THOMAS C. ABATE v. FREEMONT INVESTMENT & LOAN, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for CARRINGTON MORTGAGE LOAN TRUST, SERIES 2005-FREI, ASSET BACKED PASS-THROUGH CERTIFICATES, and CARRINGTON MORTGAGE SERVICES, LLC

MISC 12-464855

December 10, 2012

MIDDLESEX, ss.

Foster, J.

ORDER ALLOWING DEFENDANTS' MOTION TO DISMISS

Thomas C. Abate filed his Petition to Try Title (complaint) pursuant to G.L. c. 240, §§ 1-5, on May 25, 2012. In the complaint, Abate alleges that he is the record owner of, and resides in, the property at 14 Owatonna Street, Newton, Massachusetts (Property), and calls for the defendants, various alleged holders of a

mortgage Abate gave on the Property, to appear and try their claim to superior title to the Property. The case management conference was held on July 23, 2012. Defendants Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust, Series 2005-FRE1, Asset Backed Pass-Through Certificates (Deutsche Bank) and Carrington Mortgage Services, LLC (Carrington) filed their Motion to Dismiss on July 31, 2012. [Note 1] Abate filed Petitioners Opposition to Motion to Dismiss Brought by Deutsche Bank as Trustee and Carrington Mortgage Services (Opposition) on August 31, 2012. The court heard argument on the Motion to Dismiss on September 7, 2012, and took the Motion to Dismiss under advisement. The parties were given leave to file supplemental memoranda of law, which they did on September 21 and September 24, 2012. For the following reasons, the Motion to Dismiss is ALLOWED.

Background

In considering a motion to dismiss for failure to state a claim, the court accepts as true well-pleaded factual allegations and reasonable inferences drawn therefrom, Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43 , 45 (2004), but does not accept legal conclusions cast in the form of factual allegations. Iannacchino v. Ford Motor Co., 451 Mass. 623 , 633 (2008), quoting Schaer v. Brandeis Univ., 432 Mass. 474 , 477 (2000). Generally, if matters outside the pleadings are presented to and not excluded by the court, the motion will be treated as a motion for summary judgment. Mass. R. Civ. P. 12(b), 12(c). The court may, however, take into account matters of public record and documents integral to, referred to, or explicitly relied on in the complaint, whether or not attached, without converting the motion to a motion for summary judgment. Marram, 442 Mass. at 45 n.4 (2004); Schaer v. Brandeis Univ., 432 Mass. 474 , 477 (2000); Reliance Ins. Co. v. City of Boston, 71 Mass. App. Ct. 550 , 555 (2008); Shuel v. DeIeso, 16 LCR 329 , 329 (2008).

Therefore, the court will accept as true the allegations of the complaint for the purposes of the Motion to Dismiss. The court will consider the various recorded instruments submitted with the complaint and the Motion to Dismiss, and other documents referred to in the complaint. The court will also take judicial notice of the records of a related action in the United States Bankruptcy Court for the

District of Massachusetts. Jarosz v. Palmer, 436 Mass. 526 , 530 (2002). Based on the complaint and these documents, the court accepts as true the following facts.

Abate owns the Property by virtue of a deed from Charles N. Annesi, Mark S. Annesi, Michael Annesi, Karen L. Fang f/k/a Karen L. Annesi, and Donna M. Bonfiglio f/k/a Donna M. Annesi, dated June 17, 2005 and recorded in the Middlesex South Registry of Deeds (registry) at Book 45422, Page 495 on June 20, 2005 (the Deed). Abate has been in possession of the Property from June 2005 to the present.

Also on June 17, 2005, Abate executed a mortgage note (Note) payable to Fremont Investment & Loan (Fremont) [Note 2] as lender in the amount of $416,000. The same day, Abate gave Mortgage Electronic Registration Systems, Inc. (MERS) a mortgage on the Property, which was recorded in the registry at Book 45422, Page 499, on June 20, 2005 (the Mortgage). The Mortgage secures the Note and names MERS as the mortgagee under this Security Instrument. The Mortgage further states that MERS is acting solely as a nominee for [Fremont] and [Fremonts] successors and assigns. Within a few months after Abate gave the Mortgage, the Note and the Mortgage were sold, transferred, and/or assigned on more than one occasion to unknown third parties, including a mortgage backed security trust governed by New York law where hundreds, if not thousands, of mortgage loans were pooled together.

On October 29, 2010, Abate and his wife filed a petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Massachusetts, docketed as case no. 10-21808 (the Bankruptcy Proceeding). On November 23, 2010, Abate and his wife filed a Chapter 7 Individual Debtors Statement of Intention in the Bankruptcy Proceeding (the Statement of Intention), in which Abate stated under oath his intention to surrender the Property to Carrington, a creditor.

