

1
2
3
4
5 IN THE UNITED STATES BANKRUPTCY COURT
6 FOR THE DISTRICT OF ARIZONA
7

8
9 ANDREW BAILEY,
10

11
12 Debtor.

13 ANDREW BAILEY,
14

15 Plaintiff,
16

17 v.
18

19 THE BANK OF NEW YORK MELLON, as
20 trustee of the CWALT, Inc. Alternative Loan
21 Trust 2007-HY4 Mortgage Pass-Through
22 Certificates, Series 2007-HY4; BAC HOME
23 LOANS SERVICING LP; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS
INC; John Does 1-20 inclusive; and all
persons claiming by, through or under such
person, all persons unknown, claiming any
legal or equitable right, title, estate, lien, or
interest in the property described in the
complaint adverse to Plaintiff's title thereto,
24

25 Defendants.
26

Chapter 11

Case No. 09-bk-6979-RTBP

Adv. No. 09-ap-01728-SSC

(Not for Publication- Electronic Docketing
ONLY)

MEMORANDUM DECISION DISMISSING
COMPLAINT WITHOUT PREJUDICE

27 I. INTRODUCTION
28

Andrew C. Bailey, a debtor in a voluntary chapter 11 proceeding, filed a
complaint against BAC Home Loans Servicing, LP ("BAC"); The Bank of New York Mellon

1 (“BNY Mellon”), in its capacity as trustee of the CWALT, Inc. Alternative Loan Trust
2 2007-HY4 Mortgage Pass-Through Certificates, Series 2007-HY4 (“Trust”); Countrywide Home
3 Loans Servicing, LP (erroneously named as Countrywide Home Loans) (“CHL”), and Mortgage
4 Electronic Registration Service (erroneously named as The Mortgage Electronic Registration
5 Service) (“MERS”) (collectively, “Defendants”) on December 23, 2009.¹ As background for
6 this current decision, the Court has repeatedly encouraged or strongly recommended that the
7 Plaintiff retain counsel to assist him. For a variety of reasons, the Plaintiff has consistently
8 refused. This decision now considers the Defendants’ Fourth Motion to Dismiss the Complaint.
9 As to the first two motions to dismiss, the Court denied the relief requested by the Defendants
10 and afforded the Plaintiff the opportunity to amend his Complaint. The Court entered decisions
11 on the record as to the defects in the First Amended and Second Amended Complaint filed by the
12 Plaintiff.² As to the Third Amended Complaint, the Court issued a Memorandum Decision on
13 July 30, 2010, dismissing the Plaintiff’s Complaint without prejudice. The Court found that the
14 Plaintiff had no support at that time for his claims. However, the Court did find that Plaintiff
15 was entitled to certain information that might normally be provided to a borrower under the Fair
16 Debt Collection Practices Act, 15 U.S.C. §1692 (West 2010), the Federal Truth-in-Lending Act,
17 15 U.S.C. §§ 1601-1665 (West 2010), and/or the Real Estate Settlement Procedures Act, 12
18 U.S.C. §2605 (West 2010). Rather than dismiss the Third Amended Complaint with prejudice,
19 the Court determined that the Plaintiff should carefully review what claims he could assert
20 against the Defendants, and provided the Plaintiff with the final opportunity to assert cognizable
21 claims against the Defendants in a Fourth Amended Complaint.

22
23
24 **1.** The Adversary Proceeding was designated No. 2:09-ap-01728-RTBP. Because the
25 Honorable Redfield T. Baum entered an order of recusal from hearing any matter pertaining to
26 Bank of New York Mellon, the undersigned judge was randomly assigned to hear the contested
27 matters or adversary proceedings pertaining to these Defendants.

28 **2.** See Docket Entries No. 25 and 30. Those decisions are incorporated herein by
reference.

1 In this Memorandum Decision, the Court has set forth its findings of fact and
2 conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The issues
3 addressed herein constitute a core proceeding over which this Court has jurisdiction. 28 U.S.C.
4 §§ 1334(b) and 157(b) (West 2010).

