2012

Steven R. Kemp v. Wells Fargo Bank, N.A., HSBC Bank USA, National Association as Trustee for the Benefit of the Certificateholders of the Wells Fargo Mortgage Backed Securities 2007-8 Trust, Wells Fargo Bank, N.A., and John DOES of Unknown Number : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STEVEN R. KEMP Plaintiff/Appellant, vs. WELLS FARGO BANK, N.A., HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS OF THE WELLS FARGO MORTGAGE BACKED SECURITIES 2007-8 TRUST, WELLS FARGO BANK, N.A., AND JOHN DOES OF UNKNOWN NUMBER. Defendants/Appellees.	Case No. 20120099-CA

BRIEF OF APPELLANT

Nature of the Proceeding: Appeal

Trial Court and Judge: Appeal from the Second District Court, Davis County, Case No. 110703609, Judge John R. Morris.

James D. Gardner (8798)
Steward O. Peay (9584)
SNELL & WILMER, L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800
Attorneys for Appellees

E. Craig Smay (2985)
174 E. South Temple
Salt Lake City, Utah 84111
Phone: (801) 539-8515
Fax: (801) 539-8544

Attorney for Appellant

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Attorneys for Appellees

E. Craig Smay (2985)
174 E. South Temple
Salt Lake City, Utah 84111
Phone: (801) 539-8515
Fax: (801) 539-8544

Attorney for Appellant

PARTIES

STEVEN R. KEMP,

Plaintiff and Appellant,

vs.

WELLS FARGO BANK, N.A., HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS OF THE WELLS FARGO MORTGAGE BACKED SECURITIES 2007-8 TRUST, WELLS FARGO BANK, N.A., AND JOHN DOES OF UNKNOWN NUMBER.

Defendants and Appellees.

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction of this matter pursuant to §§ 78A-3-102(4), 78 A-4-103(2)(j), UCA (1953).

ISSUES ON APPEAL

Appellant asserts the following issues on appeal:

1. Where it is shown that a mortgage debt has been sold to buyers of mortgage-backed securities as part of a securitization scheme, does security for the debt pass to such buyers under 57-1-35, UCA (1953)? Preserved: Response to Motion to Dismiss, 8/8/11, see record at 514-519.

2. In such case, does the original lender, having been paid off, retain any right to foreclose on the security in its own behalf? Preserved: Response to Motion to Dismiss, 8/8/11, see record at 514-519.

3. May the original lender or its nominee, having sold the debt, declare a default or accelerate the loan, or otherwise exercise any power under the trust deed? Preserved: Response to Motion to Dismiss, 8/8/11, see record at 514-519.

4. Does a trustee of a securitization trust, upon sale of the debt as mortgage-backed securities, retain any power to exercise the security under a trust deed, in the absence of an agreement for the purpose with investors in the mortgage-backed securities? Preserved: Response to Motion to Dismiss, 8/8/11, see record at 514-519.

All of such issues present questions of law on motion to dismiss. Such issues are decided de novo, without deference.

STANDARD OF REVIEW

The issues presented raise only questions of law, reviewed for correctness, without deference to the views of the district court. *Geisdorf v. Doughty,* 972 P.2d 67, 69-70 (Utah 1998); *Robinson v. State,* 20 P.3d 396, 398 (Utah 2007). On motion to dismiss, the facts are as stated in the Complaint. *Oakwood Village LLC v. Albertsons, Inc.*, 104 P. 3d 1226, 1230 (Utah 2004); *Bearneau v. Martino,* 223 P. 3d 1128, 1130 (Utah 2009). All inferences from such facts are to be drawn in favor of complainant. *Krouse v. Bower,* 20 P. 3d 895, 897 (Utah 2001).

CONSTITUTIONAL OR STATUTORY PROVISIONS

Decision herein requires construction of §57-1-35, UCA (1953).

STATEMENT OF CASE

The matter below seeking a declaratory judgment on the issues presented, and quiet title, was decided on motion to dismiss. While the judgment is not explicit, the basis of the ruling appears to be *CPA v. MERS,* 2011 UT App. 232 (U. Apps. 2011). *CPA v. MERS* has no application because MERS is not involved.

STATEMENT OF FACTS

On Motion to Dismiss, the following facts alleged in the Complaint are deemed true:

1. Appellant made Notes evidencing a loan, and trust deeds securing the debt. See Record pp. 15-18 - Complaint, 5/27/11, ¶¶22 et seq., Exhibit E - Note; Exhibit F - Deed of Trust, Record. pp. 412, 417.

