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November 10, 2008

Honorable Kathryn C. Ferguson
United States Bankruptcy Court
District of New Jersey
U.S. Courthouse, 3rd Floor
402 East State Street
Trenton, New Jersey 08608

Re: Orr and Hollis v. Ameriquest Mortgage Co., et al.
ADV. No. 07-02615

Dear Judge Ferguson:

Please accept this Letter Brief in lieu of a more formal brief in opposition to the defendants' motion for a protective order and in support of the plaintiff's cross-motion to compel discovery in this matter.

What the defendants seek here is a back door summary judgment order through the entry of a protective order. Rather than providing discovery, they seek to prevent Ms. Hollis from obtaining any information whatsoever concerning the relationship between these parties who now purport to hold her mortgage and what the relationship was between them. In this matter, the plaintiffs are entitled to discovery whether or not Deutsche Bank holds the note or whether that note is still held by someone else.

Defendants misstate the nature of the plaintiff's complaint. The complaint contains four counts; the first count is a TILA violation with regard to the 2006 mortgage, the second count is against Ameriquest for consumer fraud with regard to the first and second Ameriquest mortgages, the third count is for common law fraud and fraud in the inducement with regard to the first and second Ameriquest mortgages against Deutsche Bank, Ameriquest and AMC, and the fourth count for aiding and abetting common law frauds against Deutsche Bank and AMC.

Only the 2006 loan is the subject of securitization and involves the defendants other than Ameriquest. Although the defendants in their moving papers assert that Ms. Hollis' 2006 mortgage loan was sold and assigned to Deutsche Bank as Trustee for AMC Mortgage Securities, Inc., they have presented no evidence to this effect. It is precisely discovery upon this issue which plaintiff seeks. In connection with Rule 26 disclosures, the defendants

provided a copy of an assignment of mortgage which was recorded. The assignment is dated June 26, 2007 and is signed by Tamara Price and purportedly notarized. See Jurow Cert. Ex. C. The Pooling and Servicing agreement dated March 1, 2006 suggests that the assignment was made prior to March 1. 2006 and that it was assigned to intermediate entities. Jurow Cert. Ex. B. Ms. Price has testified in other matters that she signed documents which were later notarized outside of her presence in connection with similar matters. Jurow Cert. Ex. D. Here, Deustche Bank's allegedly secured claim is based upon an assignment executed by Ms. Price long after it was purportedly assigned under the Pooling and Servicing Agreement and after the loan was in default. It is essential that the plaintiffs in this matter be permitted to conduct discovery concerning how this particular loan moved through the securitization process involving these defendants. If the assignment of the mortgage was not properly notarized, then Deustche Bank's security interest is void and their claim is an unsecured one.

In general, parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. Fed. R. of Civ. Proc. 26(b)(a). In this case, Trustee Thomas Orr and Plaintiff/Debtor Phyllis Hollis have brought an adversary proceeding against the defendants, including Deutsche Bank and Ameriquest Mortgage Securities and AMC Mortgage Services asserting *inter alia* that in connection with two mortgages; one made in 2001 and another in 2006 that Ameriquest violated the New Jersey Consumer Fraud Act and that Deutsche Bank, Ameriquest Securities and AMC committed common law fraud/fraud in the inducement and aided and abetted common law fraud in connection with Ameriquest's loans to Ms. Hollis.

The defendants have refused to produce any documentation whatsoever with regard to the transfer of plaintiff's 2006 mortgage loan from Ameriquest to any subsequent party. See Cert. of Margaret Lambe Jurow, Exhibit A, attaching copies of discovery propounded upon the defendants and their responses thereto. Defendants did not produce any documents in connection with the Rule 26 disclosures concerning the securitization or how the defendants other than Ameriquest became interested in this loan. Indeed, the few documents the defendants did provide were not designated as to which defendant provided them.

Defendants' stand the concept of holder in due course on its head. Pursuant to New Jersey's Uniform Commercial Code, only a holder of the negotiable instrument may enforce the instrument; that is, seek payment upon it, which is what Deutsche Bank seeks to do here in this bankruptcy proceeding. N.J.S.A. 2A:1-201(20). A negotiable instrument is transferred only when it is delivered to a person, giving that person the right to enforce the instrument. N.J.S.A. 2A:3-203(a) and N.J.S.A. 2A:1-201(14). Prior to this bankruptcy proceeding, Deutsche Bank had initiated a foreclosure action which has been stayed. This adversary proceeding is essentially the affirmative defenses and counterclaims and third party complaints which might have been brought if a stay of relief had been granted. Indeed, in this matter Deutsche Bank filed proof of claim asserting that it was a secured creditor entitled to payment upon this promissory note. "It is axiomatic that a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note unless the plaintiff actually holds the original note." In re: Development Group, 50 B.R. 588 (S.D. Fla. 1985).

