

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

* * * * *

DEUTSCHE BANK NATIONAL	*	
TRUST COMPANY, as Trustee	*	
of the Residential Asset	*	
Securitization Trust	*	NO. H-11-CV-1658
2007-A8, Mortgage Pass-	*	
Through Certificates,	*	Houston, Texas
Series 2007-H under the	*	
Pooling and Servicing	*	2:04 p.m. - 2:56 p.m.
Agreement Date	*	
	*	January 27, 2017
vs.	*	
	*	
JOANNA and JOHN BURKE	*	

* * * * *

STATUS CONFERENCE

BEFORE THE HONORABLE STEPHEN W. SMITH
UNITED STATES MAGISTRATE JUDGE

* * * * *

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Orange, Texas 77630 * 866-993-1313

18-20026.1305

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7 For the Defendants:

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P R O C E E D I N G S

2:04 P.M. - JANUARY 27, 2017

THE COURT: Good afternoon, everyone. Please
be seated.

All right. We're here on a status conference in the case of *Deutsche Bank, et al vs. John and Joanna Burke*, Civil Action H-11-1658.

Will counsel please state your appearances
for the record.

MR. HOPKINS: Good morning, Your Honor, Mark Hopkins here on behalf of Deutsche Bank.

THE COURT: Mr. Hopkins.

MS. PFEIFFER: Good afternoon, Judge. Connie Pfeiffer and Fatima Hassan Ali here on behalf of the Burkes.

THE COURT: All right. Good afternoon,
counsel.

All right, counsel, of course, this status conference is to assess where we are now on this case in light of the Fifth Circuit's ruling reversing this Court a few months -- well, back in the summer. I have asked the parties to address some issues in a Briefing Order. But I guess the most important question, seems to me, the first question is whether or not the trial record establishes whether or not Deutsche Bank had a

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1 valid homestead lien under the provisions of Article
2 XVI, Section 50 of the Texas Constitution. I've
3 reviewed the parties' briefing on that. I appreciate
4 that.

5 But with that, let me hear from you,
6 Ms. Pfeiffer, first, your arguments as to why the
7 trial record does not -- or establishes, in fact, that
8 the homestead lien is invalid.

9 MS. PFEIFFER: Yes, Your Honor, we've outlined
10 a few points and these are somewhat preliminary
11 because we may not have all the documents we need to
12 properly evaluate this. But in trying to determine
13 whether the lien complies with all 26 requirements of
14 the Texas Constitution, there's a few that we think
15 perhaps are defects.

16 And one being that we don't think that
17 there was a signed Loan Application for this particular
18 loan. It's our understanding that there was initially
19 a signed Loan Application that was denied and that
20 IndyMac later on contacted the Burkes that they could
21 forward with the loan after all, but there wasn't a new
22 application that was signed.

23 THE COURT: There was also an issue with
24 regard to the documents that were provided afterwards.

25 MS. PFEIFFER: That's right. The documents

1 have to be provided at closing and I believe one of the
2 Burkes testified during the trial that they weren't
3 provided until four days after closing.

4 THE COURT: All right. All right, so --

5 MS. PFEIFFER: And they wouldn't have been
6 provided with the signed Loan Application --

7 THE COURT: Yeah. So I think you may have
8 mentioned that there was a false income statement
9 included in the document that was provided to the
10 Burkes and I recall Mr. Burke testifying to that. Is
11 that one of your -- one of the contentions? Does that
12 violate the Texas Constitution in your view?

13 MS. PFEIFFER: I don't think that violates
14 the Constitution. I think it could be potentially a
15 fact that would be relevant to the fraud claim.

16 THE COURT: All right. And of course, we
17 don't -- you know, we're not trying a fraud case at
18 this point.

19 All right, what other arguments under --

20 MS. PFEIFFER: That's all that we've been able
21 to identify. And, you know, there's the 80 percent
22 loan to equity requirement in the Constitution, that if
23 the income were misstated, then the 80 percent rule has
24 been violated. But we first have to prove that the
25 income was misstated and, again, I think that may be a

1 fraud claim, because, as the loan was issued, it was
2 within the 80 percent at the time.

3 THE COURT: The valuation of the home?

4 MS. PFEIFFER: That's right.

5 THE COURT: Okay.

6 MS. PFEIFFER: Yeah, I apologize, I'm now
7 talking about the appraisal.

8 THE COURT: Okay, so it's the appraisal. I
9 think there was a representation you made that there
10 was a verbal appraisal that was given to Mr. and
11 Mrs. Burke in the amount of \$740,000, whereas the
12 actual -- I thought the loan agreement recited 770,000.
13 And if it were the latter figure, then that would
14 comply with the 80 percent rule, would it not?

