

1 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

2 *In re:*

3 OLGA D. PAREDES,

4 *Debtor.*

Case No. 09-22261 (*rdd*)

New York, New York

September 29, 2009

10:19:37 a.m.

5 TRANSCRIPT OF CHAPTER 13 HEARING RE:

6 DOC 7 - CONFIRMATION HEARING;

7 DOC 18 - HEARING ON LOSS MITIGATION;

8 DOC 20 - OBJECTION TO CLAIM #4 FILED BY DAVID SHAEV ON BEHALF
OF PHH MORTGAGE CORP.;

9 DOC 22 - MEMORANDUM OF LAW IN OPPOSITION TO DEBTOR'S OBJECTION
TO CLAIM #4 FILED BY SHAPIRO & DICARO;

10 DOC 23 - AFFIDAVIT IN OPPOSITION TO DEBTOR'S OBJECTION
TO PROOF OF CLAIM #4 FILED BY SHAPIRO AND DICARO;

11 DOC 24 - AFFIRMATION IN OPPOSITION TO
DEBTOR'S OBJECTION TO CLAIM #4;

12 DOC 25 - DEBTOR'S RESPONSE TO OPPOSITION TO DEBTOR'S
OBJECTION TO PROOF OF CLAIM #4

13 BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

14 A P P E A R A N C E S :

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25 *Proceedings recorded by electronic sound recording.
Transcript produced by transcription service.*

1 COURT CLERK: Olga Paredes!

2 THE COURT: Okay. Before we get into the claim
3 objection issues, where are you on loss mitigation?

4 MR. SHAEV: Your Honor, on either Thursday or Friday
5 of last week, I received an email from PHH, I guess loss
6 mitigation department, if there is such a thing, requesting a
7 budget and updated pay stubs, after, oh, about six months.

8 THE COURT: Okay.

9 MR. SHAEV: And of course we've agreed to provide that
10 information, but that's where we are. And a copy of the lease,
11 which I have, because we had rental payments. So, we will be
12 providing that information. I believe they've already sent part
13 of it to my office during the last few days.

14 THE COURT: Okay. All right. So, I'm going to
15 adjourn that to the 27th.

16 MR. SHAEV: October 27?

17 THE COURT: Yes. But I guess it's a different arm of
18 PHH that's dealing with the claim objection?

19 MR. SHAEV: I have no idea, Your Honor.

20 THE COURT: Okay.

21 MR. SHAEV: If I could figure out who is who in
22 this --

23 THE COURT: Okay. So, why don't we turn to the claim
24 objection then.

25 MR. SHAEV: All right. Thank you, Your Honor. David

1 Shaev for the Debtor. If I may outline what's preceded us to
2 this date and bring us up to date.

3 The Chapter 13 was filed on February 25 of this year.
4 The proof of claim was filed by PHH Mortgage in March. We also
5 served a qualified written request.

6 After the proof of claim, I sent a letter to PHH
7 requesting certain information documenting standing. And I did
8 get a letter back saying that PHH is the servicer in this
9 matter, and that the holder/investor is U.S. Bank National as
10 Trustee.

11 At that point I filed an objection to proof of claim
12 requesting that the claim be expunged and also for an accounting
13 of their itemization, which they attached to their proof of
14 claim, by reason of fact that the response to the QWR had less
15 money owed than I saw in the proof of claim.

16 An adjournment was requested by PHH until September
17 15, at which time they responded to my papers. And I then filed
18 a further supplement to my objection based upon their response.

19 Basically, that brings us to where we are today as far
20 as paperwork. Basically, it is my position that PHH needed to
21 prove in their proof of claim a complete unbroken chain of title
22 from the originator to the creditor. That would be the
23 originator to the sponsor, the sponsor to the depositor, the
24 depositor to the trust, and the securitized trust.

25 They would also need to prove that PHH is the real

1 party in interest in this matter to file a proof of claim, and
2 that all necessary parties were joined pursuant to Civil Rule
3 19.

4 My objection was based upon incomplete filing, Rule
5 3001(d), that PHH had no standing, that PHH as servicer has no
6 standing, and that the necessary party, meaning the real party
7 in interest, U.S. Bank, was not joined in the matter.

