

Dated: December 13, 2013
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
MIRANDA M. TAYLOR,
Debtor.

Case No. 13-27312-L
Chapter 13

Miranda M. Taylor,
Plaintiff,

v.

Adv. Proc. No. 13-00438

Wells Fargo Bank, N.A.;
Wells Fargo Home Mortgage, Inc.;
Wells Fargo Financial Tennessee, Inc.;
and Wells Fargo Tennessee 1, LLC;
Defendants.

ORDER GRANTING MOTION TO DISMISS

BEFORE THE COURT is the Motion to Dismiss filed by the Wells Fargo Defendants (collectively "Wells Fargo") on November 6, 2013 (Dkt. No. 10). Wells Fargo asserts that the complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) made applicable

in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b). The Plaintiff has filed a response (Dkt. No. 19). Oral argument was not requested. This matter is ready for decision.

FACTS AND PROCEDURAL HISTORY

The Plaintiff, Miranda M. Taylor, filed a petition for relief under Chapter 13 of the Bankruptcy Code on July 11, 2013. No plan has been confirmed at this time. The Chapter 13 trustee has filed an objection to the confirmation of the Plaintiff's plan and a motion to dismiss the bankruptcy case which are pending.

The Plaintiff commenced this adversary proceeding on October 2, 2013, by filing her complaint seeking a declaratory judgment (Dkt. No. 1). The Plaintiff asks the court to declare that, "the Defendants have not proffered a valid proof of claim with respect to real property located at 370 Buckland Cove, Eads, Tennessee 38028...and therefore, are not properly before this Court as a creditor." The Plaintiff also asks the court to declare that "the Defendants have no equitable interest in the Real Property." The Plaintiff asserts that the mortgage on her residence was never properly transferred to Wells Fargo. The Plaintiff asks that the court declare that the attempted Assignment of the Mortgage was improper and ineffective. Attached to the complaint are Exhibits A-B, E-H, consisting of (A) a screen shot from MERS ("Mortgage Electronic Registration Systems, Inc.") describing its business; (B) MERS Commercial Terms and Conditions; (E) Assignment of Mortgage; (F) Corporate Assignment of Deed of Trust; (G) MERS Servicer ID; and (H) Office of Inspector General, "Wells Fargo Bank Foreclosure and Claims Process Review." The Plaintiff filed an amended/corrected complaint on October 3, 2013, which added a certificate of service (Dkt. No. 3), and a second amended/corrected complaint on October 16, 2013, which added Exhibits (C)

MERSCORP, Inc. Rules of Membership; and (D) MERSCORP Holdings, Inc. August 2013 News Summary.

In its Memorandum of Law in Support of Motion to Dismiss (Dkt. No. 11), Wells Fargo responds that Wells Fargo Bank, N.A. is the successor by merger to Wachovia Mortgage Corporation and therefore acquired all of Wachovia Mortgage Corporation's assets, including the promissory note signed by the Plaintiff. Wells Fargo also responds that the Plaintiff's Deed of Trust was assigned to Wells Fargo Bank, N.A. as evidenced by an Assignment of Mortgage recorded in the public records of Shelby County, Tennessee. Therefore, it asserts, it has standing to file a proof of claim against the Plaintiff's bankruptcy estate. It further asserts that the Plaintiff lacks standing to challenge the validity of the assignment of her Deed of Trust. Attached to the Memorandum are Exhibits 1-4: (1) Fixed/Adjustable Rate Note ("the Note"); (2) Deed of Trust, (3) Articles of Merger; and (4) Assignment of Mortgage. Wells Fargo filed its proof of claim on November 11, 2013. It is supported by an escrow analysis, the Note, the Deed of Trust, and a Loan Modification Agreement. (Claims Register, Claim 8-1).

The Plaintiff filed a Response to the Motion to Dismiss on December 6, 2013 (Dkt. No. 19). In it the Plaintiff asserts that the motion to dismiss improperly introduces evidence outside the complaint; she asserts that should the court treat the motion to dismiss as a motion for summary judgment, she should be given the opportunity to take discovery; and she asserts that the motion to dismiss fails to show any insufficiency in the complaint.

In the complaint the Plaintiff admits that she signed a promissory note on January 11, 2008, payable to the order of Wachovia Mortgage Corporation, in the amount of \$1,420,000 (Amended/Corrected Complaint ¶ 26).

The Plaintiff admits that she signed a deed of trust in favor of Wachovia Mortgage Corporation on the same day conveying an interest in her property (Amended/Corrected Complaint ¶ 27).

The Plaintiff admits that Wachovia Mortgage Corporation was purchased by Wells Fargo Bank, N.A. on December 31, 2008 (Amended/Corrected Complaint ¶ 28).

The Plaintiff admits that MERS “as nominee for Wachovia Mortgage Corporation, Its Successors and Assigns,” assigned the deed of trust to Wells Fargo Bank, N.A. on July 16, 2012, and that an Assignment of Mortgage was executed on that date (Amended/Corrected Complaint ¶¶ 32-33).

The Note bears two endorsements. The first is “to the order of Wachovia Bank National Association without recourse by Wachovia Mortgage Corporation”; the second is “to the order of [blank] without recourse by Wachovia Bank National Association.”

