

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

In re:

Case No. 3:13-bk-2648-PMG

Jennifer Espenship,

Debtor.

Chapter 13

Jennifer Espenship,

Plaintiff,

vs.

Adv. No. 3:13-ap-558-PMG

Washington Mutual, N.A.,
JPMorgan Chase Bank, N.A.,

Defendants.

ORDER ON MOTION TO DISMISS AMENDED COMPLAINT

THIS CASE came before the Court for hearing to consider the Motion of JPMorgan Chase Bank, N.A. (the Bank) to Dismiss the Amended Complaint filed by the Debtor, Jennifer Espenship.

To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts to make his or her claim for relief plausible on its face.

In this case, the Debtor primarily claims that the Bank lacks standing to assert a lien against her homestead real property. The Debtor's claim is not plausible on its face, because (1) the documents attached to her Complaint show that the Bank purchased the secured claim from the FDIC prior to the

filing of the bankruptcy petition, and (2) the documents also include the Bank's copy of the underlying Note endorsed in blank. Consequently, the Bank's Motion should be granted, and the Debtor's Amended Complaint should be dismissed.

Background

The Debtor, Jennifer Espenship, filed a petition under Chapter 13 of the Bankruptcy Code on April 30, 2013. On her schedule of assets filed with the petition, the Debtor listed certain real property located at 1619 6th Street South, Jacksonville Beach, Florida (the Property). The Property was claimed as exempt homestead property on her schedule of exemptions.

On her schedule of liabilities, the Debtor listed "Chase" as a secured creditor holding a first mortgage on the Property.

On September 16, 2013, JPMorgan Chase Bank, N.A. (the Bank) filed a Proof of Claim in the Debtor's Chapter 13 case. The Proof of Claim (Claim Number 5) was filed in the amount of \$505,624.50, and indicates that it is secured by a lien on the Property. Copies of a Note and Mortgage signed by the Debtor are attached to the Proof of Claim.

On November 12, 2013, the Debtor filed a Complaint against the Bank and Washington Mutual, N.A. (WaMu). The Debtor's First Amended Complaint (Doc. 16) includes the following factual allegations:

1. On December 3, 2007, a Note and Mortgage were executed and made payable to WaMu. (¶ 14).
2. In March of 2009, the Debtor mailed a Qualified Written Request to "JPMorgan Chase Bank, N.A., formerly WaMu (Home Loans)." (¶ 20, Exhibit A).
3. WaMu "responded insufficiently" to the Qualified Written Request. (¶ 24).

4. The Debtor was unable to make the mortgage payment as of March of 2010. (¶ 28).

5. On August 3, 2010, the Bank filed a foreclosure action against the Debtor. (¶ 31).

6. In a Verified Amended Complaint filed in the foreclosure action, the Bank alleged that it “became WAMU’s successor-in-interest by purchase from the Federal Deposit Insurance Corporation (‘FDIC’) as receiver of WAMU.” (¶ 37).

7. The Bank is not “entitled to payment or to collect payments from [the Debtor] and there has been no valid transfer of the original Note, nor has a valid assignment been properly recorded in Duval County.” (¶ 46).

The Debtor’s Amended Complaint against the Bank and WaMu contains four Counts. Count I is an action to determine that the Bank lacks standing to assert a secured claim against the Debtor’s Property; Count II is an action to void the lien asserted by the Bank based upon its fraud and misrepresentation upon the Court; Count III is an action to void the lien asserted by the Bank based upon judicial estoppel; and Count IV is an action for a declaratory judgment that the Bank “does not have an enforceable secured or unsecured claim” against the Property.

Although the Amended Complaint is divided into four separate Counts, all of the Counts are predicated on the Debtor’s primary assertion that the Bank is not the owner and holder of the Note and Mortgage signed by the Debtor in 2007.

Discussion

The Bank filed a Motion to Dismiss the Debtor’s Amended Complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. (Doc. 19).

