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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

JP Morgan Chase Bank, NA,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL NO: 12-1-0527(1)
)	
Elise Sari Travis, et al.,)	
)	
Defendants.)	
_____)	

TRANSCRIPT OF PROCEEDINGS

had before the Honorable Rhonda I.L. Loo, Circuit Court Judge presiding, on Thursday, May 18, 2017, in the above-entitled matter: Motion for Confirmation of Foreclosure Sale.

REPORTED BY: Cammie Gillett, RPR
Official Court Reporter, State of Hawaii
Hawaii Certified Shorthand Reporter #438

1 APPEARANCES:

2

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Commissioner

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THURSDAY, MAY 18, 2017

* * *

THE CLERK: Calling Civil Number 12-1-0527. JP Morgan Chase Bank NA versus Elise Sari Travis, et al., for Plaintiff's motion for confirmation of foreclosure sale, allowances of costs, commissions and fees, distribution of proceeds, directing conveyance and for writ of possession/ejectments.

THE COURT: Good morning.

MS. MCHENRY: Good morning, Your Honor. Patricia McHenry appearing on behalf of Movant PennyMac.

THE COURT: Good morning.

MR. DUBIN: Good morning, Your Honor. Gary Dubin appearing on behalf of the Travis Defendants.

THE COURT: Good morning.

MR. KIRSCHBRAUN: Keith Kirschbraun appearing on behalf of the defendant/cross-claimant Wailea Kialoa Homesites.

MR. WIMBERLEY: Ray Wimberley, as Commissioner.

THE COURT: Go ahead, Ms. McHenry.

MS. MCHENRY: Thank you very much, Your Honor.

We're here for the confirmation of a sale. And this is, obviously, at the confirmation stage of a foreclosure action. And at the point of confirmation, the confirmation stage, the only issues that are really proper are issues that are unique to a confirmation, not other issues.

And the reason for that is that so there's a sharp

1 line, a demarcation between those things that are relevant to
2 the summary judgment stage in a foreclosure action, and then to
3 the rest of the case. And the demarcation that the Hawaii
4 Supreme Court has announced is that in the confirmation stage,
5 that which can be considered are only those issues that are
6 unique to the confirmation of a sale, such as the conduct of
7 the foreclosure auction itself, the adequacy of the price, such
8 as those kinds of factors.

9 The issue of standing, which is what Mr. Dubin has
10 raised in the opposition to the motion for confirmation, is not
11 an issue that is unique to the confirmation stage of a
12 foreclosure case. And the Hawaii Supreme Court has so said.

13 I'm going to quote from the Wise case, which we cited
14 in our memorandum.

15 And in that case, the Court held that the borrowers are
16 precluded from raising the standing of -- in that particular
17 case, it was MERS -- to bring the foreclosure action herein
18 inasmuch as a standing objection is not unique to a
19 confirmation of sale proceeding.

20 So standing is not unique and cannot be brought at the
21 confirmation stage. They're precluded from raising the
22 confirmation -- the standing at the confirmation stage.

23 Now, Mr. Dubin is likely to argue that they are not
24 barred from challenging the borrower's standing because a
25 plaintiff's lack of standing may be disputed at any stage of a

1 proceeding, including on appeal.

2 However, the lender in that case, the Wise case that we
3 cited, also said that -- the lender said that standing is
4 inappropriate in an appeal, in that particular case, from the
5 order confirming sale. And what the Hawaii Supreme Court said
6 was that the lender's arguments are dispositive.
7 Respondent's -- in this particular case, the lender was a
8 respondent -- arguments are dispositive. So we are in the
9 confirmation stage. Standing is not unique to confirmation and
10 cannot be raised.

11 Now, in addition here, we have another factor that
12 plays into this. In fact, there's an appeal of the summary
13 judgment stage. And that appeal is obviously with the
14 Intermediate Court of Appeals. And the issue of standing and
15 Reyes-Toledo has been raised by Mr. Dubin in the appeal itself.

16 I'm going to quote again, if I could, from the opening
17 brief that Mr. Dubin filed in this case concerning -- and
18 that's an appeal of the summary judgment stage.

19 Obviously, standing can be raised appropriately at the
20 summary judgment stage. And his argument is first the decision
21 of the Hawaii Supreme Court in Bank of America versus
22 Reyes-Toledo makes summary judgment unavailable in that case.
23 That was his argument.

