LATE TESTIMONY

Wednesday, February 22, 2012

To: The Honorable Robert Herkes, Chair
House Committee on Consumer Protection & Commerce & Members

The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary & Members

RE: **Testimony in SUPPORT of HB 2705—Relating to Negotiable Instruments**

Dear Chair Herkes, Chair Keith-Agaran & Members:

Thank you for the opportunity to provide testimony in **SUPPORT of HB 2705—Relating to Negotiable Instruments which repeals UCC definition of "person entitled to enforce.**

First, I would like to thank the Chairs for hearing HB 2705 today. This bill is critical and necessary to pass both the House & Senate. So many people have been vicitim's to this mass devastation of what I call a fraud and even criminal. What the banks did across the nation where they securitized so many people's mortgages and then took it to Wall Street just to make billions of dollars is what created the downfall of our economy. As a result of the economy collapsing, we have seen so many people lose their jobs which impacted our people's ability to pay for their mortgages. I have seen firsthand so many families lose their homes not because they didn't want to pay their mortgages, but because they lost their jobs and was forced into this situation which we call "FORECLOSURE."

We all know that loans are purchased by financial institutions and sometimes, borrowers don't even know who owns their loan and who to pay. Lawmakers should pass legislation where it requires the financial institution to produce the original copy of the loan. Why? It is because many borrowers are being foreclosed on by financial institutions claiming to own the loan but have no proof of it. How does a financial institution able to foreclose on a borrower, when that banks/financial institution has filed bankruptcy and/or even have shut down their business two or more years before the foreclosure took place. I have witnessed firsthand in court where financial institutions are foreclosing on borrowers and judges are ruling in favor of the banks/financial institutions using this law 490: 3-301 Person entitled to enforce instrument—negotiable instruments which was introduced and passed into law for the purpose of check fraud. Judges are using this law in their rulings against borrowers even though there is evidence presented in court where the banks/financial institutions admit that they don't have the proper documentation that they own the loan, judges are illegally ruling in favor of the bank.

In Maui, there is proof of judges ruling in favor of the banks/financial institutions who have filed bankruptcy and have shut their doors three years earlier, but are still foreclosing on borrowers. And even when the banks/financial institutions have admitted that they don't have proof that they own the loan, judges are still ruling in their favor and using this law--negotiable instrument as their main reason

why they can foreclose on a borrower. **THIS IS HEWA. WRONG, FRADULENT AND EVEN CRIMINAL.** This law was implemented for check fraud and not for foreclosures.

If you care anything about your constituents who are facing a foreclosure and were a vicitim to this fraudulent securitization scam, you will support this bill. DO THE RIGHT THING. We don't want to get out of paying our obligations to the bank. We want to stay in our homes and work out a modification with our lenders. However, banks/financial institutions don't want to work out a modification. This is why the law you passed last year is not working. And you know it's not working because banks don't want to mediate and work out a payment plan with their borrowers.

When I hear legislators say that they have to protect the banks and not the people. I know that those legislators are ignorant and in the pockets of those lobbyist who represents the banks. Let me tell you, we are not trying to get out of paying our obligation to the banks. We want to stay in our homes and make those payments. But who do we pay our mortgage payments to when even the banks who are foreclosing on us says, they can't take our payment because they don't own their loan. How's that! So who do we pay and those banks say, "I don't know." And like I said, what you passed last session and made into law is not working at all.

DO THE RIGHT THING, pass HB 2705 and delete this law entirely. And if you strongly feel that this law should stay in the Hawaii Revised Statutes, then amend this law and make it clear that this law can only be used for check fraud and not for foreclosures.

We the people are watching you. We will know who truly supports the people by how you vote and what you say on record. We the borrowers are now starting to talk to each other and are building a coalition where we will make you accountable for your vote in the next election. We will make it known how you voted and whether or not if you support the people.

Again, please, support and pass HB 2705 now. Thank you for the opportunity to provide testimony.