8 In addition, we objected that there were improper
9 charges, and that the creditor's actions in filing certain
10 assignments and documents violate the automatic stay as attempts
11 to perfect their lien after filing of the bankruptcy.

12 Now, as far as what the creditor actually filed, the
13 original proof of claim states that PHH is a secured creditor.
14 The itemization attached to the proof of claim stated a
15 foreclosure fee of \$450. A mortgage attached named MERS as
16 nominee and Mortgage World Bank as lender, the originator.

17 The adjustable rate rider also had Mortgage World as
18 originator. This is all back in March of 2006. And then there
19 was a recording page dated 7/25/06, which consisted of 24 pages
20 according to the recording page, of which we see 16 pages
21 attached to the proof of claim.

22 Now, the response to my motion brought on an
23 affirmation, an affidavit and memorandum of law. The
24 affirmation of counsel states that the note was transferred to
25 U.S. Bank. No documentation has been provided as to that.

1 Oh, let me just back up one second, Your Honor. We
2 were also to be provided the Pooling Service Agreement, the PSA,
3 by September 15 by agreement. I have not received that yet.
4 For some reason I was unable to find it on the EDGAR SEC
5 website. It might be under a different name, I'm not sure.
6 That would define all the parties in securitization.

7 There was an assignment annexed to the affirmation of
8 counsel, which was stated to be a "memorialization of the prior
9 transfer," whatever that means. There was a limited power of
10 attorney annexed stating U.S. Bank appointed PHH as Attorney in
11 Fact.

12 My analysis of that affirmation reveals the following:
13 that the assignment was three years after the origination; the
14 assignment was executed by a Tracy Johnson, as Assistant Vice
15 President of MERS; that the assignment for MERS does not
16 transfer beneficiary from MERS, because MERS is just a nominee,
17 never a beneficiary of a note, and, therefore, unable to
18 transfer; in fact, that the creditors in fact created an
19 assignment to the Trustee years after such transaction could
20 have taken place.

21 This affirmation completely contradicts their own
22 papers that the note and mortgage were previously transferred
23 from MERS to U.S. Bank as reflected in the "memorialization."

24 In addition, they did admit that \$450 was overcharged
25 to this Debtor in the proof of claim, but in their support and

1 documents they also submitted another charge of -- it's small,
2 but \$13.25, dated March 2, 2009 for a property inspection after
3 the filing of the bankruptcy, and my client has always resided
4 in this property.

5 They also admit a small error in interest -- we don't
6 know what that is -- and included a bankruptcy fee of 150 for
7 filing the proof of claim, which has brought us here today.

8 Also attached was an affidavit of Tracy Johnson, which
9 becomes very interesting, because in this affidavit Tracy
10 Johnson is the Assistant Vice President of PHH Mortgage. Her
11 previous affidavit had her papers - rather, the assignment had
12 her Vice President of MERS -- Assistant Vice President. The
13 assignment of mortgage is dated March 26, 2009, well after the
14 filing of the bankruptcy.

15 In addition, her affidavit sets forth no foundation,
16 whatsoever, for her ability to testify, including books and
17 records, as to this matter. The affidavit does admit that PHH
18 is the servicer, and that U.S. Trust is the owner of the loan.

19 Your Honor, the assignment is annexed to my original
20 papers as Exhibit B.

21 THE COURT: Yeah, I don't see an assignment in the
22 response. There's an assignment of the servicing rights, but I
23 don't see an assignment from the original holder of the mortgage
24 to U.S. Trust.

25 MR. SHAEV: That's correct. The original assignment,

1 March 16, is Exhibit E to my original motion.

2 THE COURT: Okay.

3 MR. SHAEV: There's also a memorandum of law, which
4 basically just supplements and states that PHH is the servicer,
5 and U.S. Trust is the holder of the note. What Debtor is asking
6 -- and also, it states that PHH intends to submit documentation
7 that U.S. Bank is the beneficial holder of the note.

8 We have little doubt that U.S. Bank should have been,
9 as trustee, beneficial holder of the note. We don't know if it
10 ever became, and whether it followed the rules of the Pooling
11 Service Agreement.