2. The loan was then sold and re-sold as part of a securitization scheme, and eventually purchased as securities by numerous investors. Complaint, 5/27/11, ¶¶ 32 et seq., Exhibit B, Pooling and Servicing Agreement, Record, pp. 15 et seq.

3. The original lender asserts the right to foreclose following a non-payment.

4. The loan is paid current. Complaint, ¶38. See Record p. 9.

5. Appellant seeks a declaration of the party or parties to whom payments are due, and with whom he must deal in the event of default.

6. The District Court dismissed, on the basis of *CPA v. MERS,* 2011 UT App. 232 (U. Apps. 2011). See Record pp. 664-665.

The Complaint, with exhibits, is before the Court on appellee's Motion for Summary Affirmance, on which the court has deferred judgment pending briefing.

SUMMARY OF ARGUMENT

This matter seeks a declaratory judgment of the proper payee with authority to foreclose respecting a securitized residential loan, and a quiet title decree against those not entitled to foreclose. The note and trust deed, as well as the securitization documents are admitted. The loan is paid current.

Securitization results in the debt being conveyed to investors in mortgage-backed securities ('MBS"), defined as interests in a REMIC. See Exhibits A, B to Complaint, § 860, Internal Revenue Code. The investors must be the owners of the debt. *Id.* Under ancient, now statutory (§57-1-35, UCA (1953)), law, the investors own the security and any right to foreclose the trust deed. Securitization, therefore, eliminates any claim that one who obtains possession of a note without express consent of the investors in MBS is a "holder" with a right to foreclose.

Securitization is simply an attempt to convert an interest in realty into an interest in a security, and to avoid the classic law relating to realty. In this respect, it cannot succeed unless a court invents new law to accommodate it. See Peterson "Two Faces: Demystifying the MERS Land Title Theory," 53 Wm. & Mary L. Rev. 111 (2011), http://scholarship.law.wm.edu/wmlr/vol53/ iss1/4

That the lenders and securitizers of such loans, by lodging authority to foreclose in a numerous class of investors, create practical difficulties to foreclosure, neither eliminates the right to foreclose nor provides an excuse for a judicially created right to foreclose in others. Borrowers are entitled to insist upon foreclosure under the documents as written.

The judgment due in this case is that payment is due the investors in MBS, who alone have power to foreclose.

ARGUMENT

This case presents in simple form the question common to a series of cases in local courts: Where it is shown that a mortgage debt has been sold to buyers of mortgage-backed securities as part of a "securitization" scheme, does security for the debt, along with any right to foreclose, pass to such buyers under §57-1-35, UCA (1953)? Section 57-1-35 provides simply: "The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor."

Appellees assert that the matter is controlled by *CPA v. MERS,* 2011 UT App. 232 (U. Apps. 2011). That case takes the view, said to be justified by Section 5.4, Restatement of Property, Mortgages, that there should be effectively added to §57-1-35 a proviso, "unless the original parties agree otherwise." Under this reading, the standard form trust deed used by Mortgage Electronic Registration Systems ("MERS"), reciting that "MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any and all of these interests, including - - - the right to foreclose - - -" makes MERS the permanent agent to foreclose of the original lender. Those who pay off the original lender and acquire the debt ("successors and assigns"), acquire no right to foreclose: without more, that is lodged forever in MERS.

CPA v. MERS is now treated as a broad ruling that sale of a debt in a securitization has no affect on the right to foreclose. That is, *CPA v. MERS* is treated as eliminating §57-1-35. While the case may intend such a result, it cannot be on legal grounds. The *only* rationale provided by *CPA v. MERS* is that under Section 5.4

of the Restatement, which actually expressly rejects the conclusion drawn by *CPA v. MERS* regarding MERS trust deeds, original lender and borrower can agree for all future owners of the debt that the security is independent of the debt, and lodged in MERS. MERS is not a party to the Note or trust deed in this case.