Mahalo,

Patty Nishiyama

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Testimony for HB2705 on 2/22/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Wednesday, February 22, 2012 10:24 AM

To: CPCtestimony

Cc: brucertravis@yahoo.com

Categories: Red Category

Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325
Testifier position: Support
Testifier will be present: No
Submitted by: bruce travis
Organization: Individual
E-mail: brucertravis@yahoo.com
Submitted on: 2/22/2012

Comments:
As the United States Supreme Court so clearly explained approx. 140 years ago: "The note and mortgage are inseparable; the former as essential, the latter as incident. An assignment of the note carries the mortgage with it, while an assignment of the latter ALONE IS A NULLITY. CARPENTER V LONGAN, 83 U.S. 271,274 (1872). This basic proposition has been reaffirmed. Baldwin v State of Mo.,281 U.S. 586,596 (1930) (Stone, J. concurring); National Live Stock Bank v First Nat'l Bank, 203 U.S. 296,306 (1906); Kirby Lumber Co. v Williams, 230 F 2d 330, 336 (5th Cir. 1956); In re Veal, 450 B.R. 897, 916-17 (B.A.P. 9th Cir. 2011); re Vargas, 396 B.R 511, 516 (Bankr. C.D. Cal. 2008); re Leisure Time Sports, Inc. 194 B.R. 859, 861 (B.A.P. 9th Cir. 1996); Bellistri v Ocwen Loan Servicing, LLC. 284, S.W. 3d 619, 623 (Mo. Ct. App. E.D. 2009).
If the holder of the deed of trust (mortgage) does not own or hold the note, the deed of trust serves no purpose, is impotent, and CANNOT BE A VEHICLE for deprving the grantor of the deed or trust or ownership of the property described in the deed of trust of ownership of the property described in the deed of trust. THE SOLE PURPOSE OF THE DEED OF TRUST IS TO SECURE PAYMENT OF THE NOTE. The very, and sole, purpose of a foreclosure sale pursuant to the deed of trust is to obtain funds for payment of the note. If the holder of the deed of trust does not own or hoild the note, and there were to be a foreclosure under the deed of trust, there is no assurqance that the proceeds of the foreclosure would be used for the purpose intended by the deed of trust, i.e. to be applied payment as of , or on, the note. HRS 409:section 3-301 is in violation of the United States Supreme COurt and established case law. REPEAL IT pursuant to Rep Carrol's bill HB 2705

Testimony for HB2705 on 2/22/2012 2:00:00 PM

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Testifier will be present: No
Submitted by: bruce travis
Organization: Individual
E-mail: brucertravis@yahoo.com
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IN SUPPORT OF HOUSE BILL 2705

Aloha Honorable House of Representatives, My name is Mr. Daneford Wright. I am here today in support of House Bill 2705. I would first like to begin with why I asked Representative Mele Carroll to help me to draft this bill. I have been in State Court in Maui going through the foreclosure of my home for over 2 years. Also I have been in Bankruptcy Court for over a year continuing my fight against a Bank who claims to hold my mortgage and note and yet has never proven it in court. I will get strait to the point why this section of the law must be taken out and this HB 2705 now in front of you needs to pass both the House & Senate. This Bill came about due to a very recent court decision by a Bankruptcy Judge, which is attached to my written testimony. The Judge used: **PART 3. ENFORCEMENT OF INSTRUMENTS**

§490:3-301 Person entitled to enforce instrument. "Person entitled to enforce" an instrument means (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 490:3-309 or 490:3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. [L 1991, c 118, pt of §1]

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to lift my automatic stay and allow US Bank N. A. to go back to Second Circuit Court Of Maui to continue the foreclosure on my home and to Auction off my home in 8 weeks. My family of 3 daughter, 3 son-in-laws and my seven grand –children who presently live with me on the property will be put out of our family home by a statute that was adopted by Hawaii and that can be changed or amended by this body of legislatures. You may ask why should we pass this bill when all the States but New York has adopted this section of the law? Well let me break it down to some facts, the first fact is this statute violates the Constitution of the United States under the 14 th Amendment where it states the following:

RIGHTS GUARANTEED

PRIVILEGES AND IMMUNITIES OF CITIZENSHIP,
DUE PROCESS AND EQUAL PROTECTION
FOURTEENTH AMENDMENT
SECTION 1. RIGHTS GUARANTEED

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

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States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

