IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

In re: LACY MAE SPEED, Debtor **Case No. 3:09-bk-17860**
Chapter 13

LACY MAE SPEED **PLAINTIFF**

v. **Case No. 3:12-ap-01084**

U.S. BANK, AS SERVICER FOR U.S. BANK, N.A., AS TRUSTEE FOR THE STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATE SERIES 2005-6; U.S. BANK, N.A., AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-6; AMERICA'S SERVICING COMPANY; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC. **DEFENDANTS**

ORDER DENYING DEFENDANTS' MOTION TO BIFURCATE

Now before the Court is a *Motion to Bifurcate* filed on September 10, 2013, by R. Spencer Clift on by behalf of U.S. Bank, N.A., ("**U.S. Bank**"), the Structured Asset Investment Loan Trust Mortgage Pass Through Certificates Series 2005-6" (the "**SAIL Trust**"), America's Servicing Company ("**ASC**"), and Mortgage Electronic Registration System, Inc. ("**MERS**") (collectively, the "**Defendants**"). In their *Motion to Bifurcate*, the Defendants move to "bifurcate," that is, try separately, the issue of whether the Plaintiff has standing, as a third party, to bring certain causes of action predicated on allegedly invalid assignments and transfers. Additionally, the Defendants move to bifurcate the issue

of whether U.S. Bank has standing to enforce a note secured by a mortgage. For the reasons below, the Court denies the Defendants' motion.

PROCEDURAL HISTORY

On June 13, 2012, the Plaintiff filed an amended adversary complaint asserting seven claims for relief. Three of the claims for relief are common law tort claims: (1) gross negligence by ASC; (2) fraud by the Defendants; and (3) slander of title by U.S. Bank. The Plaintiff further objects to ASC's proof of claim and requests a determination as to the validity and the extent of the mortgage lien asserted by U.S. Bank as trustee for the SAIL Trust. Finally, the Plaintiff moves for a complete audit and an accounting of the payments she has made on her mortgage to be paid for by the Defendants.

The factual allegations underpinning the Plaintiff's claims generally fall into two categories. The first category consists of allegations that the Defendants did not properly transfer and assign a note executed by the Plaintiff that is secured by a mortgage on the Plaintiff's residence. The Plaintiff's tort and stay violation claims are largely predicated on these factual allegations. The second category consists of allegations that certain Defendants lacked the authority to bring foreclosure proceedings against the Plaintiff prepetition,[1] and that, consequently, the Plaintiff does not owe certain foreclosure costs asserted by the Defendants. The Plaintiff's objection to ASC's proof of claim, her request

[1] The Plaintiff originally commenced a Chapter 13 bankruptcy case on May 12, 2006. The Plaintiff's plan was confirmed on April 29, 2008, but her case was dismissed on June 12, 2008, for failure to make timely payments to the trustee. On October 27, 2009, the Plaintiff commenced this bankruptcy case from which this adversary proceeding arose. The Plaintiff alleges that foreclosure actions were initiated against her on October 20, 2005, August 6, 2008, and September 10, 2009.

for a determination as to the extent of the mortgage lien asserted by U.S. Bank, and her motion for accounting, are largely based on this second category of factual allegations.

On August 17, 2012, the Defendants moved to dismiss the Plaintiff's adversary complaint. On December 12, 2012, the Court entered an order denying the Defendants' motion to dismiss the adversary complaint and further denied their alternative request for an order granting summary judgment (the "**Summary Judgment Order**").[2] In the Summary Judgment Order, the Court held that the Plaintiff executed a note (the "**Note**") in consideration for a home loan. The Note was accompanied by an allonge indorsed in blank. To secure the Note, the Plaintiff granted a mortgage (the "**Mortgage**") on her home. Through MERS, the Mortgage was then twice assigned to U.S. Bank who served as trustee for a different entity each time. In the first assignment, U.S. Bank was trustee for the Structured Asset Securities Corporation Mortgage Pass Through Certificate Series 2005-6 (the "**SASCO Trust**"). In the second assignment, U.S. Bank was trustee for the SAIL Trust. ASC services the loan for the SAIL Trust and filed an amended proof of claim in the Plaintiff's bankruptcy on behalf of U.S. Bank.

