920 F.3d 1223

United States Court of Appeals, Ninth Circuit.

Joan **DEMAREST**, Plaintiff-Appellant,

v.

HSBC BANK USA, N.A., AS TRUSTEE FOR the REGISTERED HOLDERS OF NOMURA HOME EQUITY LOAN, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-HE2, incorrectly sued herein as HSBC Bank USA, N.A.; Ocwen Loan Servicing, LLC; Mortgage Electronic Registration Systems, Inc., incorrectly sued herein as Mortgage Electronic Registration Systems; Western Progressive, LLC; Does, 1–10, inclusive, Defendants-Appellees.

No. 17-56432

Argued and Submitted March 6, 2019 Pasadena, CaliforniaFiled April 8, 2019

Attorneys and Law Firms

Richard Lawrence Antognini (argued), Law Office of Richard L. Antognini, Grass Valley, California, for Plaintiff-Appellant.

Emilie K. Edling (argued) and Robert W. Norman Jr., Houser & Allison APC, Portland, Oregon, for Defendants-Appellees.

Appeal from the United States District Court for the Central District of California, André Birotte Jr., District Judge, Presiding, D.C. No. 2:16-cv-05088-AB-E

Before: FERDINAND F. FERNANDEZ and MILAN D. SMITH, JR., Circuit Judges, and DANA L. CHRISTENSEN,* Chief District Judge.

OPINION

M. SMITH, Circuit Judge:

Plaintiff-Appellant Joan **Demarest** initiated an action in state court stemming from the foreclosure of her property. The defendants removed the action to federal district court based on diversity jurisdiction. The district court granted the defendants' motion for summary judgment and entered final judgment.

On appeal, **Demarest** challenges for the first time the district court's subject matter jurisdiction over the action. She argues that the Supreme Court's decision in *Americold Realty Trust v. ConAgra Foods, Inc.*, ___ U.S. ___, 136 S.Ct. 1012, 194 L.Ed.2d 71 (2016), changed the law for determining the citizenship of a trust in such a way that complete diversity of citizenship might not have existed in this case. We hold that prior authority regarding a traditional trust's citizenship still controls, and conclude that the district court properly exercised subject matter jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Demarest filed the underlying complaint in this case in Los Angeles County Superior Court on May 27, 2016, naming as defendants HSBC Bank USA N.A. (HSBC), Ocwen Loan Servicing, LLC (Ocwen), Western Progressive, LLC (Western Progressive), and Mortgage Electronic Registration Systems, Inc.

(MERS) (collectively, Defendants). The dispute concerned a loan **Demarest** had taken out on her West Hills, California home in 2005; the loan's promissory note and deed of trust were purportedly "pooled into a securitized trust labeled NORMA [sic] HOME EQUITY LOAN, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-HE2 ..." **Demarest** alleged that HSBC acted as trustee for this investment trust.

In fact, **Demarest's** loan had been securitized and the deed of trust assigned to HSBC, as trustee for the Registered Holders of Nomura Home Equity Loan, Inc., Asset-Backed Certificates, Series 2006-HE2 (the Trust). The Trust was governed by a contract entitled "Pooling and Servicing Agreement Dated as of April 1, 2006" (the Agreement), entered into between HSBC and various other parties. Among other things, the Agreement established the Trust, enumerated its assets, and appointed HSBC as trustee, and it described the Trust as a common law trust governed by New York law. Under the Agreement, all "right, title and interest" in the assets of the Trust were conveyed to the "Trustee [HSBC] for the use and benefit of the Certificateholders," and the trustee was given the power to hold the Trust's assets, sue in its own name, transact the Trust's business, terminate servicers, and engage in other necessary activities.

In her complaint (which she filed following her default on the loan and multiple initial actions aimed at combatting the foreclosure of her property), **Demarest** asserted various causes of action

under California law, including wrongful foreclosure. Defendants removed the case to the district court. The notice of removal specifically stated that it was filed on the behalf of, among others, "HSBC Bank USA, N.A., as Trustee for the registered holders of Nomura Home Equity Loan, Inc., Asset-Backed Certificates, Series 2006-HE2 ... incorrectly sued herein as HSBC Bank USA N.A." Diversity jurisdiction pursuant to 28 U.S.C. § 1332 was the only basis for federal jurisdiction claimed in the notice. It asserted that **Demarest** was a citizen of California, Ocwen was a citizen of Florida and Georgia, MERS was a citizen of Delaware and Virginia, and Western Progressive was a nominal defendant and was therefore disregarded for diversity purposes. As for HSBC, the notice stated,

> HSBC is a national banking association organized under the laws of the United States with its main office in McLean, Virginia.... Since its main office is located in Virginia, HSBC is a citizen of Virginia for diversity purposes. At the present time and at the commencement of this action, HSBC is not a citizen of California.

(citation omitted). Given that no Defendant was, like **Demarest**, a citizen of California, the notice concluded that diversity jurisdiction was established, and that removal was proper.