As the constitution is the law of the land and the statute violates the law because it deprives anyone of their property and the right to due process also equal protection of the law. How can you as law makers allow this statute to remain, as the law plainly states that the instrument can be enforceable by a person not the owner of the instrument or in wrongful possession? How can someone who does not own the instrument or in wrongful possession, be allowed to enforce it, this means the statute condones stealing. As I have said, the bankruptcy court judge used this statute to deprive me of my equal protection under law by removing the automatic stay, by allowing the foreclosure to deprive me of my property and finally no due process of law. Please refer to the attached judges decisions to see for your selves. All these years all I have been doing is defending my original mortgage contract and trying to find out who is legally entitled to be paid. I have the right under my mortgage agreement to know who I owe and to be able to talk to that person or entity. All through this foreclosure process, US Bank N. A. has not established legal standings as they have no legal assignment recorded in The Hawaii Bureau of Conveyance or the note endorsed in their name, only hear say, fraudulent documents, no chain to title which gives them no legal lien on my property. Hawaii is a lien state and I hold the deed to the property, unless this Bank can prove legal standings and produce a general ledger showing I owe only US Bank N. A. This statute allows anyone who does not own the negotiable instrument or in wrongful possession to deprive you of your property without due process of law and do not give you equal protection of the law. As I have explained that a bankruptcy court used 490:3-301 to allow the bank to continue the fraud to lift the automatic stay which gave me equal protection of the law and to deprive me and my family of our property, also violating the 14th Amendment section 1 of the constitution. I would like all of you of the House of Representatives and the Senate to ask your selves the following questions: 1. Is it lawful for anyone who does not own the negotiable instrument or in wrongful possession to deprive you of your property or home, checks, accounts, your car, securities or anything that a negotiable instrument is used just because it is in their possession? 2. Tell me and the citizens you all represent, does this body of law makers condone a law that allows anyone to steal your property? 3. Would you allow a person, bank or any other entity to take you property from you, without proper and legal documentation or the legal process to obtain it? Well this statute allows that to happen and you have no recourse or defense. 4. Ask your selves, if this statute was used to take away your home, or any negotiable instrument you owned, what would you do? Remember now the judge used the statute as it is written and re states the statute in his decision, to say it did not matter how they got it, they said they are in possession of the instrument and the statute allows them that right. Ask yourself is this statue fair and does it allow for protection under the law for the person who this statute is used to deprive a person of their property? 5. My last question to all of you is, I respectfully ask for your support for HB 2705 will all of you support this Bill and pass it?

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When I say they are not the legal lien holders of the note and mortgage are for the following reasons: 1. They presented a fraudulent assignment dated August 19, 2009 which I proved it was fraudulent with an affidavit by the liquidating trustee of New Century Liquidating Trust, which states that my note and mortgage was first transferred to New Century Capital Corporation in 2006 and on March 22, 2006 sold it to Leman Brothers Bank FSB and only serviced released to America's Servicing Company on June 01, 2006. 2. The Bank provided the court with a copy of the mortgage and note signed in blank by New Century Mortgage Corporation and the assignment of mortgage dated August 19, 2009 and said by the assignment they are now the owners of the mortgage and the holder of the note in due course. First of all to bring a foreclosure you need to be the holder of the note legally and have a valid assignment and transfer according to **§490:3-203 Transfer of instrument; rights acquired by transfer.** (a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.
(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.
(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this article and has only the rights of a partial assignee. [L 1991, c 118, pt of §1]

Also the note endorsed in blank does not say pay to bearer, but pay to the order of and not filled in to identify the persons or entity who is entitled to be paid or foreclose and if they were to foreclose the bank would have to endorse it in their name before they could legally proceed with a foreclosure and show under **§490:3-204 Indorsement.** (a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, the terms of the instrument, place of the signature, or other circumstances

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unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.
(b) "Indorser" means a person who makes an indorsement.
(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.
(d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.
[L 1991, c 118, pt of §1]

3. The Banks have given declarations under perjury of law that they have the original note and mortgage and yet each declaration does not say the person actually seen it with personal knowledge as well as they do not give an address or location of the Wells Fargo office it is located in and no supporting documents of proof they have the originals endorsed and signed in their name. The two people who work for Wells Fargo and not US Bank N. A. who signed as Vice President of Loan Documentations are really at the time of signing were Bankruptcy Supervisors and not VP of loan documentation. I have Interrogatories signed and notarized by a true Wells Fargo VP of loan documentation that state "NO" the Bank does not have the original signed NOTE, signed by my wife and I. 4. The Bank when filing for the foreclosure did not provide a general ledger of account to show where and to whom the payments were going to and the total distribution of those payments, they only provided statements of payment and not showing who and where payments were going to and that they were entitled to payment and that I owed it to them according to GAAP accounting requirements. SEE HAWAII SUPREME COURT CASE: In the case of In re Hawaiian Flour Mills, Inc., 76 Hawai`i 1, 11 (1994), the Hawaii Supreme Court stated that "[t]hese statements are inadmissible hearsay and as such are of no value on summary judgment. HRCP 56(e) (1990) (opposing or supporting affidavits must set forth facts as would be admissible in evidence)." Thus, "[a]n affidavit consisting of inadmissible hearsay cannot serve as a basis for awarding or denying summary judgment." Nakato v. Macharg, 89 Hawai`i 79, 89, 969 P.2d 824, 834 (App. 1998) (citations omitted). Our conclusion is supported by Pacific Concrete Fed. Credit Union, *supra*. In that case, the lender relied on a person's affidavit referring to a ledger not submitted in compliance with HRCP Rule 56(e). *See* id. at 337, 614 P.2d at 938. The Hawai`i Supreme Court ruled that (a) the circuit court should not have considered the information in the ledger because a copy of the ledger was not in evidence, and (b) the "[a]ffiant's testimony as to what was in the ledger was inadmissible hearsay[.]" Id. at 337. In this case, Plaintiff relies on person reading a computer screen instead of general accepted accounting principles ledger.

