STATE OF VERMONT
FRANKLIN COUNTY

SUPERIOR COURT
No. 500-09 Fc

GMAC Mortgage, LLC,
Plaintiff

v.

Timothy S. Riley, Susan M. Riley,
GMAC Mortgage Corp.,
and Occupants residing at
2349 Richford Road,
Berkshire, Vermont,
Defendants

ORDER

On October 23, 2009, Plaintiff, GMAC Mortgage, LLC filed a Complaint for Foreclosure alleging that Defendants Timothy S. Riley and Susan M. Riley (mortgagors) have failed to make payments in accordance with a Promissory Note and that such action constitutes a breach of the Note and underlying Mortgage Deed held by Plaintiff. According to Plaintiff, on or about April 19, 1999, mortgagors purchased and acquired certain real property located at 2349 Richford Road in the Town of Berkshire, County of Franklin and the State of Vermont (mortgaged premises).

In its Complaint, Plaintiff asserts that the Promissory Note was executed by Timothy S. Riley and Timothy S. Riley as Attorney-in-Fact for Susan M. Riley on August 14, 2003, in favor of GMAC Mortgage Corporation in the amount of $131,360.00. Plaintiff further contends that the Note is secured by a Mortgage Deed, also dated August 14, 2003, from Timothy S. Riley and Timothy S. Riley as Attorney-in-Fact for Susan M. Riley to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for GMAC Mortgage Corporation. Plaintiff attached copies of the original Note (Exhibit 1) and the original Deed (Exhibit 2) in support of its Complaint. Plaintiff contends that Timothy S. Riley signed the Deed as Attorney-in-Fact for Susan M. Riley by virtue of a Power of Attorney dated August 8, 2003. Plaintiff has not submitted any evidence of the Power of Attorney document.

According to Plaintiff's Complaint, the Note and Deed were assigned from MERS as nominee for GMAC Mortgage Corporation to GMAC Mortgage, LLC by an instrument dated October 9, 2009. Plaintiff has submitted a document evidencing an assignment of the mortgage, in which MERS purports to assign the deed together with any notes from MERS, as nominee for GMAC Mortgage Corporation to GMAC Mortgage, LLC. The document is dated October 9, 2009 and signed by Jeffrey Stephan. Jeffrey Stephan is identified on the assignment document as the Vice President for MERS.

Plaintiff has submitted an affidavit in which Jeffrey Stephan, this time as a "duly authorized agent of Plaintiff" attests as a "limited signing officer" to the allegations asserted in

Plaintiff's complaint. The affidavit is dated December 14, 2009. In addition, Plaintiff has submitted a Certificate of Merger which evidences the merger of GMAC Mortgage Corporation into GMAC Mortgage, LLC, on October 24, 2006. Plaintiff's Affidavit Ex. 1.

On November 25, 2009, Defendant Susan M. Riley filed a pro se answer to Plaintiff's Complaint. Her answer is not a verified answer. In her answer, Defendant admits Plaintiff's allegations except for Count II paragraph 16 and Plaintiff's request for attorney's fees and costs. Her answer also includes a personal response in which she attests to a financial hardship and her attempt to seek a loan modification.

On November 23, 2009, Defendant Timothy S. Riley filed a Verified Answer through his attorney Catherine E. Clark. In his answer, Defendant asserts that Plaintiff is not the holder of the Note since MERS did not have the ability to act for the original holder of the Note and therefore, Plaintiff cannot seek enforcement of the underlying obligation.

On December 18, 2009, Plaintiff filed a Motion for Default Judgment and/or summary judgment as to Defendants Timothy S. Riley and Susan M. Riley. In support of its Motion, Plaintiff filed a Statement of Material Facts on December 18, 2009.

Conclusions of Law

In Vermont, all foreclosures are subject to the heighted pleading requirements of Vermont Rules of Civil Procedure 80.1. This rule requires that a plaintiff establish an interest in the debt secured by a defendant's property and that this interest be set forth in its complaint. V.R.C.P. 80.1 (b)(1) (requiring that the complaint "set forth the name of the mortgagor and mortgagee, (…) any assignment of the mortgage (…) [and] the names of all parties in interest..."). In the present case, the Court finds that Plaintiff has met the requirements of V.R.C.P. 80.1 since Plaintiff has provided proof of the assignment pled through the instrument dated October 9, 2009 and signed by Jeffrey Stephan.

