

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

MATRIX FINANCIAL SERVICES CORPORATION,

Plaintiff,

vs.

No. D-202-CV-2013-04584

ADELE LARRIBAS, and if married, JOHN DOE A (true name unknown), her spouse; ELAINE CHAVEZ, and if married, JOHN DOE B (true name unknown), her spouse; and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Defendants.

**ORDER ON MOTION TO VACATE FORECLOSURE DEFAULT JUDGMENT; AND
DISMISSING FORECLOSURE COMPLAINT WITH PREJUDICE**

THIS MATTER CAME BEFORE the Court upon the motion of Defendant Adele Larribas, by and through counsel of record, to vacate the foreclosure judgment of Joshua Simms based on failure of Plaintiff's standing bring this action, and Plaintiff having appeared through counsel of record, Lucinda Silva, and having reviewed the motion, the evidence submitted at the evidentiary hearing, arguments of counsel, and being otherwise fully apprised of the premises, the Court hereby finds and concludes as follows:

I. FINDINGS OF FACT

1. Plaintiff Matrix Financial Services Corporation (hereinafter referred to as Matrix) filed the present foreclosure action against Defendants on May 28, 2013.
2. Wells Fargo Home Mortgage, Inc. (hereinafter referred to as Wells Fargo) was the original lender on the promissory note and mortgage involved in this proceeding.

3. Plaintiff alleged in its complaint that Matrix “is entitled to enforce the Note and Mortgage. Copies of any applicable Assignment(s) area attached hereto as Exhibit C.”
See Exhibit 1 (Complaint, para. 7).
4. The Complaint’s exhibits included the note (hereinafter referred to as the “1st copy of Note”), the mortgage and an assignment of the mortgage from Wells Fargo to Matrix; but the note attached to the Complaint did not include any endorsement that evidenced a transfer of the note from Wells Fargo to Matrix.
5. On September 3, 2014, Plaintiff filed with the court an Affidavit Regarding Possession of Original Note, which included a letter dated July 24, 2014 from the records custodian of Matrix and a copy of the Note (hereinafter referred to as the “2nd copy of Note”). This affidavit was signed by Sandra A. Brown, an attorney of the Albuquerque law firm representing the Plaintiff.
6. The 2nd copy of the Note included an endorsement on the second page that indicated “Pay to the order of Matrix Financial Services Corporation without recourse,” and it was signed by the Assistant Secretary of Wells Fargo Home Mortgage, Inc., Mark Brockmann.
7. On the backside of the 2nd copy of the Note’s second page is an additional endorsement, reading, “Pay to the Order of _____, without recourse,” which was then signed by Sakura Siwabessy, Authorized Signer for Matrix Financial Services Corporation.
8. As an employee of the Plaintiff law firm, the Affidavit of Sandra A. Brown and inclusion of the 2nd copy of the Note were not based on the signor’s personal knowledge of the documents’ origins, and for this reason the 2nd copy of the Note is assigned no weight.

9. On September 4 2014, Plaintiff submitted an Affidavit of Standing at Time of Filing Complaint, signed and sworn to by Tracy A. Duck an apparent “authorized signor of Matrix,” which was signed on September 3, 2014; the Duck Affidavit included a 3rd copy of the Note which was substantially in the form of the 2nd copy of the Note.

10. Mr. Duck affirmed in paragraph 4 of the Affidavit:

4. The information in this affidavit is taken from Matrix Financial Services Corp business records. I have personal knowledge of Matrix Financial Services Corp procedures for creating these records. They are (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of Matrix Financial Services Corp’s regularly conducted business activities; and (c) it is the regular practice of Matrix Financial Services Corp to make such records.
5. Matrix Financial Services Corp directly or through an agent, has possession of the promissory note. The promissory note has been duly endorsed. Matrix Financial Services Corp is the assignee of the security instrument for the referenced loan. A correct copy of the note is attached hereto and the original Note is in the physical possession of Plaintiff’s counsel.
6. The Plaintiff in this action had possession of the promissory Note, as attached, at the time of filing its Complaint for Foreclosure.

11. Mr. Duck’s representation of his “personal knowledge of the Matrix Financial Services Corp procedures for creating these records,” which includes the 3rd copy of the Note, including the endorsement, is not credible because the Note was created on July 15, 2002, and it did not initially contain the endorsement, as evidenced by the 1st copy of the Note attached to the Complaint.

12. The original note was apparently prepared by Wells Fargo, but Mr. Duck did not indicate that he was an employee of that institution and present on July 15, 2002, or at the time the endorsement was allegedly affixed to the Note; he did not explain his opportunity to obtain personal knowledge of the Note’s preparation or the timing of its endorsement.