5 II. FACTUAL BACKGROUND

6 The Plaintiff executed a promissory note (“Note”) on March 29, 2007. The
7 Defendant, BNY Mellon, provided a series of endorsements on the Note, reflecting that
8 Countrywide Bank, FSB, as the initial payee, transferred its interest to Countrywide Home
9 Loans, Inc., which transferred its interest, by blank endorsement, to any holder in due course.³

10 At the same time, the Plaintiff executed a deed of trust concerning the property
11 located at 2560 North Page Springs Rd, Cornville, AZ 86325 (“Deed of Trust”), which was
12 recorded in Yavapai County on May 4, 2007.⁴ The Deed of Trust serves as security for the
13 repayment of the Note. The Plaintiff currently resides at the property and also utilizes it as a
14 place for his business operations.

15 On May 1, 2007, several months after the closing on Plaintiff’s loan, Bank of
16 New York, now BNY Mellon, became the trustee of the Alternative Loan Trust 2007-HY4
17 pursuant to a pooling and servicing agreement (“PS Agreement”).⁵ Pursuant to the PS
18 Agreement, Countrywide Home Loans was the master servicer⁶ of all notes and deeds of trust

19
20 **3.** See the Declaration of Jacqui E. Whitney, Docket Entry No. 180, in the administrative
21 case, No. 09-bk-6979-RTBP. The Declaration has a series of endorsements set forth on the last
22 page of the Note, which is Exhibit A to the Declaration.

23 **4.** Id. The duly recorded Deed of Trust is attached to Ms. Whitney’s Declaration as
24 Exhibit B.

25 **5.** See Declaration of Ms. Whitney, Docket Entry No.180, in Administrative Case No.
26 09-bk-6979-RTBP.

27 **6.** Because Countrywide Home Loans, and certain affiliated or related entities, were
28 acquired by Bank of America, the servicing duties were transferred to one or more Bank of
America entities. BAC Home Loans Servicing LP is now the master servicer of the Plaintiff’s

1 placed in the pool of loans that constituted the corpus or res of the Trust. The Plaintiff's Note
2 and Deed of Trust were received by The Bank of New York Mellon Trust Company, N.A.
3 ("BNY Trust"), as custodian for BNY Mellon, on May 23, 2007, and were placed in the BNY
4 Trust vault in Cypress, California, the same day.⁷ Plaintiff's Note and Deed of Trust were
5 removed from the vault on January 6, 2011, as ordered by this Court for the January 19, 2011,
6 hearing.⁸ BNY Trust does not maintain records regarding whether the Plaintiff's file was
7 accessed between May 23, 2007, and January 6, 2011.⁹

8 BNY Mellon and the BNY Trust entered into a separate Servicer Level
9 Agreement in which BNY Trust was designated the agent responsible for all collateral
10 documents to be held by BNY Mellon, as Trustee for the Alternative Loan Trust 2007-HY4
11 under the PS Agreement.¹⁰ The BNY Mellon affiants state that they have verified and confirmed
12 that the original Note, with the various endorsements as set forth above, is in the possession of
13 BNY Trust as the designated agent of BNY Mellon as Trustee for the Trust.¹¹

14 Section 2.01(c)(i)(A) of the PS Agreement provides that the transfer of loans is
15 effective upon the delivery to the trustee of the Trust of

16 the original Mortgage Note endorsed by manual or facsimile
17 signature in blank in the following form: "Pay to the order of
18 _____ without recourse," with all intervening
19 endorsements showing a complete chain of endorsements from the

20 Note and Deed of Trust. Mortgage Electronic Registration System ("MERS") is the original
21 nominee under the Deed of Trust and still acts in that capacity

22 **7.** *See* Supplemental Declaration of Keri A Giardino, Docket Entry No. 70, in the current
23 Adversary Proceeding (09-ap-1728-SSC).

