

this suit occurred in Bexar county further the property the subject of this suit is also in Bexar County.

Statement of Facts

3. March 28, 1997, Plaintiff executed a Promissory Note and Deed of Trust in favor of Prime Lending to purchase 6606 Robbie Creek Cove, Austin, Texas more specifically described as: LOT 33, Block C, Lakewood Section Two Phase 1, a subdivision in Travis County Texas According to the map or plat of record in volume 79, Page 215, Plat Records of Travis County The loan was with Prime Lending Inc. The loan was in the amount of \$116,400.
4. The Deed of Trust states that the Lender is Prime Lending Inc. The Deed of Trust specifically states that it secures lender against default on the note. Paragraph 22, further states that only the lender may foreclose.
5. Pursuant to the Deed of Trust, Plaintiff was required to obtain insurance and pay taxes for the property. Through approximately 2009, Peters complied with these requirements and directly made sure her taxes and insurance were paid.
6. Plaintiff's account was set up for auto debit so that her payments would never be late.
7. Even though Mrs. Peters paid all taxes and insurance, around 2002, the Defendant began to force place insurance on the property and to force pay taxes on the property. In 2009, the property went into active foreclosure. Mrs. Peters began to actively investigate the reasons for the foreclosure and uncovered the issue with the force placed insurance. Mrs. Peters informed Chase that they had made a mistake and provided them proof that she had insurance coverage and had paid all the taxes due and that the forced placed taxes and insurance were unnecessary. She demanded credit on the account. Despite this dispute Chase refused to conduct and accounting and to provide proper credit for payments made. To avoid foreclosure, Mrs. Peters

entered into a temporary loan modification program with the Defendants. Defendant's lawyers notified Plaintiff that the foreclosure sale had been cancelled based on this agreement. Mrs. Peters made all payments under the agreement.

8. Throughout 2010 and 2011 Mrs. Peters continued to attempt to pay her mortgage by sending in payments. However, even though Mrs. Peters had made all payments under the modification Plaintiff has been requesting a full account from Chase. In May of 2012, Plaintiff was notified that the property was set for foreclosure sale. It was only at this time that Chase finally sent the accounting. The accounting is only a partial accounting for the last two years. Plaintiff however has conducted her own accounting. According to the information received from the bank, Defendant believes Plaintiff is over \$50,000 in arrears. According to the accounting done by Plaintiff, Plaintiff only owes \$31, 437.30. Only \$15,000 of this amount is on past due payments. Plaintiff believes that the disparity between the two figures is due to the fact that Chase has misapplied her payments under the mortgage to escrow fund, thereby causing her to be in default under the mortgage. It is apparent that Chase never corrected the problem that started long ago that was the source of the initial foreclosure action. Further, Defendant's accounting, in addition to missing two years does not account for the fact that the Travis County Tax office is holding excess proceeds for the overpayment of taxes made by both parties.

5. Further, Plaintiff is unable to find any assignment document assigning the mortgage the subject of this suit from Prime Lending to Chase. *Please see McCarthy v. Bank of America, 2011 U.S. Dist Lexis 147685 (ND Tex – Fort Worth) citing Carpenter v. Logan, 83 U.S. 271, 274 (1872).* Plaintiff also believes that the mortgage was securitized in a Mortgage Pool Trust. The trust will have a pooling and servicing agreement that would not allow for transfer of the note the subject of this suit after 120 days of closing. Because transfer of the deed of trust can

also be seen as an attempted transfer of the Note, the transfer again would be a violation of the pooling and servicing agreement. Plaintiffs understand the Plaintiffs do not typically have standing to challenge agreements such as the assignment and PSA because Plaintiff was not a party to those transactions. But, Plaintiffs assert that standing exists based on two principals. First, the loan pool above described was created by the original banks to these transactions in order to create investor money to fund the Plaintiff's (and all other persons whose notes were put in these trust pools) loan. As such the Plaintiff's are the reason these pools were created.

6. Therefore, Plaintiff's are third party beneficiaries for the purpose of arguing compliance with the terms of the agreement. *Please see Stine v. Stewart, 80 S.W.3d 586, 589 (Tex. 2002) for standing to sue as a 3rd Party Beneficiary.* Second, and more importantly is the basis for challenging any assignment. The reason that the Plaintiff has standing to raise the assignment issue is because the assignment failure of a proper assignment or note endorsement creates confusion as to who the holder is and creates a danger of double payment of the mortgage.

