

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

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| In re: | : | |
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| Taylor, Bean & Whitaker Mortgage Corp., | : | 03:09-bk-07047-JAF |
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| | : | |
| Debtor | | |

RENEWED MOTION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE CLAIM OF U.S. BANK NATIONAL ASSOCIATION’S, AS SUCCESSOR TRUSTEE FOR BANK OF AMERICA, NA AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN CERTIFICATE TRUSTEE 2007-1, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1

U.S. Bank National Association¹, as Successor Trustee for Bank of America, National Association, as Successor by Merger to LaSalle Bank National Association as Trustee (the “Certificate Trustee”) for First Franklin Mortgage Loan Certificate Trust 2007-1, Mortgage Loan Asset-Backed Certificates, Series 2007-1 (the “Certificate Trust”)², hereby files its Renewed Motion for Allowance and Payment of Administrative Expense against Neil F. Luria, as Plan Trustee of the Taylor, Bean & Whitaker Plan (the “Plan Trustee”).

Summary of Argument

¹ The current Certificate Trustee became a successor trustee for the Certificate Trust on or about April 9, 2009, which was before this case was filed and long before the subject motion to sell. Before then, Bank of America, N.A. was the trustee, but was not the trustee when the case was filed, much less the Sale Motion (defined below). Further, BAC Home Loan Services, Inc., is the current servicer, but a separate legal entity, Home Loans Services, Inc., located in Pittsburgh, Pa. (“Home Loan Services”), was the servicer for the Certificate Trustee until October 2010. A copy of the applicable Notice of Appointment is attached hereto as **Exhibit 1**. These important legal distinctions do not get disregarded because a party claiming an interest in property files bankruptcy.

² The Certificate Trust, through its trustee, is a legal entity whose beneficiaries are the holders of certificates that relate to certain mortgages filed against various residential real properties, which included the Deed of Trust at issue in this case.

In short, this Court ruled before that there needed to be a determination of whether the purported reconveyance (satisfaction) by Yoseph Cohen was void. That has occurred by order of the California court and thus the Certificate Trustee of the Certificate Trust is back seeking the allowance and payment of its administrative claim (part of which is covered by a reserve set aside) and at least the proceeds of the 363 sale allocated to the subject property in question.

- A. The estate post-petition ignored, mistakenly or otherwise, the indisputable fact that it had constructive and actual notice of the Certificate Trust's property rights before it sold real property to a third party under a Section 363 sale pursuant to motion (Dkt. No. 495) (the "Sale Motion"), without providing the Certificate Trust or its authorized agent legally sufficient notice.³
- B. And, even if somehow the Court were to rule that notice of the Sale Motion to a counsel to a financial institution who appeared in the bankruptcy case with regard to matters having nothing to do with a motion to sale a bulk sale of family residences, the record title, lien, and/or lis pendens of the Certificate Trustee of the Certificate Trust entitles it to the allocable proceeds from the sale of the subject property under Section 363. If those proceeds, were disbursed or commingled, an administrative claim should be allowed and paid. The Debtor conceded this result in Paragraph 20 of its Sale Motion.

³ There has never been an adjudication of the notice issue the merits of the pending motion, this Court's footnote in a prior Order notwithstanding. In fact, the Debtor did not serve the Sale Motion on the Certificate Trustee at its counsel's contact information plainly stated in the recorded Notice of Lis Pendens or to the address noted in the recorded Trustee's Deed Upon Sale (described below), of which by law it had constructive notice and through a title search had actual knowledge of at least the lawyer's information. Moreover, firms representing U.S. Bank and Bank of America, N.A. in this case did not represent the Certificate Trustee with regard to the Certificate Trust and the subject property based upon the information the undersigned firm has been able to determine from the court file and speaking with counsel that filed the noted Notices of Appearances mentioned in the footnote.