In the Summary Judgment Order, the Court addressed the Defendants' argument that the first assignment to the SASCO Trust did not deprive the SAIL Trust of the authority

[2] Because the Defendants went beyond their pleadings by attaching and relying on extrinsic documents such as the Note and Mortgage, the Court, under Fed. R. Civ. P. 12(d), was required to treat their motion to dismiss as a motion for summary judgment. *See* Fed. R. Bankr. P. 7012(b) (Fed. R. Civ. P. 12(b)-(i) applies in adversary proceedings); *see also In re Banks*, 457 B.R. 9, 12 (B.A.P. 8th Cir. 2011).

to enforce the Mortgage because possession of the Note was determinative. The Court remarked:

> The problem with the Defendants' argument is not the legal theory on which it is based. There is little question that the Allonge . . . cause[d] the Note to become bearer paper, and both parties agree that the Mortgage is inseparable from the Note. The problem with the Defendants' argument is that it fails to provide proof that the SAIL Trust has possession of the original Note. As proof that the SAIL Trust has possession, the Defendants direct the Court only to a copy of the Note. Viewing the facts in the light most favorable to the non-moving party, the Court finds the copy of the Note is not sufficient to prove the absence of the genuine issue of material fact that the SAIL Trust has possession of the original Note.

Summary Judgment Order pp. 10–11 (footnote omitted). Thus, Summary Judgment was not granted in favor of any of the Defendants because the Court was not presented with evidence of which Defendant, if any, had possession of the original note. *See id.* pp. 10–11 & n.4.

Since the entry of the Summary Judgment Order, the parties have been embroiled in an ongoing discovery dispute. The Plaintiff seeks all documents and evidence relating to the various transfers and assignments of her Note and Mortgage. The Plaintiff also seeks to go to MERS' facility to inspect various internal documents housed there. The Defendants take the position that because U.S. Bank currently has the authority to enforce the Note secured by the Mortgage, evidence relating to prior transfers and assignments is irrelevant, and producing the documents requested by the Plaintiff would be unduly burdensome.

In an effort to move the litigation forward, a status conference was held on September 12, 2013. At the status conference, the Court mediated a pending discovery

dispute and then asked the parties to briefly state their respective positions regarding the *Motion to Bifurcate* filed by U.S. Bank two days earlier. The Court listened to the parties' positions and requested further briefing on the bifurcation issue. Subsequently, the parties filed various briefs and supplemental briefs. The briefs indicate that there are two closely related standing issues that U.S. Bank seeks to bifurcate: (1) whether U.S. Bank has standing to enforce the Note secured by the Mortgage; and (2) whether the Plaintiff has standing, as a third party, to bring certain causes of action predicated on allegedly invalid assignments and transfers of her Note and Mortgage. The parties argued these two standing issues at the hearing on the *Motion to Bifurcate* on October 10, 2013. After extensive oral arguments, the Court took the *Motion to Bifurcate* under advisement.

LEGAL STANDARD

Federal Rule of Bankruptcy Procedure 7042 makes Federal Rule of Civil Procedure 42 applicable in adversary proceedings. Rule 42(b) provides:

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Fed. R. Civ. P. 42. "The decision to separate or bifurcate a trial is committed to the sound discretion of the trial court . . . ." *Farmers Co-op Co. v. Senske & Son Transfer Co.*, 572 F.3d 492, 498–99 (8th Cir. 2009); *see also State Bank of Florence v. Miller (In re Miller)*, 459 B.R. 657, 670 (B.A.P. 6th Cir. 2011), *aff'd*, 513 F. App'x 566 (6th Cir. 2013). Generally, the party seeking bifurcation has the burden of persuading the Court that

bifurcation is warranted. *E.g.*, *Dallas v. Goldberg*, 143 F. Supp. 2d 312, 315 (S.D.N.Y. 2001).

Courts have developed a number of factors to consider when determining whether bifurcation is appropriate. *See, e.g.*, *Keister v. Dow Chem. Co.*, 723 F. Supp. 117, 120 (E.D. Ark. 1989) ("So long as prejudice to the parties, confusion of the jury, and/or judicial economy are considered, the decision of separation is one for this Court."); *In re Koger*, 261 B.R. 528, 532 (Bankr. M.D. Fla. 2001) (analyzing "(1) Separability of the issues; (2) Simplification of discovery and the conservation of resources; (3) Prejudice to parties; and (4) Suitability of bifurcating trial but not discovery."); *In re Revere Copper & Brass, Inc.*, 32 B.R. 577, 581 (Bankr. S.D.N.Y. 1983) ("The reasons for separate trials include avoidance of confusion resulting from similarity or dissimilarity of claims, avoidance of prejudice, unusual difficulty in proving a particular issue, and the inherent power of the court to regulate the order of proof at trial."). In *Butler v. Dowd*, the Eighth Circuit Court of Appeals stated that a trial court, "in considering a trial on less than all of the issues must determine that (1) the issues are clearly distinct; (2) the bifurcation will not prejudice either party; and (3) the action will result in judicial economy." 979 F.2d 661, 678 (8th Cir. 1992) (citing *Taylor v. RayGo, Inc.*, 680 F.2d 1223, 1224 (8th Cir. 1982)).