*Please see In re Mortgage Electronic Registration Systems, 2012 U.S. Dist. Lexis 37134 at *15*

As stated by a District Judge in California, the standing argument does not mean that the illegal conduct of the bank can go unchecked. *Please see Johnson v. HSBC Bank USA N.A. et al; 2012 U.S. Dist. Lexis 36798 at *6-9.*

7. As stated above, in order to enforce a note the Defendant must establish that (1) the existence of the note in question (2) the Plaintiff signed the note (3) the Defendant is the owner and holder of the note and (4) a certain balance is due. *Please see Cadle Co. v. Regency Homes Inc., 21 S.W. 3d 670, 674 (Tex. App. – Austin 2000); Please see Wells Fargo NA v. Ballestas, 2011 Tex. App. Lexis 3597 (Tex. App. 2011); Shepard v. Boone, 99 S.W.3d 263 (Tex. App. – Eastland 2003); Norwood v. Chase, 2011 U.S. Dist Lexis 5147 (Citing RTC v. Camp, 965 F.2d*

25, 29 (5th Cir. 1992) & *SRSB-IV, Ltd. v. Con't Sav. Ass'n* 1994 W.L. 487237 (5th Cir. Aug. 181994) As such, the Defendant does not have a proper assignment of the note or deed of trust and thereby lacks standing to foreclose. *Please see Shepard v. Boone*, 99 S.W.3d 263, 266 (Tex. App. Eastland 2003). In addition, because the loan is probably "securitized". The security in question is controlled by what is called a pooling and servicing agreement ("PSA") which is on file with the Securities Exchange Commission. The PSA states that all transfers or assignments should take place on or before a date within the agreement of or within 120 days thereafter.

8. Plaintiff would also point out that Chapter 51 of the Texas Property Code says, The "Mortgagee" is the "grantee, beneficiary, owner or holder of a security instrument, a book entry system or if the security has been assigned **of record** the last person to whom the security instrument has been assigned **of record**" *Please see Texas Property Code Section 51.001(4)(A)-(C)*. In order to foreclose any entity must "be the owner or holder" of the Deed of Trust. Further, Section 51.002 talks about the sale and states the conditions for notice which relate to a power of sales clause in the "deed of trust or other contractual lien". Therefore in order to foreclose under Chapter 51 we must look at the contract. Under the contract in question only the "Lender" can foreclose.

9. Plaintiff would further argue that Defendant cannot demonstrate that they have a valid recorded interest in the mortgage the subject of this suit.

Causes of Action

Declaratory Judgment Action

10. Plaintiff asserts that Pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code that Plaintiff has a right to have the validity of a contract determined.

11. Plaintiff asserts that pursuant to the original Deed of Trust executed between original borrower and the Defendant that the Defendant cannot show that they have been properly assigned this mortgage such that the Defendant has standing to now foreclose. In order to enforce a note the Defendant must establish that (1) the existence of the note in question (2) the Plaintiff signed the note (3) the Defendant is the owner and holder of the note and (4) a certain balance is due. *Please see Cadle Co. v. Regency Homes Inc., 21 S.W. 3d 670, 674 (Tex. App. – Austin 2000); Please see Wells Fargo NA v. Ballestas, 2011 Tex. App. Lexis 3597 (Tex. App. 2011); Shepard v. Boone, 99 S.W.3d 263 (Tex. App. – Eastland 2003); Norwood v. Chase, 2011 U.S. Dist Lexis 5147 (Citing RTC v. Camp, 965 F.2d 25, 29 (5th Cir. 1992) & SRSB-IV, Ltd. v. Con't Sav. Ass'n 1994 W.L. 487237 (5th Cir. Aug. 181994)*

12. Plaintiff asserts that the Defendant cannot prove that they are the valid proper assignee of the note and deed of trust.

13. Plaintiff requests the court determine the following issues:

- 1) Is the defendant Bank the proper assignee of the note and deed of trust the subject of this suit.
- 2) Does the Defendant Bank have standing to foreclose because there are not assignments filed that there is not proof of endorsement of the note to the Defendant
- 3) In the event the Defendant is the holder, what is the proper amount due and owing on the note giving credit for all payments, enforcing the provisions of the deed of trust, giving credit for payment of taxes and offsetting for the overcharges relating to force paid insurance and taxes which were unnecessary and giving credit for payment by mortgage protection insurance and any force placed insurance.