An Assignment dated November 16, 2010, was recorded in the registry at Book 55969, Page 177, on December 3, 2010 (the Assignment). The Assignment purports to assign the Mortgage from MERS to Deutsche Bank. The Assignment is executed by Tom Croft, designated as Assistant Secretary of MERS, and his signature was notarized before a notary public in Orange County, California. On

November 24, 2010, Deutsche Bank filed its motion for relief from the automatic stay in the Bankruptcy Proceeding. The motion for relief from the stay was granted on December 9, 2010. Abate and his wife were discharged on February 8, 2011, and the Bankruptcy Proceeding was closed on February 13, 2011. A foreclosure auction of the Property was held on March 28, 2012. [Note 3]

Discussion

To survive the Motion to Dismiss, the complaint must set forth factual allegations which, if true, plausibly suggest that Abate is entitled to the relief he seeks. Iannacchino, 451 Mass. at 636. Abates complaint sets forth a variety of factual allegations and legal grounds which, he argues, state a claim under the try title statute, G.L. c. 240, §§ 1-5, and require Deutsche Bank and Carrington to appear and try their title. [Note 4] Specifically, Abate alleges that he has title to the Property by virtue of the Deed and is in possession of the Property, and that Deutsche Bank and Carrington claim a superior title. He further alleges that Deutsche Banks and Carringtons title is defective because the Assignment is invalid, on a variety of grounds. Deutsche Bank and Carrington, in the Motion to Dismiss, argue that Abate cannot bring this claim under the try title statute, that Abate is barred from challenging Deutsche Banks and Carringtons title under the doctrine of judicial estoppel because of his sworn statements in the Bankruptcy Proceeding, that Abate has no standing to challenge the Assignment, and that the various grounds on which Abate challenges the Assignment do not, as a matter of law, state a claim that the Assignment is invalid.

1. The try title statute.

Abate has brought this action under the try title statute. In the Motion to Dismiss, Deutsche Bank and Carrington contend that Abate should not, as a matter of law and public policy, be permitted to use the try title statute to challenge a foreclosure, arguing that to do so would permit an end-run around the nonjudicial foreclosure process set forth in G.L. c. 244, §§ 11-17C, and convert Massachusetts into a judicial foreclosure state. For his part, Abate argues that he may bring a try title action to challenge the purported foreclosure of the Property, and all he needs to state to survive a motion to dismiss is that he is in possession of the Property, holds record title, and is threatened by a claim of superior title to the Property.

Having so alleged, he argues, he has satisfied all the elements necessary to bring a try title action and has now put Deutsche Bank and Carrington to the test of bringing an action to try their claim to title, G.L. c. 240, § 3, [Note 5] and the Motion to Dismiss must be denied.

Whether Abate may bring a try title action and Deutsche Bank and Carrington move to dismiss the action for failure to state a claim requires an examination of the terms and purposes of the try title statute in light of the subsequent enactment of the Massachusetts Rules of Civil Procedure. The history and purpose of the try title statute are discussed in Bevilacqua v. Rodriguez, 460 Mass. 762 (2011). The initial try title statute was enacted in 1851. St. 1851, c. 233, § 66; Bevilacqua, 460 Mass. at 767-768. Prior to its enactment, the principle means of establishing title to real estate against an adverse claimant was the writ of entry, an English common-law form of action dating at least from the 13th century. Id. at 768; see J.H. Baker & S.F.C. Milsom, Sources of English Legal History: Private Law to 1850 22-24 (1986) (collecting rolls of 13th century writ of entry cases). The remedy provided under a writ of entry was to give the plaintiff possession of the property. It required the plaintiff to show disseisen by a trespasser, which meant that the remedy was only available to plaintiffs who were held outthat is, were not in possession of the property to which they were seeking to establish title. Bevilacqua, 460 Mass. at 768-769; Mead v. Cutter, 208 Mass. 391 , 392 (1911). This led to the cumbersome requirement that a plaintiff in possession who wished to establish title would have to abandon the property in order to regain it. Bevilacqua, 460 Mass. at 769; Munroe v. Ward, 4 Allen 150 , 151 (1862). Recognizing that this was an unreasonable thing to ask of a plaintiff in possession, the legislature enacted the try title statute, which permitted [a]ny person in possession of real property, claiming an estate of freehold to file a petition to compel an adverse claimant to appear and try its title. St. 1851, c. 233, § 66; Bevilacqua, 460 Mass. at 768-769. Under this first version of the statute, there was no requirement that a petitioner hold record or legal title to the property. Id. at 769, and cases cited.

The statute was amended to roughly its current form in 1893. St. 1893, c. 340. One of the principal amendments was to add a reference in the opening clause of the statute to record title of real property. Id.; Bevilacqua, 460 Mass. at 769. Soon

after its enactment, this amendment was interpreted to require that a petitioner in a try title action not only have possession of the property, but also title appearing in the record. Bevilacqua, 460 Mass. at 769-770; Arnold v. Reed, 162 Mass. 438 , 439-440 (1894).

