

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

In re:

DENISE L. CLARK,

Case No. 6:10-bk-09430-ABB

Chapter 7

Debtor.

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ORDER

This matter came before the Court on the: (i) Motion for Relief from Automatic Stay (Doc. No. 11) filed by Deutsche Bank National Trust Company (“Movant”); (ii) Objection thereto (Doc. No. 14) filed by the Chapter 7 Trustee Carla P. Musselman (“Trustee”); and (iii) Trustee’s Response to Motion for Relief from Stay and Cross-Motion for Determination of Secured Claim (Doc. No. 15). The final evidentiary hearing was held on September 13, 2010 at which the Trustee, her counsel, and counsel for Movant appeared. The Trustee and Movant filed post-hearing briefs pursuant to the Court’s directive (Doc. Nos. 32, 33). Movant’s Motion is due to be granted and the Trustee’s Cross-Motion is due to be denied for the reasons set forth herein.

Loan Transaction

The Debtor Denise L. Clark and Francis N. Clark, her estranged husband and a non-debtor, borrowed \$448,000.00 from Quicken Loans, Inc. (“Quicken”) pursuant to the InterestFirst Note they executed on April 27, 2005 in favor of Quicken (Doc. No. 32). They, as security for the loan, executed a Mortgage granting, Mortgage Electronic Registration Systems, Inc. (“MERS”), as a nominee for Quicken, a security interest in their real property located at 8 Jocelyn Court, Hampton, New Jersey 08827 (“Property”), and more particularly described as:

Being known and designated as Lot 2.17 in Block 69 on a map entitled "Final Plat for Rolling Meadows Estates, Block 69, Lot 2, in Lebanon Township, Hunterdon County, New Jersey, prepared by Thomas L. Yager Associates, dated December, 1989", which said map was filed in the Hunterdon County Clerk's Office on May 18, 1990 as Map No. 1045. Said premises being more particularly described as follows:

Beginning at a point, said point being in the Westerly side of Jocelyn Court (50 feet wide right of way), said point being the Westerly more corner to the herein described tract and also being the Westerly most corner to land now or formerly of Kenneth T. and Patricia L. Lapensee (Tax Map Lot 2), said point also being 490.49 feet as measured in a Southwesterly direction along the Westerly side of Jocelyn Court to the Northerly side of Mackenzie Road (50 feet wide right of way extended) and from said beginning point running thence (1) along the Easterly side of Jocelyn Court on a curve to the right with a radius of 1675.00 feet, an arc length of 645.55 feet with a chord bearing of North 28 degrees 25 minutes 53 seconds East 641.57 Feet to a Point, said Point being the Westerly most corner to lands now or formerly of Jeffrey Allen and Claire Marie Swinson (Tax Map Lot 2.16); thence (2) along the Southerly line of Swinson South 50 degrees 31 minutes 39 seconds East 315.78 feet to a point, said point being in the Westerly line of land now or formerly of Robert and Joan A. Pericone (Tax Map Lot 2.02); thence (3) along a portion of the Pericone line South 12 degrees 45 minutes 08 seconds West 358.00 feet to a point, said point being in the Northwesterly line of lands now or formerly of Manuel F. and Alice Santos (Tax Map Lot 2.01); thence along the Santos line the following 2 courses (4) South 61 degrees 39 minutes 56 seconds West 134.23 feet to a point; thence (5) South 26 Degrees 32 Minutes 40 Seconds West 58.79 Feet to a Point, said point being the Northerly corner to Lapensee; thence (6) along the Northerly line of Lapensee North 72 degrees 36 minutes 34 seconds West 341.38 feet to the point of beginning as surveyed by Thomas L. Yager, New Jersey P.L.S. No. 26790 in December 1991.

(Doc. No. 32). The Mortgage was recorded in the Hunterdon County, New Jersey land records on June 6, 2005 at Book 2858, Page 834.

The Debtor relocated to Florida and no longer resides at the Property. She filed this bankruptcy case on May 28, 2010 and the automatic stay of 11 U.S.C. Section 362(a) arose by operation of law. Movant filed its Motion seeking relief from the automatic stay pursuant to 11 U.S.C. Section 362(d)(1) for cause. Movant filed with the Motion a copy

of the Mortgage and the Affidavit of Brian Burnett, as the Assistant Vice President of OneWest Bank, FSB and as the attorney in fact for Movant. The Affidavit sets forth the Note has been in default since approximately March 2009 and the balance is approximately \$405,000.00. Movant did not submit a copy of the Note with its Motion.

Movant produced the Note at the September 13, 2010 hearing and filed a copy with its post-hearing brief (Doc. No. 32, Ex. 1). The Note contains two undated indorsement stamps on page three. One stamp was made by Scott Johnson, as the Capture Manager for Quicken, and reads: “WITHOUT RECOURSE Pay to the Order of” followed by a blank line. The second stamp has an illegible signature of “First Vice President” and reads: “Pay To The Order of Without Recourse IndyMac Bank, F.S.B.” No legible payee is named in either indorsement.

Movant filed with its post-hearing brief an Assignment of Mortgage dated June 29, 2009 pursuant to which MERS, as nominee for Quicken, purportedly assigned the Mortgage and Note to OneWest Bank FSB. The Assignment was recorded in the Hunterdon County, New Jersey land records on July 13, 2009 at Book 2027, Page 355. Movant filed a letter issued by OneWest Bank dated August 19, 2010 setting forth the original Note, original Mortgage, a loan title policy/commitment, and recorded assignment from Quicken to “IndyMac” were being transmitted to an unnamed recipient.

