

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

Miroslav Zecevic

v.

U.S. Bank National Association, as Trustee,  
Harmon Law Offices, P.C.,  
Mortgage Lenders Network, U.S.A., Inc. d/b/a Lenders Network  
Wells Fargo Bank, N.A. d/b/a America's Servicing Company,  
and GMAC Mortgage

Docket No. 10-E-196

**ORDER**

Hearing held (1/13/11) on the petitioner's Motion for Reconsideration, Clarification and Entry of Final Decree Against Defendants Mortgage Lenders Network, U.S.A., Inc, d/b/a Lenders Network, and GMAC Mortgage (filed 11/10/10), the respondents' Objection to same (filed 11/22/10), and the petitioner's Response to same (filed 12/2/10), the respondents' Motion to Dismiss (filed 11/22/10) and the petitioner's Objection to same (filed 12/2/10), the petitioner's Motion to Compel Production of Documents (filed 12/16/10) and the respondent's Objection to same, and the respondents' Motion for Attorney's Fees and the petitioner's Objection to same. Subsequent to review, the Court renders the following determination(s).

By way of brief background, the petitioner, Miroslav Zecevic, brought this action against the respondents, U.S. Bank National Association, as trustee, Harmon Law Offices, P.C., Mortgage Lenders Network U.S.A. Inc. d/b/a Lenders Network ("MLN"), Wells Fargo Bank, N.A. d/b/a America's Servicing Company ("ASC"), and GMAC Mortgage, seeking temporary, preliminary, and permanent injunctive relief, declaratory relief, and damages. On November 1, 2010, the Court denied the petitioner's request for preliminary injunctive relief. The petitioner

moves for reconsideration of that denial. The petitioner also requests that the Court enter a final decree against the defendants MLN and GMAC Mortgage, clarify its earlier order, and compel the production of documents. The respondents object and move to dismiss. The respondents also request that the Court award attorneys fees.

The Court finds the following facts. The petitioner purchased a house located at 36 Massachusetts Avenue, Laconia, New Hampshire. On June 7, 2006, he took out a first and second mortgage on the home with MLN in the amounts of \$144,000 and \$36,000 respectively. MLN was the lender on the promissory note and Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for MLN, was the mortgagee for the first mortgage. Soon thereafter MLN went out of business. On July 30, 2009, MERS assigned both the promissory note and the mortgage to U.S. Bank National Association, as trustee. The assignment was recorded in the Belknap County Register of Deeds. The assignment was executed by Andrew S. Harmon, Esq. of Harmon Law Offices, who represented both MERS and U.S. Bank National Association.

In August 2009, the petitioner asked ASC, the company responsible for servicing his loan, which company held his first mortgage and requested to modify his first mortgage. On November 19, 2009, ASC advised the petitioner that U.S. Bank National Association, as trustee for Residential Asset Securities Corporation series 2006EMX7, held his first mortgage. On November 24, 2009, the petitioner received his loan history from ASC, which indicated that he made payments to ASC in the amount of \$45,109.51. On December 17, 2009, the petitioner contacted ASC and demanded to know the status of his loan modification application. The petitioner subsequently received a letter approving his loan modification request on his first mortgage. Petitioner contacted ASC and asked why U.S. Bank National Association, as trustee, did not appear as the note holder on the modification agreements. Petitioner subsequently came

to believe that ASC was holding his funds and not paying the promissory note and mortgage holder.

On January 27, 2010, the petitioner demanded that ASC return \$45,409.51 that it had collected from him. On March 18, 2010, ASC paid the outstanding real estate taxes on the petitioner's property. On March 30, 2010, the petitioner requested U.S. Bank National Association execute a discharge of the first promissory note and mortgage. In response, David M. Rosen from Harmon Law Offices, P.C., on behalf of his client ASC, informed the petitioner via letter that U.S. Bank National Association would be foreclosing on the petitioner's home due to payment default and ASC was rejecting the petitioner's request for a return of payments. This letter from Mr. Rosen was received by the petitioner's counsel on April 7, 2010.