Based on this statutory history, a plaintiff in possession and with record title cannot bring a try title action to compel a purported mortgagee to try its mortgage title before a foreclosure. The try title act may be used to challenge a partys claim to hold a mortgage only after that party has foreclosed, because it is only after foreclosure that the mortgagee has a claim of superior title. Massachusetts is a title theory State, in which a mortgage is a transfer of legal title to the property securing the debt from the mortgagor to the mortgagee, with the mortgagor retaining the equitable title, or equity of redemption, by which the mortgagor can redeem or reacquire legal title by paying the debt which the mortgage secures. Eaton v. Federal Natl Mtge. Assn, 462 Mass. 569 , 575-576 (2012); see, e.g., U.S. Bank Natl Assn v. Ibanez, 458 Mass. 637 , 649 (2011) (Ibanez); Perry v. Miller, 330 Mass. 261 , 263 (1953); Goodwin v. Richardson, 11 Mass. 469 , 475 (1814); Maglione v. BancBoston Mtge. Corp., 29 Mass. App. Ct. 88 , 90 (1990). Before foreclosure, a lenders mortgage is not a claim of superior title giving rise to a try title claim. A mortgage estate and the underlying equitable estate, in the form of the equity of redemption, are prima facie consistent with each other. Dewey v. Bulkley, 1 Gray 416 , 417 (1854). A try title claim to challenge a mortgagees title only arises after the plaintiffs equity of redemption has been foreclosed upon. It is only upon a foreclosure that the mortgagee claims that it has eliminated the mortgagors equity of redemption and now holds a title in the property superior to the mortgagors. See Bevilacqua, 460 Mass. at 775-776. If all that Abate was alleging in the complaint was that there is uncertainty over who holds the Mortgage, he would not have a try title claim. The court reads the complaint to allege that Deutsche Bank and Carrington claim title to the Property by virtue of their purported foreclosure of Abates equity of redemption on March 28, 2012. With that allegation, Abate may seek to bring a try title action.

Abate argues that all he need allege to state a try title claim is possession, record title, and a claim of superior title. Having done so, he maintains, a defendant cannot move to dismiss but must appear and try its claim. This argument

misconstrues the elements of a try title action and how try title claims are subject to the Massachusetts Rules of Civil Procedure. Actions in this court are governed by the Rules. Mass. R. Civ. P. 1. These include try title actions, over which the court has exclusive jurisdiction. G.L. c. 185, § 1(d). Thus, a defendant in a try title action may exercise its right, when appropriate, to bring a motion to dismiss for failure to state a claim. Mass. R. Civ. P. 12(b)(6). In Bevilacqua, the Supreme Judicial Court outlined the grounds on which such a motion could be made. The SJC noted that the plaintiff must be in possession of the property and hold record title to the property in order have standing to bring a try title action. Bevilacqua, 460 Mass. at 767; see G.L. c. 240, § 1. Like the plaintiff in Bevilacqua, Abate has alleged possession of the Property and the court accepts the allegation as true, drawing the favorable inference that he is a person in possession as required by G.L. c. 240, § 1. Bevilacqua, 460 Mass. at 767; Marram, 442 Mass. at 45. Abates allegation that he holds record title, on the other hand, requires more than the bare assertion that there is a recorded instrument giving him title. Bevilacqua, 460 Mass. at 770-771. Rather, what determines if Abate has the record title required to have standing under the try title statute is whether the document purporting to give him title is effective to do so. Id. at 771. If it is not, then he has no claim. Deutsche Bank and Carrington therefore have the right to challenge whether Abate has effective record title. They may do so by bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6), which they have done. Of course, as discussed above the Motion to Dismiss must be evaluated under the standards for such motions, whereby allegations of the complaint are credited, inferences are drawn in the plaintiffs favor, and the court looks at the complaint, attached documents, and other public instruments. Iannacchino, 465 Mass. at 633, 636; Marram, 442 Mass. at 45 & n.4 (2004); Schaer, 432 Mass. at 477; Reliance Ins. Co., 71 Mass. App. Ct. at 555; Shuel, 16 LCR at 329. If, based on that standard, as a matter of law Abate does not have effective record title, then the complaint may be dismissed.

Deutsche Bank and Carrington claim that because of the foreclosure, Abate no longer has any title to the Property. In his complaint, Abate is alleging that for a variety of reasons, the Assignment of the Mortgage to Deutsche Bank was not valid, and therefore neither Deutsche Bank nor Carrington held the Mortgage and could not foreclose. As a result, Abate alleges, he still holds effective record title and they should have to prove their claim to superior title. In the Motion to

Dismiss, Deutsche Bank and Carrington argue that even applying the standard under Rule 12(b)(6), none of the grounds on which Abate claims that he holds effective record title state a claim to effective record title because he is estopped to make the claim, because he has no standing, and because these grounds are not legally valid. The court examines those arguments in turn.

2. Judicial estoppel.

Deutsche Bank and Carrington argue that the doctrine of judicial estoppel bars Abate from raising any claims relating to the foreclosure of the Property. They contend that Abate took a position in the Bankruptcy Proceeding that is contrary to the position he is taking in the complaint. See, e.g., Commonwealth v. French, 462 Mass. 41 , 51 (2012); Fay v. Federal Natl Mtge. Assn, 419 Mass. 782 , 787 (1995). Their argument is that because Abate stated in the Statement of Intention in the Bankruptcy Proceeding his intention to surrender the Property, he cannot now contest the foreclosure. See Guay v. Burack, 677 F.3d 10 (1st Cir. 2012). Abate argues that judicial estoppel does not apply in this situation because the Motion for Relief from Automatic Stay filed in the Bankruptcy Proceeding by Deutsche Bank is not an adjudicative proceeding which gives rise to estoppel, but rather a summary proceeding which does not bar further claims on the issues. See Grella v. Salem Five Cents Savs. Bank, 42 F.3d 26, 33 (1st Cir. 1994).

