UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:12-cv-80904-DMM

HERITAGE NATIONAL LAND TRUST LLC,
as Trustee for Florida Land Trust No. 02320,
dated April 12, 2012

Plaintiff,
vs.

MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., as nominee for CTX MORTGAGE COMPANY, LLC, NATIONAL CITY BANK, and THE BANK OF NEW YORK MELLON FKA the BANK OF NEW YORK, as Trustee for the Certificate holders CWALT, Inc., Alternative Loan Trust 2007-OA4 Mortgage Pass-Through Certificates,

Defendants.
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MERS[1] AND BoNY'S[2] MOTION TO DISMISS WITH INCORPORATED MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiff Heritage National Land Trust LLC's (**Heritage**) action is merely a subterfuge improperly attempting to absolve borrowers Stephen F. Rogers and Penny A. Rogers from their mortgage obligations. This case is an example of a disturbing new trend among borrowers in Florida who deed their homes, which are either in foreclosure or soon will be, to a trust (of which they are purportedly the beneficiary) and then bring suit to quiet-title and invalidate the mortgage.

[1] "**MERS**" abbreviates Mortgage Electronic Registration System, Inc.
[2] "**BoNY**" abbreviates The Bank of New York Mellon f/k/a the Bank of New York, as Trustee for the Certificate holders CWALT, Inc., Alternative Loan Trust 2007-OA4 Mortgage Pass-Through Certificates.

This action is premised on the baseless notion that some unrecorded transfer of the mortgage exists which is now void on the grounds that unrecorded transfers are ineffective against subsequent purchasers (*i.e.* the new trust owner). Heritage concedes, however, that the mortgage was duly recorded, and offers no evidence that the mortgage is void.

Heritage's first amended verified complaint dated July 25, 2012 (**complaint**), fails to state claim for any relief, and should be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. BACKGROUND

1. Heritage's supposed predecessors-in-interest, Stephen F. Rogers and Penny Rogers, husband and wife, executed a mortgage in favor of original lender CTX Mortgage Company LLC on December 28, 2006, as security for a promissory note in the amount of $444,792.00, encumbering the subject property commonly known as 107 Ventry Avenue, Jupiter, FL 33458 (the **property**). This mortgage was recorded on January 11, 2007, at Book 21296, Page 260 of the Public Records of Palm Beach County. (*See* complaint Exh. B.)

2. An assignment of mortgage to BoNY, dated June 9, 2010, was recorded on June 29, 2010, at Book 23928, Page 26 of the Public Records of Palm Beach County. (*See* complaint Exh. D.)

3. Heritage purportedly took title to the property on April 12, 2012, as trustee for Trust No. 02320, by warranty deed to trustee. This deed was recorded on April 27, 2012, at Book 25165, Page 1064 of the Public Records of Palm Beach County. (*See* complaint Exh. A.) Heritage then commenced this action in the Circuit Court of Palm Beach County on June 5, 2012.

4. Heritage filed the complaint on or about July 27, 2012, and served MERS and BoNY on August 9, 2012.

5. On August 23, 2012, MERS and BoNY removed this action to this Court based on diversity jurisdiction. [D.E. #1.]

III. LEGAL ARGUMENT

A. Legal Standard.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1207 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 [2009]). "Plausibility is the key, as the well-pled allegations must nudge the claim across the line from conceivable to plausible. And to nudge the claim across the line, the complaint must contain more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Jacobs v. Tempur-Pedic Int'l Inc.*, 626 F.3d 1327, 1332 (11th Cir. 2010) (internal citations and quotation marks omitted).

When considering a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Court can take judicial notice of the mortgage and assignment of mortgage because they are attached to the complaint, and also because the Court may take judicial notice of matters of public record without converting a Rule 12(b)(6) to a Rule 56 motion. *See Halmos v. Bomardier Aerospace Corp.*, 404 Fed. Appx 376 (11th Cir. 2010).

B. Count I Fails Because Heritage Cannot State a Claim to Discharge the Mortgage

Heritage's first count of its complaint is to discharge the mortgage as an unrecorded interest under FLA. STAT. § 695.01. This is not only meritless, it is nonsensical.

