

**United States Bankruptcy Court
For the District of Massachusetts
Western Division**

In re
Paul M. Jones

Debtor

Case No. **07-10729**
Chapter 13

MOTION TO VACATE ORDER GRANTING RELIEF FROM AUTOMATIC STAY

To the Honorable Joan N. Feeney, U.S. Bankruptcy Judge:

Debtor requests the Court to vacate its August 27, 2007 order granting relief from the automatic stay to Bank of New York, Trustee. In so doing, debtor asserts that (1) respondent Bank of New York, Trustee did not have standing when it earlier sought relief from the stay to foreclose on the Mortgage lien on debtor's residence, that (2) it equally did not have standing under the Mortgage Note, and that (3) ineffective assistance of now-suspended original counsel precludes meaningful relief against original counsel. Reinstatement of the automatic stay will stop the October 23, 2008 bench trial in the Stoughton District Court on Bank of New York, Trustee's complaint to evict the debtor from his residence, which follow its purchase of debtor's residence at the foreclosure sale. In support thereof, debtor states:

1. Debtor's Chapter 13 petition was filed on February 7, 2007.

2. Bank of New York as Trustee for the Certificate Holders, CWABS, Inc., Asset-Backed Certificates, Series 2004-7, moved for relief from the automatic stay on August 8, 2007, seeking to recommence foreclosure proceedings on debtor's residence at 572 Park Street in Stoughton, MA. Debtor, through original counsel, requested and obtained an extension of the response deadline but never filed a response so relief was granted. The residence was sold at auction to Bank of New York, Trustee on December 3, 2007. A bench trial is scheduled in Stoughton District Court on October 23, 2008 on Bank of New York, Trustee's efforts to evict debtor.

I. The Absence of Standing Under the Mortgage

4. It is black letter law that a movant must have standing to request judicial action. In the mortgagee or servicer stay relief context, the movant must have rights to the mortgage before proceeding. This Court has taken the lead among bankruptcy courts nationally to apply this maxim to mortgagees, and to deny stay relief where standing is absent. *In re Hayes*, 393 B.R. 259 (Bankr D. Mass. 2008) (Feeney, J.); *In re Maisel*, 378 B.R. 19 (Bankr.D. Mass. 2007) (Rosenthal, J.); *In re Schwartz*, 366 B.R. 265 (Bankr.D.Mass. 2007) (Rosenthal, J.).
5. Indeed, "a defect in standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent." *U.S. v. AVX Corp.*, 962

F.2d 108, 116 n. 7 (1st Cir.1992).” *In re Hayes*, 393 B.R. 259, ___ (Bankr. D. Mass. 2008) (quotation in original).

6. The mortgage *sub judice* is attached hereto as Exhibit A. It is the subject of four presumptively contradictory assignments, collectively attached hereto as Exhibit B.
7. Working backwards chronologically, Bank of New York, Trustee asserted in Paragraph 5 of its August 8, 2007 Motion that was the present holder of the relevant mortgage on debtor's residence, said mortgage being from debtor to Mortgage Electronic Registration Systems as nominee for Optima Mortgage Corporation. Exhibits attached to that Motion show that the June 22, 2004 mortgage was recorded nine months later, on March 29, 2005, and that MERS as nominee for Optima Mortgage Corporation purported to assign the mortgage to Bank of New York, Trustee for the Certificate Holders, CWABS, Inc., Asset-Backed Certificates, Series 2004-7.
8. The exhibited Assignment was undated but was notarized on November 20, 2006. The notary date, **if truthful**, would demonstrate that this Assignment predated the August 8, 2007 Motion even if the signature itself is not dated.
9. The January 10, 2008 Foreclosure Deed for this Mortgage, also included in Exhibit A, was signed by Bank of New York, Trustee for the Certificate Holders,

CWABS, Inc., Asset-Backed Certificates, Series 2004-7 and recorded on February 25, 2008. Concurrent with the recording of this Foreclosure Deed was the second Assignment of this Mortgage, included in Exhibit B, signed October 10, 2006 and notarized on January 25, 2008. This Assignment also purported to have MERS as nominee for Optima Mortgage Corporation assign the mortgage to Bank of New York, Trustee for the Certificate Holders, CWABS, Inc., Asset-Backed Certificates, Series 2004-7. The notary's handwritten revision of the notarization date is worthy of note. Still, the signature date, **if truthful**, predates the August 8, 2007 Motion.

