

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

JORGE CANELLAS,

Case No. 6:09-bk-12240-ABB

Chapter 7

Debtor.

_____/

CARLA P. MUSSELMAN,
Trustee of the Bankruptcy
Estate of Jorge Canellas,

Plaintiff,

Adv. Pro. No. 6:10-ap-00229-ABB

v.

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE OF THE LEHMAN
BROTHER SMALL BALANCE
COMMERCIAL MORTGAGE
PASS-THROUGH CERTIFICATES,
2006-3, and AURORA BANK, FSB,

Defendants.

_____/

ORDER

This matter came before the Court on the: (1) Motion for Partial Summary Judgment as to Count I filed by Plaintiff Trustee Carla P. Musselman (Doc. No. 16); and (2) the Amended Motion for Final Summary Judgment/Judgment on the Pleadings and supporting deposition testimony filed by Defendants U.S. Bank National Association, as

Trustee of the Lehman Brother Small Balance Mortgage Pass-Through Certificates, 2006-3 (“U.S. Bank”) and Aurora Bank, FSB (“Aurora Bank”) (Doc. Nos. 40-44).¹

A hearing was held on May 23, 2011, at which counsel for Plaintiff, Plaintiff, and counsel for Defendants appeared. Plaintiff’s Motion is due to be denied and Defendants’ Motion is due to be granted for the reasons set forth herein. The Court makes the following findings of fact and conclusions of law after reviewing the pleadings and evidence, hearing argument, and being otherwise fully advised in the premises.

Background

Debtor owned a commercial property located at 830 Hoffner Avenue, Orlando, Florida 32809 (“Property”). He executed a Note on August 1, 2006 for the principal amount of \$274,500.00 payable to Lehman Brothers Bank, FSB as Lender (“Note”) and secured by a Mortgage on the Property dated August 1, 2006 executed by the Debtor and his wife in favor Lehman Brothers Bank, FSB (“Mortgage”). U.S. Bank claims to own the Note and Mortgage and filed a secured Proof of Claim Number 7.

The Trustee’s Complaint

The Trustee’s Amended Complaint disputes U.S. Bank’s ownership of the Note and seeks to avoid the lien she concedes U.S. Bank has on the Property. The Amended Complaint pleads three causes of action against U.S. Bank: (1) Disallowance of Secured Claim, (2) Avoidance of Lien Pursuant to Section 506(d), and (3) Subordination and

¹ The Trustee’s Motion for Partial Summary Judgment was filed prior to her amendment of the complaint and references the original complaint (Doc. No. 1). The Trustee did not withdraw her motion after she filed the Amended Complaint (Doc. No. 20). U.S. Bank filed no opposition to the Trustee’s Motion for Partial Summary Judgment, presumably because the Amended Complaint was filed after the Trustee’s Motion for Partial Summary Judgment.

U.S. Bank’s Amended Motion for Final Summary Judgment presents the same legal issues as the Trustee’s earlier Motion for Partial Summary Judgment. The purpose of this Order is to resolve all issues presented in the motions for judgment filed in this adversary proceeding.

Transfer to Estate of Lien Pursuant to Section 510(c). The Amended Complaint names Aurora Bank as a defendant but makes no factual allegations supporting any cause of action against Aurora Bank.

The Trustee's position is the Assignment and Allonge executed by Aurora Bank (successor to Lehman Brothers Bank, FSB) were ineffective to convey to U.S. Bank a secured ownership interest in repayment of the Note because the Assignment and Allonge were executed after the Petition Date, by unauthorized persons, and the Allonge was not attached by staple to the Note.

U.S. Bank's Motion for Summary Judgment

Defendants seek final judgment in their favor. U.S. Bank argues the law of the case, established by this Court's ruling on U.S. Bank's Motion for Relief from Stay, is the Mortgage was properly recorded pre-petition and encumbers the Property. U.S. Bank argues the Trustee concedes U.S. Bank holds the Mortgage lien on the Property, the undisputed evidence demonstrates U.S. Bank is the holder of the Note, and it is entitled to collect on the Note through enforcement of its pre-petition Mortgage lien on the Property.

Findings of Fact

The following are undisputed facts regarding U.S. Bank's possession of the Note, Mortgage and transferring documents.

Aurora Bank is the successor entity to Lehman Brothers Bank, FSB. Aurora Bank employees created the Assignment and Allonge to document the transfer of ownership of the Mortgage and Note to U.S. Bank. Jennifer Henninger, Aurora Special Assets Administrative Assistant, created the Assignment and Allonge as part of her responsibilities. Jack Jacobs, Manager of the Aurora Special Assets Department,

executed the Assignment, with two witnesses. Henninger notarized his signature. Henninger delivered the Assignment to Louis Zaffino, Aurora Special Assets Officer. Henninger executed the Allonge. She sent a letter requesting the Note to the custodial department at U.S. Bank; when she received the Note, approximately a week later, she hand delivered both the Note and Allonge to Zaffino. Zaffino secured the Note and Allonge in his file cabinet until he sent them to counsel for U.S. Bank, for use in this case.