Count I seeks to discharge the mortgage on the grounds that MERS transferred its interest in the mortgage, or never legally owned it, and the true owner never recorded its interest making the mortgage ineffectual against Heritage. (*see* complaint ¶ 14.) This does not make any sense. Heritage's own complaint admits and attaches a copy of the duly recorded mortgage which lists MERS as nominee for the lender. (*See* complaint ¶ 5, Exh. B.) The mortgage is recorded, and is a valid lien against the property.

Heritage took title to the property in April 2012. (*See* complaint ¶ 8.) The mortgage has been a lien on the property since January 2007. (*See* complaint ¶ 5.) Heritage took title subject to this mortgage, and is therefore estopped from denying its validity.

"A purchaser who takes title to property subject to a mortgage without assuming any personal liability for repayment of the underlying personal liability for repayment of the underlying debt is also estopped from contesting the validity of the mortgage." *Eurovest, Ltd. v. Segall*, 528 So. 2d 482, 483 (Fla. 3d DCA 1988); *see also Nesbitt v. Citicorp Sav. of Florida*, 514 So. 2d 371, 371-72 (Fla. 3d DCA 1987) (citing, *Spinney v. Winter Park Bldg. & Loan Ass'n*, 162 So. 899 [1935].)

It is settled that under Florida law when "a purchaser of Florida real property purchases it subject to recorded mortgage liens . . . the purchaser should not able to challenge that which it willingly took subject to." *In re Trailer Park Acquisition, LLC*, Adv. No. 11-2728-BKC-AJC, 2012 WL 3039348, at *4-5 (Bankr. S.D.Fla. Jul 25, 2012). The mortgage lien was a valid

encumbrance when Heritage took title—and it willingly took title subject to this lien. Heritage cannot now deny the mortgage's validity.

Because Heritage is estopped from denying the validity of the mortgage as a matter of law, it cannot plead a viable cause of action based on the mortgage's invalidity. Nor does Heritage's argument that the mortgage is unrecorded (because it is recorded) make sense. Count I should be dismissed with prejudice.

C. Count II Fails Because Heritage Cannot State a Claim to Discharge the Assignment

Heritage's second count of its complaint is to discharge the assignment to BoNY as an unrecorded assignment. This is also nonsensical.

Count II is brought pursuant to FLA. STAT. § 701.02, which provides that an unrecorded assignment of mortgage is not valid against subsequent purchasers without notice. However, this provision does not apply to the assignment, and Heritage cannot make a viable claim.

First, the assignment is recorded, and thus Heritage had notice. Heritage's own complaint admits and attaches a copy of BoNY's duly recorded assignment of mortgage. (*See* complaint ¶ 7, Exh. D.) This assignment was recorded on June 29, 2010, which predates Heritage's deed recorded on April 27, 2012. Because Heritage knowingly and willingly took title subject to this recorded assignment of mortgage, it is estopped from denying its validity.

Second, Heritage completely overlooks FLA. STAT. § 701.02(4), which states that this section governing assignment of mortgages does not apply to mortgages that secure promissory notes governed by the Florida Uniform Commercial Code. That subsection expressly states: "The assignment of such a mortgage need not be recorded under this section for purposes of attachment or perfection of a security interest in the mortgage under the Uniform Commercial Code." FLA. STAT. § 701.02(4). Heritage admits that this mortgage is one securing a promissory

note. (*See* complaint ¶ 5.) Accordingly, the assignment is valid even if it were not recorded (which Heritage admits it was).

Third, Heritage does not even have standing to contest the assignment. In *Harvey v. Deutsche Bank National Trust Company*, 69 So. 3d 300, 304 (Fla. 4th DCA 2011), the borrower objected to the validity of the assignment of her mortgage asserting it contained fraudulent signatures. The Fourth District Court of Appeal stated that even if the borrower could prove that, it would be dispute between the assignor and assignee, not her. Here, even if there was an issue regarding the assignment of mortgage, it would be a dispute between the parties to the assignment—Heritage would have no standing to contest the validity of the assignment.

