motion for reconsideration of that Order. (R-826–36.) On August 18, 2015, the Bankruptcy Court denied the motion to reconsider, stating that it was untimely under the 14-day time limit of Bankruptcy Rule 9023 and that, even if considered on the merits, it did not establish any grounds for reconsideration. (R-1272–84.) On August 23, 2015, Merritt filed a notice of appeal of the Bankruptcy Court's Order denying her motion for reconsideration (the "Cram-Down Appeal"), though she did not appeal the Cram-Down Order itself. [4] Before the Court are Merritt's Claim Objection Appeal and Cram-Down Appeal.

4 Similar to her appeal of the motion for reconsideration of the Claim Objection Order, Merritt's notice of appeal states that she appeals the Bankruptcy Court's denial of her motion for reconsideration of the Cram-Down Order, not the Cram-Down Order itself. Her Notice of Appeal states that she appeals the "order...entered in this matter on August 18, 2015 [ ] denying Debtor's Motion for Reconsideration of the Order Overruling the Debtor's Cross Motion [ ] of the Court's Order entered on June 23, 2015 [ ]." (No. 15-cv-04937, ECF No. 1.)

**II.**

**[1]** The Court has jurisdiction over Merritt's appeals under 28 U.S.C. Sections 158(a)(1) and § 1334. The Bankruptcy Court's decisions to deny Merritt's motions to reconsider the Claim Objection and Cram-Down Motion are reviewed for abuse of discretion. *See In re Olick*, 311 Fed.Appx. 529, 531 (3d Cir.2008) (citing *McDowell v. Phila. Hous. Auth.*, 423 F.3d 233, 238 (3d Cir.2005)). Judicial discretion is abused only when the court acts in an arbitrary, fanciful or unreasonable manner or where it uses improper legal standards, criteria or procedures. *See Barnes Found. v. Twp. of Lower Merion*, 242 F.3d 151, 167 (3d Cir.2001); *see also McDowell*, 423 F.3d at 238 ("An abuse of discretion may occur as a result of an errant conclusion of law, an improper application of law to fact, or a clearly erroneous finding of fact."). [5]

5 Had Merritt appealed the Claim Objection Order and the Cram-Down Order—and not the Bankruptcy Court's denial of her motions to reconsider those Orders—the Court would review the Bankruptcy Court's legal determinations de novo and its factual findings for clear error in those Orders. *See In re Martin's Aquarium, Inc.*, 98 Fed.Appx. 911, 913 (3d Cir.2004). Merritt's appeals of only the motions for reconsideration, however, require her to demonstrate that the Bankruptcy Court abused its discretion in denying those motions. *See In re Olick*, 311 Fed.Appx. at 531. In any event, the standard of review is not determinative of the outcome: for the reasons discussed *infra*, the Court affirms the Bankruptcy Court's Claim Objection Order and Cram-Down Order even if considered on the merits.

**III.**

**[2]** The determinative issue regarding the Claim Objection is whether PNC has standing to file the Proof

of Claim. Courts often analyze that issue in the context of three actors in the mortgage lending process: the loan owner, holder and servicer. [6] *477 Merritt contests PNC's standing to file the Proof of Claim, arguing that she "has presented evidence that Freddie Mac and not PNC is the owner/holder of the subject mortgage." (Appellant's Brief at 27, No. 15-cv-04282, ECF No. 7.) Merritt's is wrong: PNC is in fact the holder of the Note; further, whether or not PNC owns the Note is irrelevant to its standing to file a Proof of Claim. *See In re Walker*, 466 B.R. 271 (Bankr.E.D.Pa.2012) (recognizing a distinction between the owner of a Note and who is entitled to enforce it); *see also In PHH Mortg. Corp. 2001 Bishop's Gate Blvd. v. Powell*, 100 A.3d 611, 621 (Pa.Super.2014) ("Evidence that some other entity may be the 'owner' or an 'investor' in the Note is not relevant to th[e] determination, as the entity with the right to enforce the Note may well not be the entity entitled to receive the economic benefits from payments received thereon.") (interpreting the Pennsylvania Uniform Commercial Code). Merritt's focus on Freddie Mac's status as the "owner" is thus irrelevant to whether PNC has standing to file the Proof of Claim. The relevant inquiry is instead whether PNC is the servicer and/or holder of the Note, which would give it standing to file the Proof of Claim. *In re Alcide*, 450 B.R. at 537 n. 22 ("In the proof of claim context, the authority of a servicer to file a proof of claim is expressly authorized by the rules of court.") (citing Fed. R. Bankr. P. 3001(b)). Here, PNC is both the holder and servicer.

6 "A 'holder' is defined as the person in possession of a negotiable instrument that is payable either to the bearer or to an identified person that is the person in possession." *Hoffman v. Wells Fargo Bank, N.A.*, No. 13–cv–5700, 2015 WL 3755207, at *3 (E.D.Pa. June 16, 2015). A "servicer" is defined by 12 U.S.C. § 2605(i)(2) as a person responsible "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan."