After the district court dismissed MERS from the action through a motion for judgment on the pleadings, the remaining Defendants moved for summary judgment. The district court granted the motion and

entered final judgment for Defendants. This timely appeal followed.

STANDARD OF REVIEW AND JURISDICTION

"We review de novo a district court's determination that diversity jurisdiction exists." *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 736 (9th Cir. 2011) (quoting *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 979 (9th Cir. 2005)). We have jurisdiction pursuant to 28 U.S.C. § 1291.

ANALYSIS

Demarest does not contest the district court's summary judgment decision on appeal. Instead, she challenges, for the first time, the court's subject matter jurisdiction over the action.

I. Challenging Jurisdiction on Appeal

Federal subject matter jurisdiction—specifically, diversity jurisdiction—exists where an action is between "citizens of different States" and "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." *Id.* § 1332(a). It requires "complete diversity" of citizenship, meaning that "the citizenship of each plaintiff is diverse from the citizenship of each defendant." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

A defendant may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Although

"[p]rocedural defects in the removal of an action may be waived by the failure to make a timely objection before the case proceeds to the merits," defects pertaining to "the subject matter jurisdiction of the court cannot be waived and may be raised at any time." *O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1379 (9th Cir. 1988) (quoting *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979)). Therefore, where, as here, a district court disposes of an action on the merits and an appellant then challenges jurisdiction for the first time, "the relevant jurisdictional question on [ ] appeal ... is 'not whether the case was properly removed, but whether the federal district court would have had original jurisdiction in the case had it been filed in that court.' " *Aradia Women's Health Ctr. v. Operation Rescue*, 929 F.2d 530, 534 (9th Cir. 1991) (quoting *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972)). Accordingly, we must determine whether the district court would have had diversity jurisdiction if **Demarest** had originally filed her case in federal court.[1]

II. Citizenship of a Trust

Demarest contends that Defendants failed to establish diversity jurisdiction because, following the Supreme Court's decision in *Americold*, they were required to demonstrate the citizenship of the Trust's investors, and could not simply rely on the citizenship of HSBC as its trustee. To address this argument, we briefly consider the Court's treatment of trust citizenship in *Americold* and two other pertinent decisions.

Decades ago, in *Navarro Savings Ass'n v. Lee*, the Supreme Court addressed "whether the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, rather than that of the trust's beneficial shareholders." 446 U.S. 458, 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). There, the plaintiffs were eight trustees of a Massachusetts trust who sued in their own names, and the defendant disputed the existence of complete diversity on the ground that, because the trust beneficiaries rather than the trustees were the real parties in controversy, the citizenships of the former ought to have controlled. *Id.* at 459–60, 100 S.Ct. 1779. The Court reaffirmed the proposition that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others," concluding, "For more than 150 years, the law has permitted trustees who meet this standard to sue in their own right, without regard to the citizenship of the trust beneficiaries. We find no reason to forsake that principle today." *Id.* at 464–66, 100 S.Ct. 1779.

Ten years later, in *Carden v. Arkoma Associates*, the Court addressed the related issue of "whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." 494 U.S. 185, 186, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990). It held that "diversity jurisdiction in a suit by or against the [limited partnership] entity depends on the citizenship of 'all the members.' " *Id.* at 195–96,

110 S.Ct. 1015 (quoting *Chapman v. Barney*, 129 U.S. 677, 682, 9 S.Ct. 426, 32 L.Ed. 800 (1889)). Notably, the Court also determined that *Navarro* was consistent with this rule, because that case, unlike *Carden*, "did not involve the question whether a party that is an artificial entity other than a corporation can be considered a 'citizen' of a State, but the quite separate question whether parties that were undoubted 'citizens' (viz., natural persons) were the real parties to the controversy." *Id.* at 191, 110 S.Ct. 1015. It continued,

> [W]e did indeed discuss the characteristics of a Massachusetts business trust—not at all, however, for the purpose of determining whether the trust had attributes making it a "citizen," but only for the purpose of establishing that the respondents were "active trustees whose control over the assets held in their names is real and substantial," thereby bringing them under the rule, "more than 150 years" old, which permits such trustees "to sue in their own right, without regard to the citizenship of the trust beneficiaries." *Navarro*, in short, has nothing to do with the *Chapman* question, except that it makes available to respondent the argument by analogy that, just as business reality is taken into account for purposes of determining whether a trustee is the real party to the controversy, so also it should be taken into account for purposes of determining whether an artificial entity is a citizen.

Id. at 191–92, 110 S.Ct. 1015 (citation omitted) (quoting *Navarro*, 446 U.S. at 465–66, 100 S.Ct. 1779).