24 **8.** Id.

25 **9.** Id.

26 **10.** Id., *See also* Declaration of Ms. Susan Elsner, Docket Entry No. 181, Administrative
27 Case No. 09-bk-6979-RTBP.

28 **11.** Id.

1 originator to the Person endorsing the Mortgage Note (each such
2 endorsement being sufficient to transfer all right, title and interest
3 of the party so endorsing, as noteholder or assignee thereof, in and
4 to that Mortgage Note).¹²

5 The original Note¹³ is endorsed from the original lender, Countrywide Bank, FSB,
6 to Countrywide Home Loans, Inc., who then endorsed the Note, in blank, as follows: "PAY TO
7 THE ORDER OF _____ WITHOUT RECOURSE."¹⁴ As mentioned above, BNY
8 Trust as the designated agent of BNY Mellon, was in possession of the Note when it was
9 removed on January 6, 2011.

10 At the January 19 hearing, after reviewing what was held in the custodial file and
11 to resolve all issues between the Plaintiff and the Defendants, the Court ordered the Defendants
12 to provide the original or an assignment of the Deed of Trust. Defendants have failed to do so.
13 The Plaintiff asserts that the PS Agreement requires the Defendants to record an assignment of
14 the Deed of Trust within 120 days of the Loan being placed in the Trust. In support of his
15 position, the Plaintiff cites to a portion of Section 2.01(c) of the PS Agreement, which provides
16 as follows::

17 As promptly as practicable subsequent to such transfer and
18 assignment, and in any event, within one hundred twenty (120)
19 days after such transfer and assignment, the Trustee shall (A) as
20 the assignee thereof, affix the following language to each
21 assignment of Mortgage: "CWALT Series 2007-HY4, The Bank
22 of New York as trustee", (B) cause such assignment to be in proper
23 form for recording in the appropriate public office for real property
24 records and (C) cause to be delivered for recording in the
25 appropriate public office for real property records the assignments

26
27 **12.** See Pooling and Servicing Agreement dated May 1, 2007 ("PS Agreement"), p. 44.
28 attached as Exhibit A to Defendants' Supplemental Memorandum in Support of Motion to
Dismiss, Docket Entry No. 69 in the current Adversary Proceeding (09-ap-1728-SSC).

13. A copy of the original Note is attached as Exhibit A to the Declaration Of Jacqui
Whitney, Docket Entry No. 180, Administrative Case No. 09-bk-6979-RTBP. As noted
previously, the Court reviewed the original Note when the custodial file was presented to it at the
January 2011 hearing.

14. See Note, at 4.

1 of the Mortgages to the Trustee¹⁵

2 The Defendants argue that this portion of the PS Agreement relates to non-MERS
3 loans only and is, therefore, inapplicable to the Plaintiff’s loan. They state that there is no
4 requirement that loans originated as MERS loans (such as the Plaintiff’s loan) be accompanied
5 by a separate assignment document. The Defendants rely on Section 2.01(c)(iii) of the PS
6 Agreement in support of their position, which outlines the requisite documentation to be held by
7 BNY Mellon, as Trustee, and states as follows:

8 (iii) in the case of each Mortgage Loan that is not a MERS
9 Mortgage Loan, a duly executed assignment of the Mortgage or a
10 copy of such assignment, with recording information (which may
11 be included in a blanket assignment or assignments), together with,
12 except as provided below, all interim recorded assignments of such
13 mortgage or a copy of such assignment, with recording
14 information (each such assignment, when duly and validly
15 completed, to be in recordable form and sufficient to effect the
16 assignment of and transfer to the assignee thereof, under the
17 Mortgage to which the assignment relates) . . . ;¹⁶