The doctrine of judicial estoppel is not fully defined. It is applied at least where a party had successfully asserted his or her inconsistent position in a previous proceeding, and that neither privity nor reliance are essential requirements. Fay, 419 Mass. at 788. For judicial estoppel to bar Abates challenge to the foreclosure, (a) he must have successfully assert[ed] his claim in the Bankruptcy Proceeding, by surrendering the Property in the Statement of Intention, and (b) the Motion for Relief from Automatic Stay, which Abate did not oppose, and the related actions in the Bankruptcy Proceeding must constitute a previous proceeding.

Deutsche Bank and Carrington rely on Guay v. Burack. In Guay, the First Circuit held that judicial estoppel prevented the plaintiffs from bringing claims in a separate civil action that they had failed to list as assets on their Chapter 11 disclosure to the Bankruptcy Court. Guay, 677 F.3d at 17-18. Here, Abate did not fail to disclose the Property as an asset, but stated under oath in the Notice of

Intention that he would surrender it. The question is whether that was the assertion of a claim. In opposition, Abate relies on Grella v. Salem Five Cent Savs. Bank. In Grella, the trustee failed to attend the Bankruptcy Courts hearing on the defendant banks Motion for Relief from Automatic Stay, in which the bank sought to exercise remedies with respect to seventeen promissory notes and mortgages. After the Bankruptcy Court granted the motion, the trustee later counterclaimed in District Court, alleging that the banks interest was voidable as a preferential transfer. Grella, 42 F.3d at 28-29. Although the defendant bank argued this issue was precluded under the doctrine of collateral estoppel, the First Circuit disagreed. Following the Seventh Circuit in Matter of Vitreous Steel Prods. Co., 911 F.2d 1223 (7th Cir. 1990), the First Circuit concluded that the hearing on a motion for relief from stay is meant to be a summary proceeding. Grella, 42 F.3d at 31 (internal citation omitted). Further, the court held that most courts had found that such hearings do not involve a full adjudication on the merits of claims, defenses, or counterclaims, but simply a determination as to whether a creditor has a colorable claim to property of the estate. Id. at 32, and cases cited. But see Nicholson v. OneWest Bank, 2010 WL 2732325, *6 n. 7 (N.D. Georgia 2010) (where the lifting of stay permitted a foreclosure sale to go ahead, the plaintiff was barred from bringing counterclaims at a later point). Although Grella turns on similar facts as this case, it relies on res judicata and collateral estoppel rather than judicial estoppel.

The court need not resolve the application of judicial estoppel to Abates claims in this action. For the reasons set forth below, whether or not his claims are estopped, Abate has failed to state a claim upon which relief can be granted, and the claims against Deutsche Bank and Carrington must be dismissed.

3. Standing.

Deutsche Bank and Carrington argue that Abate lacks standing to challenge the Assignment of the Mortgage, on the grounds that he is not a party to the Assignment or a third-party beneficiary of the Assignment. As a general rule, it is correct that only parties to a contract or the intended third-party beneficiaries of the contract have the right to enforce the contract. See Harvard Law Sch. Coalition for Civil Rights v. President & Fellows of Harvard College, 413 Mass. 66 , 70-71 (1992). It is also correct that an assignment of a contract is, itself, a contract to be

interpreted according to ordinary rules of contract interpretation. Spellman v. Shawmut Woodworking & Supply, Inc., 445 Mass. 675 , 681 (2006). Applying these principles, a decision of this court and decisions of several courts of the United States District Court for the District of Massachusetts have held that because mortgagors are neither parties to nor third-party beneficiaries of assignments of their mortgages, they cannot challenge a foreclosure on the grounds that the assignment is invalid. See, e.g., Bank of N.Y. Mellon Corp. v. Wain, No. 12 MISC 459002 (AHS) (Mass. Land Ct. Nov. 9, 2012), slip op. at 10-11; Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407, 413 (D. Mass. 2012); Wenzel v. Sand Canyon Corp., 841 F. Supp. 2d 463, 478-479 (D. Mass. 2012); Culhane v. Aurora Loan Servs. of Neb., 826 F. Supp. 2d 352, 378 (D. Mass. 2011); Peterson v. GMAC Mtge., LLC, No. 11-11115-RWZ, 2011 WL 5075613 (D. Mass. Oct. 25, 2011), at *4; Kelly v. Deutsche Bank Natl Trust Co., 789 F. Supp. 2d 262, 267-268 (D. Mass. 2011); Kiah v. Aurora Loan Servs., LLC, No. 10-40161-FDS, 2011 WL 841282 (D. Mass. Mar. 4, 2011), at *6.