ANALYSIS

Wells Fargo asks that the complaint be dismissed for the reason that it fails to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, accept the factual allegations as true, and determine whether the plaintiff can prove any set of facts that would entitle her to relief. *Wyser-Pratte Management Co., Inc. v. Telxon Corp.*, 413 F.3d. 553, 560 (6th Cir. 2005). Nevertheless, a complaint must provide more than mere labels and conclusions. *Alvord Investments, LLC v. The Hartford Financial Services Group, Inc.*, 660 F. Supp. 2d 850, 853 (W.D. Tenn. 2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). It must state “a plausible claim for relief.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). In addition to the allegations in the

complaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for taking judicial notice. *Wyser-Pratte*, 413 F.3d at 560. A defendant may introduce certain pertinent documents if the plaintiff fails to do so. These documents may then be considered part of the pleadings. *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1991).

The Plaintiff attached a number of documents to her complaint, but failed or was unable to include two critical documents: the promissory note and deed of trust that she admits that she signed. As exhibits to its Memorandum, Wells Fargo has supplied a Note and Deed of Trust that appear to be those signed by the Plaintiff. Wells Fargo produced these not only in connection with this adversary proceeding, but also as exhibits to its proof of claim. In addition, Wells Fargo has supplied the Articles of Merger between it and Wachovia Mortgage Corporation. The Plaintiff admits that the merger occurred. Wells Fargo's remaining exhibit is the Assignment of Mortgage which is included in the Plaintiff's exhibits. It was not improper for Wells Fargo to supply the supplementary documents, and the supplying of these documents does not convert the motion to dismiss to a motion for summary judgment for reasons that will be made clear below.

The Plaintiff admits that Wells Fargo Bank, N.A., purchased the assets of Wachovia Bank, N.A. Wells Fargo has shown that in fact this purchase occurred in the context of a merger. Wells Fargo Bank, N.A. is the successor by merger of Wachovia Bank, N.A. As the result of the merger, Wells Fargo Bank, N.A. became the owner of the assets of the predecessor corporation, Wachovia Bank, N.A., including the Plaintiff's promissory note. *See In re ImagePoint, Inc.*, 2011 WL 1500124, at *2 (Bankr. E.D. Tenn. Apr. 19, 2011) (acknowledging that as the result of the merger,

Wells Fargo Bank, N.A. is the owner of the assets of Wachovia Bank, N.A. including proofs of claim in bankruptcy).

It appears from the copy of the Note provided by Wells Fargo that Wachovia Bank, N.A. became the holder of the Note as the result of the endorsement by Wachovia Mortgage Corporation. The second endorsement of the Note is an endorsement in blank by Wachovia Bank, N.A. It is unclear from the record whether this endorsement was made as the result of the merger or at some other time. In any event, it appears that Wells Fargo is now the holder of the Note which is endorsed in blank.

The Note is a negotiable instrument. See Tenn. Code Ann. § 47-3-104. As such it is subject to Article 3 of Tennessee's version of the Uniform Commercial Code (the "UCC"). Parties who may enforce negotiable instruments include holders and holders in due course. Tenn. Code Ann. § 47-3-301. A holder includes a person in possession of an instrument endorsed to bearer (i.e., in blank). Tenn. Code Ann. § 47-1-201. Moreover, it is well-established that transfer of a note, without more, carries with it the lien created by the related deed of trust. *See Samples v. Bank of America, N.A.*, 2012 WL 1309135 (E.D. Tenn. April 16, 2012 (citations omitted)); *Hutchens v. Bank of America, N.A.*, 2012 WL 1618316 (E.D. Tenn. May 9, 2012) (citations omitted). Thus, even without the recording of an assignment of the Deed of Trust, Wells Fargo would be entitled to enforce it because it is the holder of the Note. Although the Note appears to be the promissory note described by the Plaintiff and acknowledged to be her own, it is not necessary at this point for the court to make the determination that the Note produced by Wells Fargo is in fact the Plaintiff's note. It appears to be, but that finding is not necessary to the court's decision.

As the apparent holder of the Plaintiff's promissory note, Wells Fargo Bank, N.A. is entitled to enforce it. This right includes the right to file a proof of claim against the Plaintiff's bankruptcy estate. *In re ImagePoint*, at *3 ("Wells Fargo Bank, as Wachovia Bank's successor by merger, succeeds to proofs of claim filed in the bankruptcy proceeding and will receive whatever benefit the holder of such claims is entitled to under the Bankruptcy Code."). The right to enforce a promissory note carries with it the rights provided under a related deed of trust.

At the time that the Plaintiff filed her complaint, Wells Fargo Bank, N.A. had not filed a proof of claim in the bankruptcy case. Its proof of claim was filed on November 11, 2013. It is supported by a number of exhibits, including the Note and Deed of Trust. The proof of claim of Wells Fargo Bank, N.A. is deemed allowed until some party in interest objects. 11 U.S.C. § 502(a). No one has objected.

It was not improper for the Plaintiff to compel Wells Fargo Bank, N.A., to file a proof of claim by commencing this adversary proceeding. Now that a proof of claim has been filed, however, the Plaintiff must proceed by filing an objection to the proof of claim if she has one. If the Plaintiff decides to file an objection, she should be guided by the comments made in this order concerning the status of Wells Fargo Bank, N.A., as successor by merger to Wachovia Bank, N.A. and the consequences of an endorsement in blank.

CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss is **GRANTED**.

cc: Debtor/Plaintiff
Attorneys for Debtor/Plaintiff
Defendants
Attorney for Defendants
Chapter 13 Trustee