However, it is well established that a plaintiff must have standing in order for the court to have jurisdiction over the claim. See *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 340 (1997) (adopting the doctrine of judicial restraint contained in the case-or-controversy requirement of U.S. Const. Art. III, § 2, cl. 1). In the context of a foreclosure action, standing is established by a showing that the plaintiff is entitled to enforce the underlying obligation. See Restatement (Third) of Property, Mortgage § 5.4(c) (stating that a mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures).

In its Complaint, Plaintiff asserts that it is entitled to enforce the obligation secured by the Note and Deed because these documents were assigned to it by MERS as nominee for GMAC Mortgage Corporation to GMAC Mortgage, LLC by an instrument dated October 9, 2009. Plaintiff has provided a copy of this assignment. However, as explained below, Plaintiff has failed to establish that at the time of transfer, MERS had the authority to assign the Note and Deed on behalf of GMAC Mortgage Corporation.

Vermont adopted the Uniform Commercial Code (UCC) in regards to negotiable instruments when it codified Title 9A. According to Title 9A, a promissory note is a negotiable instrument. 9A V.S.A. §3-104. Under Title 9A, only a person entitled to enforce can enforce a negotiable instrument. Title 9A V.S.A § 3-301 defines a person entitled to enforce an instrument as "(i) the holder of the instrument; (ii) a nonholder in possession of the instrument who has the rights of a holder; or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3-309 or 3-418(d)."

Under Title 9A V.S.A. § 3-301(i), a "holder" of an instrument, is one who possess the note *and* the note must be payable to the person in possession of the note, or to bearer. 9A V.S.A. § 1-201(b)(21)(A) (emphasis added). In the present case, although Plaintiff possesses the Note, it is not payable to Plaintiff or to bearer. Rather it is payable to GMAC Mortgage Corporation. See *Id*.; 9A V.S.A. § 3-205(b) (blank indorsement becomes payable to bearer).[1]

Nor is Plaintiff a "nonholder in possession of the instrument who has the rights of a holder" under 9A V.S.A. § 3-301(ii) since it has not established it received the rights of a holder through the assignment by MERS. As the 9A V.S.A. § 3-301 comments explain:

> "[b]ecause *the transferee's rights are derivative of the transferor's rights*, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it."

Id. cmt. 2 (emphasis added).

Therefore, absent an establishment by Plaintiff of MERS's authority to transfer the Note, Plaintiff cannot establish its own authority to enforce the Note. See *In re Wilhem*, 407 B.R. 392, 404 (Bankr. D. Idaho 2009). Here, as in *Wilhem*, the Mortgage Deed defines MERS "solely as nominee" for GMAC Mortgage Corporation, but does not, either expressly or by implication authorize MERS to transfer the Note at issue. See *Id*.; see also *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. Ct. App. 2009) (finding that MERS could not transfer promissory note where there was no evidence that MERS held the note or that the lender gave MERS authority to transfer the note). The word "nominee" is defined nowhere in the mortgage document, and the functional relationship between MERS and GMAC Mortgage Corporation is likewise not defined. See *Landmark National Bank v. Kesler*, 216 P.3d 158, 165 (Kan. 2009) (finding that in the absence of contractual definition, definition of "nominee" is left to judicial interpretation). Rather than define MERS as an "agent," the Mortgage Deed specifically defines MERS as "nominee," thereby designating MERS to act "in a very limited way." See *Id*. Without any further evidence as to MERS's authority as a "nominee," this Court finds that MERS did not have the authority to transfer the promissory note but rather possessed it as a nominee, possessing only 'bare legal title for the benefit of others." Black's Law Dictionary

[1] Also, 9A V.S.A. § 3-301(iii) is not applicable, as it does not appear that plaintiff is entitled to enforce the instrument pursuant to either section 3-309 or 3-418(d).