Respectfully, this court disagrees. Abate does not challenge the validity of the Assignment as a contract between assignor and assignee. He challenges the Assignment on the basis of whether, as a matter of real estate law, it served to convey a title interest in the Property to Deutsche Bank. A real estate mortgage in Massachusetts has two distinct but related aspects: it is a transfer of legal title to the mortgage property, and it serves as security for an underlying note or other obligationthat is, the transfer of title is made in order to secure a debt, and the title itself is defeasible when the debt is paid. Eaton, 462 Mass. at 575. In giving a mortgage to secure the payment of a debt, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. Ibanez, 458 Mass. at 649. In other words, as discussed supra, Massachusetts is a title theory State, in which a mortgage is a transfer of legal title to the property securing the debt from the mortgagor to the mortgagee, with the mortgagor retaining the equitable title, or equity of redemption, by which the mortgagor can redeem or reacquire legal title by paying the debt which the mortgage secures. Eaton, 462 Mass. at 575-576; see, e.g., Ibanez, 458 Mass. at 649; Perry, 330 Mass. at 263; Goodwin, 11 Mass. at 475; Maglione, 29 Mass. App. Ct. at 90. Because the mortgage is a conveyance, it follows that the assignment of a mortgage is a conveyance of an interest in land. Ibanez, 458 Mass. at 649.

In order to exercise the power of sale in a mortgage and foreclose upon the property, the party seeking to foreclose must hold the mortgage title, either as original mortgagee or by a valid assignment. G.L. c. 183, § 21; Ibanez, 458 Mass. at 647-648. A foreclosure by a person who does not hold the mortgage is void. Id. at 647. The mortgagor, owner of the equity of redemption, is entitled to protect that title interest by proving that the party seeking to foreclose upon it does not hold the mortgage title that gives it the right to foreclose or compelling the party that has purported to foreclose to appear and try the title it held at the time of the foreclosure. [Note 6] Eaton, 462 Mass. at 575; In re Lacey, 480 B.R. 13, 35-36 (Bankr. D. Mass. 2012). In other words, Abate has standing to challenge the validity of the Assignment because he is facing a concrete and particularized injury in fact (the loss of his property interest in the Property by foreclosure of his equity of redemption) that is causally connected to Deutsche Banks actions (its attempted foreclosure of that property interest) and that is likely to be redressed by prevailing in this action (determination that Abate has superior title). Butler v. Deutsche Bank Trust Co. Americas, No. 12-10337-DPW, 2012 WL 3518560 (D. Mass. Aug. 14, 2012), at *6, quoting Antilles Cement Corp. v. Fortunato, 670 F.3d 310, 317 (1st Cir. 2012); In re Bailey, 468 B. R. 464, 475-476 (Bankr. D. Mass. 2012).

This is not to say, however, that Abate may seek to have the Assignment declared void for any infirmity. In Butler, the court noted that Massachusetts law draws a useful distinction between void and voidable assignments. Butler, 2012 WL 3518560, at *7, citing Service Mtge. Corp. v. Welson, 293 Mass. 410 , 413 (1936); Murphy v. Barnard, 162 Mass. 72 , 77 (1894); McCarty v. Murray, 3 Gray 578 , 580 (1854). If an assignment is void, then the mortgage was never assigned to the assignee, and the assignee does not hold the legal title necessary for it to be able to foreclose. Butler, supra. Where a grantor has nothing to convey . . . [t]he purported conveyance is a nullity, notwithstanding the parties intent. Bongaards v. Millen, 440 Mass. 10 , 15 (2003). A voidable assignment, on the other hand, does not become void unless someone with the authority or right to void it does so. Abate may challenge any assignment on the grounds that it is void, or that it has been voided. He may challenge an assignment on the grounds that it is voidable, however, only if he is a party entitled to void the assignment. Thus, for example, if an assignment is made pursuant to a contract that gives one of the parties to the contract the right to void the assignment, only that party or its beneficiary,

successor, or assignee can exercise that right and void the assignment. The distinction between a void and voidable assignment and the determination of who is entitled to void an assignment turn on the specific circumstances of each situation. Whether Abate has stated particular claims that the Assignment is void or voided, or that he has the right to void the Assignment, is discussed in more detail infra. It suffices here to hold that Abate has standing to protect his property interest in his equity of redemption by challenging the validity of the Assignment.

4. The claims of the complaint.

The court now turns to the specific allegations of the complaint to determine if Abate has stated a claim under the try title statute. To state a claim, Abate must allege facts and legal theories that, if proved, would result in the Assignment to Deutsche Bank being void or invalid. The court examines each claim of invalidity in turn. None states a claim upon which relief can be granted.