Although "[c]ourts applying *Navarro* and *Carden* to the question of a trust's citizenship for diversity purposes have reached different conclusions," *Raymond Loubier Irrevocable Tr. v. Loubier*, 858 F.3d 719, 727 (2d Cir. 2017), we have held that "[a] trust has the citizenship of its trustee or trustees." *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006); *see also Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 397 & n.6 (5th Cir. 2009) (citing *Navarro* for the proposition that the "citizenship of a trust is that of its trustee"); *Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 318 (7th Cir. 1998) ("Trusts take the citizenship of the trustees rather than of the beneficiaries.").[2]

In 2016, the Supreme Court decided *Americold*, in which it addressed "how to determine the citizenship of a 'real estate investment trust,' an inanimate creature of Maryland law," and concluded that "[w]hile humans and corporations can assert their own citizenship, other entities take the citizenship of their members." 136 S.Ct. at 1014. In so deciding, the Court noted that under Maryland law, a "real estate investment trust" is "not a corporation," but is instead "an 'unincorporated business trust or association' in which property is held and managed 'for the benefit and profit of any person who may become a shareholder.' " *Id.* at 1015–16 (quoting Md. Code Ann. Corps. & Ass'ns § 8-101(c)). The Court determined that the real estate investment trust's "shareholders appear to be in the same position as the shareholders of a joint-stock company or the

partners of a limited partnership—both of whom we viewed as members of their relevant entities," and "therefore conclude[d] that for purposes of diversity jurisdiction, [the real estate investment trust's] members include its shareholders." *Id.*

In so ruling, the Court did *not* overturn *Navarro*, but instead distinguished it:

> As we have reminded litigants before ... "*Navarro* had nothing to do with the citizenship of [a] 'trust.' " Rather, *Navarro* reaffirmed a separate rule that when a trustee files a lawsuit in *her* name, her jurisdictional citizenship is the State to which she belongs—as is true of any natural person. This rule coexists with our discussion above that when an artificial entity is sued in *its* name, it takes the citizenship of each of its members.

Id. (citations omitted) (quoting *Carden*, 494 U.S. at 192–93, 110 S.Ct. 1015). But it also acknowledged that "confusion regarding the citizenship of a trust is understandable and widely shared," and opined that "[t]he confusion can be explained, perhaps, by tradition." *Id.*

> Traditionally, a trust was not considered a distinct legal entity, but a "fiduciary relationship" between multiple people. Such a relationship was not a thing that could be haled into court; legal proceedings involving a trust were brought by or against the trustees in their own name. And when a trustee files a lawsuit or

> is sued in her own name, her citizenship is all that matters for diversity purposes. For a traditional trust, therefore, there is no need to determine its membership, as would be true if the trust, as an entity, were sued.

Id. (citations omitted) (quoting *Klein v. Bryer*, 227 Md. 473, 177 A.2d 412, 413 (1962)). The Court further noted that many states "have applied the 'trust' label to a variety of unincorporated entities that have little in common with this traditional template"—such as Maryland's "real estate investment trust," which is a separate legal entity that "itself can sue or be sued." *Id.* For such unincorporated entities, the Court repeated that citizenship is determined based on the citizenships of its members, and accordingly "decline[d] to apply the same rule to an unincorporated entity sued in its organizational name that applies to a human trustee sued in her personal name." *Id.* at 1016–17.

III. Application to This Case

Althoug **Demarest** suggests that *Americold* constituted a sea change in how courts determine the citizenship of a trust, we do not find the decision to be quite so momentous. Indeed, the Court clearly rearticulated that which we already knew: "when a trustee files a lawsuit or is sued in her own name, her citizenship is all that matters for diversity purposes." *Americold*, 136 S.Ct. at 1016 (citing *Navarro*, 446 U.S. at 462–66, 100 S.Ct. 1779).

Here, HSBC—the trustee—was sued in its own name. **Demarest's** complaint named "HSBC BANK USA N.A." as a defendant, and did not mention the Trust either in the caption or in the complaint's list of defendants. Therefore, *Americold* holds that, because HSBC as trustee was "sued in [its] own name, [its] citizenship is all that matters for diversity purposes." *Id.* "[A] national bank ... is a citizen of the State in which its main office, as set forth in its articles of association, ***1229** is located." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 307, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006). It is undisputed that HSBC is a national banking association with its main office in McLean, Virginia. Thus, HSBC is a citizen of Virginia and **Demarest** is a citizen of California. The parties were therefore completely diverse, and the district court properly exercised diversity jurisdiction over the action.