24. The court has erred in its allowance of this case while the Plaintiff has not provided this court with a general ledger of accounts to show the debt and who it is owed to as well as it needs to be signed by the keeper of the general ledger and notarized to be admissible

as evidence in a court to meet the requirement of showing defendant owes the debt to plaintiff. Also how and when it became due to Plaintiff. Plaintiff has provided one sheet of calculations, which is not a general ledger of accounts. Plaintiff has not provided a general ledger required under HRCP Rule 56(e) and cannot be used to foreclose on defendant (SEE: Yonenaka and Trustee Yonenaka argue that Pacific Concrete Fed. Credit Union v. Kauanoe, 62 Haw. 334, 336-37, 614 P.2d 936, 938 (1980), and Fuller v. Pacific Medical Collections, Inc., 78 Hawai`i 213, 223-24, 891 P.2d 300, 310-11 (App. 1995), require "that a lender must place in evidence account general ledgers and cannot give mere opinion evidence, such as in affidavits in support of summary judgment motions, merely attesting to what the lender's records show[.]" We agree. HRCP Rule 56

5. The servicing company which is America's Servicing Company sent me 2 notices to foreclose in June of 2009 and US Bank N.A. assignment of August 19, 2009 stated they only became the so called holder and owner of the note and mortgage on that date and as I said the assignment is a proven fraud. The following statute applies to this as Wells Fargo Bank and US Bank N.A. made this fraudulent assignment of mortgage as attested to by the affidavit of Alan Jacobs New Century Mortgage Corporation Liquidating Trust which violated this section of the UCC code **§490:3-302 Holder in due course.** (a) Subject to subsection (c) and section 490:3-106(d), "holder in due course" means the holder of an instrument if:

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in section 490:3-306, and (vi) without notice that any party has a defense or claim in recoupment described in section 490:3-305(a).

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or

creditor's sale or similar proceeding, (ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.
(d) If, under section 490:3-303(a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.
(e) If (i) the person entitled to enforce an instrument has only a security interest in the instrument and (ii) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.
(f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.
(g) This section is subject to any law limiting status as a holder in due course in particular classes of transactions. [L 1991, c 118, pt of §1]

Case Notes

Where genuine issues of material fact existed as to whether plaintiff was a holder in due course, including whether plaintiff took mortgagor's note "for value" and whether plaintiff took the note "in good faith" and "without notice that the note was overdue" or that mortgagor had "a defense or claim in recoupment", trial court erred in granting plaintiff's motion for summary judgment. 99 H. 173 (App.), 53 P.3d 312.

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§490:3-303 Value and consideration. (a) An instrument is issued or transferred for value if:
(1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;
(2) The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;
(3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

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(4) The instrument is issued or transferred in exchange for a negotiable instrument; or

(5) The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a), the instrument is also issued for consideration. [L 1991, c 118, pt of §1]

Case Notes

Where genuine issues of material fact existed as to whether plaintiff was a holder in due course, including whether plaintiff took mortgagor's note "for value" and whether plaintiff took the note "in good faith" and "without notice that the note was overdue" or that mortgagor had "a defense or claim in recoupment", trial court erred in granting plaintiff's motion for summary judgment. 99 H. 173 (App.), 53 P.3d 312.

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The following section of the UCC Code explains my rights to recoupment, which I should have by due process of law, as I have proved factual issues exist and triable issues need to be heard by a trial by jury. **§490:3-305 Defenses and claims in recoupment.**

(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay the instrument is subject to the following:

(1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the

claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

(c) Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (section 490:3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

(d) In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity. [L 1991, c 118, pt of §1]

Case Notes

Where genuine issues of material fact existed as to whether plaintiff was a holder in due course, including whether plaintiff took mortgagor's note "for value" and whether plaintiff took the note "in good faith" and "without notice that the note was overdue" or that mortgagor had "a defense or claim in recoupment", trial court erred in granting plaintiff's motion for summary judgment. 99 H. 173 (App.), 53 P.3d 312.