Under ancient Utah law, part of which is made statutory in §57-1-35, "the security follows the debt." *Smith v. Jarman,* 211 Pac. 962, 967 (Utah 1922); *Carpenter v. Longan,* 83 U.S. 271, 275 (1872). As a result, no one may foreclose a mortgage or trust deed who does not own the underlying debt. *Bangerter v. Poulton,* 663 P. 2d 100, 101 (Utah 1983); *Dugan v. Jones,* 615 P. 2d 1239, 1243 (Utah 1980). Ownership of the debt is ownership of the security, and any right to enforce it. In a securitization scheme, ownership of the debt lodges in the investors in mortgage-backed securities ("MBS"), at least because any other result would void the REMIC tax status for which securitization trusts are created. That is, securitization trusts are commonly, if not exclusively, REMICS under 26 USC § 860D and 860G, the assets of which, and income thereof, must be owned by the investors.

In short, in a securitization, the debt is ultimately owned by the investors in MBS. It follows inescapably that the security and the right to foreclose it belongs to the investors. Interim owners, such as the original lender and those who purchase the debt to securitize it, have been paid off. As the investors do not execute the securitization documents, they provide no authority to foreclose on their behalf. See §§ 25-5-1, 25-5-4, UCA (1953).

In securitizations generally, notes representing debt are gathered and lodged with a "custodian" for the benefit of investors in MBS. CITE. At least signatories to the Pooling and Servicing Agreement ("PSA") - which do not include the investors - have access to these notes.

It then may eventuate that one of the securitizers of the debt obtains possession of the note and commences foreclosure of the note. Generally, no claim is made that this is done on behalf of the investors, and the usual PSA contains no authority to do so by any of the securitizers or the alleged "trustee."

A claim is boldly made that, as "holder" of the note in physical possession of it, a securitizer or trustee has unquestionable authority to foreclose. To assert this right, however, the alleged "holder" must show that the note was transferred to it to give it authority to foreclose. See *infra,* pp. 16 et seq. Securitization documents generally contain no such authority. They are not signed by the investors in MBS. In short, the presumption raised by possession of the note is rebuttable, and generally rebutted in cases of securitization. See *Id.*

A further problem this presents is the general requirement that acceleration of the debt precede foreclosure. The right to accelerate belongs to the owner of the debt, the investors in MBS. Generally, securitizers who attempt to foreclose these notes never attempt to accelerate, voiding any further proceedings.

If §57-1-35 is given effect, the result of securitization is to lodge the power to foreclose a trust deed in the investors in MBS. There is no escaping this.

That is, the result of attempting to turn an interest in realty into a security is to require the purchasers of the securities to cooperate to foreclose. This does not erase the power to foreclose: it only makes it less practical. Lenders now object that this sets up an impossible practical barrier to foreclosure; though the impediment is no greater than when realty is given to multiple heirs. The simple answer to this is that lenders - and purchasers of MBS - are presumed to have known the law when they chose securitization. They cannot be heard to complain now that, as a result of their own choices, they have created difficulties for themselves. Borrowers are entitled to enforce the documents as written.

The judicial history in these cases has been the invention of excuses for non-enforcement of the long-standing law.

THE *BURNETT* LINE OF CASES

A local line of cases, beginning with *Burnett v. MERS,* 2009 WC 3582294 *4 (D. Utah 2009) and followed most recently in *CPA v. MERS,* 2011 UT App 232, confuses a rule regarding *transfer* of debts and securities, once established, with the ancient black letter rules regarding *creation* of debts and securities. Thus, *CPA v. MERS* relies upon a rule set out in Restatement (Third) Property, Mortgages, §5.4 which allows *transferors* and *transferees* of existing debts to agree, for example, to transfer of a note without security, while the transferor retains the security. This rule is then applied to allow *creation* by a *borrower* of a trust deed which secures to a third party, MERS, a debt simultaneously created by a note to a *lender.*

Setting aside the fact that the standard MERS trust deed does not actually purport to make MERS the beneficiary of the trust deed (merely the "nominee" of the lender, the actual beneficiary, to act for it as agent), the ruling, like *Burnett*, is erroneous because it forgets the black letter rule in Utah that the security is the mere incident of the debt, having no separate existence, and that any attempt to *create* in a person not the owner of the debt a security for the debt is a "nullity". See *Carpenter v. Longan*, 83 U.S. 271, 275 (1872); *Smith v. Jarman,* 211 Pac. 962, 967 (Utah 1922); *Bangerter v. Poulton,* 663 P. 2d 100, 101 (Utah 1983)[1]; *Dugan v. Jones,* 615 P.2d 1239, 1243 (Utah 1980)[2]. It is impossible, under these rules, to created a security in MERS for a debt created in the lender. A further "nomination" from the lender, or any successor, would need to be shown. Clearly, any further rule regarding *transfer* of a debt and its security cannot validate a purported security which was always a nullity. The Utah rulings conflict with uniform rulings by all state supreme courts which have addressed the matter, including those of Arkansas, Kansas, Maine, Missouri and Vermont. See *MERS v. Southwest Homes of Arkansas,* 301 SW 3d 1, 4 (Ark. 2009); *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 169 (Kans. 2009); *MERS v. Saunders*, No. Cum-640, 2010 Mc. 79, ¶15 (Me. 8/12/10); *Bellistri v. Ocwen*, 284 SW 3d 619, 623-24 (Mo. Ct. App. 2009); *U.S.*