a. Note unlawfully transferred into the Carrington Trust. Paragraph 12 of the complaint states that Abate denies that his mortgage loan was lawfully transferred into the Carrington Trust 2005-FREI, either in 2005, when the trust was created or in 2010 when the . . . Assignment was recorded. The question of whether the Note was validly or lawfully transferred into Carrington Mortgage Loan Trust, Series 2005-FRE1, Asset Backed Pass-Through Certificates (the Trust) is not relevant to whether the Assignment was valid and whether Deutsche Bank or Carrington had the authority to foreclose on the Property. Neither Deutsche Bank nor Carrington need to have held the Note in order to have foreclosed under the Mortgage. The requirement announced in Eaton that a foreclosing mortgagee must either hold the note or be the authorized agent of the noteholder, 462 Mass. at 584, 586, applies only to foreclosures for which the notice of sale was given after June 22, 2012. Id. at 588-589. Here, the foreclosure took place on March 28, 2012, three months before the effective date of Eaton.

b. The Assignment fails to identify the principal and MERS had no authority from its principal Fremont to assign the Mortgage. In paragraphs 13.a and 13.b of the complaint, Abate alleges that the Assignment is invalid because it fails to identify the principal that MERS was purportedly acting for and that at the time of the Assignment, MERS had no lawful authority from its principal, Fremont, to assign

Abates mortgage. The Mortgage provides MERS is a separate corporation that is acting solely as nominee for Lender and Lenders successors and assigns. MERS is the mortgagee under this Security Instrument. [Note 7] MERS has authority to assign the Mortgage, with or without the demonstration of its principals assent. Deutsche Bank National Trust Co. v. Butler, 20 LCR 147 , 147-148 (2011), citing BAC Home Loans Servicing LP v. Kay, Land Court Case No. 10 MISC 428719, Mem. and Order on Def. Mot. to Dimiss (Dec. 22, 2010) (Long, J.). Additionally, by the terms of the Mortgage MERS was acting on behalf of the lenders assignee in executing the Assignment and was within its authority to do so as nominee for the lender. Deutsche Bank Natl Trust, Co. v. Cicchelli, 19 LCR 461 , 463 (2011) (noting MERSs status as nominee for the lender gave it the authority to assign a mortgage). The court in Cicchelli further held that in Massachusetts MERS generally may assign mortgages for which MERS is the mortgagee, as holder of legal title, and may even do so despite not holding the note. Id.; see Kiah, 2011 WL 841282, at *4 (MERS had power to act as agent of any noteholder under language of mortgage); In re Lopez, 446 B.R. 12, 18-19 (Bankr. D. Mass. 2011) (by status as nominee MERS was authorized to transfer the mortgage without having ever held the note); Randle v. GMAC Mtge., LLC, 18 LCR 546 , 550 (2010). See also Culhane, 826 F. Supp. 2d at 371 n.12 (noting that the status of MERS as nominee fits into the model for nominee trusts under Massachusetts law). MERS had the authority to assign the Mortgage without identifying its principal or further demonstrating its authority. Paragraphs 13.a and 13.b do not state a claim.

c. Failure to List Consideration. Paragraph 13.c of the complaint alleges that the Assignment fails for lack of consideration. Abate relies on G.L. c. 183, § 6 for this proposition. Section 6 provides:

Every deed presented for record shall contain or have endorsed upon it the full name, residence and post office address of the grantee and a recital of the amount of the full consideration thereof in dollars or the nature of the other consideration therefore, if not delivered for a specific monetary sum. The full consideration shall mean the total price for the conveyance without deduction for any liens or encumbrances assumed by the grantee or remaining thereon. All such endorsements and recitals shall be recorded as part of the deed. *Failure to comply with this section shall not affect the validity of any deed.* No register of deeds shall

accept a deed for recording unless it is in compliance with the requirements of this section. (Emphasis added).

Section 6 applies only to deeds, not assignments, and makes clear that non-compliance does not affect the validity of any deed. The claim that non-compliance affects the validity of the Assignment, thereby invalidating Deutsche Banks status as mortgage holder at the time of foreclosure, fails.

d. Failure to Name Mortgage Broker or Loan Originator. Paragraph 13.d of the complaint alleges that the Assignment fails to comply with G.L. c. 183, s. 6D by failing to list the mortgage broker or originator. General Laws c. 183, § 6D provides: Every mortgage and assignment of mortgage presented for record, in which a mortgage broker is involved shall contain or have endorsed upon it the name, post office address and license number of the mortgage broker and, if applicable, the mortgage loan originator responsible for placing the mortgage loan with the mortgagee. This endorsement, or notation that no mortgage broker or mortgage loan originator was involved in the mortgage, if known, shall be recorded as part of the mortgage or assignment of mortgage. *Failure to comply with this section shall not affect the validity of any mortgage or the recording of any mortgage or assignment of mortgage.* (Emphasis added).