On May 27, 2010, U.S. Bank National notified the petitioner that it had scheduled a foreclosure sale of his property on June 28, 2010. On June 16, 2010, the petitioner filed this petition with the Court. The foreclosure sale was rescheduled for July 12, 2010 and, by agreement of the parties, subsequently rescheduled for September 13, 2010. On September 10, 2010, the Court granted the petitioner's request for an *ex parte* temporary injunction enjoining the foreclosure sale. On October 7, 2010, the Court held a hearing on the petitioner's request for a preliminary injunction. On November 1, 2010, the Court DENIED the petitioner's request for a preliminary injunction. Subsequently, U.S. Bank National scheduled a foreclosure sale of the petitioner's property to take place on January 24, 2010.

#### **I. Petitioner's Motion to Reconsider**

The petitioner moves for reconsideration of the Court's November 1, 2010 Order, arguing that: (1) U.S. Bank National Association does not have standing to foreclose on his property; (2) a conflict of interest exists, which makes the assignment of the petitioner's mortgage improper;

(3) U.S. Bank National Association failed to comply with Federal Trade Commission regulations; and (4) the petitioner's mortgage may be part of a "robo-signing conspiracy."

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present . . . ." N.H. Super. Ct. R. 59-A. "Whether to receive further evidence on a motion for reconsideration rests in the sound discretion of the trial court." Farris v. Daigle, 139 N.H. 453, 454 (1995).

In this case, the petitioner states with particular clarity that U.S. Bank National Association has failed to demonstrate that it has proper standing to foreclose on the petitioner's property due to missing evidence of the assignments of the underlying promissory note and mortgage. Upon review of the motions, pleadings, and attached exhibits, the Court finds that the petitioner appears to have raised this argument in his initial pleadings and has added further clarification to same in his pending Motion for Reconsideration.

New Hampshire does not require a mortgage holder to obtain judicial authorization to foreclose on a mortgaged property. See Bolduc v. Beal Bank, SSB, 167 F.3d 667, 673 (1st Cir. 1999). "With the exception of the limited judicial procedure aimed at certifying that the mortgagor is not a beneficiary of the Servicemembers Act, a mortgage holder can foreclose on a property . . . by exercise of the statutory power of sale, if such a power is granted by the mortgage itself." U.S. Bank Nat'l Ass'n v. Ibanez, No. SJC-10694, slip op. at \*5 (Mass. Jan. 7, 2011).

"Where a mortgage grants a mortgage holder the power of sale, . . . the mortgage holder may sell the property at a public auction and convey the property to the purchaser in fee simple, and such sale shall forever bar the mortgagor and all persons claiming under him from all right

and interest in the mortgaged premises, whether at law or in equity.” Id. at \*6 (quoting Mass. Gen. Laws c. 183 § 21); accord Fletcher v. Chamberlin, 61 N.H. 438, 445-46 (1881). “Even where there is a dispute as to whether the mortgagor was in default or whether the party claiming to be the mortgage holder is the true mortgage holder, the foreclosure goes forward unless the mortgagor files an action and obtains a court order enjoining the foreclosure,” Ibanez, slip op. at \*6.

In recognition of the “substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, [courts] adhere to the familiar rule that ‘one who sells under a power [of sale] must follow strictly by its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void.’” Id. (quoting Moore v. Dick, 72 N.H. 967, 968 (Mass. 1905)).

“One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose.” Ibanez, slip op. at \*6. The “statutory power of sale” can be exercised by “the mortgagee and executors, administrators, successors and assigns” upon default by the mortgagor. RSA 477:29, III. “Any effort to foreclose by a party lacking ‘jurisdiction and authority’ to carry out a foreclosure under these statutes is void.” Ibanez, slip op. at \*6 (quoting Chace v. Morse, 76 N.E. 142, 144 (Mass. 1905)); accord RSA 477:29, III. Further, to have jurisdiction and authority to foreclose, a party must show that it is also the assignee of the underlying promissory note because “foreclosure of a mortgage may not be brought by one who has no title to it and *absent transfer of the debt*, the assignment of the mortgage is a nullity.” U.S. Bank Nat’l Ass’n. as Trustee for SG Mortgage Securities Asset Backed Certificates, Series 2006-FRE2 v. Emmanuel, 27 Misc. 3d 1220 (N.Y. App. Div. 2010) (quoting Kluge v. Fugazy, 145 A.D.2d 537, 538 (N.Y. App. Div. 1988)).

