

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

**U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR C-BASS 2007-SP1 TRUST,
MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2007-SP1,**

Plaintiffs,

vs.

No. D-101-CV-2015-02177

**MUKHTIAR S. KHALSA, GURNAM K. KHALSA,
JPMORGAN CHASE BANK, N.A. AND
UNKNOWN TENANTS, REAL NAMES UNKNOWN,**

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT, MUKHTIAR S. KHALSA'S
MOTION TO DISMISS UNDER AN UNCONSCIONABLE CONTRACT**

Plaintiff, U.S. Bank National Association, as Trustee for C-Bass 2007-SP1 Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-SP1 ("Plaintiff") by and through counsel of record, the Johnson Law Firm, LC (Thomas L. Johnson), opposes Defendant, Mukhtiar S. Khalsa's Motion to Dismiss Under Unconscionable Contract ("Motion to Dismiss"). Plaintiff requests the Court to deny the Motion because notes and mortgages are enforceable in New Mexico, there has been no splitting of Plaintiff's rights, and enforcing a note and a mortgage that are in default is not unconscionable.

INTRODUCTION

As noted in Plaintiff's response to Defendant's Motion to Dismiss for Collection of a Time Barred Account filed on April 5, 2016, in September of 2005, in return for the funding of a loan in the amount of \$166,500, Defendants Mukhtiar S. Khalsa and Gurnam K. Khalsa executed a Note secured by a Mortgage. *See* First Amended Complaint ("Complaint") ¶¶ 9-12 and 14-15.

After Defendants defaulted on the original Note, Defendants agreed to and executed a loan modification in November, 2008. *See* Complaint, ¶¶ 14 and 15. Thereafter, Defendants again defaulted on the obligations to which they had agreed. *Id.*, ¶ 16. They remain in default and the debt now exceeds \$250,000, but they ask that Plaintiff's Complaint be dismissed, that they be released from the duty to repay the debt, and that, in addition, they be recover a windfall of more than 3/4 of a million dollars.

It is difficult to follow Defendant's Motion to Dismiss, but he seems to argue that Plaintiff should not be allowed to prove that it is entitled to enforce the Note and Mortgage, that allowing an assignment of the right to collect the debt is not permitted under New Mexico law, and that even though Plaintiff's Complaint alleges that it is the owner of all rights under the Note and Mortgage and even though there has been no "partial" assignment, the entire contractual relationship must be set aside on grounds of unconscionability because the mortgage reserves rights to Plaintiff. In New Mexico, however, notes and mortgages are enforceable.

ARGUMENT

I. MOTION TO DISMISS STANDARD

A motion to dismiss pursuant to Rule 1 2(B)(6) tests the legal sufficiency of the complaint. *New Mexico Life Ins. Guar. Ass'n v. Quinn & Co.*, 111 N.M. 750, 753, 809 P.2d 1278, 1291 (1991). For purposes of a motion to dismiss, the court accepts all well-pleaded facts as true and questions whether the plaintiff might prevail under any state of facts provable under the claim. *Healthsource, Inc. v. X-Ray Assocs. of N.M, P.C.*, 2005-NMCA-097, ¶ 16, 116 P.3d 861. Dismissal under the rule is a drastic remedy and is infrequently granted. *Rummel v. Edgemont Realty*, 116 N.M. 23, 25, 859 P.2d 491, 493 (Ct. App. 1993) (citation omitted). Under this standard of review only the law applicable to such claim is tested, not the facts which

support it. *Environmental Improvement Div. v. Aguayo*, 99 N.M. 497, 499, 660 P.2d 587, 589 (1983).

II. PLAINTIFF’S COMPLAINT IS LEGALLY SUFFICIENT IN DECLARING THAT PLAINTIFF HAS STANDING AND PLAINTIFF IS LEGALLY ENTITLED TO ENFORCE THE NOTE AND MORTGAGE.

“The cause of action to enforce a promissory note originated at common law and already existed when New Mexico adopted the UCC.” *Deutsche Bank National Trust Co. v. Johnston*, 2016 N.M. Lexis 42, ¶ 12, March 3, 2016 (“*Johnston*”). The UCC recognizes the continuing vitality of the common law. *Id.* While a plaintiff must ultimately prove that it had standing to enforce the mortgage foreclosure action as of the time that it files a complaint, “it is only at trial or in a dispositive motion that plaintiffs are required to *prove* the necessary elements of their claims. *Id.*, ¶ 26. “[A] bare statement that the plaintiff holds the note may satisfy pleading standards.” *Id.* The *Johnston* court made clear that there is a simple way to establish standing. “If Deutsche Bank had presented a note indorsed in blank with its initial complaint, it would be entitled to a presumption that it could enforce the note at the time of filing and thereby establish standing.” *Id.*, ¶ 25. Plaintiff went one step further in the present case. It attached to the Complaint a copy of the note with a special indorsement directly to Plaintiff. The recipient of a special indorsement is the holder of the note, and holders of notes, by law, are entitled to enforce such notes. *Bank of New York v. Romero*, 2014 NMSC-007, 320 P.3d 1. ¶¶ 20-21, 25 (“*Romero*”).