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[1] "As a matter of law, in order to establish a valid trust deed or mortgage, a legal debt or obligation with a specific amount owed must exist."

[2] "The right asserted by the mortgagee in a foreclosure proceeding - - - does not exist separately or independently of the obligation."

Bank, NA v. Kimball, 2011 VT 81. See Peterson "Two Faces: Demystifying the MERS Land Title Theory," 53 Wm. & Mary L. Rev. 111 (2011), http://scholarship.law.wm.edu/wmlr/vol53/ iss1/4.

These rulings have no application here. Appellee cannot claim that actions of MERS in this matter are validated because of an "agreement" respecting MERS in the trust deed: there is no mention of MERS in the trust deed.

SECTION 57-1-35, UCA (1953) APPLIES.

No local court has suggested that where a note secured by a straightforward trust deed is sold, § 57-1-35, UCA (1953) does not apply. None has suggested that a securitization of a loan, involving its sale and re-sale into a securitization pool, is not such a "transfer of debt" as covered by § 57-1-35.

The single case which appears to address the matter, *Scarborough v. LaSalle Bank,* No. 2:10-CV-00624 (D. Utah 4/21/11), reaches the conclusion that a securitization is within § 57-1-35. While the *Scarborough* ruling refuses, for reasons which cannot be explained, to examine the securitization documents in issue to determine whether sale of "certificates" to investors by the trustee of a securitization trust constitutes a further "transfer of debt" within § 57-1-35, it concedes that, if such a sale is such a transfer, application of § 57-1-35 would transfer any security to the investors:

> It is true that investors may have claim on the assets from the trust, including the right to the cash-flows or proceeds of the debt. But

> this is separate and apart from Plaintiff's assertion that the "certificates represent[] the right to collect [or foreclose on] the loans." (Pl.'s Reply Reps. Order, 6) (Dkt. No. 32). It is important to note that the court is not finding that a securitization of the certificates cannot equate to a securitization of the debt.

It is universally conceded that securitization is securitization of the debt; that is, conversion of the debt into "certificates", which are the securities.

It is conceded that the securitization trust in this case has sold the "certificates" to investors. If the loan in the present case is now owned by the investors in the admitted securitization pool, as conceded in *Scarborough,* no one may collect the loan or enforce the security except the investors. The banks have been paid off when they sold the loans for securitization. While the investors could appoint an agent to collect for them, or to foreclose on their behalf, such an agreement would have to comply with the Statute of Frauds. See §§ 25-5-1, 25-5-4, UCA (1953). The investors do not execute the securitization documents. A further agreement in writing, properly executed, would be required. Defendants do not claim that any such agreement exists.

POSSESSION

A recent ruling in *CPA v. U.S. Bank,* Case No. 20110596-CA takes the position, originated by Judge Jenkins of the federal court, that possession of a note by one of the securitizers of a loan provides the possessor incontestable power to fore-

close the trust deed. This theory simply supplants the law relating to interests in realty with the law relating to securities.

It is incorrect that mere possession of a note, even if wrongful, makes the possessor the "holder" of the note with right of enforcement. The admission of a securitization is an admission that anyone holding the note, except the purchasers of MBS, and without written authority from the investors, is not a holder with right of enforcement.

A person becomes a "holder" by "negotiation" of the instrument. § 70A-3-201(1), UCA (1953). Negotiation of an instrument payable to a particular person requires both "transfer of possession of the instrument and its indorsement by the holder." §70A-3-201(2), UCA (1953). "Holder" in the latter section may mean the payee, or a person to whom the note has been previously transferred.

In the present case, the original payee was Wells Fargo Bank. A note of an undated endorsement by Wells Fargo would not suffice if it was made to transfer the note to a trustee of a securitization trust for the benefit of the investors in MBS. The further endorsement of the trustee, or any further transferee(s) of the note would be required.