The case before us is easily resolved. But we note a potential tension between our precedent in *Johnson*—"[a] trust has the citizenship of its trustee or trustees," 437 F.3d at 899—and *Americold*, where the Supreme Court ultimately concluded that the citizenship of other, nontraditional trusts (like Maryland's real estate investment trusts) should be determined based on their members, not their trustees. Any friction is strictly superficial, however, since *Johnson*—and *Navarro*, and this case—all dealt with what the Court in *Americold* referred to as a "traditional trust." *Americold*, 136 S.Ct. at 1016. The Second Circuit has interpreted *Americold* as "distinguish[ing] (1) traditional trusts establishing only

fiduciary relationships and having no legal identity distinct from their trustees, from (2) the variety of unincorporated artificial entities to which states have applied the 'trust' label, but which have little in common with traditional trusts." *Loubier*, 858 F.3d at 722. Although *Johnson* provided little description of the trust at issue there, it was "a trust whose sole trustee is a bank incorporated in Delaware with its principal place of business in Minnesota." 437 F.3d at 899. This almost certainly referred to a traditional trust, for which *Navarro* still provides guiding precedent. *Navarro* held that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others," 446 U.S. at 464, 100 S.Ct. 1779—in other words, when a trustee oversees a traditional trust, as distinguished by the Court in *Americold* from other artificial business entities.[3]

We further note that the Trust at issue in this case is, under any criteria, properly characterized as a traditional trust. In addition to the factors articulated in *Navarro*, other post-*Americold* circuit opinions have outlined various considerations to analyze when defining a trust. These include: the nature of the trust as defined by the applicable state law, *see* *Wang ex rel. Wong v. New Mighty U.S. Tr.*, 843 F.3d 487, 495 (D.C. Cir. 2016); whether the trust has or lacks juridical person status, *see id.*; whether the trustee possesses real and substantial control over the trust's assets, *see* *Bynane v. Bank of N.Y. Mellon*, 866 F.3d 351, 357 (5th Cir. 2017); and the ***1230** rights, powers,

and responsibilities of the trustee, as described in the controlling agreement, *see id.*

Here, Section 2.09 of the Agreement—"Establishment of Trust"—read,

> The Depositor does hereby establish, pursuant to the further provisions of this Agreement and the laws of the State of New York, an express trust to be known, for convenience, as "Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2006-HE2" and does hereby appoint HSBC Bank USA, National Association, as Trustee in accordance with the provisions of this Agreement.

Section 2.10 referred to the Trust as a "common law trust," and under New York law, legal title to trust property "vests in the trustee." N.Y. Est. Powers & Trusts Law § 7-2.1(a); *see also In re Beiny*, No. 621-M/2002, 2009 WL 1050727, at *3 (N.Y. Sur. Ct. Apr. 20, 2009)("[Section] 7-2.1(a) expressly provides that legal title to trust property vests solely in the trustees. Thus, neither the beneficiaries of a trust nor any one other than the trustee may validly encumber or convey legal title to property owned by a trust."), *aff'd sub nom. Wynyard v. Beiny*, 82 A.D.3d 665, 919 N.Y.S.2d 165 (2011). The Agreement also authorized HSBC to institute a "suit or proceeding in its own name as Trustee." *See Wells Fargo Bank, N.A. v. 390 Park Ave. Assocs.*, No. 16 Civ. 9112 (LGS), 2017 WL 2684069, at *3 (S.D.N.Y. June 21, 2017) (concluding that an agreement "grant[ed] the Trustee substantially the same powers that the trustee in *Navarro* had" where the trustee

held funds "for the exclusive use and benefit of all present and future Certificateholders" and was therefore "a 'real and substantial' party to the controversy"); *see also* *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 195 (2d Cir. 2003) (determining that a party "was clearly intended to be the 'master of the litigation' " where an "agreement entered into between [it] and its former employees gave [it] the express power to act on their behalf with regard to their rights in the warrants").[4]Defendants observe that, "[n]ot surprisingly ... New York Federal District Courts considering the citizenship of New York real estate mortgage investment trusts in the wake of *Americold* have distinguished the cases before them."[5]

In short, *Johnson* remains good law when applied to what *Americold* labelled traditional trusts; in such a case, as *Navarro* held, the trustee is the real party in interest, and so its citizenship, not the citizenships of the trust's beneficiaries, controls the diversity analysis. Here, HSBC—the trustee of a traditional trust—was sued in its own name and was the real party in interest to the litigation. Under any analysis, therefore, HSBC's citizenship is key for diversity purposes.

CONCLUSION

Americold might have somewhat complicated how we should ascertain the citizenship of a trust, but it upset neither *Navarro* nor our precedent in cases where, as here, the trustee of a traditional trust is sued in its own name. Because HSBC and the other Defendants were

not, like **Demarest**, citizens of California, there was complete diversity, and the district court properly exercised diversity jurisdiction.

AFFIRMED.

Footnotes

*The Honorable Dana L. Christensen, Chief United States District Judge for the District of Montana, sitting by designation.

1Defendants suggest that the district court also retained federal question jurisdiction over this action, but because we conclude that the court properly exercised diversity jurisdiction, we need not address this alternative theory.

2By contrast, the Third Circuit, "after considering *Navarro* and *Carden*, [ ] reaffirm[ed] the rule ... that the citizenship of both the trustee *and* the beneficiary should control in determining the citizenship of a trust." *Emerald Inv'rs Tr. v. Gaunt Parsippany Partners*, 492 F.3d 192, 205 (3d Cir. 2007) (emphasis added).