In addition, the Complaint alleges a full chain of title sufficient to enforce the Note and Mortgage. Complaint ¶¶ 1-4, 18-22. Through the indorsement, the Note conveyed a broad, full and unlimited assignment. The right of an assignee to enforce the mortgage is dependent upon the right to enforce the note, *Romero*, ¶ 35. Here Plaintiff has the full right to enforce the Note

and Mortgage by reason of the assignment and indorsement of the Note in favor of Plaintiff. The Complaint alleges and attaches proper documentation to show the assignment. To the extent that Defendant suggests that no assignment of a note is valid, such an argument is completely unsupported, baseless, and contrary to both the common law and the UCC. If Defendant is concerned about a foreclosure sale taking place without giving notice to Defendant such fears are unfounded. By naming Defendants in this suit, Plaintiff has ensured that Defendants will receive notice of any foreclosure sale; any right under the mortgage to sell without notice, therefore, is moot.

III. THERE WAS NO “PARTIAL” ASSIGNMENT.

There is nothing in the documents to suggest that Plaintiff received only a partial assignment. The indorsement in favor of Plaintiff is not limited, is not restricted, and is not partial. While the terms of the Note may provide for a partial assignment, the indorsement here at issue transferred and negotiated all interest in the negotiable instrument. Nowhere does the Note or Mortgage require a “bifurcation of the bundle of rights” associated with a mortgage loan as Defendant alleges. Rather, under New Mexico law, a person who has a right to enforce a note also has the right to foreclose the mortgage. *Romero, supra*, at ¶ 35. Plaintiff has both alleged and shown through the Note attached to the Complaint that it has the right to enforce the Note and the concomitant right to enforce the Mortgage. Indeed, a mortgage has no life independent of the note. *Id.* By holding all rights in the Note, Plaintiff has the full right to enforce the Mortgage.

In any event, Defendant misleads the Court in arguing that the UCC does not recognize a partial assignment. NMSA 1978 § 55-3-201(d) (1991) states that while a partial transfer of rights does not constitute a negotiation of the whole instrument, a transferee of partial rights still carries

with it “the rights of a partial assignee.” Beyond the fact that Defendant’s argument muddles the legal distinctions between transfers and negotiations as set forth in the UCC, the argument fails to recognize the specific language from the statute that in fact declares that partial assignments of certain rights can occur.

IV. MORTGAGE LOANS ARE NOT UNCONSCIONABLE BY REASON OF THEIR GIVING THE NOTE HOLDER THE RIGHT TO ENFORCE THE LOAN.

Defendant acknowledges that the standard terms found in the mortgage loan here at issue “exist in nearly all mortgage contracts that are obtainable in the modern marketplace.” When Defendant argues that this contract with standard mortgage terms is unconscionable, what Defendant is really saying is that virtually every mortgage loan in the United States is unconscionable and unenforceable. Defendant, therefore, is seeking to void millions of mortgage loans and prevent the enforcement of all mortgages -- with the inexorable result that the persons who received the proceeds of a promissory note will never have to repay the loan. Should Defendant prevail in such a far-fetched scheme, the vast majority of persons could never obtain a house, the economy of the United States would completely unravel, and absolute chaos in title to property would erupt.

Only those contracts that are grossly unreasonable and against public policy are unconscionable. *Cordova v. World Fin. Corp.*, 2009-NMSC-021, ¶ 31, 208 P.3d 901. There is nothing unconscionable about lending money to persons upon the terms in this standard mortgage contract. It is eminently reasonable that when a borrower solemnly agrees to repay money it can be coupled by a contract that also secures repayment by a mortgage on property. The Note signed by Defendants provides: “If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.” *See* Complaint, Exhibit D, p. 4, ¶ 7(B).

Defendant received the money, defaulted, and now wants out of any of the responsibilities connected with him receiving the benefits of the contract. What is grossly unreasonable and against public policy is Defendant's sovereign approach to the mutual legal and contractual obligations to which the parties agreed.

CONCLUSION

Plaintiff's First Amended Complaint is legally sufficient as a foreclosure action. Plaintiff has standing. Plaintiff holds all rights to enforce the Note and Mortgage with no partial assignment or "bifurcation" taking place. The mortgage loan complies with the UCC and is reasonable in its application. Defendant's extreme interpretations of the documents and the law are unjustified and unreasonable. Plaintiff respectfully requests the Court to deny the Motion.

Respectfully Submitted,
JOHNSON LAW FIRM, LC

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th of April, 2016, I caused a true and correct copy of the foregoing pleading to be served to all counsel of record through the court's e-file service, and also served via First Class Mail to the following:

Mukhtiar S. Khalsa
PO Box 593
Santa Cruz, NM 87567

/s/Thomas L. Johnson
Thomas L. Johnson