In In re: Mazel, the court dismissed a motion for stay relief holding that it is the lender's responsibility to bring information concerning the relationships between the parties to the court. 378 B.R. 19, 21 (Bankr. D. Ma. 2007). Judge Rosenthal quoted from In re: Parrish, 326 B.R. 708, 720 (Bankr.

N.D. Ohio 2005): "If the claimant is the original lender, the claimant can meet its burden by introducing evidence as to the original loan. If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant." 378 B.R. at 21.

In this matter, Deutsche Bank has asserted security interest in Ms. Hollis' home. Ms. Hollis contends that that mortgage was procured by fraud and that it violated the Consumer Fraud Act and Truth In Lending Acts and that Deutsche Bank's involvement in the securitization process constituted the aiding and abetting of fraud. She is plainly entitled to discovery concerning the parties' relationship with each other through the securitization process and how Deutsch Bank came to hold the loan and be assigned the mortgage. Deutsche Bank may attempt, as an affirmative defense, to claim holder in due course status. So that it might avoid set off or recoupment based on the originator's bad acts. However, it is the person asserting holder in due course that has the burden of establishing that it became a holder without notice of default or defect in this instrument. Here, Deutsche Bank and AMC attempt to assert holder in due course status and avoid set off and recoupment without providing any discovery as to how they acquired an interest in the mortgage note.

Plaintiff served deposition notices upon each party demanding the production of a corporate representative who would be able to testify regarding the underwriting origination servicing and securitization of the 2006 mortgage. Plaintiff's deposition notice provided the particularity possible given the defendants' lack of compliance with Rule 26 and refusal to provide any additional discovery which might limit the scope of a deposition.

The defendants' arguments concerning TILA assignee liabilities and preemption are premature and not properly brought in a motion for a protective order. At this stage, defendants have not even allowed any discovery concerning their alleged assignee status. It is precisely that status upon which the plaintiffs seek discovery.

"TILA preempts only state laws that conflict with the TILA." Psensky v. American Honda Finance Corporation, 378 N.J. Super. 221, 229 (App. Div. 2005). "When the assignee directly participates in the fraud, there is no TILA bar to assignee liability." (citations omitted) Id. "Congress did not intend to immunize any assignee who actively participates in the wrong." Id.

In the Psensky case the plaintiff's claims were entirely based upon disclosure not upon any wrongdoing or other unconscionable practices. Here, Ms. Hollis contends that the loans sold to her were made without any net tangible benefit to her. The Appellate Division in New Jersey has defined predatory lending as "a mismatch between the needs and capacity of the borrower. . . the loan does not fit the borrower, either because of the borrower's underlying needs are not being met or the terms of the loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capability to repay the loan." Associates Home Equity Services v. Troup, 344 N.J. Super. 254, 267 (App. Div. 2000) and Nowosleska v. Steele, 400 N.J. Super. 297 (App. Div. 2008). In connection with the 2006 Ameriquest loan, there was barely a month between the giving of the loan and the securitization being offered. The entire securitized pool consists of Ameriquest loans. Ms. Hollis is entitled to discovery upon the relationship between these parties and the marketing strategies with regard to these no asset no income verification loans. They were plainly made without regard for the ability to repay. The Psensky

case stated: "We emphasize, once again, that the TILA does not provide complete immunization for assignees from consumer fraud or other state claims. Assignees are immunized only when New Jersey law is inconsistent with the TILA." 378 N.J. Super. At 231; Jefferson Loan Company v. Session, 397 N.J. Super. 520, 539 (App. Div. 2008).

Plaintiffs are entitled to discovery concerning the relationship between these parties, the securitization and negotiation of the plaintiff's mortgage and note and Deutsche Bank's and Ameriquest's knowledge regarding the loan origination and servicing issues as it relates to the fraud and aiding and abetting claims and consumer fraud claims.

CONCLUSION

For the foregoing reasons, the plaintiff respectfully requests that this Court deny the defendants' motion for a protective order and grant the plaintiffs' motion to compel discovery and require that the defendants provide fully responsive answers to plaintiff's document demands within ten (10) days of the date hereof.

Respectfully submitted,

/s Margaret Lambe Jurow

Margaret Lambe Jurow

MLJ:mg