3Our sister circuits have reached similar conclusions post-*Americold*. *See GBForefront, L.P. v. Forefront Mgmt. Grp., LLC*, 888 F.3d 29, 32 (3d Cir. 2018) ("In light of the Supreme Court's decision in *Americold* ... we conclude that the citizenship of a traditional trust is based only on the citizenship of its trustee."); *Doermer v. Oxford Fin. Grp., Ltd.*, 884 F.3d 643, 647 (7th Cir. 2018) ("As the Supreme Court repeatedly has explained, when a trustee of a traditional trust 'files a

lawsuit or is sued in her own name, her citizenship is all that matters for diversity purposes.' " (quoting *Americold*, 136 S.Ct. at 1016)); *Bynane v. Bank of N.Y. Mellon*, 866 F.3d 351, 357 (5th Cir. 2017) ("*Navarro*'s rule is still good law: 'Where a trustee has been sued or files suit in her own name, the only preliminary question a court must answer is whether the party is an "active trustee[ ] whose control over the assets held in [its] name[ ] is real and substantial." ' " (alterations in original) (quoting *Justice v. Wells Fargo Bank Nat'l Ass'n*, 674 F. App'x 330, 332 (5th Cir. 2016))); *Wang ex rel. Wong v. New Mighty U.S. Tr.*, 843 F.3d 487, 489–94 (D.C. Cir. 2016) (concluding that "the citizenship of a traditional trust depends only on the trustees' citizenship" because "*Americold* would not apply the *Carden* test to a traditional trust, as it is not an entity").

4Defendants further note that "[w]hile much of the servicing and enforcement duties fall to the Master Servicer and subservicers under the [Agreement], any assignment of the Master Servicer role and its assigns and delegates must be reasonably satisfactory to the Trustee," and "the Trustee has the ability to terminate all the rights and obligations of the Master Servicer, at which time all rights and duties of the Master Servicer 'shall pass to and be vested in the Trustee.' " *See LaSalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc.*, 237 F.Supp.2d 618, 633 (D. Md. 2002) ("Merely because the [agreement] in this case delegates to [the servicer] the right to institute a suit in its capacity as Special Servicer does not affect the basic

premise that the trustee of an express trust is the real party in interest when suing on behalf of the trust.").

5*See, e.g.*, *U.S. Bank Nat'l Ass'n v. 2150 Joshua's Path, LLC*, No. 13-cv-1598 (DLI)(SIL), 2017 WL 4480869, *3 (E.D.N.Y. Sept. 30, 2017) ("Unlike the Maryland [real estate investment trust] at issue in *Americold*, which was authorized to sue or be sued, '*under New York law, a trust cannot sue or be sued*, and suits must be brought by or against the trustee.' " (quoting *Springer v. U.S. Bank Nat'l Ass'n*, No. 15-cv-1107(JGK), 2015 WL 9462083, at *2 n.1 (S.D.N.Y. Dec. 23, 2015))); *U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc.*, 205 F.Supp.3d 386, 411 (S.D.N.Y. 2016) (determining that "[t]he Trusts in this case are not analogous to the investment trust in *Americold*" because "[i]n contrast to a Maryland real estate trust, the Trusts have no power to sue on their own behalves and the Trustee alone is responsible for the corpus of the Trusts").

United States District Court, C.D. California.

Joan DEMAREST, Plaintiff,

v.

HSBC BANK USA, N.A., et al., Defendants.

Case No. CV 16-05088-AB (Ex)

Signed 08/08/2017

Attorneys and Law Firms

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ORDER GRANTING MOTION FOR SUMMARY JUDGMENT [DKT. NO. 30]

HONORABLE ANDRÉ BIROTTE JR., UNITED STATES DISTRICT COURT JUDGE

Before the Court is a Motion for Summary Judgment filed by Defendants Ocwen Loan Servicing LLC ("Ocwen") and HSBC Bank USA, N.A., as Trustee for the registered holders of Nomura Home Equity Loan, Inc., Asset-Backed Certificates, Series 2006-HE2, incorrectly sued herein as HSBC Bank USA, N.A. ("HSBC") (together, "Defendants").[1] (Dkt. No. 30.) Plaintiff Joan Demarest ("Plaintiff") filed an untimely

Opposition (Dkt. No. 34) and Defendants filed a Reply (Dkt. No.38). At the April 3, 2017 hearing, the Court distributed a tentative ruling that would have granted the motion. Thereafter, the Court granted Plaintiff's request to substitute counsel and, following further briefing, eventually granted Plaintiff's request under Rule 56(d) to conduct additional discovery and file a further opposition. Plaintiff filed a further Opposition (Dkt. No. 56) and Defendant filed a further Reply (Dkt. No. 60). The Court will refer to the initial and the further filings together as the Opposition and Reply. The Court heard oral argument on August 4, 2017. For the following reasons, the Court **GRANTS** the Motion.

