



Possession With Intent To Foreclose

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In *Wells Fargo Bank, N.A. v. Mitselmakher et. al.*, the Supreme Court of New York, Richmond County held that Wells Fargo Bank (“Plaintiff”) had standing to foreclose and demonstrated through admissible business records that its counsel possessed the original note prior to commencement of the foreclosure proceeding.

The issue of pre-commencement possession of negotiable instruments is governed by Article III of the Uniform Commercial Code. The question before the Court was whether Plaintiff was entitled to commence a foreclosure action in July of 2014 when its authorized counsel came into possession of the original promissory note and accompanying allonge in June of 2014. The Court addressed whether 1) Plaintiff’s counsel possessed the *original* promissory note and, if so, whether 2) Plaintiff’s *counsel* holding the instruments prior to the foreclosure action satisfies the legal requirement that the plaintiff must hold the note at the time of commencement.

Plaintiff, bearing the burden of proving possession by a preponderance of the evidence, presented evidence that the original note and allonge were delivered by traceable carrier to the law firm, scanned into the firm’s Case Management System (CMS), dated and time stamped, and stored in a secure room on June 10, 2014. Plaintiff’s counsel also executed an affidavit of note possession that addressed pre-commencement possession. The foreclosure proceeding commenced a month later in July 2014. Defendant contended the firm’s business records were inadmissible, citing the absence of identifying metadata and concerns regarding the credibility of the filing system. Defendant also urged the court to reject the affidavit and claimed the note produced in the action was inauthentic, raising concerns about a foreclosure proceeding initiated in 2009. Additionally, the defendant argued that *counsel’s* possession should not satisfy the plaintiff possession requirement for foreclosure proceedings.

Under Article III of the UCC, the only parties entitled to enforce a negotiable instrument are (1) holder of the instrument, (2) non-holder in possession of the instrument who has the rights of a holder, and (3) certain limited persons not in possession but with statutory rights to enforce the negotiable instrument. However, the Court applied UCC §§ 3-203 and 3-204 to conclude that Plaintiff’s delivery of the note and allonge to counsel qualified as a transfer of the instrument under the UCC, vesting counsel with constructive possession and allowing counsel the right to enforce the negotiable instrument. Therefore, Plaintiff’s counsel was entitled to enforce the note under UCC § 3-301 as of June of 2014.

The Court relied on Plaintiff’s credible witness testimony, affidavit, and the admissible business records evidence in its conclusion that Plaintiff’s counsel possessed the note and accompanying allonge as of June 10, 2014. As for Defendant’s concerns regarding the authenticity of the negotiable instruments, the Court cited Article III’s emphasis on “present possession and enforceability at the time of commencement” and rejected Defendant’s concerns as speculative, highlighting the lack of evidence and absence of competing documentation offered to support their claim. The Supreme Court of New York, Richmond County denied Defendant’s objections to both standing and the admissibility of business records to establish possession of the note, and ultimately ruled that Wells Fargo Bank, N.A. has standing to foreclose.