UCC Violations

14. Plaintiff asserts under the facts stated in paragraphs above that pursuant to the deed of trust the subject of this suit that the Defendant is not the holder of the note in question such that it can prove the following elements of holder status;

(1) the existence of the note in question (2) the Plaintiff signed the note (3) the Defendant is the owner and holder of the note and (4) a certain balance is due. *Please see Texas Business and Commerce Code Section 3.301, 3.309 & 3.418(d)*

15. Pursuant to §3.203 of the Texas Business and Commerce Code, Defendant Bank has no right to enforce the instrument due to the fraud and illegal acts of transferring the note and deed of trust after the closing date of the PSA and by reason of the fraudulent assignment of the documents. 16. Pursuant to §3.301 & 3.309 the Plaintiff would assert that the Defendant Bank is not the holder or owner of the note and deed or trust and cannot establish the chain of title such that Defendant can prove that Defendant bank has the right to foreclose.

Action to Quiet Title

16. Plaintiff is the original owners. The original owners of the property have superior title and Plaintiff by reason of her warranty deed has superior title. Plaintiff has been paying home owners assessments, taxes and insurance on the property as well as maintaining the property. First, the Plaintiff only need show an interest in title, this is the strength of Plaintiffs' title. "It is clear that the claiming must show an interest of some kind, but it is error that the claimant must show fee simple or uncontestable interest to prevail in a suit to remove a cloud on title or quiet title. *Please see Katz v. Rodriguez, 563 S.W.2d 627, 629-30 (Tex. App. - Corpus Christi 1977). Also see Henry v. Chase Home Finance, LLC, 2011 U.S. Dist. Lexis 139871 at *5 (S.D. Tex. Dec. 6, 2011)(denying motion to dismiss quiet title claim based on insufficient*

allegations of plaintiff's interest because defendant did not explain why allegations that Plaintiffs owned the property, had been in possession of the property and had paid taxes on the property was insufficient to plead an interest). In plaintiffs have clearly explained how they came into legal title to the property. Further a suit to adjudicate ownership of property to determine whether creditors of the original owner retained an interest in property purportedly conveyed to new owner was is properly adjudicated via an action to quiet title. *Please see Sw. Guar. Trust Co. v. Hardy Rd. 13.4 Joint Venture, 981 S.W.2d 951, 956-57 (Tex. App. – Houston [1st Dist.] 1998); Also See Mortgage Electronic Registration Systems, Inc. v. Groves, 2011 Tex. App. Lexis 2696 (Houston [14th Dist.} April 12, 2011)* Therefore, Plaintiff's allegations that a failure of assignment place a cloud over their title because there is in doubt as whom they should pay and who has the right to foreclose because the assignment places that fact in question are legitimate subjects for a quiet title actions of this sort.

17. Plaintiff is the fee simple owner of the property the subject of this suit. Plaintiff now seeks to quiet title related to the this defendants attempts to enforce the deed of trust the subject of this suit as it effects who the Plaintiff is required to pay. In a suit to quiet title the Plaintiff must prove that 1) he has a legal or equitable interest in the property 2) the existence of a claim by the defendant that appears valid on its face and interferes with the plaintiffs title 3) invalidity of the defendant's claim and 4) a request for judicial decree quieting title. As state above, the fraudulent assignment raises such an issue. *Please see La Fleaur v. Kinard, 161 S.W.2d 144, 147 (Tex. App. – Beaumont 1942)*

Breach of Contract

18. This cause of action is pled in the alternative and is only upon proof that the Defendant is the holder or servicer acting on behalf of the proper holder. Plaintiff would assert that Defendant has been paid in part through credit default swaps and mortgage insurance and further that Plaintiff has not been given proper credit for all payments and that Defendant has overcharged Defendant and has breached its contract by the force placement of insurance and taxes not permitted by the deed of trust and note. Plaintiff will be pulling a Bloomberg report in order to determine that amount paid via credit default swaps and insurance. Plaintiff asserts that she is entitled to specific performance of the note and deed of trust and is entitled to know the exact amount due with all credits and offsets.

1) Nature of the Contracts

Plaintiff borrowed money from the original lender as described above and Defendant has shown that Defendant is the current legitimate holder of the note. The contract to be enforced is the original note the subject of this suit.

2) Terms of the Contract

The note calls for a full release upon payment of the note or that proper credit be given for all payments. The documents also do not require escrow unless there is a default by Plaintiff. Plaintiff did not default on tax or insurance responsibilities and therefore the Defendant's added escrow when not permitted.

3) Performance by Plaintiffs

Plaintiffs asserts that Defendant has been paid in full via multiple insurance policies, has complied with all insurance and tax requirements and has attempted to tender full payment, which Defendant will not accept.

