

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL COURT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA09-0418

DIVISION: 55

M & T BANK,
Plaintiff,

vs.

LISA D. SMITH a/k/a LISA DAVIS
SMITH, et. al.,
Defendants.

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND
AMENDED COMPLAINT WITH PREJUDICE**

THIS CAUSE came before the Court on Defendants' Motion to Dismiss Second Amended Complaint with Prejudice. Defendants argue Plaintiff's Complaint and exhibits demonstrate a lack of standing and a fraud upon the Court, because Plaintiff has abandoned its prior claims that (1) Plaintiff is the owner of the Promissory Note and entitled to enforce the Note, but has lost the Note, and (2) Plaintiff now has possession of the Note and is currently the owner of the Promissory Note by virtue of an Assignment from an entity that had already transferred the Note. By contrast, Plaintiff now claims that it is the servicer of the loan, and that Wells Fargo owns the Note pursuant to the Allonge to the Promissory Note. The Court has reviewed the pleadings, considered arguments of counsel, and being otherwise fully advised in the premises finds as follows:

The instant action was filed by the Law Offices of Marshall C. Watson, on behalf of the Plaintiff, M & T Bank, on February 10, 2009. On April 23, 2009, the Defendants, Lisa Davis Smith and Larry Smith, moved to dismiss the Complaint, because the Plaintiff's allegation

that it owned the Note as bearer paper based on an Allonge attached to the Note conveying possession of the Note in blank, was inconsistent with the Plaintiff's allegation the Note was lost. On September 22, 2009, an Order Granting Defendants' Motion to Dismiss was entered. Plaintiff then filed an Amended Complaint on September 22, 2009, alleging that it owned the Note by virtue of an Assignment. On October 6, 2009, the Defendants again moved to dismiss the Amended Complaint, because a foreclosure action cannot be based on an Assignment of a mortgage which did not exist at the time the foreclosure was filed. On February 19, 2010, an Order Granting Defendant's Motion to Dismiss Amended Complaint was entered. On March 3, 2010, Plaintiff filed a Second Amended Complaint, alleging that it is now the servicer of the loan, and that Wells Fargo owns the Note pursuant to the Allonge to the Promissory Note. The Defendants then moved to dismiss the Second Amended Complaint on March 9, 2010, for fraud upon the Court because: (1) the previously blank Allonge to the Note now contains a stamp indicating Wells Fargo, National Association as Trustee, to be the payee of the Note, (2) First National Bank of Nevada could not have added the stamp, since the FDIC closed the First National Bank of Nevada in 2008, and (3) Plaintiff is now alleging that Wells Fargo owns the Note, contradicting all of its previous claims. Defendants' Motion to Dismiss Second Amended Complaint with Prejudice is currently before the Court.

Upon review of Defendants' motion, the Court finds the Plaintiff lacks standing and is not a proper party to the suit. The Court has been misled by the Plaintiff from the beginning. In the initial Complaint, the Plaintiff alleged it owned the Note that was lost. Then Plaintiff alleged that not only was the lost Note found, but that Plaintiff actually owned the Note by Assignment. After both of these Complaints were dismissed, Plaintiff then alleged that Wells Fargo owned the Note, while the Plaintiff was merely a servicer of the loan. Moreover, the

Assignment on which Plaintiff relied in its First Amended Complaint postdates the filing of this foreclosure action and is inconsistent with the Mortgage, Note, stamps allegedly affixed to the Note, and the Allonge. The blank stamp affixed to the Note and the Allonge indicate a transfer from First Bank Mortgage, a division of First Bank of Georgia, to First National Bank of Nevada, and then to an unidentified bearer. In contrast, the Assignment indicates a transfer from First Bank Mortgage, by and through Mortgage Electronic Recording Systems, directly to the Plaintiff. However, First Bank Mortgage had transferred possession of the Note to First National Bank of Nevada prior to the date of Assignment from First Bank Mortgage to Plaintiff, and the Assignment postdates the filing of the foreclosure action. Accordingly, this action will be dismissed with prejudice as to M & T Bank, since M & T Bank has been unable to clarify how it owns the Note, but Wells Fargo may commence a new action, on its own, if it is in fact the owner of the Note.

Additionally, the Court is concerned with the authenticity of the documents filed. Plaintiff is asking the Court to ignore the documents filed in the first two Complaints, and to rule solely on the most recent Complaint. However, all three of these documents appear to be inconsistent with one another and have changed as needed to benefit the Plaintiff. For instance, the blank Allonge as filed on both February 10, 2009, and September 22, 2009, remarkably turned into a stamped Allonge on March 3, 2010, with Wells Fargo's information in the previously blank area. This transformation is most interesting, given that it was argued that the Office of the Comptroller of the Currency closed the First National Bank of Nevada on July 25, 2008, and the stamp did not appear in either of the February or September 2009 filings. Similarly, Assignments appeared and vanished as needed, and the Allonge changed to fit the Plaintiff's particular purpose at that moment. Accordingly, an evidentiary hearing will be held to

determine the authenticity of the Allonge and the appearance of the Assignment.

Rule 4-3.3(a)(1) of the Rules Regulating the Florida Bar provides that “[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” As officers of the Court, attorneys should ensure the facts they represent and contained in their motions filed before the Court are correct and accurate. The Court has not yet had an evidentiary hearing to determine whether the various actions in this case were intentional efforts to misdirect the Court, or simply the result of inartful legal work, and therefore, the Court cannot yet determine whether sanctions should be imposed. However, this issue will be clarified at the evidentiary hearing. Accordingly, it is:

ORDERED AND ADJUDGED that:

1. The instant cause of action, *M & T Bank v. Lisa D. Smith, et al.*, St. Johns County case number CA09-0418, is and the same is hereby **DISMISSED WITH PREJUDICE**. (However, this order shall not prevent a proper plaintiff, possibly Wells Fargo, from bringing a new action on the Mortgage and Note.)
2. The Court reserves jurisdiction to determine the amount of fees and costs, if any, to which Defendants are entitled upon the filing of a motion and a hearing on the matter.
3. An evidentiary hearing is hereby scheduled for Thursday, August 19, 2010, at 1:45 p.m. in Room 305 of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida 32084, to determine why the Allonge has changed from blank to specific, why the Assignment appeared and then disappeared, and whether sanctions should be imposed against the Plaintiff and/or Plaintiff’s counsel in this action, and the Court specifically reserves jurisdiction to consider this matter.

DONE AND ORDERED in Chambers, in St. Johns County, St. Augustine,

Florida, this ____ day of June, 2010.

Conformed Copy

JUN 10 2010
J. MICHAEL TRAYNOR
Circuit Court Judge
J. Michael Traynor
Circuit Court Judge

Copies to:

Shari N. Hines, Esquire
1800 N.W. 49th Street, Suite 120
Fort Lauderdale, FL 33309

James A. Kowalski, Jr., Esquire
12627 San Jose Boulevard, Suite 203
Jacksonville, FL 32223



ATTENTION: PERSONS WITH DISABILITIES:

In accordance with the Americans With Disabilities Act, if you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Office of the Deputy Court Administrator, 904-827-5617 not later than two (2) days prior to the proceeding. If you are hearing or voice impaired, call 1-800-955-8771.