"Transfer" of an instrument is effective where "for the purpose of giving to the person receiving delivery the right to enforce the instrument." § 70A-3-203(1), UCA (1953). Where there has been no "negotiation," one can become a "holder" only by a transfer intending to provide a right of enforcement.

It is common in securitizations to place notes in a "custodianship" for administrative purposes. See §2.02, Exhibit A, Complaint. It may be possible to retrieve a note from the custodian in order to enforce it on behalf of the trustee of the trust pool (at least until the pool sells the pooled loans as "certificates" to investors) or the investors in the pooled loans (if one has a separate agreement for the purpose executed by such investors). *Id.* One who is neither the trustee nor the agent of the investors cannot obtain possession of a note to enforce it in his own name. This is at least a question of construction of the securitization documents, which, to date, all courts decline to reach.

In the present case, the district court had no evidence that appellee was the securitization trustee or the agent of the investors.

Finally, negotiation is subject to rescission, or to other remedies when obtained improperly. In such case, only a bonafide purchaser without notice is protected. §§70A-3-202, 70A-3-306, UCA (1953). The latter is the gist of the provision that one in wrongful possession may enforce the note: one who gets the note even from a thief may enforce it if he was without notice that the possession was wrongful. One with notice gets no title to the instrument, or right to enforce it. As a matter of practicality, there can be no bonafide purchasers without notice at a foreclosure of a securitized note, because the recorded trust deed recites that the debt may be sold and re-sold. This puts purchasers on notice to inquire who is the

actual owner of the debt and holder of the note. See, generally, *U.P.C., Inc. v. R.O.A. General, Inc.,* 990 P.2d 945 (U. Apps. 1959).

FORECLOSURE REQUIRES OWNERSHIP OF THE DEBT.

While a holder of a note may enforce it, this does not automatically provide authority to foreclose a security. A note is "enforced" by collection. Authority to foreclose is governed by other law than the Uniform Commercial Code. See §70A-9a-109(3)(b), (4)(k), UCA (1953), regarding perfection of a security interest. Authority to foreclose would follow *transfer* of the Note to the transferee under §57-1-35, UCA (1953). This, however, would not put such authority into the hands of a mere possessor of the Note, without a showing of proper transfer of ownership of the debt.

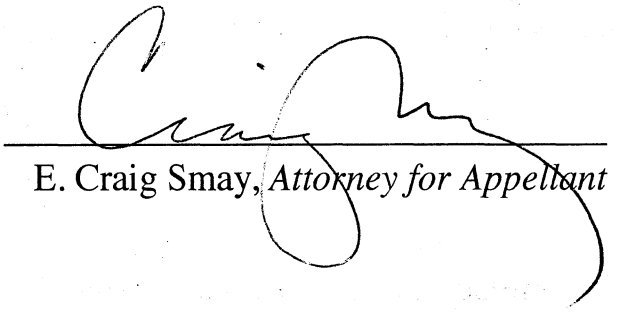
It is fundamental Utah law that a mortgage or trust deed is simply an incident of a note, having no separate existence. *Smith v. Jarman, supra*; *Carpenter v. Longan, supra*. As a result, no one may foreclose a mortgage or trust deed who does not own the underlying debt. *Bangerter v. Poulton, supra*; *Dugan v. Jones, supra*. Enforcement of notes under the UCC notwithstanding, perfection and foreclosure of a security, such as a trust deed, requires a showing that the party who would foreclose owns the underlying debt. *Dugan, supra; U.S. v. Loosley,* 551 P. 2d 506, 508 (Utah 1976). Nothing in the UCC cancels the rule that a security, such as a trust deed, in the hands of one who does not own the debt secured, is a nullity.

Furthermore, foreclosure requires a showing of proper acceleration of the debt by one having authority to do so. Securitizers lack any such authority.

Conclusions

The ruling below should be reversed, and the district court instructed to enter a ruling that only the investors in MBS can collect or enforce the debt.

Respectfully submitted this 14th day of June, 2012.