I. BACKGROUND

This action arises out of Plaintiff's default on her mortgage and Defendants' attempts to foreclose on her property. Plaintiff alleges that because of defects in the securitization of her mortgage loan, Defendants never perfected their security interest in the home and are not entitled to foreclose. *See* Compl. ¶¶ 30-34. Although the Complaint posits a laundry list of alleged defects in the securitization, the opposition raises only two of them, so the Court deems Plaintiff to have abandoned the others.

Specifically, Plaintiff claims that the Deed of Trust was not transferred and delivered to the Trust before the Trust's closing date, and intervening assignments were not recorded as required by the pooling and servicing agreement ("PSA") that governs the securitized trust. Compl. ¶¶ 74, 75. Because of these defects, "the alleged beneficiary of Plaintiff's Deed of Trust, is not the real

party in interest with regard to any action to be taken against the Plaintiff's home," *id.* ¶ 80, and the Defendants are "without legal authority or standing" to foreclose. *Id.*¶ 84. Based on these allegations, Plaintiff asserts six causes of action: (1) wrongful foreclosure; (2) violation of Cal. Civ. Code § 2924(a)(6); (3) cancellation of written instruments; (4) violation of the covenant of good faith and fair dealing; (5) declaratory relief; and (6) violation of Cal. Bus. & Profs. Code § 17200, § 17500, *et seq*. Defendants now move for summary judgment on numerous bases.[2]

The Court notes that Plaintiff's further Opposition does not advance her case. Despite securing a continuance to conduct discovery, and despite receiving certain documents from Defendant in discovery and deposing Rule 30(b)(6) witnesses, the only evidence Plaintiff submitted was her own 24-line declaration, attesting to immaterial side-issues. *See* Demarest Decl. (Dkt. No. 56-2.)

II. UNDISPUTED FACTS

The facts surrounding Plaintiff's mortgage loan and default are not disputed.[3] On December 23, 2005, Plaintiff executed a promissory note and deed of trust (the "Loan") with Quick Loan Funding, Inc. ("QLF") in the amount of $552,500 related to the property located at 6568 Sheltondale Avenue, West Hills, CA (the "Property"). (SUF 1.) After origination, the beneficial interest in the Loan was transferred to Defendant HSBC. (SUF 2.) Defendant Ocwen began servicing the Loan on behalf of Defendant HSBC in April 2006 and

continues to service the Loan on behalf of HSBC. (SUF 3.)

By June of 2006, Plaintiff had fallen behind on her monthly Mortgage Loan payments. (SUF 4.) In October 16, 2006, Plaintiff entered into a forebearance agreement to cure the payment default. (SUF 5.) On February 21, 2007, Plaintiff entered into a second forbearance agreement (the "2007 Forbearance Agreement") that set forth a 12 month payment plan to cure Plaintiff's payment default. (SUF 6.) The 2007 Forbearance Agreement contained an express waiver and general release provision whereby Plaintiff "release[d] Ocwen from any and all claims known or unknown that Borrower has against Ocwen, which in any way arise from or relate to the Note, the Mortgage, the Loan, or the Default," and waived any statutory basis for arguing she could not waive unknown claims. (SUF 7.)

However, Plaintiff did not make the payments required under the 2007 Forbearance Agreement. (SUF 8.)

On September 24, 2013, a Notice of Substitution of Trustee was recorded which substituted Western Progressive, LLC in as the Trustee under the Deed of Trust. (SUF 9.)

On November 4, 2013, a Notice of Default and Election to Sell Under Deed of Trust was recorded against the Property for Plaintiff's failure to make the October 1, 2007 contractual loan payment, or any payment thereafter. (SUF 10.) Between February 18, 2014 and March 7, 2016, three notices of trustee sale were

recorded for the Property. None of the foreclosure sales were held. (SUF 11.) Plaintiff still resides at the Property. (SUF 13.) Plaintiff's loan is currently due for the October 1, 2007 loan payment. (SUF 12.) Plaintiff has approximately $500 cash and no bank accounts, investment accounts, stocks or retirement accounts. (SUF 14.)

On or about February 23, 2009, Plaintiff filed a lawsuit against Quick Loan Funding, Inc., HSBC Bank as Trustee, Ocwen, MERS and several other defendants in Superior Court of the State of California for the County of Los Angeles, under Case No. BC408235, for real property claims. (SUF 15.)

On or about October 28, 2011, Plaintiff filed a lawsuit against Aztec Foreclosure Corporation, the previous foreclosure trustee, in the Superior Court of the State of California for the County of Los Angeles, under Case No. BC472386. Plaintiff voluntarily dismissed the case on or about November 28, 2011. (SUF 20.)

On November 29, 2011, Plaintiff filed another lawsuit against Defendants in the Superior Court of the State of California for the County of Los Angeles, under Case No. LC095614. (SUF 21.)

In Case No. LC095614, Plaintiff challenged the assignment of the deed of trust, alleging that it was executed by an unauthorized signor, it was executed after the closing date of the trust, and that Defendant HSBC as Trustee lacked the power of sale. (SUF 22.)