24 So the whole concept of standing, Reyes-Toledo, is with
25 the Intermediate Court of Appeals on appeal. And this Court

1 has been divested of jurisdiction to consider that point. So
2 we would like, then, the confirmation to proceed, the motion
3 for confirmation to be granted.

4 Now, we have supplied an affidavit of note possession.
5 We will be moving to supplement the record on appeal so that
6 the Intermediate Court of Appeals can consider that.

7 To the extent that Your Honor is interested, Chase has
8 indicated that it had the note from 2009 -- indicates it had
9 the note from 2009 to 2013, four-year period; and that the
10 complaint here in this case was filed on May 23rd, 2012, right
11 in the middle of that period. So we would ask that, therefore,
12 that the motion to confirm be granted.

13 There's another issue here that's kind of unrelated,
14 which is that there had been another hearing on this motion for
15 confirmation that was set before this Court on June 13th, 2017.
16 And I can get into that if Your Honor wants now.

17 And what had happened was that there had been a
18 stipulation to continue this particular hearing from a previous
19 time. And the stipulation -- apparently, it had been submitted
20 to the Court in time. But, apparently, it had not made it to
21 your office in time. And you came in at that previous hearing
22 time, and someone named Andrew Tello came up and asked that it
23 be continued because he didn't know about the stipulation. So
24 at that time, Your Honor set another hearing date on June 13th,
25 2017.

1 THE COURT: So we can actually strike that.

2 MS. MCHENRY: We would ask that be withdrawn.

3 Okay. Thank you, Your Honor.

4 THE COURT: Mr. Dubin.

5 Thank you.

6 MR. DUBIN: Your Honor, I'm indebted to opposing
7 counsel bringing up these important issues before this Court in
8 this case.

9 This case is suffering from a tremendous miscarriage of
10 justice. I'm asking this Court to deny this motion to confirm,
11 or to continue the hearing for the following reasons:

12 Number one, it's the law of this jurisdiction that a
13 borrower has standing to challenge the standing of the
14 foreclosing plaintiff. And in that sense, it is jurisdiction.

15 The Wise case, which was my case in the Supreme Court,
16 did not decide what Ms. McHenry is saying it did. And I invite
17 the Court to look at that opinion.

18 The Toledo case made it clear that a plaintiff cannot
19 come into this Court to foreclose if it didn't have the note at
20 the time that it filed the lawsuit.

21 Now, it is not true that confirmation is totally
22 different than summary judgment because the confirmation
23 depends upon the summary judgment. So if the summary judgment
24 has a defect, the Court can't go ahead and confirm the sale.
25 And in this case, it's clear that there's such a defect.

1 Now, the plaintiff has opened the door on this issue of
2 jurisdiction and this issue of whether or not this plaintiff is
3 entitled to foreclose because its predecessor, Chase, had the
4 note at the time.

5 Well, first of all, the plaintiff submits an affidavit
6 of note possession dated 4-20. But this was not served on me
7 until -- by mail until May 15th, almost a month after they had
8 this affidavit. And they sent it by mail. And I have the
9 postmark of May 15th on the reply.

10 I didn't get it until yesterday. In other words, a few
11 hours before this hearing. And that is not the way it's done
12 in Hawaii. I should have had this earlier. And they had the
13 note affidavit for a month and didn't give it to me. And this
14 case was continued to give them more time --

15 THE COURT: So do you need more time, Mr. Dubin, is
16 that what you're saying?

17 MR. DUBIN: Yes, I would like more time. But I just
18 need to conclude this by saying that this 4-20 affidavit
19 presents a note, and it says Chase had since 2009.

20 Your Honor, this is an absolute forgery. We have in
21 the record and we presented to this Court --

22 THE COURT: So we don't need to continue this. So
23 we're going to continue the motion. Is that what you're
24 saying?

25 MR. DUBIN: Pardon?

1 THE COURT: I thought you just said it was mailed on
2 May 15th, so you just got it the other day. So I thought I
3 heard that you needed more time.

4 MR. DUBIN: That's correct.

5 THE COURT: And you are continuing with argument. So
6 are you saying we can finish the motion today, or are you
7 asking me to continue the motion?

8 MR. DUBIN: No, I want more time. But I want to point
9 out to Your Honor and the world that my client received from
10 Chase in 2011 -- which is in the record in this case -- a copy
11 of the same note that they say they had in 2009, and it doesn't
12 have an endorsement. This plaintiff is turning this courtroom
13 into a collection agency for crooks.