13. The affidavit also does not assist in establishing *when* the Wells Fargo endorsement to Matrix was affixed on the Note.
14. The suggestion that Matrix had possession of the 3rd copy of the Note on September 3, 2014, even if true, does not answer the question of whether Matrix was the holder of the properly endorsed Note on May 28, 2013, when the Complaint was filed.
15. Judge Nan Nash scheduled an evidentiary hearing for December 3, 2014, “on the limited issue of Plaintiff’s standing” in the foreclosure action, but the parties requested a continuance of that hearing, and it was rescheduled and held on February 10, 2015 before Judge Victor S. Lopez.
16. The purpose of the hearing was to allow counsel to conduct additional discovery and to allow them to present witness testimony or other evidence at the evidentiary hearing.
17. At the February 10, 2015 hearing, the parties presented *no* witness testimony.
18. Plaintiff’s counsel submitted only an Affidavit of Lisa Jayjohn (Exhibit 4) at the hearing, entitled “Custodian’s Affidavit,” which attached a 4th copy of the Note. This copy of the Note was substantially identical to the 2nd and 3rd copies of the Note, and also contained the endorsement that was not included in the 1st copy of the Note attached to the Complaint.
19. The Jayjohn affidavit is entitled, “Custodian Affidavit;” it was signed by Lisa Jayjohn, Vice President of the Corporate Trust Department of the Bank of New York Mellon Trust Company, N.A. (hereinafter referred to as the “Bank” or “BNYMTC”); but the document does not reflect that Jayjohn was in fact the custodian of the Bank’s records; it revealed she had “access to certain records maintained” by the Bank.

20. The Jayjohn affidavit reflects that the Bank entered into a Custodial Agreement, dated as of March 1 2004 by, between and among Goldman Sachs, as owner of Matrix Capital Bank, as seller, and BNYMTC (Bank), successor to JPMorgan Chase, National Association, as Custodian.”
21. The Jayjohn affidavit confirms that the Bank of New York Mellon Trust “received the original Note on March 10, 2004,” it was then “placed in BNYMC’s vault, as Custodian, located in Irving, Texas and remained there until on or about July 16, 2014.”
22. The Jayjohn affidavit does not explain anything about the endorsement contained on the 4th copy of the Note; it does not clarify the date when that endorsement was allegedly affixed to the Note, which would accomplish a transfer from Wells Fargo to Matrix.
23. The Jayjohn affidavit, significantly, **does not explain how Matrix Capital Bank, as seller, obtained rights from Wells Fargo Home Mortgage, Inc. to the Note.**
24. Neither did the evidence establish any connection between *Matrix Capital Bank* and the Plaintiff in this case, *Matrix Financial Services Corporation*.
25. The Jayjohn affidavit further confirms at paragraph 7 “that the original Note was released from BNYMTC’s vault on or about July 16, 2014, when it was sent to the servicer, Two Harbors Investment Corp, located in 601 Carson Parkway, Minnetonka, MN, at the servicer’s request.”
26. No explanation is offered as to any connection between Two Harbors Investment Corp and the Plaintiff, Matrix Financial Services Corporation.
27. The Jayjohn affidavit finally offers “a computer printout from BNYMTC’s records reflecting the date that the original note was sent to the Servicer,” Exhibit B to the

affidavit, which is not self-explanatory and of no evidentiary value without a witness to explain the information it contains.

II. CONCLUSIONS OF LAW

- A. Defendant established good cause in this proceeding under Rule 1-060 (B) to warrant setting aside the Default Judgment of foreclosure, and established a likelihood of success on the merits as against Matrix for lack of standing.
- B. Plaintiff must demonstrate standing at the time of the filing of the foreclosure. Bank of New York v. Romero, 2014-NMSC-7, ¶17, 320 P.3d 1.
- C. Plaintiff must demonstrate standing, right to enforce the note and ownership of the mortgage at the time the complaint was filed. Bank of New York Mellon v Lopes, 2014-NMCA-097 ¶8.
- D. Plaintiff's attachment to the complaint of an unendorsed note, without evidence of when the Bank obtained possession, **does not establish the Bank as holder of the note at the time the foreclosure suit was filed.** Deutsche Bank v Johnston, No 31,503- NMCCA ¶17.
- E. Matrix Financial Services Corporation did not establish that Wells Fargo endorsed the Promissory Note to Matrix prior to filing the Complaint on May 28, 2013.
- F. Matrix did not establish that it was the holder of the Promissory Note in question on May 28, 2013, when it filed the Complaint for foreclosure.
- G. Matrix established no standing to pursue a foreclosure against Defendants based on the present record.
- H. As a result of the foregoing, the Court did not have jurisdiction to enter the Default Judgment entered in this proceeding on March 6, 2014, for lack of standing by the Plaintiff, and must dismiss. Bank of New York Mellon v Lopes, 2014-NMCA-097 ¶8

I. The Default Judgment entered in this proceeding on March 6, 2014, is hereby set-aside.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the March 6, 2014 Default Judgment of foreclosure, and all related orders and enforcement proceedings of this Court flowing from that Default Judgment are thereby VACATED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, given the Court's lack of jurisdiction to proceed, the Complaint for foreclosure filed herein must be, and the same is hereby, DISMISSED WITH PREJUDICE.


VICTOR S. LOPEZ, JUDGE
Second Judicial District, Div. XXVII