On May 17, 2012, Case No. LC095614 was dismissed after the Court granted Defendants' Demurrer to the

First Amended Complaint without leave to amend. (SUF 23.) Judgment for defendants was entered on May 25, 2012. *See* RJN Exh. 13 p. 1.

III. LEGAL STANDARD

A motion for summary judgment must be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 24748 (1986). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmoving party will have the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. *Id.* The nonmoving party then "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

"Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587. The Court must draw all reasonable inferences in the nonmoving party's favor. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson*, 477 U.S. at 255). Nevertheless, inferences are not drawn out of thin air, and it is the nonmoving party's obligation to produce a factual predicate from which the inference may be

drawn. *Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987). "[M]ere disagreement or the bald assertion that a genuine issue of material fact exists" does not preclude summary judgment. *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

IV. DISCUSSION

Defendants move for summary judgment on numerous bases. All of Plaintiffs' claims are based directly or indirectly on the alleged defects in the securitization and recording process resulting in Defendants' lack of standing to foreclose. *See, e.g.*, ¶¶ 74-76; ¶¶ 98-101; pp. 15, ¶¶ 108-110; p. 16, ¶ 100; p. 17, ¶ 103; p. 18, ¶¶ 114-115. Furthermore, Plaintiff has failed to raise a triable issue as to her defective securitization and recording allegations. Because these grounds are dispositive of all of Plaintiff's claims, the Court will not address Defendants' claim-specific arguments.

A. Plaintiff Lacks Standing to Challenge the Securitization of her Loan.

As mentioned above, the Complaint alleges a laundry list of ways in which the securitization of Plaintiff's mortgage was allegedly defective. However, Plaintiff's opposition rests only on the allegation that the deed of trust was not transferred into the securitized trust until after the trust's closing date so the transfer was void.[4] All of Plaintiff's claims rest on her challenge to the securitization of her loan.

By now it is well-understood that California law does not permit a borrower to bring a suit to preemptively

challenge an entity's authority to foreclose. *See* *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1156 (2011) (California's nonjudicial foreclosure law does not provide a cause of action allowing a borrower to bring a lawsuit to determine whether a foreclosing entity is has authority to foreclose). Numerous recent state and federal decisions have rejected Plaintiff's specific theory, finding that borrowers lack standing to challenge the validity of the assignment of a deed of trust to the securitized trust because it occurred after the closing date of the securitized trust and is therefore void. *See* *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808, 815 (2016), *reh'g denied* (Apr. 11, 2016), *review denied* (July 13, 2016) (plaintiff lacked standing to bring pre-foreclosure suit contending that the assignment of her DOT to the trust was untimely because it occurred after the closing date); *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 813 (2016), *review denied* (Mar. 22, 2017) ("New York state and federal courts continue to uphold the same rationale; that is, a borrower does not have standing to challenge an assignment that allegedly breaches a term or terms of a PSA because the beneficiaries, not the borrower, have the right to ratify the trustee's unauthorized acts.").

Likewise here, Plaintiff lacks standing to challenge the validity of the assignment under the securitization agreement. Furthermore, to the extent the assignment did not comply with the trust agreement, that renders the assignment merely voidable at the behest of the beneficiary, and not void as to Plaintiff. Because

Plaintiff's untenable flawed securitization theory underlies all of Plaintiff's claims, they all fail.

B. Plaintiff Has Not Raised a Triable Issue Of Fact.

Assuming arguendo that Plaintiff's claims *may* be validly be premised on these facts, her claims fail because she has not raised a triable issue as to these facts.[5]

First, Plaintiff's bald allegations that the deed of trust was not timely transferred into the securitized trust and that there may be other unspecified delayed or never-recorded assignments is contradicted by SUF 2 and the evidence underlying it. This fact states that "[a]fter origination, the beneficial interest in the Loan was transferred to Defendant HSBC." SUF 2. Plaintiff purports to dispute this fact by stating that there is no evidence establishing it. But Defendants' proffered fact is supported by the Declaration of Gina Feezer, a Loan Analyst for Ocwen. *See* Feezer Decl. (Dkt. No. 32).[6] Ms. Feezer testified that "the Trust took possession of the original Loan documents before the [April 1, 2006] closing date, on or about February 6, 2006." Feezer Decl. ¶ 4. Furthermore, Feezer states that this assignment was recorded on May 12, 2011. *Id.* ¶ 5. Although this assignment was recorded after the transfer, Plaintiff does not show that this fact can support any of her claims. And Plaintiff points to no other purported transfers of any interest that had to be performed and/or recorded either before or after the securitization. Plaintiff argues that Defendants' evidence is imperfect because it should include further documentation. However, Ms. Feezer laid adequate