10. The remaining two possible Assignments of this mortgage, also included in Exhibit B, come from the Mortgage's June 22, 2004 closing package delivered to the debtor. Please see the concurrently filed Debtor's Affidavit. As with all other documents in that closing package, including the Mortgage and Note, these two Assignments are not signed. One is drafted to be from Optima Mortgage Corporation to Countrywide Document Custody Services, a Division of Treasury Bank, N.A. The other is drafted to be from Mortgage Electronic Registration Systems, Inc. as Nominee for Optima Mortgage Corporation and the assignee's identity is left blank.
11. The post-closing execution of either of these two unsigned mortgages will materially impact on Bank of New York, Trustee's later allegation of standing. The presence of these two unsigned Assignments, in a closing package

delivered to debtor where no documents were signed and where the mortgage was recorded nine months after execution and in conjunction with the other two assignments for the same mortgage but each with irregularities in their execution, raises serious questions about when and even if the Mortgage at issue was ever or correctly assigned to Bank of New York, Trustee.

12. Attached as Exhibit C is the Pooling and Servicing Agreement for CWABS, Inc., Asset-Backed Certificates, Series 2004-7 from the U.S. Securities and Exchange Commission online database. (Debtor believes as of this writing that the 170 page document can be uploaded to the Court, and will immediately deliver the Agreement to the Court if otherwise.) Page 5 of the PSA identifies CWABS, Inc. as the only Depositor, and Countrywide Home Loans, Inc. and Countrywide LFT LLC as the only two Sellers. The Bank of New York is identified as the only Trustee.
13. Section 2.01(a) of the PSA, on Page 50, has the PSA Sellers Countrywide Home Loans, Inc. and Countrywide LFT LLC transferring the applicable mortgage loans to the Depositor CWABS. The same Section 2.01(a) of the PSA, on Page 51, has the PSA Depositor CWABS, Inc. immediately transferring the applicable mortgage loans to the Trustee, Bank of New York.
14. The PSA does not authorize Bank of New York, Trustee, to accept mortgages from any entity other than CWABS.

15. Nor does the PSA authorize CWABS to accept mortgage loans from any other source besides the two sellers named in the PSA, Countrywide Home Loans, Inc. and Countrywide LFT LLC. In particular, neither Bank of New York, Trustee, or Depositor CWABS, Inc., is authorized to accept an assignment of debtor's mortgage from MERS as nominee for Optima Mortgage Corporation. Any acceptance of debtor's mortgage by Bank of New York, Trustee, or by CWABS, if indeed either ever did so, was *ultra vires* and unlawful.
16. It follows that CWABS had no lawful right to transfer debtor's mortgage to the Bank of New York, Trustee, if it ever received an assignment of the mortgage.
17. Bank of New York, Trustee had no authority to accept debtor's mortgage from any entity other than CWABS, Inc. Therefore, Bank of New York, Trustee had no rights to debtor's mortgage when it filed the August 8, 2007 motion for relief from stay.
18. Debtor has shown that a wholesale violation of MLBR 4001-1(b)(2)(F) has taken place. Bank of New York, Trustee failed to identify "every subsequent transferee" of the mortgage obligations. The grant of relief from the automatic stay should be vacated for this reason alone, as Bank of New York, Trustee must not be rewarded for its noncompliance. Debtor has been forced to do Bank of New York's work.

II. The Absence of Standing Under the Mortgage Note

15. The motion for stay relief never alleges that its movant Bank of New York, Trustee had any rights to the Mortgage Note. It follows that Bank of New York, Trustee had no standing to seek stay relief.

