

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
EMMA JEAN LARKIN,) CASE NO. 08-33462 HCD
) CHAPTER 13
)
DEBTOR.)

Appearances:

Debra Voltz-Miller, Esq., counsel for debtor; 1951 East Fox Street, South Bend, Indiana 46613; and

Jeffery R. Houin, Esq., counsel for creditor; Doyle Legal Corporation, P.C., 41 East Washington Street, Suite 400, Indianapolis, Indiana 46204.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 22, 2010.

Before the court is the Motion for Summary Judgment filed by creditor Saxon Mortgage Services, Inc. (“creditor” or “Saxon”) in the bankruptcy case of chapter 13 debtor Emma Jean Larkin (“debtor” or “Larkin”). Saxon is the transferee and present holder of Claim #1, which originally had been filed by the transferor AmTrust Bank fka Ohio Savings Bank (“AmTrust”). The underlying basis for the Motion is the debtor’s Objection to Claim #1. The debtor argued that the Proof of Claim #1 was fatally defective and that AmTrust did not hold a perfected secured interest in the debtor’s real estate. The creditor, first AmTrust and now Saxon, challenged the debtor’s Objection. Prior to trial, however, Saxon filed a Motion for Summary Judgment, claiming that there were no issues of material fact in dispute in this matter. For the reasons that follow, the court grants Saxon’s summary judgment motion and overrules the debtor’s objection to Claim #1.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

BACKGROUND

On September 1, 2006, Larkin executed a 30-year Note to American Mortgage, in the amount of \$128,000, to purchase her residence. The Note was secured by a Mortgage, entered into on that same date, on property located at 820 Oakdale Drive in Elkhart, Indiana. The Mortgage was recorded in the Elkhart County Recorder's Office on September 7, 2006.

Larkin filed a chapter 13 bankruptcy petition on October 5, 2008. She listed "Ohio Savings Bank/AMTRUST" as a secured creditor on her Schedule D. On October 27, 2008, creditor AmTrust filed Proof of Claim #1 in the amount of \$134,144.39 (and arrearages of \$9,208.49), secured by the debtor's real estate. Attached to the Proof of Claim were the following documents:

- (a) the first and third pages of a three-page promissory note ("Note") signed by Larkin as borrower and naming American Mortgage & Financial Services, LLC ("American Mortgage"), as lender;
- (b) the Endorsement Allonge to the Note, in which American Mortgage endorsed the Note to the order of Ohio Savings Bank without recourse and Ohio Savings Bank endorsed the Note in blank without recourse;
- (c) pages 1, 11, and 12 of the 12-page Mortgage, which listed Larkin as Borrower; Mortgage Electronic Registration Systems, Inc. ("MERS") as mortgagee and "nominee for Lender and Lender's successors and assigns"; and American Mortgage as Lender; in addition, the pages presented the debtor's signature and notary's acknowledgment; and Exhibit A gave the legal description of the debtor's residence; and
- (d) a worksheet with the pre-petition arrearages claimed by AmTrust.

Proof of Claim #1.

On September 3, 2009, the debtor filed an Objection to AmTrust's Claim pursuant to 11 U.S.C. § 502(b)(1). She sought disallowance of the claim because it lacked sufficient documentation to prove that AmTrust held a secured claim under Indiana law. She also asserted that AmTrust was not the real party in interest authorized to file a claim. AmTrust filed two responses to the debtor's Objection.

After several pre-trial hearings, a trial on the issues was scheduled. The parties filed and the court approved their joint Proposed Pre-Trial Order. However, on March 1, 2010, the Federal Deposit Insurance

Corporation (“FDIC”), as Receiver for AmTrust Bank, transferred the Note that is the basis for Claim #1 from AmTrust to Saxon. Counsel for Saxon then filed his appearance in this proceeding and sought a continuance of the scheduled trial and the opportunity to file a dispositive motion. The court granted the creditor’s requests. On May 19, 2010, Saxon filed its Transfer of Claim, naming Saxon as the transferee in Claim #1, and on May 20, 2010, it filed its Motion for Summary Judgment and supporting brief and documentation. *See* R. 76-80. The debtor filed a Response, also with supporting brief and documentation. The court then took the matter under advisement.