It can be argued that § 6D should be interpreted to mean that while non-compliance does not affect the validity of any mortgage, it does affect the validity of an assignment. This is a misreading of the statute. Read fairly, § 6D provides that a mortgage is not affected by non-compliance, and non-compliance does not affect the validity of recordation of a mortgage or assignment. The legislatures intent in § 6D was to ensure that an entitys status as holder of a mortgage cannot be challenged because the mortgage instrument or instrument transferring the mortgage fails to list the broker or originator or lacks a notation that neither one was involved in the transaction. Therefore, non-compliance with § 6D does not affect the validity of the Assignment.

e. Lack of Corporate Seal. In paragraph 13.e of the complaint Abate alleges that the Assignment is invalid and legally inoperative because it lacked the MERS corporate seal. General Laws c. 183, § 1A provides that [n]o instrument purporting to affect an interest in land shall be void because it is not sealed or does not recite

a seal. Therefore, even if an instrument lacks a corporate seal, the validity of the instrument is not affected. In any event, under G.L. c. 183, § 54B, see infra, the authority of the signatory of the Assignment to bind the assignor cannot be disputed, and MERS is bound by the Assignment.

f. The Assignment was made in violation of the terms of the Trust. Paragraph 13.f of the complaint alleges that the Assignment is void because it was made in violation of the terms of the [Trust] which closed on November 3, 2005 and could not accept loans thereafterparticularly non-performing loans. This is a claim that the Assignment may be voided because it violated the terms of the Trust. As discussed supra, the only persons entitled to void the Assignment on this basis are the parties to the agreements setting the terms of the Trust. Abate has nowhere alleged that he is a party to any of those agreements. He has no standing to enforce the terms of the Trust, and, therefore, no standing to raise the claim set forth in paragraph 13.f.

g. The Assignment was not lawfully executed because Tom Croft did not appear before the notary. Paragraph 13.g of the complaint alleges that the Assignment was not lawfully executed in accordance with G.L. c. 183, s. 30 because Tom Croft is alleged not to have personally appeared before the notary to sign. By statute, no deed shall be recorded unless it has been acknowledged. G.L. c. 183, § 29. An acknowledgment made outside the Commonwealth is valid in Massachusetts if such acknowledgement [has been] made before anotary public. G.L. c. 183, § 30(b). The Assignment was acknowledged before a California notary public, and is valid in Massachusetts.

To the extent Abate is alleging in this paragraph that Crofts alleged failure to appear before the notary voids the Assignment, he also fails to state a claim. The acknowledged Assignment is presumptively valid under G.L. c. 183, § 54B. See Peterson, 2011 WL 5075613, at *4-*5; Aliberti v. GMAC Mtge., LLC, 779 F. Supp. 2d 242, 249 (D. Mass. 2011); Kiah, 2011 WL 841282, at *7. Section 54B provides in relevant part:

Notwithstanding any law to the contrary, . . . [an] assignment of mortgage . . . , if executed before a notary public . . . , whether executed within or without the commonwealth, by a person purporting to hold the position of president, vice

president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent, asset manager, or other similar office or position, including assistant to any such office or position, of the entity holding such mortgage, or otherwise purporting to be an authorized signatory for such entity, . . . shall be binding upon such entity and shall be entitled to be recorded, and no vote of the entity affirming such authority shall be required to permit recording.

Section 54B provides that an assignment executed before a notary by a person purporting to be an officer of the assignor is binding upon the assignor. This means that the assignor cannot later disclaim or rescind the assignment, and that the assignee can rely upon the validity of the assignment and record it. In other words, § 54B makes an assignment that satisfies its requirements valid and binding upon the assignor, the assignee, and third parties to the extent provided by law. The phrase person *purporting to hold the position* of president, vice president, etc., id. (emphasis supplied), means that so long as the execution block or notarization describes the signatory as holding the position, the assignor, and by extension the assignee and third parties, cannot later claim that the signatory did not really hold that position. A signature on an assignment that otherwise complies with § 54B and other relevant requirements can only be challenged as a forgery. If the signature was forged, then it was not signed by an actual person purporting to be an authorized signatory. See Peterson, 2011 WL 5075613, at *5.

Here, the Assignment is purportedly signed by an Assistant Secretary of MERS before a notary public. Therefore, it is valid and binding pursuant to § 54B unless the signature on the Assignment is a forgery. Paragraph 13.g does not allege with particularity that the execution of the Assignment by Tom Croft is fraudulent. Mass. R. Civ. P. 9(b). The Assignment is therefore valid pursuant to § 54B. Even assuming that Croft did not appear before the notary, the Assignment served to assign the Mortgage from MERS to Deutsche Bank.

h. Tom Croft was not duly authorized to execute the Assignment and was an employee of Carrington. In paragraph 13.h, Abate alleges that the Assignment is invalid because Tom Croft was not a party duly authorized to execute the Assignment. As discussed supra, this claim is fully foreclosed by G.L. c. 183, § 54B.

Croft is a person purporting to hold the position of . . . assistant to the secretary of MERS. Id. Abate cannot look behind his authority.

i. Tom Croft was an employee of Carrington. In paragraph 13.i, Abate alleges that the Assignment is invalid because Tom Croft is or was at the time of the [Assignment], an employee of Carrington . . . , who purportedly acted as the servicer for the Trust. For the same reasons, it does not matter if Croft was an employee of Carrington at the time he executed the Assignment. He purported to be an Assistant Secretary of MERS, and Abate cannot look behind that statement of authority.