15 MS. PFEIFFER: That's correct.

16 THE COURT: Okay.

17 MS. PFEIFFER: So, if the 770 is the right
18 number, it's not a --

19 THE COURT: Where in the record is there
20 evidence about the \$740,000 appraisal?

21 MS. PFEIFFER: It was a -- it was through
22 testimony at trial.

23 THE COURT: All right. Then also, you made
24 another claim with regard to the loan closing earlier
25 than 12 days after the application. I guess that's

1 sort of tied up with your argument about there wasn't
2 an application really?

3 MS. PFEIFFER: That's right.

4 THE COURT: But there was an initial
5 application. As I understand, as I recall, there was
6 an initial application that the Burkes made, which was
7 turned down. And then later the bank, according to
8 Mr. Burke or Mrs. Burke, contacted them and said, well,
9 we think we can -- we can work something out, and
10 something to the effect that the initial loan officer
11 was no longer employed or no longer on the font.

12 So why couldn't the bank just reactivate
13 the initial application, and would that not then comply
14 with the time limits issue?

15 MS. PFEIFFER: I'm not sure that they couldn't.
16 That might be a valid option for them.

17 THE COURT: And then I think you also make an
18 argument that the -- that there was a failure to
19 receive all the executed documents at closing. Is
20 that -- and I guess that tracks back a little bit to
21 your argument that they were provided the Loan
22 Application four days after the closing?

23 MS. PFEIFFER: Yes, I think it's two-fold.
24 One, I guess it would depend on whether that initial
25 application is valid -- you know, whether the bank can

1 rely on that after it had been initially denied;
2 whether that was provided to them at closing, which I'm
3 not sure if that was; and if it was provided at closing
4 or four days afterwards, as Mr. Burke testified.

5 THE COURT: Now, well, the only testimony that
6 was in trial was Mr. Burke because the bank didn't call
7 any witnesses. So there's no other evidence about
8 contradicting the claim that he received it for the
9 first time four days later.

10 Doesn't that provision of the Texas
11 Constitution say that they have to receive the executed
12 documents at the time the extension of credit is made?

13 MS. PFEIFFER: Yes.

14 THE COURT: Okay. And do we know what date
15 that was? Is that the date of closing or is that
16 another date?

17 MS. PFEIFFER: Well, it would be the closing
18 date, but are you asking what precise date it was?

19 THE COURT: Well, I think we know what the
20 closing date was, I believe.

21 MS. PFEIFFER: It would be when all the
22 documents were signed.

23 THE COURT: Okay, when the documents were
24 signed. So, at the time the extension of credit is
25 made, that is the -- that's the closing date as far as

1 you're concerned?

2 MS. PFEIFFER: Yes.

3 THE COURT: All right. All right, well, let
4 me hear from Mr. Hopkins. And again, I've reviewed
5 your brief, Mr. Hopkins. Are you saying that the issue
6 of the validity of the lien was already admitted in the
7 defendant's answer?

8 MR. HOPKINS: Your Honor, I'm saying Texas
9 law is very clear what a mortgagee has to prove at
10 trial to substantiate its claim and move forward with
11 foreclosure: That a debt exists, and the Burkes
12 admitted in their answer that a debt exists and also
13 in their trial testimony. That the debt is secured by
14 a lien credit under the Texas Constitution regarding
15 home equity lending. The Burkes also admitted that
16 within their answer.

17 THE COURT: Where?

18 MR. HOPKINS: It's cited in my brief, Your
19 Honor. It's -- and I footnoted it. Their answers is --

20 THE COURT: Well, I have a copy of the
21 defendant's answer and I think you refer to paragraph 8
22 and I'll read it here. It says, "Defendant admits that
23 the loan referenced in paragraph 7 was made pursuant to
24 Article XVI, Section 50(a)(6) et seq. of the Texas
25 Constitution. However, Plaintiffs deny that the loan

1 complied with Article 16, Section 50(a)(6) et seq. of
2 the Texas Constitution."

3 Didn't they put that at issue then?

4 MR. HOPKINS: Your Honor, with the aid of
5 counsel because they had the counsel at the time that
6 their answer was final. They agreed that the loan was
7 intended to be a home equity loan under the
8 Constitution, and they assert that the lien or loan
9 documents do not comply with the requirements of the
10 Constitution. And as set out elsewhere in my brief,
11 that representation alone is insufficient to put the
12 bank on notice, which was with respect to what the
13 defects are with the loan agreement.