Count II is meritless and should be dismissed with prejudice.

D. Count III Fails

Heritage's third count of its complaint is to hold the assignment invalid. Heritage's argument appears to be that because BoNY is a trustee of a New York trust, and under New York trust law every action taken by the trustee in violation of the trust instrument is void, the assignment is void. This is apparently based on the convoluted and legally untenable argument that the trust is a special purpose vehicle governed by a pooling and servicing agreement (**PSA**) , and under the PSA, the trust elected to be treated as a real estate mortgage investment conduit (**REMIC**) for purposes of federal taxation. (*See* complaint ¶¶ 19-26; 26 U.S.C. § 860A, *et seq*.) Heritage argues that under federal tax law all mortgages must be obtained by the REMIC within three months of formation; but here the trust was formed in March 2007, and the assignment of mortgage is dated June 2010, clearly violating the three month rule. (*see* complaint ¶¶ 27-28; 26 U.S.C. § 860G.) Heritage concludes that the assignment is void because the violation of federal tax law, renders the assignment unauthorized, and void under New York trust law. (*see*

complaint ¶¶ 29-32.) Heritage's argument is completely without merit.

First, the provision of New York trust law cited by Heritage does not even apply. *See* N.Y. EST. POWERS & TRUSTS LAW § 7-2.4.[3] Heritage overlooks the fact that this statute only voids sales, conveyances and acts of the trustee. The assignment of mortgage is not an act of BoNY, nor is there any signature of any BoNY official on the assignment.

Second, New York trust law only invalidates actions taken by the trustee in violation of the instrument creating the trust. *See* N.Y. EST. POWERS & TRUSTS LAW § 7-2.4. Even assuming then there was a violation of federal tax law, that is not a violation of the trust instrument. A violation of 26 U.S.C. § 860G would not render the assignment void under New York law.

Third, as a matter of law, violations of federal tax law by REMICs have no effect on the rights of mortgagors and mortgagees under the relevant loan and security documents. This issue was recently discussed in *Tripoli v. Branch Banking & Trust Corp.*, No. 2:12-CV-125-DN, 2012 WL 2685090 (D.Utah Jul. 6, 2012). In that case, the borrower made the argument that 26 U.S.C. § 860G prevented the bank from foreclosing. The court stated that 26 U.S.C. § 860G was a federal tax law governed taxation of REMICs, and had no bearing on the bank's ability to foreclose. *Id*. at *5. Even assuming then that 26 U.S.C. § 860G was violated, it would have no effect on the validity of the assignment of mortgage.

Fourth, Heritage does not actually plead a violation of 26 U.S.C. § 860G. That statute defines what is a "qualified mortgage" for REMIC purposes, but despite the use of the word "mortgage" in actuality the statute means the underlying note. *See* 26 U.S.C. § 860G(a)(3)(A) ("The term 'qualified mortgage' means any obligation . . . which is principally secured by an interest in real property . . .") (emphasis added). This provision does not apply to assignments of

[3] N.Y. EST. POWERS & TRUSTS LAW § 7-2.4 reads in its entirety: "If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void."

mortgages, but instead to transfers of notes.

Fifth, Heritage has no standing under Harvey, cited above, and even if the PSA was breached by a violation of 26 U.S.C. § 860G, Heritage would have no standing to raise that issue as a matter of law. In the recent case of *Castillo v. Deutsche Bank National Trust Company*, 89 So. 3d 1069 (Fla. 3d DCA 2012), the borrower challenged standing on the grounds that Deutsche Bank, as a trust, violated the PSA and the trust documents when it took possession of the note and mortgage voiding their possession. The Third District Court of Appeal rejected this argument and held that because the borrower was not a party to, nor a third-party beneficiary of, the trust, she lacked standing to raise this issue. Similarly here, Heritage is not a party to any PSA or trust of BoNY and has no standing to raise this issue.

Count III is meritless and should be dismissed with prejudice.

E. Count IV Fails

Heritage's fourth count of its complaint is for a declaration that holders of all unrecorded interests that failed to intervene as a party to this litigation with thirty (30) days of filing of the lis pendens be forever barred from asserting their unrecorded interests. This relief should be denied.