1076 (8th ed.2004). Therefore, the purported transfer of the Note as evidenced by Exhibit 3 did not transfer the Note since there is insufficient evidence to find that MERS had such authority as a nominee. As a result, Plaintiff cannot establish its ability to enforce the Note based upon this transfer and does not have standing to enforce the obligation.

Although in its Motion for Summary Judgment, Plaintiff claims in the alternative that it is entitled to enforce pursuant to a merger of GMAC Mortgage Corporation into GMAC Mortgage, LLC on October 24, 2006, and has provided evidence of this merger, Plaintiff has provided no evidence that it is entitled to enforce the instrument pursuant to 9A V.S.A. § 3-301 which is consistent with its Complaint. Since this is a matter involving title to property, this Court is obligated to ensure that the Plaintiff is the real party in interest. Failure by a plaintiff mortgagee to show that it has standing to bring a foreclosure action could create title issues for future unsuspecting purchase of land. Therefore, the Court finds that Plaintiff has failed to establish standing consistent with its Complaint.

Moreover, it has come to the Court's attention that the Plaintiff is a participant in the Home Affordable Modification Program (HAMP). On April 13, 2009, Joseph A. Pensabeno, Chief Servicing Officer, EVP for GMAC Mortgage Corporation executed a Commitment to Purchase Financial Instrument and Servicer Participation Agreement (the Contract) with Fannie Mae the authorized financial agent for the Treasury whereby the Plaintiff agreed to participate in the Home Affordable Modification Program under the Emergency Economic Stabilization Act of 2008 (HAMP).[2] Under the contract, the Plaintiff stands to receive up to $633,000,000.00 in exchange for modifying home loans through HAMP.[3]

On page two of the Contract, Plaintiff specifically agrees to comply with all program guidelines and procedures established by the Department of Treasury, including:

> "…any supplemental documentation, instructions, bulletins, letters, directives, or other communications, including, but not limited to, business continuity requirements, compliance requirements, performance requirements and related remedies, issued by the Treasury, Fannie Mae, or Freddie Mac in order to change, or further describe or clarify the scope of, the rights and duties of the Participating Servicers…"
>
> Subsequently, the Treasury issued Supplemental Directive 09-001. At page 14, the following appears:
>
> "Servicers must use reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for the HAMP, including in-person contacts at the servicer's discretion."
>
> Also on page two of the Contract, Plaintiff agrees that it shall:

[2]http://financialstability.gov/docs/HAMP/GMAC%20Mortgage%20Inc%20Servicer%20Participation%20Agreement.pdf at 18.
[3] Contract, page 3.

> "perform the Services for all mortgage loans its services [and] (…) use reasonable efforts to remove all prohibitions or impediments to its authority, and use reasonable efforts to obtain all third party consents and waivers that are required, by contract or law, in order to effectuate any modification of a mortgage loan under the Program."
>
> The Financial Instrument that is part of the Contract contains the following provision:
>
> "Servicer covenants that …(ii) all Services will be offered to borrowers, fully documented and serviced, or otherwise performed, in accordance with the applicable Program Documentation." See page B-3 paragraph 5(c)

Despite these contractual obligations, there is no indication that this Plaintiff has offered HAMP services to these defendants. Given the equitable nature of foreclosure proceedings, this apparent inaction is of great concern to the Court. See *Merchants Bank v. Lambert*, 151 Vt. 204, 206 (1989) (foreclosures are equitable proceedings). Indeed, the Court is concerned that these Defendants may not even know of the possible remedies available under HAMP. Therefore, the Court finds that before proceeding further in this matter, it is equitable for this Court to require the Plaintiff to make a showing that it has complied with its contractual obligations under HAMP by notifying the mortgagors that loan modifications may be possible and reviewing the loan to determine if the mortgagors are eligible.

Accordingly, Plaintiff's Complaint is hereby **DISMISSED** without prejudice for lack of standing with leave to amend. Upon refilling, the Plaintiff will be required to demonstrate its efforts to comply with its HAMP obligations.

_____
Ben Joseph, Presiding Judge
Franklin Superior Court

5 March 2010