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§490:3-306 Claims to an instrument. A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A

person having rights of a holder in due course takes free of the claim to the instrument. [L 1991, c 118, pt of §1]

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§490:3-309 Enforcement of lost, destroyed, or stolen instrument. (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in rightful possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, section 490:3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means. [L 1991, c 118, pt of §1]

To conclude this testimony and my explanation of how this statute was used to deprive my family and I of our home. I really hope that our legislators understand we and all home owners had invested a large sum of money into their homes. As for my family and I we invested our hard earned money in an amount of over $390,000.00 dollars since 2004 to present. All the statues above were used in my case and yet the judge did not care or consider them. It is my hope and prayer that our legislators start to work together for the good of the people of Hawaii and delete these types of laws that violate the constitution and our rights. This is your opportunity to do what we all know is PONO.

LATE TESTIMONY

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re DANEFORD MICHAEL WRIGHT and ELLAREEN UILANI WRIGHT, Debtors.	Case No. 10-03893 Chapter 13 Re: Docket No. 47

MEMORANDUM OF DECISION CONCERNING THE DEBTORS' OBJECTION TO CLAIM

The debtors object to a mortgage claim, contenting that the claimant has not established its standing. I conclude that the creditor has standing to file its proof of claim as a real party in interest because it has physical possession of the note, endorsed in blank.

BACKGROUND

Factual History

The debtors, Daneford and Ellareen Wright (the "Wrights"), borrowed $748,000.00 from New Century Mortgage Corporation ("New Century"). The Wrights' promise to repay the loan is evidenced by a note, dated December 21, 2005, in favor of New Century. The note is payable to the order of New Century; it is payable at a definite time; and it contains no promises other than those

permitted by Haw. Rev. Stat. § 490:3-104(a)(3).

To secure their obligations under the note, the Wrights executed a mortgage, also dated December 21, 2005, in favor of New Century. The mortgage encumbers property on the island of Maui. The mortgage was duly recorded on December 30, 2005. Paragraph 20 of the mortgage provides that, "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to [the Wrights]."

New Century endorsed the note in blank. The endorsement is not dated. U.S. Bank National Association, as Trustee for The Structured Asset Securities Corporation Mortgage Loan Trust, 2006-NC1 ("U.S. Bank") has physical possession of the note.

The trust, of which U.S. Bank is trustee, is a so-called securitization trust. The trust raised funds from investors, acquired a large number of mortgage obligations, collects payments on the mortgages, and allocates the cash flow to the investors under a complicated scheme. A Trust Agreement[1] and a Mortgage Loan Sale and Servicing Agreement[2] (collectively the "Trust Documents"), each dated

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[1] Trust Agreement, SECURITIES AND EXCHANGE COMMISSION (Jun. 1, 2006), http://www.sec.gov/Archives/edgar/data/1365185/000116231806000905/exhibit41.htm.

[2] Mortgage Loan Sale and Servicing Agreement, SECURITIES AND EXCHANGE COMMISSION (Jun. 1, 2006), http://www.sec.gov/Archives/edgar/data/1365185/000116231806000905/exhibit991.htm

as of June 1, 2006, spell out the rights and obligations of the trustee, the servicer, the investors, and other participants in hundreds of pages of mind-numbing detail.

In order to give the trust the preferred tax status of a real estate mortgage conduit ("REMIC"), the Trust Documents provide for a closing date by which all assets must be transferred into the trust. See I.R.C. § 860G. The closing date for this trust was June 1, 2006.

New Century and its affiliates filed chapter 11 bankruptcy petitions on April 2, 2007. The Wrights have filed an affidavit by the liquidating trustee of the New Century Liquidating Trust attesting that New Century transferred the Wrights' loan to NC Capital Corporation, which sold the loan to Lehman Brothers Bank, FSB on March 22, 2006, and that the loan was "service released" to America's Servicing Company, on June 1, 2006. (Lehman Brothers Holdings Inc., the parent of Lehman Brothers Bank, filed its own chapter 11 petition on September 15, 2008.)

On August 19, 2009, New Century executed an assignment of the mortgage, "together with the promissory note thereby secured," to U.S. Bank. The assignment was recorded on September 2, 2009.