Motion for Stay Relief

Movant seeks stay relief pursuant to 11 U.S.C. Section 362(d)(1) asserting its security interest in the Property is not adequately protected. The Trustee objects to the Motion asserting Movant does not have standing to seek stay relief because it has not established it is the lawful holder of the Note and Mortgage. The Trustee requests an

opportunity to conduct discovery and an adjudication of the amount of Movant's claim pursuant to 11 U.S.C. Section 506(a).

A motion for relief from the automatic stay must be prosecuted in the name of the real party in interest. 11 U.S.C. § 362(d); FED. R. CIV. P. 17(a)(1); FED. R. BANKR. P. 7017. "The real party in interest in relief from stay is whoever is entitled to enforce the obligation sought to be enforced." In re Jacobson, 402 B.R. 359, 366 (Bankr. W.D. Wash. 2009). Only the holder of a note and mortgage, or its authorized agent, has standing to bring a stay relief motion. Id. at 367.

The documents presented do not create a chain of title establishing how the Quicken loan documents made their way to Movant. Movant affirmatively states in its pleadings it has possession of the Note. It produced the Note on September 13, 2010. Movant does not affirmatively state in its pleadings it holds the Mortgage, but its pleadings and exhibits, when taken together, imply Movant has possession of the Mortgage. Movant has established it has possession of the Note and Mortgage.

The Trustee asserts, even if Movant has possession of the Note and Mortgage, it is not a holder with standing to seek stay relief because the indorsement stamps on the Note are in blank. Neither party addressed what law governs this issue.

The Note does not contain a governing law provision. The Mortgage at Paragraph I sets forth:

'Applicable Law' means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

Doc. No. 32. Florida choice of law rules set forth the law of the state where the contract was made governs if the contract does not detail which state law governs. Sims v. New Falls Corp., 37 So.3d 358, 361 (Fla. 3d DCA 2010). The Property is in New Jersey and the Note and Mortgage were presumably executed in New Jersey. The Debtor's bankruptcy papers set forth she resided in the Property from 1991 through 2009, and Mr. Clark continues to reside at the Property. New Jersey state law governs the Note and Mortgage.

New Jersey statutory law sets forth an instrument bearing an indorsement in blank becomes payable to the party in possession of the instrument. N.J. STAT. ANN. § 12A:3-205 (West 2004). Movant, as the party in possession of the Note and Mortgage, holds these instruments and can enforce them pursuant to New Jersey statutory law.

The result is the same if Florida law were the governing law. Florida's Uniform Commercial Code provision regarding indorsements in blank mirrors the New Jersey statute. The indorsements on the Note constitute blank indorsements, not special indorsements, which made the Note payable to the bearer and allowed it to be negotiated by transfer of possession alone. FLA. STAT. §§ 673.2051(1), 673.2051(2) (2009); Riggs v. Aurora Loan Servs., LLC, 36 So.3d 932, 933 (Fla. 4th DCA 2010).

Movant has standing to enforce the loan documents and to seek relief from the automatic stay. It is uncontroverted the Note has been in default since approximately March 2009, and a balance of approximately \$404,984.98 is due and owing. Adequate protection payments are not being made to protect Movant's interest in the Property. Movant has established it is entitled to stay relief pursuant to 11 U.S.C. Section 362(d)(1).

Movant, with the granting of stay relief, can seek to enforce its security interest through a foreclosure proceeding in the appropriate State Court. The determination of the amount of its secured claim is relevant to a foreclosure proceeding and subject to adjudication by the State Court. The Trustee's Cross-Motion for adjudication of Movant's claim is a matter for the appropriate State Court.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Trustee's Objection (Doc. No. 14) is hereby **OVERRULED** and her Cross-Motion (Doc. No. 15) is hereby **DENIED**; and it is

ORDERED, ADJUDGED and DECREED that Movant's Motion (Doc. No. 11) is hereby **GRANTED** pursuant to 11 U.S.C. Section 362(d) and the automatic stay of 11 U.S.C. Section 362(a) is hereby lifted as to the Property having a legal description of

Being known and designated as Lot 2.17 in Block 69 on a map entitled "Final Plat for Rolling Meadows Estates, Block 69, Lot 2, in Lebanon Township, Hunterdon County, New Jersey, prepared by Thomas L. Yager Associates, dated December, 1989", which said map was filed in the Hunterdon County Clerk's Office on May 18, 1990 as Map No. 1045. Said premises being more particularly described as follows:

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Marie Swinson (Tax Map Lot 2.16); thence (2) along the Southerly line of Swinson South 50 degrees 31 minutes 39 seconds East 315.78 feet to a point, said point being in the Westerly line of land now or formerly of Robert and Joan A. Pericone (Tax Map Lot 2.02); thence (3) along a portion of the Pericone line South 12 degrees 45 minutes 08 seconds West 358.00 feet to a point, said point being in the Northwesterly line of lands now or formerly of Manuel F. and Alice Santos (Tax Map Lot 2.01); thence along the Santos line the following 2 courses (4) South 61 degrees 39 minutes 56 seconds West 134.23 Feet to a Point; thence (5) South 26 degrees 32 minutes 40 seconds West 58.79 feet to a point, said point being the Northerly corner to Lapensee; thence (6) along the Northerly Line of Lapensee North 72 degrees 36 minutes 34 seconds West 341.38 feet to the point of beginning as surveyed by Thomas L. Yager, New Jersey P.L.S. No. 26790 in December 1991;

and more commonly known as 8 Jocelyn Court, Hampton, New Jersey 08827; and it is further

ORDERED, ADJUDGED AND DECREED that this Order is entered for the sole purpose of allowing Movant to pursue *in rem* remedies and Movant shall not seek or obtain *in personam* relief against the Debtor.

Dated this 10th day of November, 2010.

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