The Certificate Trustee states as follows:

Background

1. The Certificate Trustee's claim is based on a loan made in 2007 by the Certificate Trustee, as a successor-in-interest trustee, for the benefit of certain certificate holders, secured by a first lien on a certain residence at 41009 Knoll Drive in Los Angeles, California (the "Property"). Copies of the Deed of Trust recorded January 22, 2007 and the Assignment of Deed of Trust recorded March 4, 2008 in the Official Records of Los Angeles County are attached as Composite **Exhibit 2**.

2. As of April 13, 2009, the total amount owed to the Certificate Trustee of the Certificate Trust on the subject promissory note and mortgage is \$811,539.14, including principal in the amount of \$735,928.16, non-default interest rate of 6.9% per annum since February 1, 2008, and permitted charges. These amounts have never been satisfied.

3. On April 13, 2009, because of the borrower's default, the Certificate Trustee caused a trustee's deed of trust sale to occur (non-judicial foreclosure process under California law) sale to recover on debt owing to the Certificate Trustee due to the borrower's default. A Trustee's Deed Upon Sale was in fact executed and recorded in the public records of Los Angeles County, California, on April 16, 2009, a copy which is attached hereto as **Exhibit 3**.

4. The Certificate Trustee then attempted to sell the Property to a third party but discovered that a third-party, Yosef Cohen, lacking any authority on behalf of the Certificate Trustee, had earlier executed a forged document which falsely claimed that the Certificate Trustee's deed of trust (i.e., mortgage) on the Property had been satisfied in full. A copy of the Substitution of Trustee and Full Conveyance which is attached hereto as **Exhibit 4**.

5. In addition, on February 27, 2008, a Deed of Trust with a different mortgagee than the original borrower in favor of T.J. Financial, Inc. was recorded against the Property, a copy of which is attached hereto as **Exhibit 5**.

6. On April 27, 2009, purportedly based upon default under the Deed of Trust, a Trustee's Deed upon Sale was recorded in favor of Federal Home Loan Mortgage Corporation ("FHLMC"), a copy of which is attached hereto as **Exhibit 6**.

7. On May 11, 2009, the Certificate Trustee filed a complaint in California state court along with a recorded Notice of Lis Pendens, to set aside the purported reconveyance or satisfaction of the Certificate Trustees's deed of trust. A copy of the Notice of Lis Pendens is attached hereto as **Exhibit 7**. FHLMC was named due to its filed deed of trust and was served per California law by certified mail at various addresses and also served through its agents, including the Debtor, at an Ocala, Florida address. Neither FHLMC nor its agents responded, including advising the Certificate Trustee for the Trust that the Debtor had been filed.

8. On August 24, 2009, the Debtor filed its bankruptcy petition in this Court.

9. On October 21, 2009, the Debtor filed its *Motion for an Order, Pursuant to Sections 105 and 363 of the Bankruptcy Code and Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (I) Approving Bidding Procedures and Terms of Auction for the Sale of Certain of Debtor's "REO" Property Free and Clear of All liens, Claims and Interests, (II) Setting Hearing Date for Approval of Sale of Property, (III) Fixing Deadline for Objecting to Proposed Asset Sale, (IV) Approving Form and Manner of Sale Notice, and (V) Approving Bid Protections; (VI) Authorizing Debtor to Sell REO Property Free of Liens, Claims and Interests, and (VII) Granting Related Relief* (Dkt. No. 495) (also, the "Sale Motion").

10. Through the Sale Motion, the Debtor sought to conduct a bulk sale of

approximately 1046 foreclosed real property assets, defined in the Sale Motion as the “REO Assets.” The Property is one of the REO Assets included in the Sale Motion, specifically property #7070511. However, the description of the Property only refers to an address and does not reference a legal description, a tax identification number or parcel identification number.

11. Neither the Certificate Trustee nor its counsel of record on the recorded lis pendens was served the Sale Motion, even though ¶ 13 of the Sale Motion stated that it would serve the Sale Motion to the “REO Parties,” which is merely defined as the “parties having an interest in the Property.” See Certificate of Mailing dated October 22, 2009 (Dkt. No. 509).

12. On November 5, 2009, the Court held a hearing to approve the bid procedures aspects of the Sale Motion and set an auction date, sale hearing, date and date for objections to the sale (See Dkt. entry “hearing held” noted between Dkt. Nos. 594 and 621), and on November 11, 2009 the Court entered an Order Approving Motion to Sell Property Free and Clear of Liens (Dkt. No. 621).

13. An auction to sell the REO Assets was conducted on December 11, 2009.

14. On December 15, 2009, this Court held a hearing on the Sale Motion to approve the sale to the winning bidder, and on December 17, 2009, this Court entered the Sale Order which approved the sale of the REO Assets to Selene RMOF REO Acquisition II LLC (“Selene”) (Dkt. No. 802).

15. On December 16, 2009, the Debtor filed its Notice of Supplemental Hearing on the Debtor’s Sale of Certain REO Assets (Dkt. No. 791). However, neither then Certificate Trustee nor its counsel of record on the recorded lis pendens were served such notice. See the Certificate of Mailing dated December 18, 2009 (Dkt. No. 807).

16. Then on January 11, 2010, this Court entered its Supplemental Order Approving the Debtor's Sale of Certain REO Assets and Granting Related Relief (Dkt. No. 859).

17. Interestingly, FHLMC executed the Quit Claim Deed for the Property to the Debtor January 13, 2010, but it was not recorded for some reason at that time. It was then recorded in connection with the recording of the Grant Deed to Selene that occurred on May 17, 2010, copies of which are attached as **Exhibit 8** and **Exhibit 9**, respectively.⁴

18. Notwithstanding that the Debtor had received before the auction and hearing to approve the sale and the entry of the Order approving the same, a title report that reflected a Notice of Lis Pendens (the Certificate Trustee's Deed Upon Sale was still of record and should have been found as well), the Debtor did not provide either a copy of the Sale Motion or notice of hearing to the Certificate Trustee identified in the recorded Deed of Trust or Trustee's Deed Upon Sale, its counsel identified in the recorded Notice of Lis Pendens., or the known servicer, Home Loan Services, for the Certificate Trust which was available in public filings filed with Securities and Exchange Commission.⁵

⁴ Homes Loan Services was the agent for the Certificate Trustee at the time the motions, notices and orders were served and the hearing held in connection with the Sale Motion. However, that exclusive agent never received notice of the Sale Motion or other papers and neither did the counsel for the Certificate Trustee far as the undersigned can determine from the certificates of mailing which are filed in the case.

⁵ The Debtor received a *Property Information Report* with respect to the Property, issued November 13, 2009 (as of October 30, 2009) (the "Title Report"). The Title Report clearly reflected that under the "Judgments/Liens/Additional Information" section, there was a *Notice of Pendency of Action* recorded on May 11, 2009 (previously defined as the Lis Pendens), as Instrument No. 20090691202, naming the Trust's predecessor trustee, Bank of America as successor by Merger to LaSalle Bank National Association as Trustee for First Franklin Mortgage Loan Trust 2007-1 Mortgage Loan-Asset Backed Certificates, Series 2007-1, as the plaintiff.

Post-Sale Bankruptcy Motions

19. On December 16, 2010⁶, the Certificate Trustee filed its *Motion for Relief as to a Portion of the Sale Order (Dkt. No. 802), And in the Alternative, Application for Allowance and Payment of an Administrative Expense Claim* (the “Motion for Relief from Sale and Motion for Administrative Claim”), in which the Certificate Trustee requested this Court, among other things, (i) grant it relief from the Sale Order because the order was entered in error or because the Sale Order was void with respect to the Property because the Debtor never had legal title to the Property; (ii) enter an order directing the Debtor to distribute the net proceeds from the sale of the Property to the Certificate Trustee, to the extent not disbursed by the Debtor, or if the proceeds were already disbursed, to require the Debtor to pay the amount of net sale proceeds to the Certificate Trustee, and in the alternative, and/or grant (iii) an administrative expense claim in the amount of the net sale proceeds from the Debtor’s sale of the Property or the fair market value of the Property at the time of the sale. In short, the Certificate Trustee was looking to recover at least the amount of the sale proceeds and a larger administrative claim if possible.

20. On March 28, 2011, the Certificate Trustee filed its *Clarification to its Motion for Relief as to a Portion of the Sale Order and in the Alternative, Application for Allowance and Payment of an Administrative Expense Claim* (Dkt. No. 2863) (the “Clarification”).

21. On April 1, 2011, this Court entered the *Order on Bank of America’s Motion for Relief as to Portion of Sale Order and Alternative Application for Allowance and Payment of Administrative Expense* (the “Agreed Order”) (Dkt. No. 2887). In part, the Debtor agreed to

⁶ This date is before the expiration of one year after entry of the sale order, which motion complies with Bankruptcy Rule 7060, if that rule applies to the sale order.

reserve the \$272,182.05 in REO sales proceeds allocable to the Property, without prejudice to the determination of the amount of the administrative expense, if any, to which the Certificate Trustee is entitled.

22. On or about April 26, 2012, this Court entered the *Order Sustaining Without Prejudice the Plan Trustee's Objection to Administrative Expense Claim #3355* (Dkt. No. 5216) ("Order Sustaining Objection to Claim").

23. On May 31, 2012, this Court entered its *Order Denying in Part Motion for Reconsideration of the Court's April 26, 2012 Order Sustaining Without Prejudice the Plan Trustee's Objection to Administrative Expense Claim #3355* (Dkt. No. 5366) (the "Order on Reconsideration").

24. The Plan Trustee has reserved more than \$270,000 to pay toward the claim of the Certificate Trustee, if allowed.

California Action

25. Based in part on what the Certificate Trustee understood this Court's direction to be in its prior orders, the Certificate Trustee filed suit in California Superior Court, County of Los Angeles, on July 31, 2012, against Samek, who is the current owner of the Property, and Yosef Cohen, captioned *U.S. Bank National Association, as successor trustee v. Yosef Cohen et al*, case No. BC489337.

26. Process was obtained over Yosef Cohen, who failed to respond and was subject to a default judgment. A default was entered against Yosef Cohen, after he was served by publication notice and Notice of Ruling was filed on April 23, 2014. A copy of the proof of publication and Notice of Ruling are attached hereto as **Exhibits 10** and **11**, respectively.

27. The Certificate Trustee and Samek engaged in litigation and extended negotiations regarding the ownership rights to the Property that included entry of against Yosef Cohen voiding his fraudulent reconveyance and effectively abating the case to permit the Certificate Trustee to obtain the proceeds of the sale as an administrative claim, failing which the California litigation would be reinstated. A copy of the “Stipulated Judgment and Order” entered by the California Superior Court on April 8, 2015 is attached hereto as **Exhibit 12**.

Argument

28. A forged reconveyance of a deed of trust is completely void and ineffective to transfer title under California law. *Firato v. Tuttle* (1957) 48 Cal. 2d 136, 139; *Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 40-42. “[I]t has been uniformly established that a forged document is void *ab initio* and constitutes a nullity; as such it cannot provide the basis for a superior title as against the original grantor.” *Wutzke v. Bill Reid Painting Service, Inc.*, *supra*, 151 Cal.App.3d at 43.

29. California law defines forgery in this context as, among other things, “knowingly executing, with intent to defraud, any instrument purporting to convey real property, or any right or interest in real property, with full knowledge that the person executing the document has no right to or interest in that property.” See Cal. Penal Code § 531(a); see also Miller & Starr, California Real Estate, 3rd Edition, page 123, §8:53. The fact that Cohen illegally signed his name to a document purporting to act on behalf of the mortgagee to release that person’s property rights is a forgery under California law. In other words, with regard to fraudulent real estate records, a forgery is not limited to common notions where one person signs a document representing that he the person signing when in fact the signor is an imposter.

30. Pursuant to this applicable law, the California court issued a judgment that the fraudulent reconveyance is voided *ab initio*, not voidable (**Exhibit 12**). Prior to this judgment, the California court also issued a default judgment against Yosef Cohen that the fraudulent reconveyance is voided *ab initio*, not voidable (**Exhibit 13**). The failure to file an answer in litigation is an admission as to the material allegations of the complaint. *Vasey v. California Dance Co., Inc.* (1977) 70 Cal.App.3d 742; *Molen v. Friedman* (1998) 64 Cal.App.4th 1149.

31. The Plan Trustee cannot claim the Debtor or estate ever had good title to the Property vis-à-vis the Certificate Trustee because at the time of bankruptcy sale, the Debtor did not have legal or equitable title in the Property free and clear of the Certificate Trustee's interest. Moreover, a simple review of the chain of title documents by the Debtor would have revealed the reconveyance document executed by Yosef Cohen was not valid or at least questionable, requiring further inquiry by any acquirer of the Property..

32. In accordance with this Court's May 31, 2012 order (Dkt No. 5366), the Certificate Trustee obtained a California judgment adjudicating that the reconveyance was void from its inception.

33. Further, the Debtor and the estate had constructive notice of the Certificate Trustee's claim to the Property due to the existence of recorded Notice of Lis Pendens and its Trustee's Deed Upon Sale filed in the public records of California.

34. The recorded Trustee's Deed Upon sale was effective against the Debtor and its predecessors and successors. California Civil Code section provides:

1213. Every conveyance of real property or an estate for years therein acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees; and a certified copy of such a recorded conveyance may be recorded in any other county and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance and where the original conveyance has

been recorded in any county wherein the property therein mentioned is not situated a certified copy of the recorded conveyance may be recorded in the county where such property is situated with the same force and effect as if the original conveyance had been recorded in that county.

1215. The term "conveyance," as used in Sections 1213 and 1214, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills.

35. A lis pendens recorded instrument recorded in the office of the county recorder where land is located by statute gives constructive notice of a pending lawsuit affecting title to described real property. California law is clear on this point. CCP 405.24 provides:

405.24. From the time of recording the notice of pendency of action, a purchaser, encumbrancer, or other transferee of the real property described in the notice shall be deemed to have constructive notice of the pendency of the noticed action as it relates to the real property and only of its pendency against parties not fictitiously named. The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, shall relate back to the date of the recording of the notice.

36. Case law is in accord. *Gale v. Sup.Ct. (Gale)* (2004) 122 CA4th 1388, 1395, 19 CR3d 554, 559. Anyone who acquires an interest in property (e.g., purchaser, mortgagee) subject to a lis pendens takes that interest subject to any judgment that may be entered in the lawsuit. See *Malcolm v. Sup.Ct. (Green)* (1981) 29 C3d 518, 523, 174 CR 694, 696, fn. 2; *Kirkeby v. Sup.Ct. (Fascenelli)* (2004) 33 C4th 642, 651, 15 CR3d 805, 811; *Bishop Creek Lodge v. Scira* (1996) 46 CA4th 1721, 1733, 54 CR2d 745, 751.

