UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEUTSCHE BANK NATIONAL TRUST CO., AS THE RESDENTIAL ASSET SECURITIZATION TRUST 2007-A8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-H UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2007,	§	CIVIL ACTION 4:11-CV-01658
Plaintiff,	§	
v.	§	
JOHN BURKE AND JOANNA BURKE,	§	
Defendants.	§	

BRIEFING FOR JANUARY 27, 2017 STATUS CONFERENCE

In advance of the January 27, 2017 status conference, the Court requested the parties brief the following three issues following remand of this case from the Fifth Circuit. Dkt. No. 119. Accordingly, Defendants John Burke and Joanna Burke file this briefing.

1. **Deutsche Bank has not satisfied its burden to prove a valid homestead lien under Article XVI, Section 50 of the Texas Constitution.**

Deutsche Bank, as the holder of a deed of trust, sought to foreclose on Mr. and Mrs. Burkes' home by filing this declaratory judgment suit for a non-judicial foreclosure sale pursuant to Texas law. This Court held a bench trial on February 6, 2015, when the following exhibits were admitted into the record:

- Deed of Trust (Security Instrument), PX 1, page 34, line 7;

- The Assignment of the Deed of Trust, purporting to assign all rights under the Burkes' loan agreement to Deutsche Bank, PX 2, page 34, line 7;
- The Home Equity Note (Fixed Rate- First Lien), DX 11, page 48, line 16;
- The Notice of Default dated March 9, 2010 sent by IndyMac Mortgage Services giving the Burkes notice of default and an opportunity to cure by April 10, 2010, was admitted as PX 4, page 50;
- The Notice of Acceleration dated February 10, 2011 sent by a law firm representing the mortgage servicer (OneWest Bank FSB) giving formal notice of default and acceleration of the maturity of the debt, PX 5, page 48, line 15.
- Four days after closing, the Burkes received loan documents from the lender including an unsigned loan application form falsely declaring that the borrowers' employment income was $10,416.67 a month, DX 2, pp 78-80;

The trial record demonstrates that the home equity lien fails to comply with the Constitution in several respects, including:

- The application for the extension of credit was not voluntary, written, and consented to by all owners and their spouses in violation of Tex. Const. art. XVI, § 50(a)(6)(A), (Q)(v). When the Burkes complete their loan application, they did not claim any employment income. Trial Record 80-82. The Burkes received from the lender an unsigned loan application form falsely declaring that the borrowers' employment income was $10,416.67 a month. DX 2. The false income declaration was knowingly made by the lender, IndyMac, because the Burkes never claimed any employment income during the loan process. Trial Record 80-82. The Burkes were retired. *Id.* at 81, line 16. The Burkes promptly notified IndyMac of the

inaccurate income figure, but no satisfactory answer was ever given. Trial Record 83-84. Mr. Burke since learned that IndyMac would enter "false income so that [the loan] could be underwritten and successfully passed and that would obtain FDIC insurance." *Id.* at 80

- The lender failed to correct its failure to comply with its obligations after being notified by the Burkes of the defectiveness of the loan application in violation of Tex. Const. art. XVI, § 50(a)(6)(Q)(x). Mr. Burke testified to contacting IndyMac about the false income information and that IndyMac failed to address the issue. Trial Record 83-84. Thus, the Burkes notified IndyMac and IndyMac failed to cure the issue as set forth in Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(a-f).
- The value of total indebtedness exceeded 80% of the home's total value in violation of Tex. Const. art. XVI, § 50(a)(6)(B). The amount of the extension of credit was $615,000. PX 1. The appraiser instructed by IndyMac appraised the home verbally to the Defendants as $740,000. The loan-to-value ratio was then 83.1 %. At closing the recorded value was $770,000.[1] The home equity loan refinancing or modifications was manipulated to a loan-to-value ratio of 79.77%.
- The loan closed earlier than 12 days after the borrower applied for it in violation of Tex. Const. art. XVI, § 50(a)(6)(M)(i). The closing date was May 21, 2007. The Burkes never submitted an application to get this loan. Trial Record 83, line 11. The Burkes initially submitted an application for a loan to a woman who worked for IndyMac bank. That loan application was turned down. *Id.* at 82, line 11. Some time thereafter, IndyMac contacted the Burkes to redo the mortgage and informed