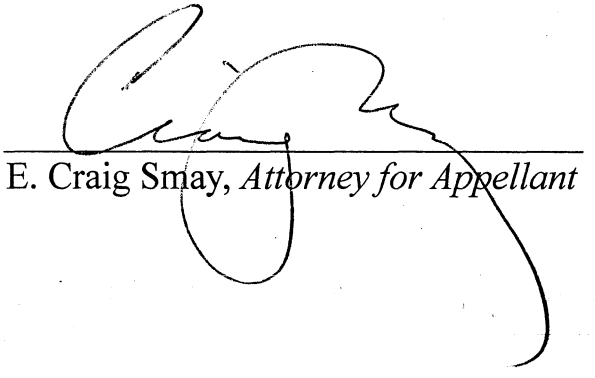


E. Craig Smay, *Attorney for Appellant*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "**BRIEF OF APPELLANT**", was sent this 14th day of June, 2012, postage pre-paid to the following by U.S. Mail:

James D. Gardner (8798)
Steward O. Peay (9584)
SNELL & WILMER, L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800
Email: jgardner@swlaw.com
speay@swlaw.com

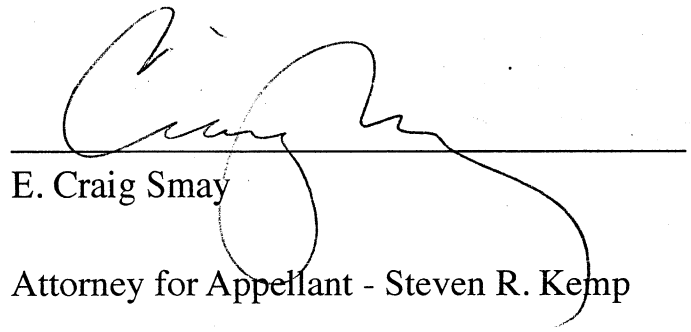


E. Craig Smay, *Attorney for Appellant*

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 3,720 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 for MAC Version 12.3.3 in 14-point Times New Roman Font.



E. Craig Smay

Attorney for Appellant - Steven R. Kemp

Dated: June 14, 2012

Prepared by:
James D. Gardner (8798)
Stewart O. Peay (9584)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800
Email: jgardner@swlaw.com
speay@swlaw.com

Attorneys for Defendants

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH,
DAVIS COUNTY, FARMINGTON DEPARTMENT

STEVEN R. KEMP, Plaintiff, vs. WELLS FARGO BANK, N.A., HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE WELLS FARGO MORTGAGE BACKED SECURITIES 2007-8 TRUST, WELLS FARGO BANK, N.A., AND JOHN DOES OF UNKNOWN NUMBER, Defendants.	**ORDER GRANTING WELLS FARGO DEFENDANTS' MOTION TO SET ASIDE DEFAULT AND MOTION TO DISMISS** Civil No. 110703609 Judge John R. Morris

Defendants Wells Fargo Bank, N.A. and HSBC Bank USA N.A., as Trustee for the Benefit of the Certificate Holders of the Wells Fargo Mortgage Backed Securities 2007-8 Trust (collectively referred to as "Wells Fargo Defendants") July 21, 2011 Motion to Set Aside Default of Wells Fargo Bank, N.A. and their July 21, 2011 Motion to Dismiss came on for regularly scheduled hearing at 9 a.m. on December 14, 2011. The Wells Fargo Defendants were represented by James D. Gardner and Stewart O. Peay and Plaintiff Steven R. Kemp was

represented by E. Craig Smay. Having heard the argument of counsel and considered the writings filed by the Wells Fargo Defendants and Plaintiff related to these motions, and based on the arguments presented by both parties,

IT IS HEREBY ORDERED that:

1. The July 21, 2011 Motion to Set Aside Default is hereby granted and the July 8, 2011 Default of Wells Fargo Bank, N.A. is hereby set aside;

2. The July 21, 2011 Motion to Dismiss is hereby granted and all of Plaintiff's claims in this lawsuit are hereby dismissed with prejudice;

DATED this _____ day of _____, 2011.

BY THE COURT:

John R. Morris
Second Judicial District Court

Approved as to form:

E. Craig Smay
Counsel for Plaintiff Steven R. Kemp

13974724

Utah Code Annotated

25-5-1. Estate or interest in real property.

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

25-5-4. Certain agreements void unless written and signed.

(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(a) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(b) every promise to answer for the debt, default, or miscarriage of another;

(c) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(d) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;

(e) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation; and

(f) every credit agreement.

(2) (a) As used in Subsection (1)(f) and this Subsection (2):

(i) (A) "Credit agreement" means an agreement by a financial institution to:

(I) lend, delay, or otherwise modify an obligation to repay money, goods, or things in action;

(II) otherwise extend credit; or

(III) make any other financial accommodation.

