STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

COPY

HSBC BANK USA, National Association, as Trustee,

Plaintiff/appellee,

Circuit Court Case No. 11-693 AV
Hon. Melinda Morris

vs

District Court Case No. 10-3034 LT
Hon. Julie Creal

MARY F. YOUNG,

Defendant/appellant,

and

MR. OCCUPANT and MRS. OCCUPANT,

Defendants.

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ORDER DENYING PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION

At a session of the Court held in the
Washtenaw County Courthouse in
the City of Ann Arbor on
October 16, 2012

PRESENT: HONORABLE MELINDA MORRIS, Circuit Judge

Plaintiff/appellee HSBC Bank USA (HSBC) filed this action for possession of defendant/appellant Mary Young's home after a mortgage foreclosure by advertisement. The

district court granted HSBC's motion for summary disposition and defendant sought leave to appeal, which this Court granted. The Court ruled from the bench after hearing oral argument, reversing the trial court's order granting summary disposition for plaintiff and remanding for further proceedings. Plaintiff filed a motion for reconsideration. For the reasons stated below, plaintiff's motion for reconsideration is denied.

I. BACKGROUND

Young refinanced her home with Wells Fargo Home Mortgage on April 22, 2004, with an adjustable interest rate that ranged from 9.25% to 10.875%. Young defaulted and received notices of default from Wells Fargo in Feb., Apr. and Aug. of 2008.

On October 8, 2008, Wells Fargo purported to assign the mortgage to HSBC as Trustee for Wells Fargo Home Equity Trust 2004-2. The Trust is governed by a Pooling and Servicing Agreement (PSA). The PSA requires that all mortgages and notes be transferred into the Trust by Sept. 29, 2004. It also requires that mortgages transferred into the Trust not be in default.

Young's loan was pooled with many others for servicing in a process described in *Bank of NY v Raftogianis*, 418 NJ Super 323, 333; 13 A3d 435 (2010): lenders sell, to a pool or trust, substantial numbers of loans they have issued. Interests in the pool or trust are sold to investors, who share in the funds received as the loans are repaid. Servicing entities are retained to administer the underlying loans.

Most of these trusts are governed by pooling and servicing agreements. The relevant portions of the PSA for the trust for which HSBC is the trustee provide that, for a mortgage loan to be transferred into the Trust,

- the depositor must deliver both (1) the endorsed mortgage note and (2) a recorded assignment of the mortgage (or blank assignment in recordable form),
- the note and assignment must be delivered on or before the closing date, 9/29/2004, and

- there is no default existing under the mortgage/note and no foreclosure action currently threatened.

The Depositor is defined to be Wells Fargo Asset Securities Corporation, the Custodian is Wells Fargo Bank N.A. and the Trustee is HSBC.

The PSA is governed by New York law.

In January 2009, Wells Fargo and Young entered into a Loan Modification Agreement. The agreement was on Wells Fargo letterhead and signed by an officer of Wells Fargo, which was described as the lender. Young was unable to keep up with payments under the modified loan.

HSBC commenced foreclosure by advertisement on March 11, 2010, and bought the house at the sheriff's sale. Six months later, on Nov. 8, 2010, HSBC filed a complaint for possession in the district court.

Young served discovery requests on plaintiff, asking, among other things, to view the original promissory note. Plaintiff produced a copy – not the original – on February 14, 2011. The note was payable to Wells Fargo as lender and had no endorsements or allonges.

About a month later, plaintiff produced another copy of the note, this one with a stamped and typed endorsement to HSBC as Trustee, with no date indicating when the endorsement occurred.

When HSBC filed a motion for entry of judgment of possession, Judge Easthope found it was essentially a motion for summary disposition and ordered that it be re-noticed The court also indicated it would allow Young to depose the signer of original note, another, more legible copy of which was produced at the hearing.