Counsel for U.S. Bank currently is in possession of the original Mortgage, the Assignment, the original Note, and the Allonge. No other person or entity (including the undisputed original owner of the Note and Mortgage, the former Lehman Brothers Bank, FSB, now known as Aurora Bank) claims to be the rightful owner or holder of the Note or Mortgage. Only U.S. Bank asserts those interests.

U.S. Bank is the holder of the Note and the owner of the Mortgage, which attached to the Property pre-petition. U.S. Bank's secured Claim Number 7 is allowable.

There is no dispute of material fact. The Trustee has not established she is entitled to any of the relief sought by her Amended Complaint. The Trustee's Motion for Partial Summary Judgment is due to be denied. U.S. Bank's Motion for Final Summary Judgment is due to be granted.

Plaintiff's Amended Complaint names Aurora Bank as a defendant but makes no factual allegations supporting any cause of action against Aurora Bank. Aurora Bank, FSB is entitled to judgment on the pleadings.

Conclusions of Law

Granting summary judgment is appropriate “if 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 the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c) (2007). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A court determining entitlement to summary judgment must view all evidence and make reasonable inferences in favor of the party opposing the motion. Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995).

“Judgment on the pleadings is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.” Cannon v. City of West Palm Beach, 250 F.3d 1299, 1301 (11th Cir. 2001). All facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party. Id.

The Trustee opposes summary judgment for U.S. Bank by arguing material factual questions exist regarding the legal effect of the Allonge and Assignment. She argues those documents are suspect because they are backdated and it appears the Allonge was never stapled to the Note. She argues the signators did not have authority to execute the Allonge and Assignment. She concludes the documents are ineffective to transfer any interest to U.S. Bank and the backdating indicates dishonesty on the part of U.S. Bank in asserting its ownership of the Note and Mortgage. The Trustee makes an alternative argument: even if the Allonge and Assignment did transfer the Note and

Mortgage to U.S. Bank, the transfers did not occur until after the Petition Date. The Trustee asserts this post-petition timing alone justifies disallowance of U.S. Bank's claim.

The Trustee's arguments are irrelevant to whether U.S. Bank's Claim Number 7 is allowable. Aurora Bank employees created the Assignment and Allonge intending to document the transfer of the Note and Mortgage to U.S. Bank. No other person or entity asserts it owns the Note or Mortgage. U.S. Bank's custodial department was in physical possession of the Note, when Henninger requested it, in order to complete the loan transfer documents; and U.S. Bank's counsel is now in physical possession of the Note, Mortgage and the transferring documents.

Note

U.S. Bank is the holder of the Note. See In re Hwang, 438 B.R. 661, 667 (C.D. Cal. 2010) (an entity in physical possession of a note was holder and only proper enforcer of note under California law); In re Relka, 2009 WL 5149262, at *5 (Bankr. D. Wyo. Dec. 22, 2009) (creditor was holder of a note, based on witness testimony of creditor's employee she personally retrieved the note from creditor's vault); In re Darlington, 2009 WL 6498171, at *3 (Bankr. N.D. Ga. Sept. 11, 2009) (witness testimony a note was maintained in creditor's business records was sufficient to establish creditor was holder of the note); In re Hill, 2009 WL 1956174, at *4 (Bankr. Ariz. July 6, 2009) (creditor was holder of a note, based on witness testimony creditor was in possession of the note and production of the original note in court).

Mortgage

U.S. Bank is the owner of the Mortgage. "[A] Mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the

debt.” Johns v. Gillian, 184 So. 140, 143 (Fla. 1938); see also Riggs v. Aurora Loan Services, LLC, 36 So. 3d 932, 933-34 (Fla. 4th DCA 2010) (per curiam); WM Specialty Mortgage, LLC v. Salomon, 874 So. 2d 680, 682-3 (Fla. 4th DCA 2004).

The Court has determined the Mortgage attached to the Property pre-petition. The Amended Complaint concedes U.S. Bank “has a lien on the property arising from the Assignment of the mortgage, as recorded in Orange County public records” (Doc. No. 20, ¶21).

Conclusion

U.S. Bank’s secured Claim Number 7 is allowable. The Trustee cannot establish facts that would entitle her to avoid U.S. Bank’s lien on the Property or subordinate the lien to the claims of the unsecured creditors. U.S. Bank is entitled to final summary judgment pursuant to Federal Rule of Civil Procedure 56.

The Amended Complaint names Aurora Bank as a defendant but makes no factual allegations supporting any cause of action against Aurora Bank. Aurora Bank, FSB is entitled to judgment on the pleadings.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Plaintiff Trustee Carla P. Musselman’s Motion for Partial Summary Judgment as to Count I (Doc. No. 16) is **DENIED**, and it is further

ORDERED, ADJUDGED and DECREED that the Amended Motion for Final Summary Judgment/Judgment on the Pleadings by Defendants U.S. Bank National Association, as Trustee of the Lehman Brother Small Balance Commercial Mortgage Pass-Through Certificates, 2006-3 and Aurora Bank, FSB (Doc. No. 40) is **GRANTED**.

Dated this 3rd day of June, 2011.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge