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January 22, 2008

Via facsimile (609-989-6589) and Lawyer's Service
Honorable Neil H. Shuster, P.J.Ch.
210 S. Broad Street
Trenton, New Jersey 08650

Re: LaSalle Bank, NA, as trustee v. Grizzle, et als.
Docket No. F-21765-07
Motion Return Date: February 1, 2008

Dear Judge Shuster:

We represent plaintiff in the above matter. Before the Court is our motion for summary judgment, seeking to strike the contesting answer filed by defendants Aundra and Rayonne Grizzle (hereinafter "defendants"); dismiss defendants' counterclaim; enter default against said parties; transfer the matter to the Foreclosure Unit to proceed as uncontested; and sever and transfer the crossclaim and third-party complaint to the Law Division. Defendants have opposed this application and cross-moved for summary judgment, seeking to dismiss plaintiff's complaint. Please accept this letter memorandum, which is being submitted with leave from Your Honor, in further support of plaintiff's motion and as supplemental opposition to defendants' cross-motion.

Defendants' cross-motion to dismiss the foreclosure based on an alleged lack of standing must be denied. Defendants are mixing apples and oranges by arguing that plaintiff does not have standing to pursue this foreclosure because it allegedly is not a holder-in-due-course (hereinafter "HIDC") of the underlying

Note. Standing and HIDC status are far from the same, and whether plaintiff will be permitted at the appropriate time in this litigation to assert HIDC status as to defendants' counterclaim has no bearing on whether plaintiff's complaint was properly filed by a real party in interest with standing to sue.

R. 4:26-1 provides: "Real Party in Interest - Every action may be prosecuted in the name of the real party in interest... ." Id. While not a defined term within the Rule itself, the phrase "real party in interest" has been construed by countless Courts in this State as requiring "that a litigant have a sufficient stake in the matter and real adversariness, with a substantial potential for real harm flowing from the outcome of the case." In re New Jersey Bd. of Public Utilities, 200 N.J.Super. 544, 556 (App. Div. 1985) (additional citations omitted). A financial interest in the outcome of litigation is ordinarily sufficient to confer standing. See, Erny v. Russo, 333 N.J. Super. 88 (App. Div. 2000), rev'd on other grds. sub. nom Erny v. Estate of Merola, 171 N.J. 86 (2002)(additional citations omitted).[1] Thus, all that is required for a party to establish itself under the broad umbrella of "standing" to foreclose is the existence of a stake in the outcome of the action, which stake may or may not include a financial interest.

On the other hand, pursuant to N.J.S.A. 12A:3-302, a HIDC is defined as 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 to call into question its authenticity; and
>
> (2) the holder took the instrument for value, in good faith, without notice the at the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as a part of the same series, without notice that the instrument contains an unauthorized signature or has been altered, without notice of any claim to the instrument described in 12A:3-306, and without notice that any party has a defense or claim in recoupment described in

[1] For a comprehensive discussion on the issue of "standing" see, PRESSLER, Current N.J. Court Rules, (GANN), Comment R. 4:26-1, (GANN).

subsection a. of 12A:3-305.

Simply put, to be a HIDC, one must take a negotiable instrument for value, in good faith, and without notice of any default or defect. While this is one way a party can establish itself as having a sufficient stake in the outcome of a litigation for standing purposes, it is only one of many.

Another way one can establish itself as a stakeholder for standing purposes is to provide an executed Assignment of Mortgage, which transfers to the assignee a legal interest in the real property at issue. Again, while this is one way to establish standing, it is not mandated. Requiring a fully executed Assignment of Mortgage in order to confer standing at the time a foreclosure complaint is filed significantly and improperly narrows R. 4:26-1 to eliminate from those parties who have standing any entity which has a sufficient stake and/or financial interest in the outcome of the action, in favor of only those who have a perfected legal interest. Not only does this contravene years of jurisprudence during which we have seen R. 4:26-1 expanded to mean that anyone with an interest in the outcome of the litigation has standing, but it plainly ignores well-settled caselaw in New Jersey which holds that an assignment does not have to be reduced to a writing in order to be valid in equity. For example, see Rose v. Rein, 116 N.J. Eq. (E & A 1934) (bond and mortgage may be assigned by mere delivery, without writing, and still be good in equity; right of assignee of bond and mortgage to foreclose mortgage in his own name is not exclusive, where mortgagee pledged mortgage as collateral security with assignee for debt amounting to less than mortgage debt, mortgagee retaining sufficient interest to entitle him to bring foreclosure suit, making assignee party to proceeding); see also, Leonard v. Leonia Heights Land Co.,81 N.J. Eq. 489 (E & A1913); United States of America v. Goldberg, 362 F.2d 575 (3d Cir.1966); In re Kennedy Mortgage Company, 17 B.R.957 (D. N.J. 1982).