4) Breach of Contract

Plaintiffs asserts that the Defendant's failure provide an accounting, proper credit, force payments for taxes and insurance in violation of the contract, and failure to provide credit for any credit default swap or insurance payment constitutes a material breach of contract. Further, Plaintiff requests that the Court enforce the contract by specific performance and order all proper credit, offsets be given for the account, including for amounts which were overcharged due to bank error.

Request for an Accounting

19. Plaintiff requests an accounting for all payments made by the Plaintiff on the note, all payments made by any third party entity as a result of the Plaintiff's default, all payments made by Plaintiff and all monies being held in suspense or being held by Travis County.

Causation; damages.

20. Plaintiff seeks no damages related to this cause only declaratory and equitable relief related to discovering who the proper holder of the note is under UCC3 and quieting title and injunctive relief related thereto.

Request for Preliminary Injunction

21. Pursuant to Federal Rules of Civil Procedure 65(a)(1)&(d), the Plaintiffs allege that she has not received proper notice to cure and notice of foreclosure and that the Defendant does not have standing to foreclose and in the alternative because the Defendant did not provide the proper notices because the amounts sought to cure are inaccurate and not in compliance with the Deed of Trust and Note. The Plaintiff alleges because the Defendant cannot prove that they are the owner or holder of the note that it is likely that Plaintiff will succeed on the merits of this case.

Plaintiff further would assert that to allow the Defendant to foreclose or to takes steps to foreclose during the litigation process would cause irreparable harm to the Plaintiff. In balancing the equities, the hardship on the Defendant by stopping any right to foreclose is much less then when balanced against the Plaintiff losing their property and investment based on improper documentation. The effect on the public interest by the denial of the injunction would be to allow banks to foreclose on the property of sub prime mortgages without requiring the bank to prove that it has a legal right to foreclose.

22. Plaintiff requests the Court to set bond and Plaintiff requests that Defendant and or its agents, servants or attorneys be enjoined, pending further order of this Court from:

Foreclosing on, selling of otherwise disposing of the property at:

6606 Robbie Creek Cover, Austin, Texas. more specifically described as: 6606 Robbie Creek Cove, Austin, Texas more specifically described as: LOT 33, Block C, Lakewood Section Two Phase 1, a subdivision in Travis County Texas According to the map or plat of record in volume 79, Page 215, Plat Records of Travis County

Attorney's Fees

23. As a result of the defendant's failure to comply with the provisions of the Texas Property Code & Texas Civil Practice and Remedies Code Chapter 37 & 38, plaintiff has found it necessary to employ an attorney to bring suit on the Deed of Trust and Note and therefore request all costs and attorney's fees be assessed against the Defendant.

24. Plaintiff seeks all reasonable and necessary attorneys' fees associated with the claims brought against Defendants as permitted by those statutes and related to the request to quiet title which include the following:

(a) Preparation and trial of this lawsuit; and

- (b) Post-trial, pre-appeal legal services; and
 - (c) An Appeal to the court of appeals; and
 - (d) Making or responding to an application for writ of error to the Supreme Court of Texas;
- and
- (e) An appeal to the Supreme Court of Texas in the event application for writ and error is granted; and
 - (f) Post-judgment discovery and collection in the event execution on the judgment is necessary.

Requests for Relief

25. WHEREFORE, Plaintiffs requests that defendant be cited to appear and answer, and that on final hearing Plaintiffs have:

1. That the Plaintiffs be granted a temporary restraining order and temporary injunction against the Defendant until Defendant's right to foreclose is determined by the court.
2. Such other and further relief in law or in equity to which Plaintiffs may be justly entitled.
3. Plaintiffs pray that Citation and notice issue as required by law and that the court grant the relief requested in this petition.
4. Plaintiffs pray for general relief
5. That the Court grant the Plaintiffs request for temporary restraining order.

Demand for Jury and Trial Setting

26. Plaintiffs demand a Jury Trial. Plaintiff's jury fee is tendered with this petition and Plaintiffs request that the Court set this issue for trial at the earliest possible date available to the Court

Respectfully Submitted

/s/ Kenneth E. Grubbs

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CERTIFICATE OF SERVICE

I hereby certify that on the 14TH day of AUGUST, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

W.M. LANCE LEWIS
QUILLING, SELANDER, LOWDS, WINSLETT & MOSER, P.C.
2001 BRYAN STREET, STE 1800
DALLAS, TEXAS 75201

/s/ Kenneth E. Grubbs
Kenneth E. Grubbs