First, this count does not apply to MERS or BoNY because both of them are parties to this action, and because Heritage admits their interests are recorded. (*See* compliant ¶¶ 5, 7.)

Second, this claim is untenable because Heritage itself states there will be no judicial sale. (*see* complaint ¶¶ 36, 36(A), 36(B); FLA. STAT. § 48.23(1)(d).) The Florida Legislature made clear that the bar on unrecorded interest-holders who fail to intervene only applies "if such proceedings are prosecuted to a judicial sale[.]" Heritage now asks this Court to read this language out of the statute.

Under both federal and Florida judicial precedent, statutes must be read to give effect to

all words and phrases. *See Kasischke v. State*, 991 So. 2d 803, 808 (Fla. 2008) ("We cannot construe the plain language of the statute in a manner that renders this language superfluous."); *United States. v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2330 (2011) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."). Heritage's interpretation, which would render the language of FLA. STAT. § 48.23(1)(d) requiring a judicial sale superfluous, should be rejected.

In an attempt to make an end run around this statutory language and its own statement, Heritage argues that the provision should apply even in the absence of a judicial sale because a judicial disposition is equivalent to a judicial sale. Heritage cites no support for this proposition.

Count IV is meritless and should be dismissed with prejudice.

F. Count V Fails Because Heritage Fails to State a Claim to Quiet Title

Heritage's final count is to quiet title to the property. In a quiet title action a plaintiff must allege facts supporting: **(1)** title in the plaintiff to the property in controversy; and **(2)** that a cloud of title exists. *Stark v. Frayer*, 67 So. 2d 237, 239 (Fla. 1953); *Atl. Beach Imp. Corp. v. Hall*, 197 So. 464 (Fla. 1940); and *Woodruff v. Taylor*, 118 So. 2d 822 (Fla. DCA 1960). To properly allege that a cloud of title exists, a plaintiff must plead: **(1)** "the matter which constitutes the alleged cloud" and **(2)** "facts . . . which give the claim apparent validity as well as those which show its invalidity." *Stark*, 67 So. 2d at 239. "If the suit is brought to quiet and establish a title as against an unknown cloud . . . then the facts which show the apparent existence of a potential cloud should be alleged." *McDaniel v. McElvy*, 108 So. 820, 830 (Fla. 1926).

Heritage fails to allege facts to even support the apparent existence of a cloud of title. Heritage has not alleged any *facts* showing that the mortgage and assignment are invalid. On the

contrary, Heritage admits that both of these instruments were duly recorded. (*See* complaint ¶¶ 5, 7.) Recognizing this, Heritage instead merely pleads legal conclusions that the mortgage is somehow void. Heritage does not plead any facts to support these legal conclusions. Even on a motion to dismiss, legal conclusions do not need to be accepted as true. *See Coach Serv. Inc. v. 777 Lucky Accessories Inc.*, 752 F. Supp. 2d 1271, 1274 (S.D. Fla. 2010) ("Here Lucky merely lists legal conclusions, and therefore, cannot be taken as true."). Simply put, there are no facts alleged in the complaint showing why the mortgage and assignment are invalid.

Heritage also fails to state a claim to quiet title because as a subsequent purchaser it is estopped from denying the validity of a prior recorded mortgage. "A purchaser who takes title to property subject to a mortgage without assuming any personal liability for repayment of the underlying personal liability for repayment of the underlying debt is also estopped from contesting the validity of the mortgage." *Eurovest, Ltd. v. Segall*, 528 So. 2d 482, 483 (Fla. 3d DCA 1988).

Because Heritage cannot state a cause of action to quiet title, its claim should be dismissed with prejudice.

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IV. CONCLUSION

Heritage's complaint is meritless. This Court should enter an order **(i)** dismissing the complaint in its entirety with prejudice; **(ii)** awarding BoNY and MERS attorneys' fees and costs as allowed by law; and **(iii)** granting BoNY and MERS such other relief as the Court deems just and proper.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing was served via U.S. Mail on August 24, 2012, on all counsel or parties of record on the Service List below.

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