12 Basically, we're asking that my objection to the proof
13 of claim be sustained; that the proof of claim be expunged.
14 We're requesting an order by this Court to bring in Tracy
15 Johnson to testify in this courthouse as to the evidence and
16 statements that she has made.

17 THE COURT: Well, but -- I mean today is the hearing,
18 right? So, if she's not here, she's not here.

19 MR. SHAEV: I understand that, Your Honor, that even
20 though I'm saying there's no foundation to it, the fact that she
21 submitted an affidavit stating that she's Vice President of PHH,
22 and also submitting papers saying she's Vice President MERS at
23 one point -- Assistant Vice President, excuse me, I'd like to
24 know what other corporation she's vice president of. I'd like
25 to know -- what we're getting at Your Honor --

1 THE COURT: My question went to this: it seems to me
2 that that request may be relevant to other matters and maybe
3 that's why the U.S. Trustee is here. But it's not really
4 relevant -- you're not asking for an adjournment of this hearing
5 so you can --

6 MR. SHAEV: No.

7 THE COURT: -- so you can cross-examine her? I mean
8 it's related to other issues?

9 MR. SHAEV: Yes, it is, Your Honor.

10 THE COURT: Okay.

11 MR. SHAEV: Unfortunately it's a *modus operandi* that
12 we see in these cases where we object to a proof of claim and
13 then documents are prepared to try to facilitate the claim, as
14 opposed to the real documents that are necessary. And in fact,
15 it's a fraud on the Court.

16 THE COURT: Okay. Well, let me ask you, before I hear
17 from PHH, a couple of questions. First, is there -- given the
18 claimant's admission that the claim was too high by
19 approximately \$468, is there now agreement on the amount, or
20 does the Debtor still believe that the claim is too high? There
21 was originally a part of the objection that said that the escrow
22 was too high. Is that amount still in -- is the amount of the
23 claim still in dispute?

24 MR. SHAEV: It's still in dispute, yes, Your Honor.

25 THE COURT: Okay. And what is the basis for the

1 remaining dispute?

2 MR. SHAEV: Well, I mean even in their own papers,
3 they stated that there was an overcharge in interest. I don't
4 even know what that overcharge is. It may be small numbers, but
5 for instance, the \$450 that they do admit to, if you amortize
6 that over the life of the loan, becomes rather large. So, we
7 don't know what that statement means. We haven't had the chance
8 to confer on that.

9 THE COURT: Is there any other aspect of the amount
10 that the Debtor objects to?

11 MR. SHAEV: Not that we're aware of. We haven't done
12 an analysis of the mortgage. That really was not the purpose of
13 the motion.

14 THE COURT: Okay. All right. Well, I may have
15 another question for you, but let me hear from PHH.

16 MR. SHAEV: Thank you.

17 MR. DICARO: John DiCaro, Shapiro & DiCaro for PHH.
18 Your Honor, the objection had three major components and I'll --
19 maybe we'll -- maybe I'll work better backwards, the simpler
20 ones first.

21 I guess I wasn't aware there's still a major dispute
22 about the amount due because, as you indicated, in Ms. Hobert's
23 affirmation, she indicated we acknowledge there was an error
24 with some of the figures, and she outlined the amounts that we
25 believe were incorrect.

1 THE COURT: I think the only remaining dispute is how
2 those amounts would be amortized. I think the categories of the
3 amounts are now agreed to. The amounts in the claim by category
4 are agreed to, but the calculation based on past due payments
5 premised upon those amounts may need to be fixed. But I think
6 that's something an order can do.

7 MR. DICARO: I'd like to suggest that you know we
8 certainly acknowledge that when we filed those papers, there
9 were some errors and we'll clearly corrected that. We've
10 indicated we would do so and that part of it seemed relatively
11 simple.

12 THE COURT: Okay.

13 MR. DICARO: The second part of the objection had to
14 do with the filing of the assignment of mortgage to U.S. Bank,
15 which Debtor's counsel has characterized as a fraud. Judge, I
16 don't believe there's any issue about -- I mean first, as I know
17 the Court's aware, issues of standing have become paramount in
18 many courts. In our memorandum of law we indicated there's no
19 statute, nor is there any case law that indicates that the
20 filing or an assignment of mortgage after the filing of the
21 bankruptcy petition is in any way a violation of the stay. If
22 that were true, then there could never be a transfer of any
23 asset. There's no attempt to collect a debt in that scenario.