Here, U.S. Bank National Association, as trustee, was not the original mortgagee to whom the power of sale was granted; rather, it claims the authority to foreclose as the eventual assignee of the original mortgagee. However, U.S. Bank National Association, as trustee, has the authority to exercise the power of sale only if it was the assignee of *both* the mortgage and the underlying promissory note at the time of the notice of sale. See Emmanuel, 27 Misc. 3d at 1220. U.S. Bank National Association has failed to furnish any evidence that MERS, the entity purporting to assign the underlying promissory note to U.S. Bank National Association, ever held the underlying promissory note. Nothing has been submitted to the Court indicating that MLN assigned the underlying promissory note to MERS before going out of business.

Thus, based on the documents before the Court, U.S. Bank National Association has failed to show that it held the promissory note at the time of the notice of foreclosure. Therefore, U.S. Bank National Association likely does not have the authority to foreclose on the petitioner's property. Accordingly, upon reconsideration of the facts and pleadings, the Court finds that the petitioner has demonstrated a likelihood of success on the merits such that a preliminary injunction enjoining foreclosure of his property is GRANTED.

Additionally, in his Motion for Reconsideration, petitioner states with particular clarity that "U.S. Bank National Association, as Trustee, lacks standing to foreclose on [the petitioner's] premises based on a conflict of interest in Harmon Law Offices['] concurrent representation of both [the assignor, MERS] and [a]ssignee[,] U.S. Bank National Association, as Trustee." Upon review of the motions, pleadings, and attached exhibits, the Court finds that the petitioner appears to have raised this argument in his initial pleadings and has added further clarity to it in his Motion for Reconsideration.

Assuming that U.S. Bank National Association could cure the assignment defect addressed above, U.S. Bank National Association's counsel would then have to address its conflict of interest in its concurrent representation of both the purported assignor, MERS, as nominee for MLN, and the purported assignee, U.S. Bank National Association, as trustee. New Hampshire Rule of Professional Conduct 1.7 "Conflicts of Interest" states in relevant part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.0(e) explains that "informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." For informed consent to be effective, the client must be made "aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. . . . When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." N.H. R. Prof'l Conduct 1.7 cmt. 18.

Here, Attorney Harmon represented both the purported assignor, MERS, as nominee for MLN, and the purported assignee, U.S. Bank National Association, as trustee. No evidence exists to show that MERS and U.S. Bank National Association provided informed consent, confirmed in writing, to the representation conflict. Accordingly, Attorney Harmon is directed to provide: (1) an affirmation explaining whether both MERS, as nominee for MLN, and U.S. Bank National Association gave informed consent, confirmed in writing, and (2) the information presented to them by Attorney Harmon regarding the implications of common representation. See Emmanuel, 27 Misc. 3d at 1220 (discussing a similar transaction between MERS and U.S. Bank National Association where both entities were represented by a single attorney).

Additionally, in his Motion for Reconsideration, petitioner states that “the Court did not take into account the Federal Trade Commission requirements of transfer of loan ownership . . . .” The petitioner goes on to quote regulations purportedly from the Federal Trade Commission, but does not provide any specific citation(s) to the source of the regulations. The Court finds that the petitioner did not raise this argument in his original pleadings. Therefore, on this point, the Court finds that the petitioner failed to state with particular clarity a point of law or fact that the Court either overlooked or misapprehended in rendering the November 1, 2010 Order. However, assuming he did, the petitioner has not shown that he has exhausted his administrative remedies to allow the Court to enforce those regulations. See Boise Cascade Corp. v. Fed. Trade Comm’n, 498 F. Supp. 772, 777-78 (D. Del. 1980) (explaining exhaustion of administrative remedies).

Finally, in his Motion for Reconsideration, petitioner states that his “loan documents could also be part of a robo-signing conspiracy that was found in thousands of loans around the Country, which is currently being investigated.” The Court finds that the petitioner did not raise this argument in his original pleadings or at the hearing on the matter. Therefore, on this point,

the Court finds that the petitioner failed to state with particular clarity a point of law or fact that the Court either overlooked or misapprehended in rendering the November 1, 2010 Order.

Accordingly, the petitioner's Motion for Reconsideration is GRANTED in part and DENIED in part consistent with the above. Additionally, upon reconsideration of the facts and pleadings, the Court finds that the petitioner has demonstrated a likelihood of success on the merits such that a preliminary injunction enjoining foreclosure of his property is GRANTED.