37. The Certificate Trustee of the Certificate Trust is an innocent party because the estate, post-petition, sold the Property and collected money when it had at least constructive notice of the Certificate Trustee's property interest in specific property, but failed to provide the Certificate Trustee for the benefit of its specific holders notice calculated to be received by a known party with a claim on that property. Thus, the estate's violation of the Certificate Trustee's due process rights post-petition has harmed the Certificate Trust beneficiaries because

had the received notice it could have asserted its claim in the Property and prevented the estate from selling the same free of its interest. *In re Fernwood Markets*, 73 B.R. 616, 621 (Bankr. E.D. Pa. 1987) (citing *Ray v. Norseworthy*, 90 U.S. (23 Wall.) 128, 23 L.Ed. 116 (1874) and noting it is “a dated but nevertheless viable case). *See also In re Rounds*, 229 B.R. 758 (Bankr. W.D. Ark. 1999).

38. However, even if notice had been received, based upon the Debtor’s representation that there were no claims against what was being sold and that any valid interest would be protected in any event, a potentially interested party who may have been participating in the case on certain matters or received the motion at a general office would have no reason to inquire or object. Moreover, it appears the Debtor’s interest in the Property did not appear of record until after the Sale Motion, notice, and order approving sale in May 2010.

39. The estate’s sale of the Property occurred post-petition, thus creating the right to seek an administrative claim under Section 503. The fact that the Debtor may have been a servicer for FHLMC and that either FHLMC, either directly or through an agent like the Debtor,⁷ engaged pre-petition in acts that affected the Certificate Trustee’s rights, does not render its claim a pre-petition. The Debtor engaged in post-petition conduct, even if mistakenly, that may have violated both the notice requirements under Section 363 of the Bankruptcy Code and due process, in addition to misstating that it had no knowledge of any party claiming an interest in the Property.

40. In any event, because the Certificate Trust’s rights in the Property existed at the time of the Section 363 sale and those rights predate any interest acquired by the Debtor in the

⁷ The Certificate Trustee has no information as to whether the Debtor was responsible for FHLMC’s pre-petition conduct.

same property, the Certificate Trustee has a right to the proceeds from the sale of the Property as prescribed by the Bankruptcy Code because its interest attaches to the sale proceeds as a matter of law. The Debtor agreed in its Sale Motion that the rights of parties with interest in property sold would be preserved.

41. Any result other than granting the Certificate Trustee the sale proceeds or admin claim to that extent is fundamentally unfair and might encourage debtors and trustees to forego or ignore information in title reports on real property or UCC searches on personal property or neglect to identify parties with a record claim to property proposed to be sold in a motion under Section 363. This is particularly true in a bulk sale context where notice is sent to hundreds or thousands of creditors or possible parties in interest, including to a party at an address least likely to reach that party where the debtor has knowledge of the specific contact information of a representative with the closest connection to a claim to the property being sold.

CONCLUSION

THEREFORE, the Certificate Trustee respectfully requests that this Court enter an order (i) allowing and ordering payment of the an administrative claim in the amount of the unsatisfied mortgage, in the amount of \$811,539.14 plus interest at the rate of 6.9% on the principal amount of \$735,928.16 up to value of the Property plus interest from the date of the original motion for an administrative expense, and awarding the Certificate Trustee the amount reserved by the Plant Trustee to partially satisfy that administrative claim with the balance treated as an unsecured claim, and (ii) determine that the interest of the Certificate Trustee for the Certificate Trust attaches to the allocable share of proceeds. the (ii) any other and further relief as this Court deems necessary and just.

Dated this 14th day of July, 2015.

/s/ Mark J. Wolfson
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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via US Mail or CM/ECF on this 14th day of July, 2015, to the following recipients: Edward Peterson, 110 East Madison Street, Suite 200, Tampa, Florida 33602; Elena L. Escamilla, Office of the United States Trustee, 135 W Central Blvd, Suite 620, Orlando, FL 32801; J. David Dantzler, Troutman Sanders, 600 Peachtree Street, NE, Suite 5200, Atlanta, GA 30308-2216; Arthur J. Spector, Berger Singerman, PA, 350 E. Las Olas Blvd., 10th Floor, Fort Lauderdale, FL 33301, and to all parties who requested electronic noticing through CM/ECF.

/s/ Mark J. Wolfson
Attorney