24 Moreover, I want to make sure it's clear, one of the
25 things that he said just now was that we tried to create

1 documents after the fact. That's not true. There are no
2 documents. In fact I wish there were some documents that I
3 could have provided you, but in fact there were no documents
4 created after the fact. The key issue has to do with standing.

5 THE COURT: Well, when did U.S. Trust become the
6 holder of the mortgage?

7 MR. DICARO: Judge, I can't -- to be perfectly frank,
8 I can't tell you that. I don't know the answer. And I finally
9 saw that it's an odd situation --

10 THE COURT: Well, so how do I know that U.S. Bank is
11 the holder of the mortgage?

12 MR. DICARO: Well, I can understand. It's a problem
13 which I can't answer -- it's a question I can't answer for you.

14 THE COURT: Okay.

15 MR. DICARO: PHH has indicated that they transferred
16 the loan to U.S. Bank.

17 THE COURT: But they don't have the authority to do
18 that.

19 MR. DICARO: They did, Judge, because -- well, Judge,
20 let's go back. At the origination of the loan, clearly the note
21 was assigned to PHH. It doesn't appear there was ever --

22 THE COURT: Where is the evidence of that?

23 MR. DICARO: It's submitted as a -- a copy of the note
24 with the endorsement is attached to Ms. Johnson's affidavit, I
25 believe, Judge. I think it's Exhibit B.

1 THE COURT: Let's look at that because I didn't read
2 it that way.

3 MR. SHAEV: Your Honor, if it was transferred to PHH,
4 which is just a servicer, that totally violates PSA rules. And
5 why would there be assignment now from MERS two months ago or
6 three months ago, whenever it was, to U.S. Bank? It makes no
7 sense.

8 And by the way, let me just straighten one thing out,
9 I'm not stating that counsel has produced or created documents.
10 What we're saying is that documents are created and this goes
11 back to documents that are provided to counsel, whether it be
12 LBS or some other organization that's doing this.

13 (Whereupon, the Judge searched for and reviewed
14 Exhibit B at this time.)

15 MR. DICARO: Judge, I'm having -- I'm trying to find
16 my copy of the assignment of the note, Judge. The assignment of
17 the note indicates an endorsement -- I'm sorry, the note, not
18 the assignment. The note indicates it's been assigned.

19 THE COURT: I don't see that in Ms. Johnson's
20 affidavit.

21 MR. DICARO: Sorry, Judge, I -- let me make sure I'm
22 citing right exhibit. I apologize.

23 (Whereupon, the court clerk hands counsel a document.)

24 MR. DICARO: That's not what I'm looking for. That's
25 also in there, but there should be another attached to that

1 affidavit. I believe it is. I'm just trying to find her
2 affidavit now, Judge; I'm sorry.

3 The note should be annexed as Exhibit B to her
4 affidavit, and there were several documents that were attached.
5 The adjustable rate and note, and the -- there's a six-page
6 document I believe. And then on the final page, on page 6 of 6,
7 there is an endorsement to pay to the order of PHH from Mortgage
8 World Bank. Do you have it? I'm sorry; if you don't have it, I
9 can bring you a copy of it in my file here, Judge.

10 COURT CLERK: Here.

11 MR. DICARO: Yeah, this is it.

12 COURT CLERK: It's the page right before Exhibit C.

13 THE COURT: But this is --

14 MR. DICARO: Judge, I'm trying to -- I'm trying to
15 address the issues --

16 THE COURT: I understand. But it's --

17 MR. DICARO: -- that when the loan was originated --

18 THE COURT: This is the stamped endorsement, right?

19 MR. DICARO: Judge, the UCC --

20 THE COURT: All right.

21 MR. DICARO: The UCC Section, I believe it's 3104 or
22 204, I'm not positive.

23 THE COURT: Okay.

24 MR. DICARO: That's a proper endorsement, Judge.

25 THE COURT: Okay.

1 MR. DICARO: So, in other words, at the time the loan
2 was originated, within a couple of days of the origination, the
3 note was assigned to PHH, the servicing rights were assigned to
4 PHH. I've provided you a letter that indicates that Mortgage
5 World Bankers notified the hazard insurance company that PHH
6 should be deemed the mortgagee insured. Obviously, the big
7 document is missing because there's no assignment of mortgage.
8 I'm not sure why that is. I can't explain it, obviously I
9 wasn't there. But it certainly represents an intent to transfer
10 the loan to PHH. PHH clearly owns the obligation because
11 there's an assignment into them.