It is important to note the manner in which thousands, and sometimes millions, of loans are routinely

bulk-transferred in the secondary mortgage market. The assignee performs its due diligence, bulk transfer agreements are executed, money is wired, and on a date certain, the proverbial "switch is flipped" wherein the assignee takes over regardless of the execution of a formal, legal assignment for each and every loan. By way of example, one large national mortgage servicer recently purchased 1.3 million loans from another large servicer. Even if it took one minute per assignment to execute (which itself is a stretch), it would take over ten years to execute all the resulting assignments if same were executed at the rate of 40 hours per week. Obviously, this is neither practical for the parties involved, nor cost-effective to consumers in general, who would ultimately bear this cost in future loan originations through higher interest rates and additional fees. The fact that a legally executed assignment of mortgage may not exist at the time a foreclosure action is initiated does not mean that the plaintiff lacks standing to foreclose its equitable interest in the mortgage, which can of course be asserted in the Chancery Division.

In addition to those parties which are the HIDC of a negotiable instrument or the legal assignee of a fully executed assignment of a mortgage which secures such an instrument, there are several other "stakeholders" with a sufficient interest to be the plaintiff in a mortgage foreclosure action. Without limitation, some of these stakeholders include: a servicing agent, nominee, noteholder or investor (regardless of whether HIDC status exists), or an equitable assignee (one who has been assigned a mortgage without the execution of a formal, legal, assignment of mortgage). Any one of these parties possess a sufficient stake in the foreclosure to be a proper party plaintiff with standing.

Based on the foregoing, defendants' arguments that plaintiff does not have standing to foreclose because it has not established itself as a HIDC and/or did not have a legal assignment of mortgage as of the date of the complaint must fail. While these are two ways by which a party can establish itself as a "real

party in interest" for purposes of R. 4:26-1, they are not the only ways and therefore neither is required to demonstrate that one has a sufficient enough stake in the outcome of litigation in order to establish standing.

Because neither of the issues raised by defendants (HIDC status and legal assignment of mortgage) are required for a foreclosing plaintiff to establish its standing, defendants' argument is not dispositive as to the issue and their cross-motion must be denied. Therefore, assuming the Court is disinclined to accept plaintiff's primary argument that summary judgment is appropriate in its favor because the consideration provided defendants with the purchase money to obtain title to the collateral property, and they have admitted their default by failing to pay as required, both cross-motions should be denied and plaintiff should be permitted to establish through discovery that it has a sufficient stake in the outcome of this action and therefore has standing to foreclose under R. 4:26-1. Plaintiff should also be permitted to establish through discovery whether it is a HIDC and therefore entitled to dismissal of defendants' counterclaim on a future dispositive motion. The harsh remedy of dismissal is not only disfavored under our Court Rules, but unsupported by the facts before the Court on defendants' cross-motion. Dismissal would not only be premature and inappropriate, but would serve no purpose but to frustrate judicial economy.

As a final note, plaintiff argues that all cases cited in defendants' sur-reply are either irrelevant or distinguishable from the case at bar. Based on the Court-imposed limitation as to the length of this memorandum, we can not expand herein. However, plaintiff reserves the right to argue this point more fully at oral argument and/or in a supplemental writing if directed by the Court.

Respectfully submitted,

ZUCKER, GOLDBERG & ACKERMAN, LLC

By: Richard P. Haber

RPH/

cc: Margaret Lambe Jurow, Esq. - via facsimile (732-572-0066) and Lawyer's Service