(B) "Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated with deposit accounts or overdrafts.

(ii) "Creditor" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

(iii) "Debtor" means a person who seeks or obtains credit, or seeks or receives a financial accommodation, under a credit agreement with a financial institution.

(iv) "Financial institution" means:

(A) a state or federally chartered:

(I) bank;

(II) savings and loan association;

(III) savings bank;

(IV) industrial bank; or

(V) credit union; or

(B) any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act.

(b) (i) Except as provided in Subsection (2)(e), a debtor or a creditor may not maintain an action on a credit agreement unless the agreement:

(A) is in writing;

(B) expresses consideration;

(C) sets forth the relevant terms and conditions; and

(D) is signed by the party against whom enforcement of the agreement would be sought.

(ii) For purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application.

(c) The following actions do not give rise to a claim that a credit agreement is created,
unless the agreement satisfies the requirements of Subsection (2)(b):

(i) the rendering of financial advice by a creditor to a debtor;

(ii) the consultation by a creditor with a debtor; or

(iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships.

(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The provision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:

(i) the debtor is provided with a written copy of the terms of the agreement;

(ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and

(iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

57-1-35. Trust deeds -- Transfer of secured debts as transfer of security.

The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor.

70A-3-201. Negotiation.

(1) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(2) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

70A-3-202. Negotiation subject to rescission.

(1) Negotiation is effective even if obtained from an infant, a corporation exceeding its powers, a person without capacity, by fraud, duress, or mistake, or in breach of duty or as part of an illegal transaction.

(2) To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

70A-3-203. Transfer of instrument -- Rights acquired by transfer.

(1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(3) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(4) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

70A-3-306. Claims to an instrument.

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument

or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

70A-9a-109. Scope.

(1) Except as otherwise provided in Subsections (3) and (4), this chapter applies to:

(a) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

(b) an agricultural lien;

(c) a sale of accounts, chattel paper, payment intangibles, or promissory notes;

(d) a consignment;

(e) a security interest arising under Section **70A-2-401** or **70A-2-505** or Subsection **70A-2-711**(3) or **70A-2a-508**(5), as provided in Section **70A-9a-110**; and

(f) a security interest arising under Section **70A-4-210** or **70A-5-118**.

(2) The application of this chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this chapter does not apply.

(3) This chapter does not apply to the extent that:

(a) a statute, regulation, or treaty of the United States preempts this chapter;

(b) another statute of this state expressly governs the creation, perfection, priority, or enforcement of a security interest created by this state or a governmental unit of this state;

(c) a statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or governmental unit; or

(d) the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under Section **70A-5-114**.

(4) This chapter does not apply to:

(a) a landlord's lien, other than an agricultural lien;

(b) a lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but Section **70A-9a-333** applies with respect to priority of the lien;

(c) an assignment of a claim for wages, salary, or other compensation of an employee;

(d) a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;

(e) an assignment of accounts, chattel paper, payment intangibles, or promissory

notes which is for the purpose of collection only;

(f) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

(g) an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;

(h) a transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections **70A-9a-315** and **70A-9a-322** apply with respect to proceeds and priorities in proceeds;

(i) an assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(j) a right of recoupment or set-off, but:

(i) Section **70A-9a-340** applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and

(ii) Section **70A-9a-404** applies with respect to defenses or claims of an account debtor;

(k) the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

(i) liens on real property in Sections **70A-9a-203** and **70A-9a-308**;

(ii) fixtures in Section **70A-9a-334**;

(iii) fixture filings in Sections **70A-9a-501**, **70A-9a-502**, **70A-9a-512**, **70A-9a-516**, and **70A-9a-519**; and

(iv) security agreements covering personal and real property in Section **70A-9a-604**;

(l) an assignment of a claim arising in tort, other than a commercial tort claim, but Sections **70A-9a-315** and **70A-9a-322** apply with respect to proceeds and priorities in proceeds;

(m) an assignment of a deposit account in a consumer transaction, but Sections **70A-9a-315** and **70A-9a-322** apply with respect to proceeds and priorities in proceeds;

(n) an assignment of a claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. 104(a)(1) or (2); or

(o) an assignment of a claim or right to receive benefits under a special needs trust as described in 42 U.S.C. 1396p(d)(4).

(5) Notwithstanding anything to the contrary in this section, Subsections (4)(n) and (o) shall only be effective to security interests created on or after May 6, 2002.