III. The Ineffective Assistance of Counsel

16. There is a thread in case law that a debtor, injured by the action or inaction of counsel, is limited to recourse against counsel. Debtor believes that application of this rule is not equitable in this case.
17. First is the strength of Bank of New York's errors, beginning with its obvious failure to comply with MLBR 4001-1(b)(2)(F) and ending with the meritorious grounds for debtor's assertion that Bank of New York, Trustee does not have standing. The Bank does not come before the Court with clean hands.
18. Second is the assertion that original counsel refused to oppose the Bank's motion unless he was directly paid an additional \$1,500.00 by the debtor, despite counsel's obligation to effectively and zealously advocate for the debtor, without additional payment, unless and until the Court relieves counsel from that obligation. Concurrently filed is Debtor's Affidavit on this point. The debtor did

not have the funds, so no opposition was filed and stay relief was granted on August 27, 2007.

19. Original counsel's wrongful failure to file an opposition to the stay relief motion is underscored by his August 17, 2007 Motion To Extend Time To Respond to the stay relief motion, which was allowed.
20. Additionally, attached to Debtor's Affidavit is a copy of an October 22, 2007 \$7,500.00 cashier's check purchased by the debtor and made payable to original counsel. After stay relief was granted on August 27, 2007, original counsel advised the debtor that he discovered problems with the mortgage's assignment and could hire an expert to denounce the foreclosure auction and hopefully have it suspended or cancelled if the debtor would pay this \$7,500.00 - without Court approval. Debtor then had the money and made the payment, to no avail.
21. Original counsel was later suspended from the practice of law for one year beginning on August 7, 2008 for unrelated reasons. Please see the Order of the Supreme Judicial Court of Massachusetts, attached hereto as Exhibit D.
22. Original counsel's failure to comply with this Order, notably its requirements in Paragraph 2 that he withdraw from this Case, give notice to the debtor of his disqualification and of a need to act promptly to seek substitute counsel, give notice to all other parties to this Case of his disqualification, refund unearned

fees - including the \$7,500 payment which was never approved by this Court, collectively demonstrate the likelihood that original counsel cannot make the debtor whole if he loses on the pending eviction bench trial before the Stoughton District Court.

23. Debtor's request for relief in this Motion is modest. He seeks to remain in his residence until Bank of New York, Trustee does what it ought to have already done under MLBR 4001-1(b)(2)(F) and demonstrate its standing. "It is the claimant's burden to bring information regarding the relationships between the parties to the Court." *In re Maisel*, 378 B.R. 19, 22 (Bankr. D. Mass. 2007) (Rosenthal, J.).
24. There is no injury to any third party, since Bank of New York, Trustee was the purchaser of the property at its foreclosure sale and is the plaintiff in the pending eviction suit.
25. These facts are remarkably similar to those in *In re Schwartz*, 366 B.R. 265 (Bankr.D.Mass. 2007) (Rosenthal, J.), where stay relief to allow an eviction was denied due to the apparent absence of standing for the underlying foreclosure sale.

WHEREFORE movant debtor requests that the Court reinstate the automatic stay against any action by Bank of New York, Trustee on its mortgage and the related obligations concerning debtor's residence at 572 Park Street in Stoughton, MA.

Debtor, by counsel

/s/ L. Jed Berliner, Esquire
L. Jed Berliner, Esquire, BBO No. 039950
Berliner Law Firm
95 State Street, Suite 1010
Springfield, MA 01103-2081
telephone: (413) 788-9877
facsimile: (413) 746-9877
email: ljed3@aol.com

Certificate of Service

The undersigned certifies that this document was filed with the Court in a manner appropriate for automated service of true electronic images to all ECF Registrants in this Case or Proceeding, including Respondent Bank of New York, the Chapter 13 Trustee and the U.S. Trustee, and also was served by first class mail, with postage prepaid and return address provided, to:

Original Counsel

John F. Cullen, Esquire
17 Accord Park, Suite 103
Norwell, MA 02061

Date: October 21, 2008

/s/ Jed Berliner
L. Jed Berliner