After considering the *Butler* factors, the Court finds that bifurcating the two standing issues from a trial on the Plaintiff's claims is not appropriate in this case, as discussed below.

DISCUSSION

Standing to Enforce the Note and Mortgage

The Court first addresses its decision not to bifurcate the issue of whether U.S. Bank has standing to enforce the Note securing the Mortgage (the "**Standing to Enforce Issue**").

Applying the first *Butler* factor, the Court finds that the Standing to Enforce Issue is clearly distinct from the issue of whether the Plaintiff has meritorious claims. A distinctness inquiry involves measuring "the degree of evidentiary entanglement among the issues to be bifurcated." *Koger*, 261 B.R. at 532. As indicated in the Summary Judgment Order, the Note is bearer paper, and possession alone determines who has the right to enforce it. Thus, the Standing to Enforce Issue can be quickly determined if U.S. Bank proves that it has possession of the original note.[3] In contrast, adjudicating the Plaintiff's tort and stay violation claims will require a lengthy evidentiary analysis of the conduct and the intent of the Defendants. Moreover, the Plaintiff's remaining claims -- consisting of an objection to a proof of claim, a request for the determination of the validity and extent of the Mortgage, and a motion for accounting -- largely involve factual disputes over accounting. Resolving the Standing to Enforce Issue is a distinct evidentiary inquiry.

[3] In her supporting brief in opposition to the Defendants' *Motion to Bifurcate*, the Plaintiff argues that possession alone is insufficient to enforce the Note and further questions whether Article 3 of the Uniform Commercial Code applies. By finding the Note "bearer paper" in the Summary Judgment Order, the Court implicitly held that the Note is a negotiable instrument governed by Article 3. The Court adheres to that determination under the "law of the case" doctrine. *See In re Just Brakes Corp. Sys., Inc.*, 293 F.3d 1069, 1072 (8th Cir. 2002) ("The law of the case doctrine prevents relitigation of a settled issue in a case and requires that courts follow decisions made in earlier proceedings to insure uniformity of decisions, protect the expectations of the parties and promote judicial economy.").

However, the Court finds that the second *Butler* factor -- whether bifurcating the Standing to Enforce Issue will prejudice the parties -- weighs against bifurcation. "[A] prejudice inquiry involves determining the cost of bifurcation to each party." *Koger*, 261 B.R. at 532. The Plaintiff argues bifurcation will prejudice her with unnecessary delay and duplicative discovery. She maintains that the *Motion to Bifurcate* is another attempt by the Defendants to skirt their discovery obligations and further drain her financial resources in a case that has been pending for over four years. These arguments are well-taken. Since the entry of the Summary Judgment Order in December 2012, the Defendants have been aware of the various issues left for trial. They waited nearly nine months, until two days before a status conference, to file their *Motion to Bifurcate*. While the delay in filing the motion may be attributable to the parties' efforts at attempting a settlement and to the complexity of the issues in this case, the Defendants could have filed their motion earlier. The Plaintiff should not be prejudiced with further delay.

Applying the last *Butler* factor, the Court finds that bifurcating the Standing to Enforce Issue will not result in judicial economy. "Judicial economy results if granting a motion for a separate trial would eliminate the need for future trial if one of the parties is successful." *Keister*, 723 F. Supp. at 122 (citing *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 541 (8th Cir. 1977)). A cornerstone underlying the Plaintiff's request for a determination of the validity and extent of the mortgage lien is that *none* of the Defendants have the authority to enforce the Note against the Plaintiff. (Pl.'s Compl. at ¶ 42). Therefore, this claim, and possibly others, will fail as a matter of law if the Court determines that U.S. Bank has standing to enforce the Note and Mortgage. However,

dismissal of some of the Plaintiff's claims will not eliminate the need for future trial. The Plaintiff has asserted seven claims for relief; many of these claims are plead in the alternative. Thus, bifurcation will not spare the parties from a future trial. The Court finds the issue of whether U.S. Bank has standing to enforce the Note securing the Mortgage will not be bifurcated.