DISCUSSION

Saxon seeks summary judgment as to the debtor’s Objection to Claim #1.² Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. *See Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322. “To avoid summary judgment . . . the nonmoving party [is] required to set forth ‘specific facts showing that there is a genuine issue for trial,’ Fed. R. Civ. P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position.” *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that a real factual dispute exists, the nonmovant must produce evidence of the dispute rather than relying solely on the

² Objections to proofs of claim are contested matters. Federal Rule of Bankruptcy Procedure 9014(a) establishes that relief in contested matters shall be requested by motion. Rule 9014(c) applies Bankruptcy Rule 7056 in contested matters, and Rule 7056 makes Federal Rule of Civil Procedure 56 applicable. This summary judgment motion is therefore proper.

allegations or denials in its pleadings. *See Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L.B.R. B-7056-1. Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

Saxon’s Motion asks for summary judgment on the debtor’s objection to Proof of Claim #1. A proof of claim “shall constitute prima facie evidence of the validity and amount of the claim” if it is executed and filed in accordance with the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 3001(f); *see In re Blue*, 2004 WL 1745786 at *2 (N.D. Ill. July 30, 2004). Rule 3001 requires that the original or a duplicate of the written document must be filed with the proof of claim when the claim is based on a writing. Fed. R. Bankr. P. 3001(c). It also requires that, if the creditor claims a security interest in the debtor’s property, “the proof of claim shall be accompanied by evidence that the security interest has been perfected.” Fed. R. Bankr. P. 3001(d). The claim “is deemed allowed, unless a party in interest . . . objects.” 11 U.S.C. § 502(a). With an objection comes a shifting burden of proof for the parties:

Claim objectors carry the initial burden to produce some evidence to overcome the rebuttable presumption of validity. The evidence set forth by the objecting party must be of a probative force equal to that of the allegations asserted in the claim. “Once the objector has produced some basis for calling into question allowability of a claim, the burden then shifts back to the claimant to produce evidence to meet the objection and establish that the claim in fact is allowable.” [*In re*] *O’Malley*, 252 B.R. [451,] 456 [(Bankr. N.D. Ill. 1999)]. However, the ultimate burden of persuasion always remains with the claimant to prove entitlement to the claim.

In re Vanhook, 426 B.R. 296, 298-99 (Bankr. N.D. Ill. 2010) (citing cases). Accordingly, the debtor first must overcome the rebuttable presumption that the creditor’s claim is valid.

In this case, the debtor objected to Claim #1 pursuant to § 502(b)(1), which provides that “the court, after notice and a hearing, shall determine the amount of such claim . . . and shall allow such claim in such amount, except to the extent that – (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law” The debtor objected to Claim #1 on several grounds. The court considers each objection and Saxon’s response in turn.

The debtor first raised a procedural failure on the part of the creditor: Because the creditor attached to the Proof of Claim only two of the three pages of the Note and only 3 of the 12 pages of the Mortgage, it failed to comply with Bankruptcy Rule 3001(c) and (d). The creditor responded that, by attaching the relevant pages of the documents to prove the claim, it substantially complied with the Rule.

At an early hearing on the debtor's objection to the claim, the court agreed with the debtor that the documentation attached to Proof of Claim #1 was incomplete and insufficient to establish the validity of the claim or AmTrust's right to enforce the Note at issue in the claim. *See In re Blue*, 2004 WL 1745786 at *2 (stating that Bankruptcy Rule 3001(c), requiring attachment of the writing upon which the claim is based, requires specific, not substantial, compliance). Consequently, the court concluded that the proof of claim could not be deemed *prima facie* valid. The hearing was continued so that the creditor could provide additional documentation. The creditor presented the entire Note and other documents to satisfy the specific compliance requirement of Bankruptcy Rule 3001(c).

The remaining objections challenge the creditor's purported interest in the debtor's Note and Mortgage. The parties do not dispute that the debtor gave a Note to American Mortgage on September 1, 2006, and that the Note was secured by a Mortgage entered into that day. They agree that the Mortgage was recorded in the Elkhart County Recorder's Office on September 7, 2006. The debtor questions the validity of the assignments from American Mortgage to Ohio Savings, AmTrust, and Saxon.