14 III. DISCUSSION

15 The Court requested further information on the endorsements allowed under the
16 PS Agreement because the Plaintiff insisted that only specific endorsements were valid. As
17 noted in the portion of the PS Agreement cited herein, Plaintiff is mistaken. The PS Agreement
18 clearly states that the Note may be endorsed “in blank in the following form: ‘Pay to the order of
19 _____ without recourse,’ ” Plaintiff also incorrectly argues that the other language in the
20 same portion of the PS Agreement, requiring that “all intervening endorsements showing a
21 complete chain of endorsements from the originator to the Person endorsing the Mortgage Note,”
22 requires something more than blank endorsements. Blank endorsements are clearly allowed
23 under the PS Agreement, and a complete chain of endorsements is clearly contained on the Note.
24

25 _____
26 **15.** See PS Agreement, p. 47.

27 **16.** See PS Agreement, p. 45.

1 As mentioned above, the original Note is endorsed from the original lender, Countrywide Bank,
2 FSB, to Countrywide Home Loans, Inc., who then endorsed the Note, in blank, as follows: "PAY
3 TO THE ORDER OF _____ WITHOUT RECOURSE." This was sufficient to
4 transfer the interest in the Note pursuant to the PS Agreement.

5 The Court also requested information on the placement of the Plaintiff's loan into
6 the Trust. The Plaintiff's custodial loan file was placed in the BNY Trust vault, as agent for
7 BNY Mellon, on May 23, 2007. Since the PS Agreement was signed on May 1, 2007, the
8 custodial loan file was properly placed in the custody of BNY Trust within the 30-day period.
9 Therefore, any arguments of the Plaintiff to the contrary are not valid.¹⁷

10 However, the Defendants have not produced an assignment of the Plaintiff's Deed
11 of Trust reflecting its transfer to BNY Mellon. BNY Mellon argues that an assignment of the
12 Deed of Trust is not required in this case, because Plaintiff's loan was a MERS loan and the PS
13 Agreement does not require MERS loans to include a separate assignment of the deed of trust in
14 order to be included in the CWALT Trust. The Defendants' conclusion misses the point. Even
15 if the assignment is not required under the PS Agreement, it may create an issue as to the nature,
16 extent, and validity of the security interest vis a vis the Plaintiff as a debtor in possession in this
17 Chapter 11 case.

18 By way of background, in reviewing whether a creditor asserting a lien on real
19 property has set forth a *prima facie* case (in a motion for relief from the automatic stay, for
20 example), the court must consider under what chapter of the Bankruptcy Code the debtor has
21 filed. For instance, if the individual debtor has filed a chapter 7 petition, a trustee in bankruptcy
22 is appointed and is charged with collecting and liquidating, if necessary, the non-exempt
23 _____

24 **17.** The Court is somewhat troubled by BNY Trust's statement that it does not maintain
25 records reflecting whether its custodial files are accessed, or removed, after being placed in its
26 vault. The absence of records may create a dispute as to whether a particular file may have been
27 improperly handled or altered. However, when this Court reviewed the custodial loan file for
28 Plaintiff's loan, it did not see any irregularities or alterations on any of the documents contained
in the file.

1 property of the debtor for distribution to the debtor's creditors, according to the priorities set
2 forth in the Bankruptcy Code.¹⁸ The trustee in bankruptcy may increase the amount of property
3 of the estate available for distribution to creditors by exercising certain avoidance powers
4 enumerated, *inter alia*, in Bankruptcy Code Sections 544, 547, and 548.¹⁹ An individual debtor
5 may acquire the same duties and responsibilities of a trustee in bankruptcy by filing a chapter 11
6 petition, seeking to reorganize or to file a plan of liquidation.²⁰ Because the debtor in possession
7 is vested with the same powers of the trustee, the debtor in possession may pursue avoidance
8 actions as well.²¹ In this case, the individual Debtor filed a chapter 11 petition seeking to
9 reorganize, and no bankruptcy trustee has yet been appointed in this case. As a result, the Debtor
10 exercises the rights of a bankruptcy trustee concerning the ability to avoid certain transfers or
11 transactions.