The Wrights defaulted under the terms of the note and U.S. Bank commenced a foreclosure action in state court on December 29, 2009. The

Wrights filed for bankruptcy protection on December 22, 2010.

Procedural History

On May 31, 2011, the Wrights filed an objection to U.S. Bank's proof of claim. Dkt. no. 47. U.S. Bank timely responded to this objection on July 6, 2011. Dkt. no. 54. The court found that there were factual disputes regarding the loan documents and scheduled a further hearing for August 1, 2011. Dkt. no. 61. At the August 1 hearing, the court directed U.S. Bank to file a declaration summarizing the evidence in support of its claim, and gave the Wrights the opportunity to respond in writing by December 2, 2011. The parties have submitted their papers and the issue is now ready for decision.

STANDARD

A timely filed proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a); Garner v. Shier (In re Garner), 246 B.R. 617, 620–21 (B.A.P. 9th Cir. 2000). If a party objects to the claim, the bankruptcy court must determine the amount of the claim as of the date the petition was filed, and "shall allow such claim . . . except to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." Id. § 502(b)(1); Heath v. Am. Express Travel Related Serv. Co., Inc. (In re Heath), 331

B.R. 424, 432 (B.A.P. 9th Cir. 2005). A proof of claim filed in accordance with the Federal Rules of Bankruptcy Procedure constitutes prima facie evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f). The objecting party bears the burden of persuasion as to the validity of the claim. Litton Loan Servicing v. Garvida (In re Garvida), 347 B.R. 697, 706 (B.A.P. 9th Cir. 2006).

DISCUSSION

The Wrights contend that U.S. Bank lacks standing to file a proof of claim because it failed to comply with the terms of the Trust Documents. Specifically, the Wrights argue that the assignment of the mortgage into the trust occurred on August 19, 2010, after the cut-off date of June 1, 2006, required by the Trust Documents. As a consequence, the Wrights contend that the transfer is void under New York law, the note and mortgage are not assets of the trust, and U.S. Bank lacks standing to take any action with respect to the note and mortgage. I disagree for the following reasons.

First, U.S. Bank has standing to file its proof of claim because it is the "holder" of the note. Only a "real party in interest" can file a proof of claim. See Fed. R. Civ. P. 17(a)(1); Fed. R. Bankr. P. 7017, 9014(c); see also Veal v. Amer. Home Mtge. Servicing, Inc. (In re Veal), 450 B.R. 897, 907 (B.A.P. 9th Cir. 2011). For a proof of claim based on a mortgage loan, the "real party in interest"

is the party entitled to enforce the note and accompanying mortgage. Under Hawaii law, a "[p]erson entitled to enforce" an instrument includes the "holder" of the instrument. See Haw. Rev. Stat. § 490:3-301. A "holder" includes "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession . . . ." Haw. Rev. Stat. § 490:1-201(b)(1). The Wright's note is a negotiable instrument. See Haw. Rev. Stat. § 490:3-104 (West 2011). The note was endorsed in blank, and U.S. Bank has possession of it. Dkt. no. 80, Decl. Teressa J. Williams, ¶ 3. The Wrights have not provided any evidence to the contrary. U.S. Bank, therefore, has standing to file its proof of claim as holder of the note.

U.S. Bank is a holder even if the note was transferred to the trust after the closing date. A holder is "entitled to enforce the instrument *even though the person is not the owner of the instrument or is in wrongful possession* of the instrument." Haw. Rev. Stat. § 490:3-301 (emphasis added).

Second, even if U.S. Bank were not a holder, the evidence shows that the note was probably timely transferred into the trust. According to New Century's liquidating trustee, New Century transferred the Wrights' note to NC Capital Corporation. On March 22, 2006, NC Capital Corporation sold the note to Lehman Brothers Bank, FSB. Dkt no. 85, Decl. Alan M. Jacobs, ¶ 2. Pursuant to

the terms of the Trust Documents, Lehman Brothers Holdings, the parent of Lehman Brothers Bank, FSB,[3] sold the note to Structured Asset Securities Corporation, which in turn transferred the note to U.S. Bank as trustee for the trust. This apparently all occurred on or before the defined closing date of the trust, June 1, 2006. As further corroboration, the liquidation trustee declared that, also on June 1, 2006, the note was "service released" to America's Servicing Company. See dkt. no. 85, Decl. Alan M. Jacobs, ¶ 2. America's Servicing Company is a dba of Wells Fargo, the servicing agent for U.S. Bank. See dkt. no. 80, Decl. Teressa J. Williams, ¶ 2. The chain of documents, though complex, demonstrates that the note was probably timely transferred to trust.