The debtor's second objection focuses on the mortgage. It asserts that Claim #1 "does not evidence a perfected security interest held by AmTrust Bank fka Ohio Savings Bank in Debtor real estate. The mortgage as recorded with the Elkhart County Recorder's Office evidences a mortgagee of Mortgage Electronic Registration Systems ("MERS"), yet the mortgage attached to the proof of claim is incomplete and does not reference MERS." R. 37 at 1-2.

The court finds that, contrary to the debtor's allegation, the Mortgage attached to the Proof of Claim #1 – which was the Mortgage executed by the debtor along with the Note on September 1, 2006, and

recorded on September 7, 2006 – specifically stated on the first page that MERS was the mortgagee and was “acting solely as a nominee for Lender [American Mortgage] and Lender’s successors and assigns.” *See* Proof of Claim #1, Att. p. 4. The successions to American Mortgage were documented.

(1) The Endorsement Allonge to Note, which was “affixed and [became] a permanent part of said Note,” endorsed the debtor’s Note to the order of Ohio Savings Bank.

(2) Ohio Savings Bank, in turn, by Corporate Resolution of its Board of Directors, changed its name to AmTrust Bank, effective April 23, 2007.

(3) On October 14, 2008, the Mortgage was assigned from MERS to AmTrust Bank.

(4) After AmTrust Bank failed and was closed on December 4, 2009, the FDIC, as Receiver for AmTrust, assigned the debtor’s mortgage from AmTrust to Saxon on May 18, 2010.

The court notes that the written assignments of the Mortgage from MERS to AmTrust and from AmTrust to Saxon were notarized documents that made reference to the instrument number of the original mortgage recorded in the Office of the Elkhart County Recorder, as well. *See* R. 82, Exs. 4, 5.

The court is satisfied that, under the properly recorded mortgage, MERS was the mortgagee for American Mortgage and its successors and assigns, and that the change in mortgagee from American Mortgage to Ohio Savings Bank to AmTrust and finally to Saxon has been sufficiently documented for the purposes of a proof of claim. The recording statutes regarding assignments of mortgages are designed to protect third party purchasers and mortgagees, not mortgagors. *See Rowe v. Small Business Admin.*, 446 N.E.2d 991, 992 (Ind. App. 1983). It has long been held in Indiana that the recording of an assignment of a mortgage “is not necessary to the validity of the mortgage, but is simply a protection to a good-faith purchaser of the mortgage itself, or the bond or debt which it secures.” *Perry v. Fisher*, 65 N.E. 935, 936 (Ind. App. 1903); *see also In re Samuels*, 415 B.R. 8, 23 (Bankr. D. Mass. 2009) (stating that “an assignment of mortgage need not be recorded in order to be valid against the mortgagor or her grantees”). The debtor is a mortgagor, not a subsequent purchaser. Consequently, the debtor cannot challenge the validity of her properly recorded mortgage for failure to record a subsequent assignment.

The debtor's third argument challenged the Note in the same way she challenged the Mortgage. The debtor argued that "[t]here is simply no proof that any . . . note from Emma Larkin to American Mortgage . . . went from American Mortgage . . . to AmTrust, to FDIC, to Saxon." R. 82, Ex. 10 at 10. She specifically pointed out the lack of documentary evidence of the transfer of the Note to AmTrust. *See* R. 82, Ex. 10 at 4. Saxon defended its claim that it is the proper party in interest to enforce the Note and thereby to file the Proof of Claim by arguing that there is an unbroken chain of title from American Mortgage to Saxon and that Saxon validly holds a security interest in the debtor's residence.

It is clear that the original Note to American Mortgage, signed by the debtor, was a properly negotiated instrument between the debtor and the lender; the debtor does not challenge the original Note or Mortgage. She raises specific issues about the Allonge that are discussed below, but does not challenge its relationship to the original Note or its authenticity. In this context, therefore, the Allonge is the second document in the chain of title after the original Note.