12 Because of the avoidance powers of the bankruptcy trustee or the debtor in
13 possession, this Court requires that if a party seeking relief from the automatic stay asserts a
14 perfected security interest in any property of the estate, that moving party must be able to present
15 at least a *prima facie* case that it has such a perfected security interest under applicable law.²²
16 The fact that the transaction is not avoidable between the parties to the underlying loan
17 transaction is not dispositive of whether the transaction may be avoided by third parties that are,
18 for instance, *bona fide* purchasers.²³

19 The Court is aware of ARS § 33-817, which states, "The transfer of any contract
20

21 **18.** See, for instance, 11 U.S.C. §§ 701, 702, 704, 541, 522, 507, and 726 (West 2010).

22 **19.** See 11 U.S.C. §§ 544, 547, and 548 (West 2010).

23 **20.** See 11 U.S.C. §§ 1101, 1107, 1108, 1121, and 1129 (West 2010).

24 **21.** See 11 U.S.C. §§ 1107, 544, 547, and 548 (West 2010).

25 **22.** Nor is such a requirement unusual. See In re DBSI, Inc., 432 B.R. 126 (Bankr. D.
26 Del. 2010); In re Gunnison Center Apartments, LP., 320 B.R. 391 (Bankr. D. Colo. 2005).

27 **23.** See 11 U.S.C. § 544(a)(3) (West 2010).

1 or contracts secured by a trust deed shall operate as a transfer of the security for such contract or
2 contracts.” ARS § 33-817. The Court further acknowledges that the Supreme Court of Arizona
3 has held that a mortgage is a “mere incident to the debt,” and its “transfer or assignment does not
4 transfer or assign the debt or the note,” but “the mortgage *automatically* goes along with the
5 assignment or transfer” of the note. Hill v. Favour, 84 P.2d 575, 578 (Ariz. 1938) (emphasis
6 added). However, ARS §33-818 poses a potential problem. It states, in pertinent part:

7 [A]ssignment of a beneficial interest under a trust deed, . . . shall
8 from the time of being recorded impart notice of the content to all
9 persons, including subsequent purchasers and encumbrancers for
10 value.

11 Given that the Arizona legislature has not rescinded Section 33-818, it must be interpreted in a
12 manner that allows it to be consistent with other statutory provisions without reducing the
13 Section to surplusage. An Arizona appellate court, in reviewing the issues, stated that Arizona
14 law requires that if a secured creditor with a lien on the borrower’s real property wishes to
15 ensure that said interest is not subject to the claims of a *bona fide* purchaser, that secured creditor
16 should record an assignment of its interest with the Recorder in the County in which the
17 borrower’s real property is located. If notice of the assignment has not been provided, through
18 recordation, the secured creditor may have its interest avoided by a *bona fide* purchaser. *See*
19 Rodney v. Arizona Bank, 836 P.2d 434, 172 Ariz. 221 (Ariz. App. Div. 2 1992) (Unless and
20 until the transferee of the beneficial interest in the deed of trust records an assignment of the
21 deed of trust, the security interest in the real property remains unperfected.).²⁴ Thus, under
22 Arizona law, a potential subsequent *bona fide* purchaser for value may have a basis to set aside
23 an assignment of real property that is not duly recorded. Whether this Debtor has the ability to
24 proceed, as a Debtor in Possession, and set aside BNY Mellon’s secured transaction is not
25 currently before this Court. However, BNY Mellon could have resolved the issue if it had

26 **24.** The Appellate Court sets forth, *in dicta*, an interesting analysis of the rights and
27 remedies of the borrower vis a vis the original lender and the relative priorities of two lenders
28 that believed that they obtained a perfected security interest on the borrowers’ real property.

1 service thereon.

2

DATED this 3rd of May, 2011.

3

4



5

Honorable Sarah Sharer Curley
United States Bankruptcy Judge

6

7

BNC TO NOTICE

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28