The only evidence relied upon by the Wrights to establish the untimeliness of the transfer into the trust is the assignment of mortgage, dated August 19, 2009. The date of this document is irrelevant, however, because, as a matter of common law, the mortgage was automatically transferred with the underlying note. See In re Veal, 450 B.R at 916 (citing Restatement (Third) of Property (Mortgage) § 5.4 (1997)); see also Carpenter v. Longan, 83 U.S. 271, 274–75 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An

[3] The record does not explain how or when the note passed from Lehman Brothers Bank, FSB to Lehman Brothers Holdings.

assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."). U.S. Bank succeeded to the mortgagee's interest automatically as soon as it became entitled to enforce the note. The formal assignment of the mortgage at a later date is surplusage.

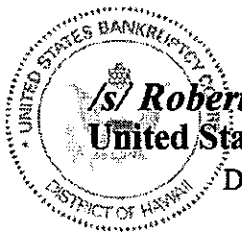
Third, even if the trust acquired the note after the closing date contrary to the Trust Documents, the Wrights are not contracting parties or third-party beneficiaries to those documents, and therefore lack standing to raise any potential violations. See Cooper v. Bank of New York Mellon, 2011 WL 5506087 (D. Haw. Oct. 25, 2011), report and recommendations adopted in 2011 WL 5508993 (D. Haw. Nov. 9, 2011); see also Velasco v. Security Nat. Mort. Co., 2011 WL 4899935, at *9 (D. Haw. Oct. 14, 2011) (dismissing breach of contract claim because the plaintiffs failed to allege sufficient facts to demonstrate that they were third-party beneficiaries of the pooling and service agreement and rejecting the plaintiff's conclusory allegation that the benefit they received was a loan that they otherwise would not have qualified for); In re Washington, 2011 WL 6010247, at *5 (Bankr. W.D. Mo. Dec. 1, 2011); In re Smoak, 2011 WL 4502596, at *5 (Bankr. S.D. Ohio Sep. 28, 2011); In re Correia, 452 B.R. 319, 324 (B.A.P. 1st Cir. 2011) (affirming lower court's determination that the debtors lacked standing to raise violations of the pooling and servicing agreement); Livonia Prop.

Holdings, LLC v. 12840–12976 Farmington Rd. Holdings, LLC, 717 F.Supp.2d 724, 748 (E.D. Mich. 2010), aff'd 399 Fed. Appx. 97 (6th Cir. 2010) (holding that a plaintiff who was not a party to the pooling and servicing agreement at issue lacked standing to challenge the parties' compliance with the contract).

The Wrights raise two additional arguments that should be addressed. The Wrights contend that the declarations of Teressa J. Williams and Trina M. Glover provided by Wells Fargo in support of its motion are hearsay and not based on personal knowledge. The declarants have testified that they have the requisite personal knowledge. The Wrights' questions about their personal knowledge are purely speculative.

The Wrights also contend that, under New York law, which governs the trust, a trust may not accept property by way of a blank assignment or endorsement. The Wrights' reliance on section 7-2.1(c) of the New York Estates, Powers & Trusts Law, however, is misplaced. The section provides that a trust may acquire property in the name of the trust and, if property is in fact acquired in the name of the trust, can only be conveyed, encumbered, or disposed of in the name of the trust and by an authorized individual. The provision simply allows a trust to acquire property in its name and in no way restricts the means by which a trust may acquire property.

A separate order overruling the Wrights' objection to claim will be entered.



/s/ Robert J. Faris
United States Bankruptcy Judge
Dated: 01/05/2012

LATE TESTIMONY

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re DANEFORD MICHAEL WRIGHT and ELLAREEN UILANI WRIGHT, Debtors.	Case No. 10-03893 Chapter 13 Re: Docket No. 47

ORDER OVERRULING OBJECTION TO CLAIM NO. 1

For the reasons set forth in the Memorandum of Decision Concerning The Debtors' Objection to Claim, filed concurrently herewith,

IT IS HEREBY ORDERED that the Objection to Claim, filed by the debtors on May 31, 2011, is OVERRULED.