Defendant then filed a motion to depose Mills. She argued that the authenticity of the purported note was in doubt, given the various versions of the note and the late production of an

endorsed copy. Judge Goodridge admitted she had not read the pleadings and denied defendant's motion. She directed that information be obtained from plaintiff via interrogatories, and if documentation on the endorser was not provided, authenticity would be an issue for trial.

The signer was Joan Mills, a vice president of Wells Fargo. In response to defendant's interrogatories, Ms. Mills described only the general process by which notes are endorsed. When asked when the endorsement was added to Young's note, she responded only "when the loan was subsequently sold to HSBC. . ." She also indicated that the note has remained in Wells Fargo's possession since its execution in 2004.

Defendant attempted to file a motion to compel discovery and for leave to conduct further discovery, but on June 9, 2011, the court refused to allow the motion and granted summary disposition for plaintiff, finding that there was no evidence and none likely to be produced that HSBC did not own the note, and that no potential factual development would alter the rights of the mortgage and note holder.

II. STANDARD OF REVIEW

A motion for summary disposition is reviewed *de novo*. *Beach v Twp of Lima*, 489 Mich 99, 105-06 (2011). The evidence is viewed in the light most favorable to the nonmovant. *In re Smith Trust*, 480 Mich 19, 23-24 (2008).

MCR 2.119(F), made applicable in appeals to the circuit court by MCR 7.110, governs motions for reconsideration and provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The language of the rule is not a restriction or limitation on a court's ability to reconsider a previous opinion, *Fets Engineering Co v Ecco Systems, Inc*, 188 Mich App 362; 471 NW2d 85 (1991), vacated on other grounds, 439 Mich 977; 483 NW2d 619 (1992), and a court has the discretion to correct any of its decisions that contain a serious error, to preserve judicial economy and to minimize costs to the parties, *Prentis Family Foundation v Barbara Ann Karmanos Ctr Inst,* 266 Mich App 39, 52; 698 NW2d 900 (2005); *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986). The "palpable error" language of the MCR 2.119(F) denotes a general rule but is not mandatory; circuit courts are not *required* to find palpable error to grant a motion for reconsideration. *People v Walters*, 266 Mich App 341, 350-51; 700 NW2d 4241 (2005).

A party's failure to present evidence, an argument or to cite available legal authority to support its position on the motion of which reconsideration is sought, however, does not create or constitute palpable error by which the court and the parties have been misled. A court has the discretion to deny reconsideration when such an omission is the basis for the motion. See *Woods v SLB Property Management LLC*, 277 Mich App 622, 629-630; 750 NW2d 228 (2008),*Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000), *American Transmission, Inc v Channel 7 of Detroit*, 239 Mich App 695, 709-710; 609 NW2d 607 (2000), *Gjokaj v Scott*, unpublished opinion *per curiam* of the Court of Appeals, decided 7/19/2007 (Docket No. 270270); 2007 WL 2067593 (Mich App 2007), *Plait v Hartfield Enterprises, Inc*, unpublished opinion *per curiam* of the Court of Appeals, decided 3/23/2006 (Docket No. 265319); 2006 WL 740077 (Mich App 2006), *Hernandez v Taylor Commons Ltd Partnership*, unpublished opinion *per curiam* of the Court of Appeals, decided 6/29/2004 (Docket No. 247576); 2004 WL 1459527 (Mich App 2004), and *Brantman v Brantman*, unpublished opinion

per curiam of the Court of Appeals, decided 5/22/2003 (Docket No. 243800); 2003 WL 21205979 (2003).

III. DISCUSSION

In its motion for reconsideration, plaintiff-appellee first argues that the Court committed palpable error in adopting an argument rejected by the Michigan Supreme Court in *Residential Funding Co, LLC v Saurman*, 490 Mich 909; 805 NW2d 183 (2011), and the Sixth Circuit in *Livonia Prop Hldgs, LLC v 12840-12976 Farmington Rd Holdings, LLC*, 717 F Supp 2d 724, 735 (ED Mich 2010), *aff'd* , 399 Fed Appx 97 (CA 6, 2010), and expanding the scope of MCL 600.3204(1)(d).

Plaintiff-appellee is incorrect. In *Saurman*, the Michigan Supreme Court held that the Mortgage Electronic Registration System, which was the mortgagee but not the holder of the note and not the owner of note, nonetheless was an owner of an interest in the indebtedness and had standing to foreclose by advertisement. The issue presented to this Court was completely different from that addressed in *Saurman*. Here, defendant argued that HSBC lacked standing, not because it was a mortgagee without a note or interest in the indebtedness, but because *neither* the mortgage nor the note had been validly and effectively transferred to HSBC. The mortgagor here claimed that the purported assignment to HSBC was void because it did not comply with the terms of the Pooling and Servicing Agreement that governed the Trust; and that since HSBC owned neither the mortgage lien nor the note, it did not have any interest in the indebtedness and the statute did not authorize it to foreclose on defendant's property. Even under *Saurman* , an entity must have an ownership interest in at least one – the mortgage *or* the indebtedness – to foreclose by advertisement. If defendant/appellant is correct that failure to comply with the PSA voids the transfers to the Trust, then HSBC would not have such an interest.

Second, HSBC argues that the Court committed palpable error in allowing defendant-appellant to challenge the assignment of her mortgage and note because a non-party lacks standing to challenge an assignment of a mortgage or note. HSBC relies on *Rogan v Bank One*, 457 F3d 561, 566-67 (CA 6, 2006), and *Livonia Property Hldgs, LLC v 12840-12976 Farmington Rd Hldgs, LLC*, 717 F Supp 2d 724, 746 (ED Mich 2010).

It is true that the general rule is that only parties to and third party beneficiaries of an assignment may challenge its validity, but Michigan recognizes an exception to the general rule. As the court states in *Livonia Property Hldgs, supra* at 102,

> An obligor "may assert as a defense any matter which renders the assignment absolutely invalid or ineffective, or void." 6A CJS Assignments § 132 (2010). These defenses include nonassignability of the instrument, *assignee's lack of title*, and a prior revocation of the assignment, none of which are available in the current matter. *Id.* Obligors have standing to raise these claims because they cannot otherwise protect themselves from having to pay the same debt twice. *Id.* In this case, Livonia is not at risk of paying the debt twice, because Farmington has established that it holds the original note. Farmington has produced ample documentation that it was in possession of the note and had been assigned all rights therein prior to the initiation of foreclosure proceedings. The district court reviewed the copies in exhibits and the originals produced by Farmington and was satisfied that they were authentic. Without a genuine claim that Farmington is not the rightful owner of the loan and that Livonia might therefore be subject to double liability on its debt, Livonia cannot credibly claim to have standing to challenge the First Assignment.

Thus, HSBC is incorrect that Michigan authority does not permit a mortgagor to challenge the validity of an assignment. HSBC has provided no Michigan authority on the question whether the defect in its title that defendant alleges renders the assignment completely void or merely voidable, or whether such a difference is material, and no argument that another state's law controls in the present case.

HSBC argues, third, that the Court committed palpable error by allowing defendant-appellant to invoke the Pooling and Servicing Agreement as a basis for finding the foreclosure ineffective, because defendant-appellant, who was not a party to the agreement, has no standing

to enforce it. This issue has not been decided by the Michigan Court of Appeals or Supreme Court, and there is conflicting authority in other jurisdictions. Admittedly, the vast majority of the courts deciding the issue have held that mortgagors have no standing to challenge an assignment for failure of the parties to the assignment to comply with the PSA. See, *e.g.*, *Gumapac v Deutsche Bank Nat'l Trust Co,* unpublished opinion of the US Dist Ct CD Cal, issued 7/30/2012 (Docket No. . 2:11–cv–10767–ODW [CWx]) (listing decisions).[1] Most of

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[1] *Gumapac* at *4:

> However, Courts have resoundingly rejected mortgagor claims predicated on contentions that a party to the securitization process failed to adhere to the PSA, reasoning that the mortgagor is not a party to the PSA and thus lacks standing to assert such claims. *Rodenhurst v Bank of America,* 773 F Supp 2d 886, 899 (DHaw 2011) ("The overwhelming authority does not support a [claim] based on improper securitization"); *Cooper v Bank of NY Mellon,* No 11–00241 LEKRLP, 2011 WL 3705058, at *17 (DHaw Aug 23, 2011) (dismissing breach of contract claim brought by delinquent mortgagors for breach of the PSA because mortgagors were not third-party beneficiaries of PSA and thus lacked standing to enforce its terms); *Abubo v Bank of NY Mellon,* No 11–00312 JMS–BMK, 2011 WL 6011787, at *8 (DHaw Nov 30, 2011) (noting that a third party lacks standing to raise a violation of a PSA); *see also Bascos v Fed Home Loan Mortg Corp,* No CV 11–39680–JFW (JCx), 2011 WL 3157063, at *6 (CD Cal July 22, 2011) ("Plaintiff has no standing to challenge the validity of the securitization of the loan as he is not an investor of the loan trust"); *Greene v Home Loan Servs, Inc,* 2010 WL 3749243, *4 (D Minn Sept 21, 2010) ("Plaintiffs are not a party to the [PSA] and therefore have no standing to challenge any purported breach of the rights and obligations of that agreement."); *In re Correia,* 452 BR 319, 324 (BAP 1st Cir 2011) (rejecting argument by debtors that mortgage assignment was invalid based on noncompliance with the PSA, as debtors were neither parties, nor third party beneficiaries, of the PSA).

For a thoughtful discussion of the issue, see *Butler v Deutsche Bank Trust Co Americas,* ___ F Supp 2d ___, ___; 2012 WL 3518560, *6-7 (D Mass 2012):

> Courts in this district are in agreement that a mortgagor lacks standing to challenge the assignment of his mortgage directly if he is neither a party to nor a third-party beneficiary of the assignment contract....
>
> However, "the question of whether [a mortgagor has] standing to challenge [an] assignment is different from the question of whether [he has] standing to challenge the foreclosure on the basis that [the foreclosing entity] did not properly hold the mortgage at the time of the foreclosure." . . . A number of decisions have held that mortgagors have standing to challenge a foreclosure sale as void due to an allegedly invalid assignment....
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> * * *
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> Mortgagors challenging foreclosure sales that are void due to invalid assignments have standing to do so because they have demonstrated "a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant's actions, and a likelihood that prevailing in the action will afford some redress for the injury."...
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> * * *
>
> I do not, however, hold that a mortgagor has standing to challenge a foreclsoure on the basis of just any potentially invalidating deficiency in an assignment. Massachusetts case law distinguishes

those courts, however, have reached that conclusion through application of the general rule that a nonparty to an assignment has no standing to challenge its validity. As discussed above, that is not the rule in Michigan.

For the reasons stated above, plaintiff-appellee's motion for reconsideration is denied.

Melinda Morris
Circuit Court Judge

PROOF OF SERVICE

I certify that I mailed a copy of the above Order upon all attorneys of record or parties by placing said copy in the first class mail with postage prepaid from Ann Arbor, Michigan on this 17 day of October, 2012.

Betty-Jo Spiers-Beeding
Judicial Coordinator

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between void and voidable assignments… If an assignment is voidable, but has not been avoided, then the assignee has legal title to convey to the purchaser at a foreclsoure sale. If an assignment is void, then the assignee was assigned nothing and has nothing to convey to the purchaser at the foreclosure sale. Where a "grantor has nothing to convey … [t]he purported conveyance is a nullity, notwithdstanding the parties' intent." …

Here, however, Butler fails to allege facts or present legal argument sufficient to establish that the assignments to Deutsche Bank were void due to their failure to comply with the Pooling and Servicing Agreement....