14 Yes, I want more time. I'd like to brief the --

15 THE COURT: Okay. So you got the reply late. So you
16 need some more time to read the reply. Is that it?

17 MR. DUBIN: Yes. Yes.

18 THE COURT: Okay. So if I continue it for a week,
19 would that be enough time?

20 MR. DUBIN: No, because I have to -- I'd like to
21 present a paper to the Court.

22 THE COURT: So you're going to file something else in
23 response to Ms. McHenry's reply?

24 MR. DUBIN: Yes, because I filed my opposition on time.

25 THE COURT: Right.

1 MR. DUBIN: They asked for more time. They took a
2 month. I had a discussion with Ms. McHenry, which she'll
3 acknowledge, that I needed time after they filed their reply.
4 Because the rules do not allow you to file your papers in your
5 reply, it should have been in your motion. So, therefore, I
6 should have 18 days to respond to their moving affidavit, which
7 is the -- which is the paper that they just filed.

8 THE COURT: Mr. McHenry.

9 MS. MCHENRY: Yes, Your Honor.

10 THE COURT: It sounds like he just got this document a
11 day ago or two days ago.

12 MS. MCHENRY: Your Honor, we served it on him, as
13 allowed by the rule, by mailing it to him on May 15th.

14 THE COURT: Three days ahead of time.

15 MS. MCHENRY: Three -- yes, it was in the appropriate
16 time period. We dropped it in the mail. He acknowledged it
17 was postmarked that day. That's not in our control how long
18 the post office takes to deliver it to him. So we complied
19 with the rule. And, therefore, there should not be any further
20 continuance since we complied.

21 My reply is four-pages long, four or five-pages long.
22 We're not talking about something that's voluminous.

23 In any event, to the extent that Mr. Dubin is talking
24 about the affidavit of note possession, as I said, the issue of
25 standing is not an issue at the confirmation stage. It's being

1 presented to Your Honor for Your Honor's information. We're
2 going to be supplementing the record on appeal so that then the
3 Hawaii Intermediate Court of Appeals can consider it.

4 So, therefore, I would be asking that Your Honor
5 proceed with the hearing and ruling on the motion for
6 confirmation.

7 THE COURT: And I believe Ms. McHenry complied with the
8 rule, so I'd like to get the hearing done today.

9 MR. DUBIN: Well, Your Honor. Our offices are two
10 blocks away from each other. This paper is 25 pages. And the
11 rules of the Court requires -- Hawaii Rules of Civil Procedure
12 Rule 56(a) requires that moving affidavits be submitted at the
13 time the motion is submitted, and then we're supposed to have
14 at least 18 days to respond.

15 This affidavit was supposedly mailed two days ago.

16 THE COURT: Well, you have the postmark on the letter,
17 right, on the envelope? It says May --

18 MR. DUBIN: Well, this doesn't mean when it was
19 actually dropped in the mailbox. This is a machine postmark by
20 Ms. McHenry's office.

21 Would Your Honor like to see this?

22 THE COURT: Well, most law offices have a machine that
23 postmarks their mail.

24 MR. DUBIN: Yeah, but this does not mean it was mailed
25 that day.

1 THE COURT: Well, you know -- well, that is true. But
2 that's the way most law offices do. They have a mail room and
3 they have the postage machine and they run the envelopes
4 through it and deposit it in the mail, I'm assuming the same
5 day as the postmark is on it, but I'm not absolutely sure.

6 MR. DUBIN: It's Rule 56(a). It's supposed to be --
7 the moving declaration or affidavit is supposed to be filed
8 with the motion. That's why we have the 18-day rule. This is
9 not three pages. This is 25 pages.

10 THE COURT: Yes, Ms. McHenry.

11 MS. MCHENRY: Yes.

12 Your Honor, the certificate of service that we have
13 states that it was served on May 15th.

14 THE COURT: That's what the certificate of service
15 says, May 15th.

16 MR. DUBIN: Yes. And the declaration is dated April
17 20th.

18 THE COURT: Understood. But I think we've had enough
19 time. I think the rule has been complied with, so I'd like to
20 finish the hearing today.