UNITED STATES BANKRUPTCY COURT DISTRICT OF HAWAII

/s/ Robert J. Faris
United States Bankruptcy Judge
Dated: **01/05/2012**

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LATE TESTIMONY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF HAWAII

Case No. 10−03893

Chapter 13

In re:

Daneford Michael Wright
PO Box 322
Kahului, HI 96733

Social Security No.:
xxx−xx−0304

Employer's Tax I.D. No.:

Ellareen Uilani Wright
PO Box 322
Kahului, HI 96733

xxx−xx−8327

NOTICE OF ENTRY OF ORDER OR JUDGMENT

NOTICE IS HEREBY GIVEN that on the date indicated below this court entered on the docket of the above−entitled case the following order or judgment:

Order Overruling Objection to Claim No. 1(Related Doc # 47) . Date of Entry: 1/5/2012. (LL)

The original order or judgment is on file at the Clerk's Office of this court. The document may be viewed at the bankruptcy court and is available for viewing on the Internet by using Pacer for a fee. Information on the PACER system can be found on the court's web page: **www.hib.uscourts.gov**

Date: January 5, 2012

Address of the Bankruptcy Clerk's Office:
1132 Bishop Street
Suite 250
Honolulu, HI 96813

Telephone number: (808) 522−8100

Clerk of the Bankruptcy Court:

Michael B. Dowling

LATE TESTIMONY

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re DANEFORD MICHAEL WRIGHT and ELLAREEN UILANI WRIGHT, Debtors.	Case No. 10-03893 Chapter 13 Re: Docket No. 107

MEMORANDUM OF DECISION ON MOTION FOR RECONSIDERATION OF ORDER OVERRULING THE DEBTORS' OBJECTION TO CLAIM

Mr. and Mrs. Wright, the debtors, ask the court to reconsider its prior decision (docket no. 96) overruling their objection to a mortgage claim. The Wrights argue that the court made seven errors, but they offer no new evidence or arguments.

I conclude that, with one minor exception which does not affect the outcome, my prior decision was correct.

The prior decision says that "U.S. Bank National Association, as Trustee for The Structured Asset Securities Corporation Mortgage Loan Trust, 2006-NC1 ("U.S. Bank") has physical possession of the note." The debtors point out that the creditor's declarations state that the note is in the possession of Wells Fargo Bank, N.A., doing business as Americas Servicing Company, which is the servicing

agent for U.S. Bank. The debtors are correct as a matter of fact, but the difference is not relevant as a matter of law. In order to be a "holder" of a negotiable instrument, a person must be in possession of the instrument. It is a fundamental rule of agency law that possession by an agent is the same as possession by the principal. See, e.g., Buckner v. Western Life Ins. Co., 382 S.W.2d 12, 15 (Mo. App. 1964); Davis v. State, 219 Ga. 398, 133 S.E.2d 329, 334 (Ga. 1963). The common law of agency supplements the Uniform Commercial Code. Haw. Rev. Stat. § 490:1-103(b). Therefore, U.S. Bank is a "holder" of the note because U.S. Bank's agent, Wells Fargo, has physical possession of the note.

In response to my determination that U.S. Bank is a "holder" of the Wrights' note, the Wrights argue that U.S. Bank is not a "holder in due course." Even if this were correct, it would not matter. A "holder" is entitled to enforce a negotiable instrument. Haw. Rev. Stat. § 490:3-301(West 2012). A holder who meets the additional criteria of a "holder in due course" has extra rights; namely, the makers of the instrument cannot assert certain defenses against the holder in due course. Id. §§ 490:3-302, 305(b). But a "holder" who is not a "holder in due course" nevertheless has the right to enforce the instrument. The Wrights have failed to refute U.S. Bank's evidence that it is a "holder" of the Wrights' note.

Most of the Wrights' arguments turn on the timing of the assignments of the

their mortgage. These arguments miss the fundamental points, explained in my prior decision, that a holder of the note is automatically entitled to enforce any security for the note, regardless of whether or when the security is separately assigned, and that a holder is entitled to enforce a note even if the holder's possession is wrongful.

The debtors state that the allegedly untimely assignment of their note to the securitization trust prejudiced them. The prejudice that they identify, however, is nothing more than a repetition of their arguments that the assignment was defective. To show that they were "prejudiced" in this sense, the Wrights would have to establish, not just that the assignment was too late, but that they are worse off because the assignment was tardy rather than timely. The Wrights have failed to do this. There is no reason to think that they would be in a better position if the note had been transferred before June 1, 2006, rather than after.

None of the Wrights' other arguments are new or meritorious. There is no reason to repeat my discussion of those points.

Therefore, the motion for reconsideration is DENIED.

/s/ Robert J. Faris
United States Bankruptcy Judge
Dated: **01/27/2012**