foundation for the facts she stated. Furthermore, despite two shots at discovery, Plaintiff presented no evidence to show that the assignment was deficient. *See* *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 270 (2011) (defendant "did not bear the burden of proving a valid assignment," rather, "the burden rested with plaintiff affirmatively to plead facts demonstrating the impropriety"). Here, Plaintiff has only attacked the adequacy of Defendants' evidence, but has pointed to no evidence whatsoever to establish her affirmative case—that the transfers of the note or the assignment of the DOT was defective. Plaintiff has therefore not created a genuine issue of fact to present to a jury. Therefore, the undisputed facts establish that Plaintiff's deed of trust was transferred into the trust before it closed, and that the assignment was ultimately recorded. Because each and every one of Plaintiff's claims turns on those allegations, each and every one of her claims fails. Defendants' motion for summary judgment is therefore **GRANTED**.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Ocwen Loan Servicing LLC's and HSBC Bank USA, N.A.,'s Motion for Summary Judgment. (Dkt. No. 30.)

The Court also **DISMISSES** Defendant Western Progressive LLC, which filed an uncontested Notice of Nonmonetary Status and as to whom the Complaint makes no actionable allegations.

Defendants shall file a Proposed Judgment within 14 days of the filing of this order.

The Pretrial Conference and Jury Trial dates are hereby vacated.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4785979

Footnotes

1Plaintiff also named Western Progressive LLC as a Defendant, but it filed a Notice of Nonmonetary Status in state court before this case was removed. *See* Dkt. No. 12.

2Defendants also filed an unopposed Request for Judicial Notice ("RJN") asking the Court to take judicial notice of 14 exhibits. (Dkt. No. 31.) Exhibits 1-7 consist of publicly recorded documents related to Plaintiffs' property and foreclosure proceedings and they are referenced in, or central to, the Complaint's allegations; Exhibits 8-14 are court records. With their further Reply, Defendants filed a Supplemental RJN seeking judicial notice of five court records. (*See* Dkt. No. 61.) All of these materials are judicially noticeable as matters of public record under Fed. Evid. 201. The Court therefore **GRANTS** Defendants' RJN.

3The facts are taken from Defendants' Separate Statement of Undisputed Facts. ("SUF," Dkt. No. 40.) Plaintiff purports to dispute five of the twenty-three facts Defendants proffer. *See* Dkt. No. 56-1. The Court finds that these disputes are not genuine because the challenged facts are supported by the cited evidence, and Plaintiff offers no contrary evidence. Furthermore,

Plaintiff submitted no statement of additional facts. Therefore, all of Defendants' proffered facts are undisputed.

In addition, although Plaintiff *submitted* evidence—the Declaration of Patricia Rodriguez (Dkt. No. 35), the Declaration of Steven M. Corser (Dkt. No. 37), and the Declaration of Joan Demarest (Dkt. No. 56-2)—none of it creates a genuine issue. First, the matters to which Demarest attests are immaterial to the issues the motion raises. As for the Rodriguez and Corser Declarations, Plaintiff *does not rely on either of them* in either of her oppositions or her other filings. As such, Plaintiff has not shown that this evidence is relevant in any way. Furthermore, the Rodriguez Declaration does not offer actual evidence but instead restates some of Plaintiff's allegations and some of her legal arguments. Before she withdrew at the eleventh hour, Rodriguez was Plaintiff's attorney and has no personal knowledge of the facts Plaintiff alleges and thus cannot attest to them, nor is legal argument evidence that belongs in a declaration. As for Steven Corser, he offers seemingly expert testimony, but Plaintiff did not disclose him, let alone as an expert, until she filed his declaration. Therefore, Corser's testimony is inadmissible. *See* Defs' Objection & Adams Decl. (Dkt. Nos. 39, 38-1). For all of these reasons, the Court **STRIKES** the Rodriguez and Corser Declarations.

4Plaintiff has therefore abandoned claims based on other alleged defects in the securitization.

5The opposition raises several claims and theories (e.g., pertaining to Plaintiff's payments in bankruptcy) that

do not appear in her Complaint and that are not relevant to the disposition of this motion,

6Plaintiff did not file objections to any of Defendants' evidence.

5/15/2019

United States Court of Appeals, Ninth Circuit.

Joan **DEMAREST**, Plaintiff-Appellant,

v.

HSBC BANK USA, N.A., AS TRUSTEE FOR the REGISTERED HOLDERS OF NOMURA HOME EQUITY LOAN, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-HE2, incorrectly sued herein as HSBC Bank USA, N.A.; Ocwen Loan Servicing, LLC; Mortgage Electronic Registration Systems, Inc., incorrectly sued herein as Mortgage Electronic Registration Systems; Western Progressive, LLC; Does, 1–10, inclusive, Defendants-Appellees.

No. 17-56432

ORDER

Before: FERNANDEZ and M. SMITH, Circuit Judges, and CHRISTENSEN,* District Judge.

Judge M. Smith has voted to deny the petition for rehearing en banc, and Judges Fernandez and Christensen have so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition is DENIED.

Footnote

*The Honorable Dana L. Christensen, Chief United States District Judge for the District of Montana, sitting by designation.