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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HON. GEORGE H. WU, JUDGE PRESIDING

Margaret Carswell,)
)
Plaintiff,)
)
vs.) No. CV-10-05152-GW
)
JP Morgan Chase Bank N.A. et)
al.,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Thursday, January 6, 2011; 9:08 A.M.

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1 LOS ANGELES, CA.; THURSDAY, JANUARY 6, 2011; 9:08 A.M.

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3 THE COURT: Let me call the matter of Carswell
4 versus JP Morgan.

5 MR. MARQUEZ: Good morning, Your Honor.
6 Patricio Marquez of Alvarado Smith for defendants JP Morgan
7 Chase Bank N.A. and California Reconveyance Company.

8 THE COURT: All right.

9 MR. GILLIES: Good morning, Your Honor.
10 Douglas Gillies for Plaintiff Margaret Carswell.

11 THE COURT: All right. Let me ask both sides.
12 Did you see the Court's tentative ruling on this motion to
13 dismiss the First Amended Complaint?

14 MR. MARQUEZ: Yes, Your Honor.

15 MR. GILLIES: Yes.

16 THE COURT: Does anybody want to argue anything?

17 MR. GILLIES: Well, I have a few problems with
18 your tentative opinion, Your Honor.

19 THE COURT: Well, I would expect that you did, but
20 what do you want to say?

21 MR. GILLIES: First of all, there was a request
22 for judicial notice of the Congress oversight panel report
23 which was cited in my opposition, so if I could ask the
24 Court, would you be willing to consider giving judicial
25 notice of that report? It was downloaded from the Congress

1 site.

2 THE COURT: Well, how does it relate specifically
3 to this particular matter? I can understand, obviously,
4 that Congress is looking into various things and, et cetera,
5 et cetera, but what is it about the report that relates
6 specifically to this case?

7 MR. GILLIES: All right. The report puts into
8 context the conditions in which this case is one example.
9 It shows the concern that is rising at the level of Congress
10 to what the ramifications of these problems are.

11 What it basically boils down to is this: If a
12 mortgage was created by a deed of trust and a promissory
13 note and the promissory note disappears because it went into
14 a securitization chain and cannot be recovered, and that
15 could happen in one of two ways. The most common way is the
16 securitization goes in more than one direction and so the
17 note is lost.

18 In that case, it's impossible to perfect title on
19 the completion because there is no ability to deliver the
20 promissory note back to the trustor or to the purchaser, and
21 so what the COP report is saying is that we are entering
22 into a time in which real property rights in this country
23 will be --

24 THE COURT: Why would that argument relate to this
25 particular case?

1 MR. GILLIES: Because as we show in our complaint,
2 the note was securitized almost immediately after the
3 documents were --

4 THE COURT: Let me stop you. Is your client going
5 to be paying off the loaned amount?

6 MR. GILLIES: Well, if the loaned amount has been
7 paid back, under the --

8 THE COURT: Well, if that were the case, then it
9 would be in a different situation. In other words, again,
10 the problem is, is that your clients, it's my understanding,
11 hasn't been making any of the payments.

12 MR. GILLIES: But she has alleged that the payment
13 has been made, that the lender has been paid in full.

14 THE COURT: Yes. But not by her.

15 MR. GILLIES: No. But, for example, if I owe a
16 thousand dollars to American Express and somebody else sends
17 that check in and they get their money, they can't turn
18 around and come after me anyway and say, well, we got the
19 money but we didn't get it from you so you still owe us.
20 And that's not the case.

21 THE COURT: No, that's pretty much the fact. If A
22 owes B a thousand dollars and A says, well, B, you got a
23 thousand dollars from A yesterday and, therefore, I don't
24 have to pay you the amount I owe, normally it behooves A to
25 establish the fact that, in fact, B received the thousand

1 dollars for A's debt.

2 MR. GILLIES: Yes. And that's what we are
3 alleging, that the investment pool was paid in full for
4 Margaret Carswell's debt. That's specifically alleged in
5 the complaint.

6 THE COURT: Well, let me hear a response from the
7 defense counsel.

8 MR. MARQUEZ: Certainly, Your Honor. I think what
9 plaintiff is confusing here is, on the one hand, plaintiff
10 undertook an obligation to borrow \$2.5 million. She has not
11 satisfied the obligation to repay that debt. That is
12 entirely distinct from the lender's right to sell the note
13 off to someone else in exchange for money. The one does not
14 excuse the other.

15 So I think the court has hit the nail on the head
16 here. Plaintiff does not allege that she has satisfied her
17 obligations under the note such that the deed of trust
18 should be wiped out and absent that allegation. I don't
19 think that there is any claim in addition to all of the
20 reasons that the court has set out in this tentative ruling
21 and for all the reasons that the court set forth in its
22 prior ruling on the prior motion to dismiss that there isn't
23 a factual basis to support any of plaintiff's claims.