The "Endorsement Allonge to Note" was attached to the Note as an affixed and permanent part of the Note, and it transferred the Note by endorsement³ from American Mortgage to Ohio Savings Bank without recourse.⁴ It was signed by George W. Burkley III, Member of American Mortgage; there is no indication that he is not a proper signatory. The Allonge also was stamped with another endorsement, this one from Ohio Savings Bank fka Ohio Savings Bank F.S.B., without recourse. Ohio Savings Bank's authorized agent, Andrea Koppa, signed that endorsement; however, both the date and the payee were left blank. The debtor questioned this undated, blank section of the Allonge; she claimed that "Ohio Savings Bank endorsed the Note at an unknown time to an unknown entity." R. 82, Ex. 10 at 7. However, this endorsement in blank was prepared in the Allonge so that Ohio Savings could consummate a transfer of the

³ "Endorsement," also spelled "indorsement," is defined as "the placing of a signature, sometimes with an additional notation, on the back of a negotiable instrument to transfer or guarantee the instrument or to acknowledge payment." Black's Law Dictionary 844 (9th ed. 2009).

⁴ "Without recourse" is defined as "without liability to subsequent holders." Black's Law Dictionary 1740 (9th ed. 2009).

Note to another bank by filling in the necessary information. Because the date and transferee were left blank, it is clear that the Note was not assigned from Ohio Savings to another bank.

The third document in the chain of title was Ohio Savings Bank's corporate resolution, changing the name of Ohio Savings Bank to AmTrust Bank, effective April 23, 2007. *See* R. 82, Ex. 2 at 5-6. At that point, AmTrust was in possession of the original Note, endorsed to its previous corporate name (Ohio Savings Bank) and endorsed in blank. AmTrust was entitled, therefore, to enforce the Note, both as the bearer in possession of the Note and as the successor in interest to Ohio Savings Bank by corporate name change. AmTrust was the holder of the Note. *See* Ind. Code § 26-1-1-201(20)(A) ("Holder" means: (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person if the identified person is in possession of the instrument."). AmTrust also was the entity entitled to enforce the Note. *See* Ind. Code § 26-1-3.1-301(1) ("Person entitled to enforce" an instrument means: (1) The holder of the instrument.").⁵

On December 4, 2009, however, AmTrust was closed by the Office of Thrift Supervision, and the FDIC, named as Receiver, transferred the Note to Saxon on March 1, 2010. R. 80, Ex. B; R. 76. The transfer transactions that occurred after AmTrust failed were carried out to protect the depositors in that Bank, and they comprised the fourth step in the chain of title. *See* R. 80, Ex. B; R. 82, Ex. 6. Saxon's transfer document, R. 76, in effect amended the Proof of Claim so that the real party in interest was substituted for the originally listed claimant, AmTrust. As amended, the Proof of Claim now has thorough documentation supporting it. Nevertheless, the claim has remained the same, and the only change to the Proof of Claim is the name of the claimant. *See Gens v. Resolution Trust Corp.*, 112 F.3d 569 (1st Cir.), *cert. denied*, 522 U.S. 931 (1997) (allowing amendment to proof of claim when amendment substituted real party in interest for claimant originally listed; finding no prejudice where claim remained the same); *In re Montagne*, 421 B.R. 65, 81 (Bankr. D. Vt. 2009) (finding no prejudice to debtor or his estate in allowing

⁵ The Uniform Commercial Code was codified in the Indiana Statutes at Ind. Code § 26-1-3.1-101 *et seq.*, effective July 1, 1994.

amendment). Saxon provided evidence that the debtor's Note was properly transferred from American Mortgage to Ohio Savings, then to AmTrust, and finally to Saxon. The debtor has provided no evidence that Saxon is not the holder of the claim. The court finds, consequently, that the creditor has provided the requisite documents to satisfy the chain of title by which it can claim to be the valid holder of the debtor's Note.

The debtor's fourth objection challenged the Allonge, which "purportedly transferr[ed] the note" from American Mortgage to Ohio Savings. R. 37 at 2. "Allonge" is a French term used in legal contexts for a paper that is annexed to a note. *See French v. Turner*, 15 Ind. 59 at *3 (Ind. 1860); *see also First Bank of Whiting v. Samocki Bros. Trucking Co.*, 509 N.E.2d 187, 188 (Ind. App. 1987) (acknowledging use of allonge to set forth terms established in previously executed security agreements). "Allonge" is defined as "a slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." Black's Law Dictionary 88 (9th Ed. 2009). Under Indiana law, however, "[a]n indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement." Ind. Code § 26-1-3.1-204(a), U.C.C. Comment, 2002 Main Volume, ¶ 1. From the days of early common law, allonges have been used to add indorsements to instruments and thereby to transfer the instruments to successors in interest. Moreover, in Indiana "a paper affixed to the instrument is part of the instrument" when one determines whether an endorsement or signature was made on that instrument. Ind. Code § 26-1-3.1-204(a). From these statutory provisions the court deduces that the Allonge affixed to the debtor's Note is a part of the Note, and it is a valid endorsement from the lender American Mortgage (which had the power to endorse the original promissory note made payable to American Mortgage) to the successor in interest, Ohio Savings.