21 Mr. Dubin.

22 MR. DUBIN: Well, I would move to strike the paper,
23 then, because the Intermediate Court of Appeals has held that
24 it will not consider a reply paper with new arguments in it,
25 and these are new arguments.

1 If the Court wishes to proceed, I pointed out that
2 Chase provided us in 2011 with a copy of the note that didn't
3 have an endorsement, contradicting the 4-20 affidavit. You
4 know, anyone can write an affidavit. Let's look at the facts.

5 We have a contrary copy of the note from Chase itself
6 in 2011. Last time I looked, 2011 was after 2009. In addition
7 to that, the endorsement is signed by Cynthia Riley. And we
8 provided the Court with evidence on the record that she wasn't
9 even employed in 2009 by Washington Mutual when the loan was
10 made. So here's another issue of going backwards in time,
11 falsifying the paper.

12 And if that isn't enough, Washington Mutual Bank, in
13 2007, didn't exist. It was -- MERS had been cancelled as a
14 federal association in 2005. And that's in the record.

15 If that isn't enough, we have the testimony of the
16 Washington Mutual receiver for the FDIC in a criminal
17 proceeding under oath. We provided in the record which
18 testifies that they didn't know what Washington Mutual owned by
19 way of mortgages. So Chase just said, well, we own it.

20 I don't know if there has been a case in world history
21 of such fraud that they have the nerve to present a 2009 -- an
22 affidavit that says in 2009, they owned the mortgage.

23 And if you look at the reply paper -- I didn't have
24 enough time to, obviously, prepare a response to this -- it
25 doesn't even show what Chase had in 2009. It doesn't support

1 the affidavit. So there's no question in the world that Your
2 Honor has before you a false, fraudulent copy of the note.
3 Perjury is what it amounts to.

4 Is this Court is going to throw somebody out of their
5 home based upon a note which is false?

6 In addition to that, if you want anything else, you can
7 look at the note, and it's signed by Elise Travis. And her
8 signature on the note, which we provided you, is different than
9 the note that they provided. The first letter of her first
10 name is below the line.

11 This is one of the copies they gave us. It's below the
12 line. And in this 4-20 affidavit, it presents a copy where her
13 first name is written on or above the line.

14 How many false copies of the note does it take to get
15 the attention of this Court before somebody is thrown out of
16 their home? When will this fraud stop?

17 I would like to have additional time, the 18 days that
18 I'm allowed under the Hawaii Rules of Civil Procedure Rule
19 56(a) that this Court is bound by, to put all these arguments
20 on the record. I didn't have a chance to do that because I got
21 this belated, contrary to our rules, reply memorandum.

22 Now, there is an appeal going on from the summary
23 judgment. But that appeal does not have anything to do with
24 stopping this Court from analyzing these arguments in this
25 confirmation hearing. Because, once again, this confirmation

1 of sale procedure is still a part of this same case. And it
2 depends upon the validity of the promissory note.

3 The promissory note you have before you, which is
4 false, fraudulently signed by somebody who didn't even work for
5 the company at that time, with conflicting copies of the
6 promissory note. How in the world is Your Honor going to
7 confirm this sale and throw my clients out of their home? This
8 courtroom should not be a collection agency for crooks.

9 THE COURT: Ms. McHenry.

10 MS. MCHENRY: Thank you, Your Honor. These are
11 arguments that Mr. Dubin is making now that are relevant to the
12 right of a lender to proceed with foreclosure. Those issues
13 were decided in connection with the motion for summary
14 judgment, and those are up on appeal before the Intermediate
15 Court of Appeals.

16 And if I can point out to you those same arguments that
17 Mr. Dubin is making now were in connection with the motion for
18 summary judgment. He was talking, for example, about Cynthia
19 Riley -- I have his opening brief here on the appeal of the
20 MSJ. And he talks about Cynthia Riley, how that she supposedly
21 wasn't working for Washington Mutual at the time. He's talking
22 about an alleged fraud with respect Elise Travis' signature.

23 Those are on page 4 of his opening brief. He's talking
24 about that the FDIC never had a Travis WAMU FHA mortgage to
25 assign to case. That's in his opening brief of the granting of

1 summary judgment. Those issues were argued before and are
2 subject of the appeal.

3 He challenges the FDIC as receiver. Those are issues
4 that relate to the granting of summary judgment, to the merits
5 of the right to foreclose. And, therefore, they are issues
6 that are now with the Intermediate Court of Appeals pursuant to
7 Mr. Dubin's appeal of the grant of summary judgment.