12 Now, we were talking --

13 THE COURT: They, under what?

14 MR. DICARO: The note was assigned to PHH. The
15 underlying obligation here is assigned to PHH.

16 THE COURT: Oh, okay, I just didn't --

17 MR. SHAEV: And that contradicts everything and every
18 paper where U.S. Bank is the Trustee and owner of the --

19 MR. DICARO: I didn't interrupt you when you spoke,
20 sir. Let me just finish.

21 Subsequent to that time -- and I don't know when, I
22 can't tell you -- U.S. Bank or PHH then apparently intended or I
23 believe they did transfer. Now, I think the Court is well aware
24 because we've dealing with these issues now for a couple of
25 years.

1 In the secondary market there are many cases where
2 assignments of mortgages, assignments of notes don't happen at
3 the time they should. It was standard operating procedure for
4 many years.

5 THE COURT: Well, I'm sorry; where is the evidence
6 that the mortgage was assigned to PHH?

7 MR. DICARO: Well, Judge, I don't -- there's not an
8 assignment of mortgage. The only evidence I can provide you is
9 that there was a notification to the hazard insurance company
10 that PHH should be the mortgagee insured, the note was
11 transferred. And as a general rule, you know liens follow
12 notice. It's very unusual for a mortgage and a note to be
13 separated from each other. The servicing rights were
14 transferred to PHH. You know again, the reality is --

15 THE COURT: Why would they bother doing that?

16 MR. DICARO: Because I think, Judge --

17 THE COURT: If they were transferring the mortgage,
18 why would they bother transferring the servicing then?

19 MR. DICARO: Judge, I can't answer your question. I
20 don't know the answer because I don't have for you all the
21 documentation.

22 THE COURT: And we don't have any evidence -- what is
23 the evidence of the transfer of the mortgage to U.S. Bank?

24 MR. DICARO: All I have is PHH's representations,
25 Judge.

1 THE COURT: By the woman who also appears to be
2 working for MERS, and who isn't here.

3 MR. DICARO: I understand.

4 THE COURT: So, I don't think you've sustained your
5 burden.

6 MR. DICARO: Well, Your Honor, okay.

7 THE COURT: I mean, I'm prepared to accept evidence,
8 but I don't think this is sufficient evidence. I mean, the
9 affiant isn't here. I think the Debtor has raised very
10 substantial questions as to the affiant's capability to testify
11 as a custodian of the documents, and it's acknowledged that
12 there's no evidence of the assignment to the actual claimant.
13 And that the affiant -- although it's now stated that the
14 affiant on behalf of PHH, it says that PHH is the mortgage
15 holder -- that proof of claim was filed in its capacity as
16 "servicer" in the affidavit. So, it just doesn't add up.

17 I mean I think that perhaps there could have been
18 enough to show it. I mean, I think that there is a power of
19 attorney that authorizes PHH to act as Attorney in Fact for U.S.
20 Trust, which to me indicates that U.S. Trust thinks it's the
21 mortgage holder, but there's no evidence that it holds the
22 mortgage.

23 MR. DICARO: I agree with you, Judge. I think that
24 the reality is that -- and this is one of those cases in which I
25 fear that we're beginning to -- that we're ignoring what we know

1 to be true because we can't get our hands on the documents.

2 THE COURT: But I don't know it to be true. I mean,
3 that's the problem. I mean, the proof of claim --

4 MR. DICARO: I think the Debtor would say to you that
5 she's only dealt with one entity the entire time she's had this
6 mortgage.