j. The Assignment fraudulently attempts to conceal the date of the securitization of the Note. Paragraph 13.j of the complaint states that the Assignment fraudulently attempts to conceal the actual date of the securitization of Abates mortgage loan and its sale to various third-parties. Assuming the truth of this allegation, it does not state a claim under the try title statute for the invalidity of the Assignment of the Mortgage. The question of the securitization of the Note is not relevant to whether the Assignment was a valid transfer to Deutsche Bank of title to the Mortgage, thereby giving Deutsche Bank title in the Mortgage with the accompanying right to seek to foreclose Abates equity of redemption. Moreover, as discussed supra, Deutsche Bank had the authority to foreclose on the Property no matter the status of the Note, because neither Deutsche Bank nor Carrington need to have held the Note at the time of the foreclosure. Eaton, 462 Mass. at 588-589.

k. Paragraph 20 of the Mortgage bars bifurcation of the Note and Mortgage. Paragraph 17 of the complaint alleges that the bifurcation of the Note and Mortgage, with MERS holding the Mortgage while the Note was assigned to other entities, breached the terms of the mortgage contract at Para. 20. In other words, Abate claims that the Mortgage itself requires, in paragraph 20, that the Note be assigned along with the Mortgage and that bifurcation of the two is prohibited. Paragraph 20 is entitled Sale of Note; Change of Loan Servicer; Notice of Grievance. It provides in relevant part:

The Note or partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as Loan Servicer) that collects Periodic Payments due

under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

There is nothing ambiguous about this provision. No terms are inconsistent on their face, and the phraseology cannot support reasonable difference of opinion as to the meaning of the words and the obligations undertaken. Suffolk Constr. Co. v. Lanco Scaffolding Co., 47 Mass. App. Ct. 726 , 729 (1999), quoting Fashion House, Inc. v. K Mart Corp., 892 F. 2d 1076, 1083 (1st Cir. 1989). Construed according to its plain terms and its usual and ordinary sense, id., paragraph 20 does not require that the Note and Mortgage be conveyed together. It simply addresses the question of what notice is to be provided to the borrower upon sale of the Note and/or the Mortgage. It provides that the Note can be transferred, along with the Mortgage, without prior notice to the borrower. On the other hand, if the Loan Servicer changes, then the borrower is entitled to written notice of that change. Paragraph 20 does not require that the Note and Mortgage be assigned together. The assignment of the Note to another entity while MERS held the Mortgage did not breach the Mortgage.

To state a claim under the try title statute against Deutsche Bank and Carrington upon which relief can be granted, Abate was required to allege that he has possession of and effective record title in the Property and that Deutsche Bank and Carrington are claiming superior title. Abate has attempted to plead his effective record title by allegations and legal claims that Deutsche Bank and Carrington did not validly foreclose his equity of redemption because they did not hold a valid Assignment of the Mortgage. None of these allegations and legal claims states a

claim that the Assignment was invalid. Therefore, as a matter of law, Deutsche Bank held a valid Assignment, had the power to foreclose, and did so. The foreclosure eliminated Abates record title in his equity of redemption. He does not have effective record title to the Property, and has not stated a claim against Deutsche Bank and Carrington under the try title act.

Unlike an action to quiet title pursuant to G.L. c. 240, §§ 6-10, which is in rem, a try title action is an action at law brought against the respondent as an individual. Bevilacqua, 460 Mass. at 767 n.5. Thus, while the allowance of the Motion to Dismiss disposes of the claims against Deutsche Bank and Carrington, the moving parties, it does not adjudicate Abates claims against Fremont and MERS, who remain defendants. A telephone status conference is set down for January 9, 2013 at 9:30 a.m., to discuss further proceedings in this action.

Conclusion

For the foregoing reasons, Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan trust, Series 2005-FRE1, Asset Backed Pass-Through Certificates and Carrington Mortgage Services, LLCs Motion to Dismiss is hereby ALLOWED.

The claims of the complaint against Deutsche Bank and Carrington in this action are hereby DISMISSED WITH PREJUDICE.

SO ORDERED

By the Court (Foster, J.)

FOOTNOTES

[Note 1] The Motion to Dismiss is brought only by the defendants Deutsche Bank and Carrington. The default of defendant Mortgage Electronic Registrations Systems, Inc. was entered on July 23, 2012. Service has not been completed on defendant Freemont Investment & Loan.

[Note 2] It appears that this is the same entity as the defendant Freemont Investment & Loan.

[Note 3] The fact and date of the foreclosure auction is not mentioned in the complaint, but is alleged in Deutsche Banks and Carringtons memorandum of law in support of the Motion to Dismiss. Abate does not appear to dispute that a foreclosure auction of the Property was held on that date.

[Note 4] The same claims are made against defendants Fremont and MERS. As the Motion to Dismiss is brought by Deutsche Bank and Carrington, only the claims against them are addressed.

[Note 5] Such an action could be brought as a counterclaim in this action. Mass. R. Civ. P. 13.

[Note 6] Conversely, a foreclosing entity seeking to establish its title must prove that it had title allowing it to foreclose, i.e., that it held the mortgage either as original mortgagee or by a valid assignment. Ibanez, 458 Mass. at 645-646.

[Note 7] The Mortgage defines Lender as Fremont.

Home/Search Land Cases by Docket Number Land Cases by Date Land Cases by Name