#### **II. Petitioner's Motion for Clarification**

The petitioner also requests the Court to clarify that Counts III, IV, V, VI, VII, VIII, XIV, and X of the petitioner's petition survive the Court's November 1, 2010 Order. The Court's November 1, 2010 Order only addressed (1) U.S. Bank National Association's and ASC's Motion to Set Aside Default and to File Their Answer Late, and (2) the petitioner's request for a preliminary injunction. Thus, the petitioner's Motion for Clarification is GRANTED.

#### **III. Petitioner's Motion to Enter Final Decree Against MLN and GMAC Mortgage**

The petitioner requests the Court to enter a final decree against MLN and GMAC Mortgage. The respondent does not object. Both MLN and GMAC Mortgage have been served with notice of this lawsuit and have failed to file an appearance. Thus, the petitioner's Motion to Enter a Final Decree Against Mortgage Lenders Network U.S.A. Inc. d/b/a Lenders Network and GMAC Mortgage is GRANTED.

#### **IV. Petitioner's Motion to Compel Production of Documents**

The petitioner moves to compel production of documents by the respondents. While the court must give discovery rules a broad and liberal interpretation, the court also has discretion to determine the limits of discovery. N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429 (2009).

“A party’s request for information must appear relevant and ‘reasonably calculated to lead to the discovery of admissible evidence.’” *Id.* at 429-30 (quoting Super. Ct. R. 35(b)(1)).

Upon review of the pleadings, the Court finds that the petitioner’s request is reasonably calculated to lead to the discovery of admissible evidence. As discussed above, the Court has found that U.S. Bank National Association has failed to furnish sufficient evidence establishing standing to foreclose on the petitioner’s property. The petitioner’s Request for Production of Documents attached to his Motion to Compel lists a variety of documents that speak directly to the issue of standing to foreclose.

Accordingly, the petitioner’s Motion to Compel Production of Documents is GRANTED.

#### V. Respondents’ Motion to Dismiss

The respondents move to dismiss the petitioner’s petition. The respondents appear to argue that because the Court found that the petitioner was unlikely to succeed on the merits of his claim and all the petitioner’s claims “are predicated upon the allegation that U.S. Bank does not hold the note,” his case should be dismissed.

The respondents’ argument fails for two reasons. First, the respondents appear to mistakenly believe that the Court’s November 1, 2010 Order denying the petitioner’s request for preliminary injunctive relief is dispositive of the merits of the petitioner’s case. However, a denial of a request for a preliminary injunction is not dispositive of the merits of a case. Compare N.H. Dept. of Environmental Servs. v. Mottolo, 155 N.H. 57, 63 (2007) (discussing a request for preliminary injunctive relief), with Bohan v. Ritzo, 141 N.H. 210, 213 (1996) (discussing a motion to dismiss). Thus, the Court will not rely upon a decision denying preliminary injunctive relief to dismiss a case. Second, the respondent’s argument fails because Court has reconsidered

its November 1, 2010 Order and has determined that the petitioner's request for a preliminary injunction enjoining foreclosure should be GRANTED.

Accordingly, the respondents' Motion to Dismiss is DENIED.

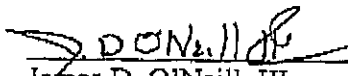
**VI. Respondents' Motion to Award Attorney's Fees**

The respondents request that the Court award attorney's fees pursuant to New Hampshire Superior Court Rule 59. Under Rule 59, "[t]he Court may assess reasonable costs, including counsel fees against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion." Here, the Court finds that the petitioner has not committed any "frivolous or unreasonable conduct." Accordingly, the respondents' Motion to Award Attorney's Fees is DENIED.

In conclusion: (1) the petitioner's Motion for Reconsideration is GRANTED in part and DENIED in part; (2) upon reconsideration of the facts and pleadings, the Court finds that the petitioner has demonstrated a likelihood of success on the merits such that a preliminary injunction enjoining foreclosure of his property is GRANTED; (3) the petitioner's Motion for Clarification is GRANTED; (4) the petitioner's Motion to Enter a Final Decree Against Mortgage Lenders Network U.S.A. Inc. d/b/a Lenders Network and GMAC Mortgage is GRANTED; (5) the petitioner's Motion to Compel Production of Documents is GRANTED; (6) the respondents' Motion to Dismiss is DENIED; and (7) the respondents' Motion to Award Attorney's Fees is DENIED.

Date

1/20/11

  
James D. O'Neill, III  
Presiding Justice