7 THE COURT: And who's that?

8 MR. DICARO: It's been PHH.

9 THE COURT: Well, okay, but --

10 MR. DICARO: I understand. PHH -- Judge, I got it.

11 I'm not disagreeing. This is obviously an unusual case.

12 Typically, I have documentation I can argue about or argue, to
13 discuss with you.

14 I guess what I'd like to do -- it seems to me that the
15 reality is that clearly this loan -- I mean when the proof of
16 claim was filed, it was filed in the name of PHH, I think that
17 there's a reasonable argument based on the lack of documentation
18 that PHH could be deemed the "titleholder".

19 THE COURT: But they didn't attach the right
20 documents. I mean the proof of claim is not prima facie valid
21 because they don't attach the documents as required in
22 Bankruptcy Rule 3001. They attached, I think probably
23 knowingly, only certain pages of the documents. None of which
24 had the name of the claimant on it -- of the holder.

25 I mean, you cannot tell from the proof of claim who

1 the creditor is from the underlying documents attached to the
2 proof of claim.

3 MR. DICARO: I think that was not PHH. I think that
4 was an error by my office.

5 THE COURT: Well, in any event, I mean someone
6 supplied your office with incomplete documentation - but, in any
7 event, the proof of claim is not prima facie valid because it
8 doesn't comply with Rule 3001; it doesn't attach the documents
9 underlying the claim. And so the burden has shifted to the
10 claimant to establish its claim. And I don't think it's done
11 it. I mean I think that I have a more than 50 percent doubt
12 that if the Debtor paid this claim, it would be paying the wrong
13 person. That's the problem. And that's because the claimant
14 has not shown an assignment of a mortgage. U.S. Bank does have
15 a power of attorney. That's attached to the response. So, I
16 could infer from that that PHH is U.S. Bank's agent, although
17 Mr. Shaev has raised issues as to Ms. Johnson's ability to
18 testify as the custodian of the documents, which are, you know,
19 I think they're legitimate.

20 But I don't see how I could get from the fact that PHH
21 is U.S. Bank's agent to the leap that you want me to make, which
22 is that U.S. Bank is the secured creditor when there's no
23 evidence of an assignment of the mortgage, other than the agent
24 of U.S. Bank saying they're the holder of the mortgage. And I
25 don't see how I can accept that.

1 MR. DICARO: Judge, I understand. The reality is, Ms.
2 Hobert from my office asked for a further adjournment because we
3 couldn't provide the documentation that Mr. Shaev wanted because
4 we're still seeking. I guess I'd ask you to give us a little
5 more time to provide it to you, Judge.

6 THE COURT: But when was the proof of claim filed?

7 MR. SHAEV: The proof of claim was filed I believe it
8 was April 7. My motion was filed --

9 THE COURT: And when was the claim objection filed?

10 MR. SHAEV: July 15.

11 THE COURT: I mean these cases move, you know. I
12 just --

13 MR. DICARO: I understand, Judge.

14 THE COURT: I don't think an adjournment is warranted.
15 There was no request of me for an adjournment, until we had this
16 whole oral argument and it was apparent you were going to lose.

17 MR. SHAEV: Your Honor, this is the adjourn date.

18 THE COURT: So, I'm not going to grant an adjournment.

19 MR. SHAEV: Your Honor, this is the adjourned date.
20 It was adjourned on consent.

21 THE COURT: Okay. There was no further request for an
22 adjournment?

23 MR. DICARO: I think Ms. Hobert --

24 THE COURT: But anyway there was no --

25 MR. SHAEV: I don't remember. one.

1 THE COURT: -- there was no request of the Court, and
2 you know we have 80 people here, and I just don't -- I've spent
3 time on this, I've researched, I've read the documents. I just
4 don't think an adjournment is merited at this point. You know
5 if Ms. Johnson really was going to stand up for what she --
6 particularly after the response -- she should be here.

7 MR. SHAEV: We'd love for her to be here, Your Honor.

8 THE COURT: Did you have something to say, Mr. Zipes?

9 MR. ZIPES: Judge, may I approach?

10 THE COURT: Yes.

11 MR. ZIPES: Just for a moment. Judge, my office has
12 been monitoring -- Greg Zipes from the U.S. Trustee's Office.
13 My office has been monitoring this case, and we do agree with
14 many of the concerns raised by the Debtor at least as an initial
15 matter, on the proof of claim.