To survive a motion to dismiss under Rule 12(b)(6), a claimant “must allege facts to make his or her claim for relief ‘plausible on its face.’” In re Fundamental Long Term Care, Inc., 494 B.R. 548, 554 (Bankr. M.D. Fla. 2013)(citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955,

167 L.Ed.2d 868 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).

In this case, the focus of the Debtor’s Amended Complaint is that the Bank lacks standing to assert a lien against her Property, because it never received a proper assignment of the loan documents signed by the Debtor, and therefore is not the holder of the Note and Mortgage. (Doc. 16, ¶¶ 58, 64).

The Court has considered the Amended Complaint and attached documentation, and finds that the Debtor’s claim for relief is not plausible on its face.

A. Acquisition of loan

First, the documents attached to the Debtor’s Amended Complaint show that the Bank purchased the secured claim from the FDIC prior to the filing of the Debtor’s bankruptcy petition.

The Note and Mortgage were originally executed in favor of WaMu. (Doc. 16, ¶ 14). The Debtor appears to acknowledge that the FDIC became the receiver of WaMu in 2008. In Paragraph 45 of her Amended Complaint, for example, the Debtor alleges that “WAMU, upon information and belief, was bankrupt and taken over by the FDIC on or about September 2008.” (Doc. 16, ¶ 45).

Additionally, the Debtor appears to acknowledge that the FDIC sold assets of WaMu to the Bank pursuant to a Purchase Agreement. (Doc. 16, ¶¶ 58-59, 64). In Paragraph 64, for example, the Debtor refers to “the sale of WAMU’s assets on September 25, 2008 by the FDIC.” (Doc. 16, ¶ 64).

Significantly, the exhibits attached to the Debtor’s Amended Complaint reflect that her Note and Mortgage were included in the assets purchased by the Bank from the FDIC. The Bank’s prepetition amended foreclosure complaint is attached as Exhibit D to the Debtor’s Amended Complaint. In Paragraph 4 of the amended foreclosure complaint, the Bank alleges:

4. Effective September 25, 2008, WASHINGTON MUTUAL BANK, FA was closed by the office of Thrift Supervision and the Federal Deposit Insurance Corporation was named receiver. JPMorgan Chase Bank, National Association acquired certain of the assets, including all loans and loan commitments, of Washington Mutual Bank. As a result of the purchase, no assignment of the promissory note or mortgage was necessary; rather, those documents are now held by the entity which is known as JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, SUCCESSOR IN INTEREST BY PURCHASE FROM THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF WASHINGTON MUTUAL BANK F/K/A WASHINGTON MUTUAL BANK, FA and which is now the name of the Plaintiff in the above-styled court action. A copy of the Affidavit of the Federal Deposit Insurance Corporation is attached hereto as Exhibit "C".

(Doc. 16, Exhibit D)(Emphasis supplied). The amended foreclosure complaint is verified. The Vice President of the Bank declared under penalty of perjury that the facts alleged in the amended foreclosure complaint, including Paragraph 4, were true and correct to the best of her knowledge.

Finally, as referenced in Paragraph 4 of the Bank's amended foreclosure complaint, the FDIC's Affidavit was attached as an exhibit to the complaint. In the Affidavit, Robert C. Schoppe, as Receiver in Charge for FDIC as Receiver of Washington Mutual Bank, states:

2. On September 25, 2008, Washington Mutual Bank, formerly known as Washington Mutual Bank, FA ("Washington Mutual"), was closed by the Office of Thrift Supervision and the FDIC was named receiver.

3. As authorized by Section 11(d)(2)(G)(i)(II) of the Federal Deposit Insurance Act, 12 U.S.C. §1821(d)(2)(G)(i)(II), the FDIC, as receiver of Washington Mutual, may transfer any asset or liability of Washington Mutual without any approval, assignment, or consent with respect to such transfer.