24 THE COURT: Again, it seems to me that I
25 understand -- I understand your citation to this

1 Congressional material, but, again, the Congressional
2 material doesn't relate to this particular case specifically
3 and you haven't shown that it does.

4 MR. GILLIES: Well, there are two sides to the
5 argument. One is that the lender, the one who is identified
6 in the deed of trust and the promissory note as the one who
7 is entitled to the money has been paid. That's one
8 allegation. The other --

9 THE COURT: Not by your client, though. Why is
10 your client claiming that there has been some sort of
11 payment that relates to her debt?

12 MR. GILLIES: Because that is --

13 THE COURT: In other words, what you are saying is
14 that if a lender lends money to someone and if the lender
15 sells that particular debt to someone else, that that would
16 extinguish the obligation of the borrower because of the
17 fact that the lender got paid some money already and so,
18 therefore, the debt is extinguished. In other words, the
19 debt cannot be transferred in any way.

20 MR. GILLIES: Now I see the problem. It's the use
21 of the word lender. Chase does not allege in this case that
22 it's a lender. It says that it's a servicer. WaMu, though
23 it arranged the deal, was not the lender. It was merely a
24 servicer. The lender was the investment trust.

25 When we say the lender has been paid, we mean the

1 investment trust. They have been paid in full and they have
2 been paid in full for Margaret Carswell's debt. And so they
3 have been paid.

4 The second part of the argument --

5 THE COURT: Let me stop you. I understand that
6 point.

7 Let me ask the defense counsel. What is your
8 response to that?

9 MR. MARQUEZ: There is no allegation in the
10 complaint and I have no basis to believe that there can be
11 that any entity that may have purchased the note and deed of
12 trust from Washington Mutual Bank did so in full repayment
13 of plaintiff's obligations under the note or deed of trust,
14 and I think that's what's missing here.

15 I don't have the particular citation in front of
16 me, but I am fairly certain that the deed of trust and
17 possibly even the note indicates that the note may be sold
18 at some point in time without notice to plaintiff.

19 That was set forth from the outset, and, again,
20 plaintiff appears to be conflating her obligations, her
21 personal obligations undertaken in exchange for the money
22 that she plainly received with the lender and/or servicer's
23 right to sell off the note to an investor.

24 THE COURT: Let me just stop you at this point in
25 time. Frankly, again, what you are arguing now isn't

1 contained in any pleading.

2 MR. GILLIES: It's in Paragraph 57 of the
3 complaint.

4 THE COURT: Well, not really, not as you are
5 currently stating or attempting to state it.

6 MR. GILLIES: That's where we say that beneficiary
7 has been paid in full. That's the language --

8 THE COURT: Well, by whom?

9 MR. GILLIES: That's what we need to discover. We
10 don't have any of those facts. They have all of the
11 documents. We don't.

12 THE COURT: Let me ask you. In other words, what
13 you are basically saying is that if somebody files a
14 complaint that says A has failed to pay a loan -- or, no,
15 actually you are the plaintiff so the plaintiff is saying
16 that what? I want to sue the lender because I've paid off
17 the loan and the lender has said there is no -- it's not
18 even that. I mean, this is sort of strange.

19 Let's take a look at -- you said paragraph 56?

20 MR. GILLIES: 57.

21 THE COURT: 57, okay. Paragraph 57 says WaMu
22 securitized plaintiff's single-family residential mortgage
23 loan through Washington Mutual Mortgage Securities
24 Corporation. Plaintiff is informed and believes that
25 WaMu Mortgage passers through certificate series 2007-0A1

1 trust described in Paragraph 12 is terminated and the lawful
2 beneficiary has been paid in full.

3 That is not sufficient.

4 MR. GILLIES: Well, that's what we are alleging,
5 that the beneficiary has been paid in full. Not the
6 servicer. We are not saying that Chase has been paid in
7 full. They are just the servicer. That's all they call
8 themselves.

9 They are working for someone else. They are not
10 the lender. They don't get the money, but they are refusing
11 to identify who the lender is. They are just saying give us
12 the money because we are the servicer like an agent working
13 for a percent. I think it's 2 percent. And so they are
14 saying give us the money even though our beneficiary has
15 been paid.

16 THE COURT: Again, this is like a lender saying,
17 you know, you can't recover on this debt -- sorry, the
18 borrower is saying to the lender you can't recover on this
19 debt because you've already been paid, I think, by someone
20 else. That normally doesn't cut it.

21 Normally, you have to say either I paid, in which
22 case it's based on the party's own knowledge, or you could
23 say you have been paid by X person. You can't say I think
24 you have been paid.

25 MR. GILLIES: Well, the document, this isn't

1 something that we have to look the code for. The deed of
2 trust is what specifies the agreement between the parties.
3 And the deed of trust, I do have copies that I can
4 introduce. In fact, I guess, since we are talking about it,
5 I should. So I would like to introduce these documents.

6 THE COURT: Well, again, this is a motion to
7 dismiss as insufficiency of the allegations of pleadings.
8 In other words, if you want me to take judicial notice of
9 something, I can take judicial notice of it.