16 The creditor -- there's a basic power imbalance
17 usually between the Debtor and a creditor. The creditor has a
18 duty and obligation to make sure that its papers make sense.
19 And the proof of claim that was filed here at its core doesn't
20 make sense. And that's what the creditor filed.

21 Mr. Shaev is very aggressive and has ferreted out some
22 of these issues, but it wouldn't necessarily be the case in
23 another case. And my office has a concern. We were here to
24 state our concern. And counsel filing documents on behalf of a
25 creditor also has an obligation to make sure that all the papers

1 are in order.

2 We're hearing today that in fact we don't have an
3 assignment, or counsel has never seen it; he's "seeking" it.
4 And there's a breakdown in what counsel is also filing. In this
5 is cases. If he doesn't have that document and is seeking that
6 basic document. So, my office is here and we're monitoring it.
7 And we are concerned about it. We would ask to participate in
8 any further discovery or proceedings to the extent that that's
9 necessary.

10 THE COURT: Okay. Well, as far as the motion before
11 me, which is an objection to the claim, I am not prepared to
12 grant an adjournment, as I stated. Further, as I stated, I
13 believe that the proof of claim, as filed, was not entitled to a
14 presumption of prima facie validity because the underlying
15 documents in support of the claim, which was after all a
16 mortgage claim, were not attached in a complete manner and in a
17 way that would have enabled the Debtor to evaluate whether in
18 fact the claimant had a mortgage or was the agent for the
19 mortgage holder, being the holder of the underlying note.

20 The burden then is still on the claimant. The
21 claimant responded to Debtor's objection with two affidavits.
22 Neither of the affiants is present to be cross examined today.

23 Ms. Johnson's affidavit, which is the primary
24 affidavit upon which the claimant relies, is self-contradictory
25 and contradicts the proof of claim and the documents itself. I

1 do not accept her as the custodian of documents that she's
2 referring to or that she attaches.

3 And I also note that she acknowledges -- and it's been
4 acknowledged by counsel today -- that there is no proof of
5 assignment of the mortgage to U.S. Bank, the claimant for whom
6 PHH is purportedly acting as agent under a power of attorney.
7 And, therefore, the only evidence that U.S. Bank is the holder
8 of the mortgage and the claimant is Ms. Johnson's statement to
9 that effect, which cannot be corroborated.

10 So, while I believe that while it would have been
11 possible for U.S. Bank to have carried its burden if it had
12 provided sufficient documentation or evidence, it has not done
13 so here. I also believe that that evidence could have been in
14 the form of post-bankruptcy documents as long as those documents
15 showed credible and reliable evidence of transfer of title,
16 because, as counsel for the claimant pointed out, assignments in
17 and of themselves aren't a transfer of the Debtor's property,
18 but only of the property of the assignor to the assignee. This
19 isn't an issue of postpetition perfection, for example.

20 But, again, that evidence of transfer staring with the
21 trust itself and going up to the claimant, U.S. Bank, has not
22 been provided. And, accordingly, the claimant has not carried
23 it's burden that it's the creditor in this case.

24 And I rely on -- in addition to the case that's cited
25 by the Debtor, a fairly recent case from Massachusetts, In re

1 Samuels, 2009 Bankr. Lexis, 1954 (Bankr. E.D. Mass., July 6,
2 2009), on these issues. I think the judge there got it right in
3 that you can show with other evidence ownership of the note and
4 ownership of the claim. That evidence can be postpetition
5 evidence, but you need to show it. I just don't believe it's
6 been shown here, including by the acknowledgement that there's
7 no assignment to U.S. Bank.

8 MR. DICARO: Judge, may I make one final comment that,
9 given what you said, the fact that we did submit to you a copy
10 of the assignment, the original assignment of the note into PHH
11 which was contemporaneous with the transfer of the loan, that if
12 you deem the proof of claim or the proof claim insufficient to
13 show that U.S. Bank is the owner, I'd ask that you consider the
14 fact that PHH is the owner of the loan on the record --

15 THE COURT: Well, I have considered that point -- that
16 even if it would be insufficient to show that it was a secured
17 creditor, it was the holder of the note. The problem is that I
18 think the Debtor has properly pointed out that Ms. Johnson is
19 not a reliable custodian of the documents. And the note -- if
20 you look at the stamp on the note, I would want to cross-examine
21 Ms. Johnson on that because it's an unusual stamp. It really
22 does look like it -- I don't trust it. I mean, it looks odd to
23 me.