4. Pursuant to the terms and conditions of a Purchase and Assumption Agreement between the FDIC as receiver of Washington Mutual and JPMorgan Chase Bank, National Association ("JPMorgan Chase"), dated September 25, 2008 (the "Purchase and Assumption Agreement"), JPMorgan Chase acquired certain of the assets, including all loans and all loan commitments, of Washington Mutual.

5. As a result, on September 25, 2008, JPMorgan Chase became the owner of the loans and loan commitments of Washington Mutual by operation of law.

(Exhibit C to Exhibit D to Doc. 16)(Emphasis supplied). In other words, Schoppe attested in the Affidavit that the Bank purchased all of WaMu's loans from the FDIC, and that the Bank became the owner of the loans pursuant to the parties' Purchase and Assumption Agreement and the Federal Deposit Insurance Act. See 12 U.S.C. §1821(d)(2)(G)(i)(II)(The FDIC, as receiver, may transfer any asset of a defaulted institution without approval, assignment, or consent.)

The Bank's verified foreclosure complaint and the FDIC's Affidavit were attached to the Debtor's Amended Complaint. Where the allegations of a complaint are contradicted by documents that are incorporated into the complaint by reference, the Court is not required to accept the allegations as true for purposes of a motion to dismiss. Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities, LLC, 505 B.R. 135, 141 (S.D.N.Y. 2013).

Based on the Debtor's acknowledgements in the Amended Complaint, together with the exhibits attached to the Amended Complaint, the Court cannot draw the reasonable inference that the Bank lacks standing to assert a lien against the Debtor's Property. The Note and Mortgage were initially made payable to WaMu. WaMu was closed, and the FDIC became its receiver in 2008. As receiver, the FDIC sold all of WaMu's loans to the Bank pursuant to a Purchase and Assumption Agreement between the FDIC and the Bank. Since that time, the Bank has asserted the lien against the Debtor's Property "as successor in interest by purchase from the Federal Deposit Insurance Corporation, as receiver for Washington Mutual Bank."

B. State law

Second, the documents attached to the Debtor's Amended Complaint include the Bank's copy of the underlying Note endorsed in blank.

A copy of the Note with the blank endorsement is also attached to the Proof of Claim filed by the Bank in the Debtor's bankruptcy case. (Claim Number 5).

The Debtor alleges in her Amended Complaint that the endorsement on the Note does not establish the Bank's status as holder of the Note, because the signature on the endorsement is an electronic stamp. (Doc. 16, ¶¶ 73, 74). Even assuming that the allegation is true, the Court cannot draw the reasonable inference that the signature and endorsement were not authorized by WaMu, in view of WaMu's receivership involving the FDIC, and the sale of all of its loans to the Bank in 2008.

The Debtor's claim that the Bank lacks standing is not plausible on its face, because the documents attached to her Amended Complaint include the Bank's copy of the Note endorsed in blank.

Conclusion

In this case, the Debtor primarily claims in her Amended Complaint that the Bank lacks standing to assert a lien against her homestead real property. The Debtor's claim is not plausible on its face, because (1) the documents attached to the Amended Complaint show that the Bank purchased the secured claim from the FDIC prior to the filing of the Debtor's bankruptcy petition, and because (2) the documents also include the Bank's copy of the underlying Note endorsed in blank. Consequently, the Debtor's Amended Complaint should be dismissed.

Accordingly:

IT IS ORDERED that:

1. The Motion of JPMorgan Chase Bank, N.A. to Dismiss Amended Complaint is granted, as set forth in this Order.

2. The First Amended Complaint filed by the Debtor, Jennifer Espenship, Objecting to Standing of Secured Claim, Fraud and Misrepresentation upon the Court, Judicial Estoppel, and Declaratory Judgment is dismissed, without prejudice to the Debtor's right to assert any claims or defenses that she might have against the Bank, other than the claims based on lack of standing.

DATED this 26th day of SEPTEMBER, 2014.

BY THE COURT

Paul M. Glenn
PAUL M. GLENN
United States Bankruptcy Judge