Standing to Bring Claims as a Third Party

The Court now addresses its decision not to bifurcate the issue of whether the Plaintiff has standing, as a third party, to bring claims predicated on alleged invalid transfers and assignments of her Note and Mortgage (the "**Third Party Standing Issue**").

Applying the first *Butler* factor, the Court finds that the Third Party Standing Issue is clearly distinct from the issue of whether the Plaintiff has meritorious claims. Here, "the degree of evidentiary entanglement among the issues to be bifurcated," *Koger*, 261 B.R. at 532, is minimal. Because "standing is a threshold inquiry . . . that must be resolved before reaching the merits of a suit," *Medalie v. Bayer Corp.*, 510 F.3d 828, 829 (8th Cir. 2007), there will be no evidentiary entanglement by trying the standing issue separately from a trial of the Plaintiff's claims. As the Supreme Court of Arkansas succinctly noted:

> It is fundamental in American jurisprudence that in order to bring a lawsuit against an opposing party, one must have standing to do so. Without standing, a party is not properly before the court to advance a cause of action.

Farm Bureau Ins. Co. of Ark., Inc. v. Running M Farms, Inc., 366 Ark. 480, 485, 237 S.W.3d 32, 36 (2006) (citations omitted). Whether the Plaintiff is the proper party to bring the claims raised in her adversary complaint is an entirely different question than whether

her claims are meritorious. Accordingly, the first *Butler* factor weighs in favor of bifurcation.

For the same reasons as the Standing to Enforce Issue, the Court also finds that the second *Butler* factor -- whether bifurcating the Third Party Standing Issue will prejudice the parties -- weighs against bifurcation. Bifurcation will prejudice the Plaintiff with further delay.

Finally, the Court finds that the third *Butler* factor -- whether bifurcating the Third Party Standing Issue will result in judicial economy -- also weighs against bifurcation. At the outset, the Court recognizes that the Defendants are correct in that the Plaintiff, a third party, generally lacks standing to challenge assignments of her Note and Mortgage. *See, e.g., In re Walker*, 466 B.R. 271, 285 (Bankr. E.D. Pa. 2012) ("[I]f a borrower cannot demonstrate potential injury from the enforcement of the note and mortgage by a party acting under a defective assignment, the borrower lacks standing to raise the issue."); *see also Blackford v. Wstchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1909) ("As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so."). [4] The Defendants argue that the Plaintiff cannot challenge the assignments

[4] The Plaintiff characterizes judicial decisions in the wake of the foreclosure crises as being "all over the place regarding questions of . . . standing to enforce the note and mortgage, standing of the Debtor to raise challenges regarding the terms of securitized trust agreements, [and the] standing of the Debtor to raise challenges to assignments . . . ." (Pl's Pre-Hr'g Br. p. 16). In support of this assertion, the Plaintiff cites two decisions: *Wells Fargo Bank, N.A. v. Erobobo*, 39 Misc. 3d 1220(A), 972 N.Y.S.2d 147 (N.Y. Sup. Ct. 2013) and *Saldivar v. JPMorgan Chase Bank, N.A. (In re Saldivar)*, No. 11–10689, 2013 WL 2452699 (Bankr. S.D. Tex. June 5, 2013). In *Erobobo*, the plaintiff, a REMIC trust, had acquired the Defendants' mortgage and note after the trust had closed in violation of the PSA. *Id.* at 8. The court held that the PSA was governed by New York trust law, which provided that any conveyance in violation of a trust is void. *Id.* Applying New York law, the Court held the transfer of the Note and

based on the Defendants' alleged failure to comply with their internal documents such as the pooling and servicing agreement (the "**PSA**") that governs the SAIL Trust. This is also true. If the Plaintiff does not have standing to assert violations of the PSA and other internal documents, then her claims based on these allegations fail as a matter of law.[5] However, as with the Standing to Enforce Issue, adjudicating the Third Party Standing Issue may

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Mortgage to the trust was void. *Id*. In *Saldivar*, the court was also presented with a PSA governed by New York trust law and applied *Erobobo* to hold that acts in contravention of the PSA were void. 2013 WL 2452699, at *4. There are no allegations that the PSA at issue here is governed by New York trust law or that Arkansas trust law would yield a result similar to *Erobobo*. Moreover, *Erobobo* appears to be an outlier and has been faulted for its application of New York law. *Koufos v. U.S. Bank, N.A.*, 939 F. Supp. 2d 40, 56–57 & n.2 (D. Mass. 2013) (discussing cases), *amended in part* (July 1, 2013).