Merritt acknowledges that PNC is the servicer. (C.R. 256; Appellant's Brief at 25–26, No. 15-cv-04937, ECF No. 7) ("PNC admittedly is the mortgage servicer.") PNC is also the holder of the Note by virtue of its acquisition of the original holder, National City. *See VFC Partners 25 LLC v. Scranton Ctr. Holdings LP*, 541 Fed.Appx. 206, 207 (3d Cir.2013) (holding that after a merger between Bank of America and LaSalle Bank, Bank of America had standing in a foreclosure action because "by way of a merger, Bank of America succeeded to LaSalle's rights as assignee pursuant to the National Bank Act.") (citing 12 U.S.C. § 215(e)). Thus, even though Freddie Mac is the owner of the Note—a fact which Merritt mistakenly believes is dispositive—PNC has standing to enforce the Proof of Claim as the holder and servicer. *See In re Alcide*, 450 B.R. 526, 537 (Bankr.E.D.Pa.2011) (collecting cases) ("A number of courts have upheld the authority of a mortgage loan servicer to file a proof of claim on behalf of the mortgage holder."). [7]

7 Since PNC has standing to file a Proof of Claim as the holder and servicer of the Note, it is unnecessary to evaluate its assertion that Merritt's Claim Objection is barred by the *Rooker-Feldman* doctrine and *res judicata*. (*See* Appellee Brief at 12–16, No. 15-cv-04282, ECF No. 7.)

**[3]** **[4]** Merritt also claims that the redaction of Freddie Mac's name was "designed to deceive the Court that the actual owner of the Note and Mortgage was Freddie Mac." (Appellant's Brief at 10, No. 15-cv-04282, ECF No. 7.) This assertion—which focuses on representations made about the *owner* of the Note and Mortgage—is not only irrelevant to whether PNC has standing but also without merit. To show that PNC committed a fraud on the Court, Merritt must show: "(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court." *Herring v. United States*, 424 F.3d 384, 386 (3d Cir.2005). Aside from whether PNC perpetrated an intentional fraud, which appears unlikely given that it was presumably attempting to comply with the *478 redaction protocol articulated in Bankruptcy Rule 9037, [8] the Bankruptcy Court stated that it had not been deceived. (C.R. 81–82.) The Court cannot now find on appeal that the Bankruptcy Court erred in stating what only it could know—whether or not it was misled.

8 Rule 9037 states that when filing a document, a party must redact certain personal identification items such as an individual's social security number, taxpayer identification number and financial-account number.

## IV.

**[5]** The Bankruptcy Court did not abuse its discretion in denying Merritt's motion for reconsideration of the Cram-Down Order. It correctly determined that the Mortgage Loan was not subject to cram-down, and there was

therefore no basis on which to reconsider the Cram-Down Order. Further, it correctly determined that Merritt's request for reconsideration was untimely and that she had not presented new evidence, change in law, or a manifest injustice.

**[6]** **[7]** The "normal rule" in bankruptcy is that, to the extent a claim exceeds the value of collateral on which it has a lien, the claim may be "crammed down" to the value of the collateral. *See In re Scarborough*, 461 F.3d 406, 409–10 (3d Cir.2006). Section 1322(b)(2) of the Bankruptcy Code "carves out an exception to this general rule[ ]" for a Chapter 13 debtor by providing that it does *not* apply to a "claim secured only by a security interest in real property that is the debtor's principal residence." *Id.* Thus, a Chapter 13 debtor may not modify the rights of a creditor with a security interest in his primary residence. *See id.* In *Scarborough*, the Third Circuit Court of Appeals stated that the "critical moment" in determining whether property is a "principal residence" within the meaning of the exception is "when the creditor takes a security interest in the collateral." 461 F.3d at 412. "It is at that point in time that the underwriting decision is made and it is therefore at that point in time that the lender must know whether the loan it is making may be subject to modification in a Chapter 13 proceeding at some later date." *Id.* (internal citation and quotation marks omitted).

Merritt's argument in favor of her Cram-Down Motion is that the Property is not her primary residence because she currently rents a room in the Property and considers her "homestead" to be in Florida. (R-360.) Under *Scarborough*, however, the relevant inquiry is not whether she now rents part of the property or considers her homestead to be elsewhere, but what representations she made to National City at the "critical moment" she executed the Mortgage Loan. 461 F.3d at 412. At that time, Merritt stated that she would use the Property as her "primary residence" and did not disclose any rental income in the Loan Application. (R-397.) She did not disclose any anticipated rental income or include a rider that the Property would be used as a rental property or second home. (R-397–99; 417–33.) The Mortgage she executed provides that Merritt is to "occupy, establish, and use the Property as [her] principal residence." (R-424.) National City did not purport to take any security interest in any rental income or other payments derived from the Property. It took a security interest only in the Property, her "principal residence." Accordingly, the Mortgage Loan is not subject to modification under Section 1322(b)(2), and pursuant to the Third Circuit's ruling in *Scarborough*, the Bankruptcy Court correctly denied Merritt's Cram Down Motion and her motion to reconsider ***479** the Cram Down Motion. [9]

9 Since the Bankruptcy Court accurately applied the *Scarborough* ruling to deny the Cram-Down Motion, the Court need not address the contentions regarding whether the Bankruptcy Court abused its discretion in finding the motion for reconsideration untimely pursuant to Bankruptcy Rule 9023.

The Bankruptcy Court's decisions are affirmed.

**All Citations**

555 B.R. 471

**End of Document**