[1] The Acknowledgement Regarding Fair Market Value of Homestead Property lists the fair market value of the residence to be $770,000. This is not part of the trial record.

them that the previous woman representative had been terminated. The loan application was resubmitted with the false income information and "was never sent to [Mr. Burke] for signature, or [Ms. Burke]." *Id.* at 82, line 11. It appears there was no time between when the Burkes applied for the loan and when the loan closed.

- The lender failed to provide a copy of the loan application and all executed documents signed by the Burkes *at closing* related to the extension of credit in violation of Tex. Const. art. XVI, § 50(a)(6)(Q)(v). Mr. Burke testified to receiving the loan application documents not at closing, but four days after closing. Trial Record 79, lines 10-12. That is when the Burkes realized that the documents falsely declared their income to be $10,416.67. *Id.*; DX 2.

These are the deficiencies that are apparent from the trial record. There may be other ways the loan is invalid under the Texas Constitution but are not yet evident from the trial record.

2. In a declaratory action, it is the creditor, here Deutsche Bank, that bears the burden of proving a constitutionally valid lien on the homestead.

The ultimate issue of whether a lender has a valid lien on homestead property is a question of law. *Florey v. Estate of McConnell*, 212 S.W.3d 439, 445 (Tex. App.—Austin 2006, pet. denied) (citing *Commonwealth Land Title Co. v. Nelson*, 889 S.W.2d 312, 321–22 (Tex. App.—Houston [14th Dist.] 1994, writ denied)). Where the facts are disputed, the burden of proving constitutional compliance to create a valid lien rests on the lender. Section 50(a) provides that homesteads are protected from forced sale for the payment of debts except for certain specifically enumerated debts. Case law sets forth the respective burdens of the homeowner and the lender where the existence of a valid Section 50 lien is disputed.

The homeowner has the initial burden: "The party claiming a homestead exemption has the burden to prove that the property constituted a homestead at the time the deed of trust was executed." *See Chase Manhattan Mortg. Corp. v. Cook*, 141 S.W.3d 709, 713 (Tex. App.—Eastland 2004, no pet.) (citing *Burk Royalty Co. v. Riley*, 475 S.W.2d 566, 568 (Tex. 1972); *Gregory v. Sunbelt Savings, F.S.B.*, 835 S.W.2d 155, 158 (Tex. App.—Dallas 1992, writ denied); *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 313 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)).

If the homeowner meets this burden, "then the creditor has the burden to prove that the debt falls within one of the excepted debts listed in Article XVI, section 50(a)." *Cook*, 141 S.W.3d at 713-14 (citing *Lifemark Corp.*, 655 S.W.2d at 314). In Section 50 cases, it is always the lender's burden to prove that it has complied with the Constitution and thereby brought into existence a valid lien. *See Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 784-85 (Tex. 1988) ("A lien on a homestead can be created only in the manner set out in the Constitution. … First State Bank had the burden to prove that a lien existed.").

The *Lifemark Corporation* decision illustrates that a lender's failure to prove constitutional compliance renders its lien void such that all it has is a loan. In that case, money was lent to a party who used it to purchase a home, but the loan did not comply with the constitutional requisites to create a homestead lien. The court held that it was the lender's burden to prove the existence of a valid lien:

> Obviously, the trust deed and lien with which [the lender] secured its loan and promissory note were void. Tex. Const. Art. XVI, § 50; *Cade v. Dudney*, 379 S.W.2d 370 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.). ... [The lender] has failed to meet its burden of proving the existence of a valid purchase money lien. This is simply a loan, and nothing more.

Lifemark Corp., 655 S.W.2d at 313-14.