Ultimately, save the two cases identified by the Plaintiff, the great weight of authority holds that borrowers do not have standing to challenge PSAs. In *Walker*, the Court scoured the case law on this issue and concluded:

> it appears that a judicial consensus has developed holding that a borrower lacks standing to (1) challenge the validity of a mortgage securitization or (2) request a judicial determination that a loan assignment is invalid due to noncompliance with a pooling and servicing agreement, when the borrower is neither a party to nor a third party beneficiary of the securitization agreement, *i.e.*, the PSA.

466 B.R. at 285 & nn. 28–29 (collecting cases); *see also Reinagel v. Deutsche Bank Nat. Trust Co.*, 722 F.3d 700, 708 n. 29 (5th Cir. 2013) (". . . [C]ourts invariably deny mortgagors third-party status to enforce PSAs.") (collecting cases). The Court sees no reason to deviate from this authority.

[5] A number of the Plaintiff's claims appear to be determinable on the Third Party Standing Issue alone because the Plaintiff has not shown a cognizable injury. For example, the Plaintiff contends that the Defendants willfully violated the automatic stay by permitting the postpetition assignment of the Mortgage. (Pl.'s Compl. at ¶¶ 107, 110–12). Even accepting the proposition that the postpetition assignment of a mortgage constitutes a violation of the automatic stay, see, e.g., *Kapila v. Atl. Mort. & Inv. Corp. (In re Halabi)*, 184 F.3d 1335, 1337–38 (11th Cir. 1999), it is unclear how the Plaintiff suffered a legal injury that would give her standing to bring this claim. Other allegations are that ASC was grossly negligent by allowing the postpetition assignment of the Mortgage from MERS without notice to the Court. (Pl.'s Compl. at ¶ 99). Finally, the Plaintiff contends that the second assignment was fraudulent because MERS, the purported assignee, allegedly lacked the authority to transfer the Note and the Mortgage. (Pl.'s Compl. at ¶ 68). Without allegations of a cognizable injury, these claims will fail as a matter of law.

obviate the need for a trial on some of the Plaintiff's claims, but other claims will survive (*e.g.*, the Plaintiff's motion for accounting) which will not spare the Court or the Parties of additional discovery and litigation. The Court finds that the Third Party Standing Issue will not be bifurcated.

Timeline for Litigation

Having concluded that the two standing issues will not be bifurcated, the Court now briefly outlines the future timeline for this litigation. First, the parties will wrap up discovery.[6] At trial, the Court will first hear evidence on the issue of whether U.S. Bank has possession of the original note (*i.e.*, the Standing to Enforce Issue). If the Court concludes that U.S. Bank has possession of the original note, then the Court will dismiss the Plaintiff's claim for a determination of the validity and extent of the Mortgage to the extent that it is predicated on U.S. Bank's inability to enforce the Note. With respect to the Third Party Standing Issue, the Court directs the Plaintiff to establish her standing, as a third party, by showing how she was injured by the various assignments and transfers of her Note and Mortgage.

Ultimately, if the Court were to resolve the two standing issues in the Defendants' favor, the Court anticipates that it will be largely left with two factual inquires: (1) whether the Defendants properly applied the Plaintiff's loan payments and calculated their secured claim (essentially the allegations underlying the Plaintiff's motion for accounting and the

[6] With the legal guidance given in this opinion, there should be sufficient information for the parties to negotiate reasonable discovery agreements without further court involvement.

remainder of the Plaintiff's objection to the extent and/or the validity of the mortgage lien); and (2) whether there was improper prepetition foreclosure conduct that comes within the allegations supporting the remaining tort claims.

The Plaintiff's bankruptcy case has been going on for four years without a confirmed plan. This adversary proceeding has been an impediment to a confirmable plan. Although the Court has decided against bifurcating the two standing issues raised by the parties from a trial on the Plaintiff's claims, the Court intends this order to serve as a guidepost for the litigation moving forward.

CONCLUSION

The Court finds that the *Motion to Bifurcate* should be denied because the two standing issues sought to be bifurcated will not eliminate the need for future discovery or a trial.

Accordingly, it is hereby

ORDERED that the Defendants' *Motion to Bifurcate* is **DENIED**.

IT IS SO ORDERED.

Audrey R. Evans
United States Bankruptcy Judge
Dated: 12/07/2013

cc: Debtor
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