10 And if it is something that is a document which
11 has been referenced in the pleadings that has not heretofore
12 been provided to the court, well, you can provide it to the
13 court and I will take a look.

14 MR. GILLIES: Okay. I do have it. Let me just
15 since I've got this in front of me, can I just mention
16 that --

17 THE COURT: All right.

18 MR. GILLIES: -- the deed of trust in
19 Paragraph 23 -- this is the only agreement that shows what
20 the obligations are between the parties. It says that upon
21 payment of all sums secured by this security instrument,
22 lender shall request trustee to reconvey the property. It
23 doesn't say paid by whom. It simply says in that deed of
24 trust payment of all sums secured by the security agreement.
25 And we have alleged that those payments have been made.

1 THE COURT: By whom?

2 MR. GILLIES: I don't know, but that was the basis
3 for the termination.

4 THE COURT: In other words, I can go back to my
5 lender on my home mortgage and say I don't think I need to
6 pay anymore because you've already been paid.

7 MR. GILLIES: Well, you could under your security
8 agreement.

9 THE COURT: And then I'd lose my home. I mean,
10 these are the consequences of saying that you've already
11 been paid by someone else without attempting to identify who
12 or what it is. Normally, debts of one aren't paid by other
13 people.

14 MR. GILLIES: Well, in the events being described
15 by the Congressional oversight panel, that has happened many
16 times.

17 THE COURT: In other words, Congress has found
18 that debts of borrowers in the residential market have been
19 paid off by persons unknown to them and that was a
20 Congressional finding?

21 MR. GILLIES: No. Actually, a lot of that payment
22 came from Congress from our taxes. That's why COP was
23 formed, because Congress put almost a trillion dollars into
24 Wall Street, and that money was, a lot of it, going to pay
25 off those debts to the investors.

1 THE COURT: Yes.

2 MR. MARQUEZ: I think I will go home and call my
3 lender and see if I can get a full reconveyance of the deed
4 of trust and title it back to me.

5 THE COURT: Let me do it this way. I will grant
6 the motion to dismiss the first amended complaint. I will
7 allow the plaintiff to make an offer of proof as to how you
8 would attempt to amend the first amended complaint in a way
9 which will satisfy the court's problems that I've raised
10 both in this motion to dismiss and the earlier motion to
11 dismiss, and I will take a look at it.

12 If I find that there is something that might give
13 me pause to say that your client has a basis to go forward,
14 I will then allow the defense counsel to respond and I will
15 hold another hearing. If I decide that it's not sufficient,
16 I will dismiss with prejudice. But I will give you one more
17 chance to give me an offer of proof in this regard.

18 MR. GILLIES: Then I will provide the deed of
19 trust at that time, not now.

20 THE COURT: All right. That's fine.

21 MR. MARQUEZ: Your Honor, if I may for the record,
22 defendants do object to that on the basis that, A, the order
23 granting the original motion to dismiss, the original
24 complaint was very clear. It was very clear in that it was
25 only giving plaintiff leave to amend to cure the failed

1 defects in that pleading.

2 Plaintiff had the opportunity to do so,
3 essentially ignored the court's order, really didn't cure or
4 address those deficiencies. We have pointed that out in a
5 second motion to dismiss. The court has had an -- sorry,
6 plaintiff has had an opportunity to respond yet again in
7 opposition.

8 THE COURT: Let me stop you. I understand the
9 situation, but I'm in the Ninth Circuit.

10 MR. GILLIES: I can read your order if you like.
11 It doesn't say anything like that.

12 THE COURT: Well, again, I've given you leave to
13 file something new and I will take a look at it at that
14 point in time.

15 Let me ask. How long do you think it will take
16 for you to do that?

17 MR. GILLIES: Well, given this month, I hope I
18 have till the end of the month.

19 THE COURT: I tell you what. I will give you
20 until the 28th of January and I will set this matter back on
21 calendar for a tickler date of February the 7th, but that's
22 a nonappearance. I will hopefully let you know within that
23 week whether or not I will require some response from the
24 defense or whether or not I'm going to issue the dismissal
25 without leave. All right?

1 MR. MARQUEZ: Just to clarify, Your Honor.

2 THE COURT: Yes.

3 MR. MARQUEZ: Plaintiff is receiving essentially
4 leave to file a sur-reply brief of sorts?

5 THE COURT: No. I'm allowing him to make an offer
6 of proof as to how he would amend the first amended
7 complaint to get around the problems that I've already
8 pointed out. Okay?

9 MR. MARQUEZ: Understood.

10 MR. GILLIES: Thank you, Your Honor.

11 THE COURT: All right. Thank you.

12 MR. MARQUEZ: Thank you, Your Honor.

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14 (At 9:25 a.m. proceedings were adjourned.)

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
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proceedings held in the above-entitled matter and that the
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Date: January 21, 2011

WIL S. WILCOX
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