

CONCURRING OPINION BY GINOZA, J.

In this appeal, we review whether the Circuit Court of the First Circuit (circuit court) properly granted summary judgment to Defendants-Appellees Deutsche Bank National Trust Company, as Trustee of the IndyMac INDX Mortgage Loan Trust 2006-AR14, Mortgage Pass-Through Certificates Series 2006-AR14 Under the Pooling and Servicing Agreement Dated October 1, 2006 (Deutsche Bank) and OneWest Bank, FSB (OneWest Bank) with regard to Count 1 in Plaintiff-Appellant Lynette Agard's (Agard) First Amended Complaint, which asserted claims of unfair or deceptive acts or practices (UDAP) under Hawaii Revised Statutes (HRS) Chapter 480.

For the reasons stated herein, I concur with the majority that summary judgment on Count 1 was properly granted as to Deutsche Bank, but should not have been granted as to OneWest Bank.

I. UDAP Claims Against Deutsche Bank

With regard to Agard's UDAP claims against Deutsche Bank, Agard contends that conflicting evidence regarding Deutsche Bank's claim of title should have precluded summary judgment. On this issue, the decisive factor in my view is that the Adjustable Rate Note (Note) executed by Agard was transferred to Deutsche Bank. In her opening brief, Agard did not present any substantive argument questioning that Deutsche Bank properly held the Note. In her reply brief, however, Agard argues that Deutsche Bank was not a holder of the Note because a purportedly untimely assignment of *mortgage* had a reference indicating it was also assigning the related note. Even if Agard's argument in her reply brief is considered, the evidence and applicable common law do not support her contentions.

First, Deutsche Bank carried its burden to show that the Note was transferred to Deutsche Bank. In support of its summary judgment motion, Deutsche Bank submitted the declaration of Charles Boyle (Boyle) in which he attested, *inter alia*, that after the Note had been indorsed several times, it was indorsed in blank and was in the possession of Deutsche Bank. A copy of

the Note, with the endorsements, was attached to Boyle's declaration. Moreover, by the time the circuit court granted summary judgment to Deutsche Bank on Count 1, both Agard and Deutsche Bank had submitted to the circuit court copies of Deutsche Bank's interrogatory responses, which were verified by Boyle, and which stated in relevant part that Deutsche Bank became the owner of the subject loan for the benefit of the certificate holders of the Trust as of the closing date of the Trust, which was October 31, 2006. Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e) provides in pertinent part that "[t]he court may permit affidavits to be supplemented or opposed by . . . answers to interrogatories . . . ."1

Second, as stated in the majority opinion, the common law provides that when there is a note and related mortgage, the mortgage automatically transfers with the underlying note. Carpenter v. Longan, 83 U.S. (16 Wall.) 271, 274 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it[.]"); In re Veal, 450 B.R. 897, 916 (B.A.P. 9th Cir. 2011) ("This rule appears to be the common law rule."); In re Wright, No. 10-03893, 2012 WL 27500, at \*3 (Bankr. D. Haw. Jan. 5, 2012) (holding that the date of an assignment of mortgage was irrelevant to establish timeliness of transfer of the mortgage into a trust where a related note was timely transferred into the trust because "as a matter of common law, the mortgage was automatically transferred with the underlying note");

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<sup>1</sup> In her declaration, Agard states that she reviewed the Pooling and Servicing Agreement (PSA) for the subject trust, and that her note and mortgage were not in the trust. However, only one page of the PSA is attached to her materials. Under HRCP Rule 56(e), Agard should have attached a sworn or certified copy of the PSA and could not simply rely on her conclusory statements. Fuller v. Pac. Med. Collections, Inc., 78 Hawai'i 213, 224, 891 P.2d 300, 311 (App. 1995) ("All papers referred to in the affidavits must also be attached and sworn to or certified. These requirements are mandatory.") (citation and block quote format omitted); Miller v. Manuel, 9 Haw. App. 56, 66, 828 P.2d 286, 292 (1991) (noting that courts will review material submitted regarding a motion for summary judgment for compliance with Rule 56(e) and that "ultimate or conclusory facts or conclusions of law are not to be utilized in a summary judgment affidavit[]").

Restatement (Third) of Prop.: Mortgages § 5.4 (1997). Moreover, under the common law, once a note is transferred, a subsequent assignment of the mortgage is a nullity. See Carpenter, 83 U.S. (16 Wall.) at 274 ("An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); In re Wright, 2012 WL 27500, at \*3 ("[Bank] succeeded to the mortgagee's interest automatically as soon as it became entitled to enforce the note. The formal assignment of the mortgage at a later date is surplusage.").

In this case, therefore, Agard's reliance on an assignment of mortgage to challenge whether Deutsche Bank had title to foreclose is misplaced. Rather, given the evidence that the Note was previously transferred to Deutsche Bank, any of the assignments of mortgage thereafter in this case were a nullity. Moreover, the questions raised by Agard about the validity of the mortgage assignments appear to be immaterial with regard to Agard's UDAP claims against Deutsche Bank in Count 1. Indeed, all of Agard's claims under Count 1 against Deutsche Bank relate to allegations about improperly separating the Note and mortgage, improperly claiming an interest in the subject property, the alleged improper assignments of the mortgage, and other related allegations. Because the mortgage automatically transferred with the Note, Deutsche Bank was entitled to foreclose on the property and the circuit court properly granted summary judgment to Deutsche Bank on Count 1.

## II. UDAP Claims Against OneWest

With regard to Agard's claims against OneWest in Count 1, she alleges various misconduct by OneWest related to her attempts to modify the loan. Agard contends and attests in her declaration submitted to the circuit court, *inter alia*, that: OneWest made misrepresentations by agreeing to a loan modification, acknowledging receipt of payment from her per the agreement, and then reneging on the loan modification without justification; OneWest misrepresented that Agard had failed to make payments in February and March 2009 when she had receipts to

show she made the payments; OneWest misapplied Agard's payments; and a OneWest representative instructed Agard not to make a payment in August 2009 and then OneWest subsequently informed Agard she was no longer eligible for loan modification in part because she failed to make the August 2009 payment.

OneWest, in turn, submitted a declaration by Boyle in which he attests, *inter alia*, that: Agard was offered and signed a stipulated forbearance plan indicating that a review was being done to determine if Agard qualified for a loan modification, and which required that Agard make certain payments in the interim; Agard failed to make a required payment; Agard was determined to be ineligible for loan modification; a further forbearance plan was later proposed, which Agard signed; and while Agard made the first five payments under this latter plan, she failed to make the sixth balloon payment.

Given the contradictory evidence adduced by Agard and OneWest, there are genuine issues of material fact with regard to Agard's claims for UDAP under HRS Chapter 480 against OneWest. See Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 227-29, 11 P.3d 1, 15-17 (2000) (holding that genuine issues of material facts existed where defendants' affidavits raised questions regarding credit union's allegedly deceptive practices). Thus, summary judgment should not have been entered in favor of OneWest on Agard's UDAP claim in Count 1.

For these reasons, I respectfully concur.

*John W. King*