24 There is a stamped provision and then U.S. Bank is
25 somewhere off to the right of it, and it --

1 MR. DICARO: It's not U.S. Bank, it's PHH.

2 THE COURT: I'm sorry, you're right. PHH is off to
3 the right of it. And plus which, it's an odd -- the notion of
4 the transfer of the note to the servicer from the trust just
5 doesn't make sense. So, I would clearly want it cross-examined
6 or have cross-examined. I would have questions for her, but I'm
7 sure that Mr. Shaev would, too, on how that document appeared in
8 the file and it related to the structure of the trust. I cannot
9 accept it based on just its appearance here in this affidavit
10 which she's not here to testify on. So, I just --

11 You know clearly it wasn't attached the proof of claim
12 in the first place. It showed up in the affidavit, and she
13 needed to sustain the burden of showing where it came from and
14 why it was entered into. To my knowledge of how these
15 securitized mortgage note/trusts are structured, it doesn't make
16 sense, and it's not explained anywhere in the affidavit as to
17 how it would make sense that it would be transferred to the
18 servicer of the trust -- the note would be transferred to the
19 servicer of the trust. That's an odd thing for me to accept.
20 So, I did consider that point. But, based on the evidence
21 before me, I don't accept that it establishes that there's an
22 amount owing.

23 MR. DICARO: And Judge based on the documents before
24 you, you would suggest that the owner of this mortgage is the
25 original mortgage holder?

1 THE COURT: You know what, what I will say is this,
2 the owner of the mortgage as far as I can see (and the owner of
3 the note) has not filed a proof of claim in the case. That's
4 what I've found. Someone filed a proof of claim who's not been
5 able to establish that they hold the note and the mortgage. So,
6 Mr. Shaev, you could submit an order accordingly.

7 MR. SHAEV: Your Honor, I also request to have leave
8 to file an application for fees to be paid by the creditor in
9 this matter. I do not want to charge a client on this mess.

10 THE COURT: Well, that's not before me though.

11 MR. SHAEV: No, it's not before you. Just leave to
12 file an application.

13 THE COURT: Okay. Well, you can always file an
14 application.

15 MR. DICARO: Thank you, Judge.

16 MR. SHAEV: Do you want a copy of the transcript with
17 the order or --

18 THE COURT: Um --

19 MR. SHAEV: I'm going to order one anyway, so.

20 THE COURT: I'd like to see a copy. This wasn't a
21 lengthy bench ruling, so I'm assuming the transcript will be
22 fine with me. But it doesn't need to be attached to the order.

23 MR. SHAEV: Okay. Thank you, Your Honor.

24 THE COURT: It could be referenced. The record of the
25 hearing could be referenced in the order.

1 MR. SHAEV: Thank you, Your Honor.

2 COURT CLERK: Could we re-schedule a confirmation
3 hearing?

4 MR. SHAEV: Your Honor, if we could go out on this a
5 little bit because we are still dealing with loss mitigation,
6 okay.

7 THE COURT: Okay.

8 COURT CLERK: With who?

9 MR. SHAEV: Well, that waits to be seen.

10 THE COURT: Well, all right.

11 MR. SHAEV: We do need to resolve this somehow.

12 THE COURT: Well, I mean if the claim is disallowed
13 how do you -- I mean, isn't that your resolution?

14 MR. SHAEV: That's a partial resolution.

15 THE COURT: Okay.

16 MR. SHAEV: We'll need to restructure the plan at this
17 point.

18 THE COURT: All right. Well, so, why don't I adjourn
19 this to the 27th of October, the confirmation hearing.

20 MR. SHAEV: All right, thank you, Your Honor.

21 COURT CLERK: Thank you.

22 THE COURT: Thank you.

23 (Whereupon the matter was adjourned to October 27,
24 2009 and the proceeding concluded at 10:57:52 a.m.)

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CERTIFICATION

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I, Rochelle V. Grant, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: October 10, 2009


Signature of Approved Transcriber