This rule in *Hruska* and illustrated in *Lifemark Corporation* is consistent with holdings in the foreclosure cases and in other types of liens. *See Lindig v. Johnson City State Bank*, 41 S.W.2d 222, 225 (Tex. Comm'n App. 1931, holding approved) (bank seeking to foreclose had the burden to prove the validity of its lien); *Weeks v. First State Bank of De Kalb*, 207 S.W. 973, 974 (Tex. Civ. App.—Texarkana 1918, no writ) (lender had initial burden to prove "the existence of the lien"); *see also Murray v. Cadle Co*., 257 S.W.3d 291, 296 (Tex. App.—Dallas 2008, pet. denied) ("The party seeking to foreclose a judgment lien has the burden of proving [compliance with statutory requirements].").

The point is that to exercise rights on a lien, it must be valid, and the burden of proving this is on the lienholder. Thus, it is clear that Deutsche Bank has the burden here. Furthermore, "[t]he ultimate burden of proof is upon the party who, upon the pleadings, asserts the affirmative claim, and who, therefore, in the absence of evidence will be defeated . . . ." *McCart v. Cain*, 416 S.W.2d 463, 466 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.) (citation omitted). Deutsche Bank has asserted an affirmative claim by petitioned the Court for a declaratory judgment authorizing non-judicial foreclosure.

3. The *EverBank* decision does not appear to be a basis for departing from the Fifth Circuit decision in this case.

The Court previously concluded that the MERS assignment to Deutsche Bank was invalid in part because it was signed by MERS in its capacity as agent or "nominee" rather than as principal or "beneficiary." Dkt. No. 94 at ¶ 10; *see* Assignment of Deed of Trust. On appeal, the Fifth Circuit rejected this argument, noting that just because "the assignment did not state that MERS was acting in its capacity as beneficiary [would] not change [its] analysis." *Deutsche Bank Nat'l Trust Co. v. Burke*, 655 Fed. Appx. 251, 254 (5th Cir. 2016) (citing *Allen v. Bank of Am., N.A.*, No. EP–14–CV–429–KC, 2015 WL 1726986, at *8 (W.D. Tex. Apr. 15, 2015) (reviewing the security

instrument to conclude that MERS was a beneficiary and thus "MERS had every right to assign its interest in the Property to Deutsche Bank.")). After reviewing the Fifth Circuit decision and the *EverBank* decision, we do not see a basis for departing from the Fifth Circuit's decision. *See EverBank, N.A. v. Seedergy Ventures, Inc.*, 499 S.W.3d 534, 541 (Tex. App.—Houston [14th Dist.] 2016), *reh'g overruled* (Aug. 9, 2016).

In *EverBank*, the Fourteenth Court of Appeals held that an assignee bank, EverBank, had standing to foreclose on a property because the assignee bank was the holder of the underlying note. The homeowner, Seedergy Ventures Inc., has argued that that EverBank was neither the holder of the note under Texas law nor the owner of the note with the right to enforce it. Seedergy relied on *Nueces County v. MERSCORP Holdings, Inc.*, 2:12-CV-00131, 2013 WL 3353948 (S.D. Tex. July 3, 2013) for this proposition. The *EverBank* discussion focused on whether MERS could be *a holder of a promissory note*, not whether MERS's *ability to assign a deed* could be impacted by its designation as agent or "nominee" rather than a principal or "beneficiary." Ultimately, the Fourteenth Court of Appeals held EverBank had standing to foreclose on the property because it was holder of the note.

Here, MERS is a beneficiary to the Security Interest here. Thus, "MERS, as the beneficiary of a security instrument and a book entry system, 'had the authority to transfer the Security Instrument together with the power to foreclose to another party.'" *Deutsche Bank Nat'l Trust Co. v. Burke*, 655 Fed. Appx. at 254 n.1 (quoting *Casterline*, 537 Fed.Appx. at 317; *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing has been served on all counsel of record on this 23rd day of January, 2017, via electronic filing. Any other counsel of record will be served by facsimile transmission and/or first class mail.

/s/ Constance H. Pfeiffer

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