This Endorsement Allonge to the Note contained both a special endorsement and a blank endorsement. American Mortgage identified Ohio Savings Bank as "a person to whom it makes the instrument payable," and thus it was a "special endorsement." Ind. Code § 26-1-3.1-205(a). The instrument

therefore was payable to Ohio Savings and could be negotiated only by the endorsement of Ohio Savings. *Id.* Ohio Savings then endorsed the Note in blank, by stamping the statement “Pay to the order of _____ Without Recourse” on the Allonge. This endorsement, made by the instrument’s holder, was a “blank endorsement.” Ind. Code § 26-1-3.1-205(b) (“When endorsed in blank, an instrument becomes payable to the bearer and may be negotiated by transfer of possession alone until specially endorsed.”). The blank endorsement converted the Note to “bearer paper.” *See* Ind. Code § 26-1-3.1-109(c). It made the Note payable to the person in possession of the instrument. In this case, the Note first was transferred by special endorsement to Ohio Savings, and Ohio Savings, as possessor, owner and holder of the Note, was entitled to enforce the Note. It is worth noting again that, even though the Allonge then was endorsed in blank and converted to bearer paper by Ohio Savings, it was not negotiated to another entity before the debtor filed her bankruptcy petition. Ohio Savings held the Note, and when its name changed, AmTrust fka Ohio Savings Bank became the person who could demand payment of the Note. It was entitled to enforce the Note by filing Proof of Claim #1.

The debtor presents a final argument. She claims that the post-petition assignment of the debtor’s Mortgage from MERS to AmTrust and then to Saxon violated the automatic stay, in particular § 362(a)(3), (4), or (5). She neither cites cases in support of her position nor explains how the assignment violated those subsections. The court finds that her contention cannot be supported. “[O]nce the original grant by the mortgagor to the mortgagee has been perfected,” the later assignment of that mortgage “does not involve a ‘transfer of the property of the debtor,’” *see In re Halabi*, 184 F.3d 1335, 1337 (11th Cir. 1999), and cannot constitute a violation of the automatic stay.

The postpetition assignment of a mortgage and the related note from one holder to another is not a transfer of property of the estate. The mortgage and note are assets of the creditor mortgagee, not of the Debtor. Nor is the postpetition assignment of a mortgage and the related note an act to collect a debt; the assignment merely transfers the claim from one entity to another.

In re Samuels, 415 B.R. 8, 22 (Bankr. D. Mass. 2009). The court finds that American Mortgage perfected the Mortgage by recording it, and that its successors in interest – Ohio Savings, AmTrust, and Saxon – received their assignments of the Mortgage and Note without violating the debtor’s automatic stay.

The court concludes that the debtor failed to set forth specific facts showing that there is a genuine issue for trial concerning the Proof of Claim #1 filed by AmTrust and now held by Saxon. Specifically, the court finds that the debtor failed in her burden, under 11 U.S.C. § 502(b), of showing that Claim #1 is unenforceable against the debtor. The court has determined that Saxon is the current holder of the debtor’s Note and Mortgage and that Saxon is entitled to enforce the Note and Mortgage through its Proof of Claim #1. Accordingly, the debtor’s Objection to Claim is overruled. The creditor, on the other hand, has sustained its burden of demonstrating that no genuine issue of material fact is in dispute. Consequently, Saxon’s Motion for Summary Judgment is granted.

CONCLUSION

For the reasons set forth above, the court holds that there are no genuine issues of material fact and that Saxon has established that it is in possession of the Note and owner of the Mortgage securing the Note. It therefore is entitled to summary judgment as a matter of law. The court therefore allows the Motion for Summary Judgment filed by Saxon Mortgage Services, Inc., and overrules the Objection to Proof of Claim #1 filed by the debtor Emma Jean Larkin.

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Judge
United States Bankruptcy Court