8 And Mr. Dubin says, well, it's kind of like there's a
9 continuum, that somehow the foreclosure depends upon the
10 granting of summary judgment and, therefore, he can raise it
11 again at the confirmation stage.

12 That is not the law in Hawaii. There's a summary
13 judgment stage. It's separate for appealable purposes. And
14 then there can be -- then the second stage, which is the
15 confirmation stage. And that confirmation stage, by law,
16 pursuant to the Wise decision, only deals with issues that are
17 unique to the confirmation. And Mr. Dubin was saying, well, I
18 mischaracterize things.

19 The Hawaii Supreme Court said that the lender's
20 arguments are dispositive.

21 That's not me. That's the Hawaii Supreme Court on the
22 issue that -- the issue of standing cannot be raised in
23 connection with the confirmation, Your Honor, because it's not
24 an issue that's unique to confirmation.

25 Thank you, Your Honor.

1 THE COURT: Anything else, Mr. Dubin?

2 MR. DUBIN: Yes. Your Honor, Ms. McHenry opened the
3 door. She presented the affidavit, which is a new argument,
4 and another copy of the note that contradicts all the other
5 copies of the note.

6 If Your Honor confirms this sale, you should put in
7 your order that this Court is not interested in fraud or
8 perjury before it. As Ms. McHenry says, that's not appropriate
9 to discuss before the Court, that the documents presented to it
10 are perjured and are false. If this Court is blind to perjury
11 and fraud, then it ought to say so in its order.

12 THE COURT: Mr. Wimberley, anything?

13 MR. WIMBERLEY: No, Your Honor. Thank you.

14 THE COURT: How about Mr. Kirschbraun?

15 MR. KIRSCHBRAUN: I have nothing to add, Your Honor.

16 THE COURT: Okay. Thank you very much, counsels.

17 The Court, having had an opportunity to review the
18 motion, the opposition, the reply, having heard the oral
19 arguments in court this morning, the Court's going to go ahead
20 and grant plaintiff's motion for confirmation of foreclosure
21 sale.

22 Defendant does argue that in violation of Toledo,
23 plaintiffs lack both a genuine dispute of material elements, as
24 well as standing, all of which are defenses to the summary
25 judgment motion. However, this is a motion for confirmation of

1 a foreclosure sale.

2 The summary judgment motion, having been heard on the
3 merits in this Court on August 16th, 2016, the Court finds the
4 defendant's opposition is not proper at this time.

5 Res judicata would preclude defendants from challenging
6 standing in their opposition from the order confirming sale,
7 despite the general proposition that a lack of standing may be
8 raised at any time.

9 Under the doctrine of res judicata, challenges to
10 respondent's standing were subsumed under the foreclosure
11 judgment, which became final and binding.

12 Judgment of foreclosure of mortgage is final, and an
13 alleged lack of standing is a defense to the right to foreclose
14 to the motion for summary judgment and decree of foreclosure,
15 and is to be determined during the first phase of a foreclosure
16 case. The confirmation phase falls within the second phase.
17 And, therefore, the defense cannot properly raise a standing
18 challenge at this particular point.

19 Notwithstanding these arguments, plaintiff has,
20 nevertheless, provided proof that establishes that the original
21 note was in plaintiff's possession at the time this complaint
22 was filed.

23 Further, defendant alleges forgery, fraud, defects, et
24 cetera. All of these, the Court finds, is without merit.

25 So, Ms. McHenry, can you prepare the order on the

1 matter.

2 MS. MCHENRY: I will, Your Honor. Thank you.

3 THE CLERK: Court stands in recess.

4 (Proceedings concluded.)

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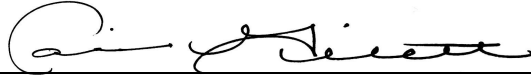
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C E R T I F I C A T I O N

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I, CAMMIE GILLETT, a Registered Professional Reporter,
Certified Shorthand Reporter for the State of Hawaii #438, do
hereby certify that the foregoing pages comprise a full, true
and correct transcript of the proceedings had in connection
with the above-entitled cause.

Dated this 19th day of May 2017.

Sgd: / 
Cammie Gillett, RPR
Official Court Reporter, State of Hawaii
Hawaii Certified Shorthand Reporter #438