14 Specifically, the *Curry* case, the Dallas
15 Court of Appeals on very similar grounds, where the
16 borrower says --

17 THE COURT: Is that a summary judgment case?

18 MR. HOPKINS: Yes, Your Honor.

19 THE COURT: Okay. We're not at summary
20 judgment stage here, right, we're after a trial?

21 MR. HOPKINS: I don't believe the bank's
22 burden is any different at a summary judgment than at a
23 trial of this cause, Your Honor. They were required to
24 establish --

25 THE COURT: Well, wait a minute. A summary

1 judgment under Texas law, the moving party has to
2 establish, you know, that there's no issue of law that
3 they're entitled to relief, so that burden is not the
4 same as the trial burden.

5 MR. HOPKINS: Your Honor, I believe we're
6 discussing how the issue of whether or not a loan is
7 compliant with the Texas Constitution comes in new
8 existence.

9 The Texas Supreme Court in the *Wood* case,
10 which Ms. Pfeiffer was counsel for, describes the cure
11 provisions and a borrower's obligations as a defense to
12 foreclosure, the cited language in my brief.

13 The sister case to that Supreme Court
14 case, that *Garofolo* case, describes the borrower's
15 rights to challenge whether a home equity loan is
16 compliant as a shield to foreclosure.

17 THE COURT: A shield. You accord "shield" with
18 affirmative defense?

19 MR. HOPKINS: I do, Your Honor. And Your
20 Honor had asked us to look into the *EverBank* case from
21 the 14th Court of Appeals. While not the *EverBank*
22 case, the 14th Court of Appeals -- may I sit when I
23 read this screen?

24 THE COURT: Sure.

25 MR. HOPKINS: The 14th Court of Appeals, in

1 *Wilson vs. Ames Capital* -- it's at 2007 Westlaw
2 3072054 -- in that case the Court of Appeals
3 entertained a borrower's allegations that a lender was
4 required to prove all the 26 elements of the Texas Home
5 Equity lending requirements within their case in chief.

6 And reading the Court's response, it
7 reads, "Wilson's challenge to the evidence supporting
8 the judgment relies on her contention that as the party
9 seeking to enforce the lien (Ames, the lender) had the
10 burden to plead and prove that its lien on Wilson's
11 homestead satisfied the many requirements set forth in
12 Subsections 50(a)(6), A through Q. However, Wilson
13 cites no authority, and we have found none, indicating
14 that a home equity lender seeking to enforce its lien
15 has the burden of proof on those requirements."

16 Continuing, the Court says, "If anything,
17 judicial economy would dictate that a failure to comply
18 with any of these requirements is in the nature of an
19 affirmative defense, so that judicial resources are
20 spent litigating the few requirements that are
21 contested rather than the many that are not."

22 That's from the 14th Court of Appeals,
23 Your Honor. And I believe that matches with the
24 Constitution, the way, as described in the *Wood* case, a
25 lender always has the right to cure, and a borrower is

1 put to the obligation of letting the lender know where
2 the defects are.

3 THE COURT: And in this case the argument is
4 that Mr. Burke notified the bank about the false
5 information on the application about his income and
6 nothing was done about it.

7 MR. HOPKINS: Your Honor, first, the notice
8 has to be in writing.

9 THE COURT: Where is -- does the Constitution
10 say that?

11 MR. HOPKINS: It specifically provides that
12 the notice must be in writing, Your Honor. Nowhere in
13 the trial court's record does it reflect that the bank
14 was given written notice.

15 And I'd also point out to the Court,
16 while the Court only has the aid of the evidence that's
17 before it, the Burkes consistently use the term
18 "employment income." It's not -- and I believe the
19 Court may have the perception that this loan was closed
20 with no reflection at all with respect to the Burkes'
21 income. I've had the benefit of reviewing that closing
22 file, which wasn't put in evidence before the Court
23 because the allegations were raised by the Burkes. But
24 it clearly shows that Mrs. Burke has an offshore
25 pension account, foreign bank accounts that she asked

1 be kept strictly confidential, banking relations with
2 Barclay's, Bank of America, Chase and Citi, and credit
3 from Neiman's and Nordstrom's and Jaguar.

4 THE COURT: Well, the bank never -- the bank
5 had the opportunity at trial to introduce the evidence
6 or to contradict Mr. Burke's testimony and did not, so
7 this is out.

8 MR. HOPKINS: If the issues were tried, Your
9 Honor.

10 THE COURT: Well, and of course, I'm reading
11 from your -- the Plaintiff's Pretrial Order. One of
12 the contested propositions of law was whether or not
13 Plaintiff has a valid and subsisting home equity home
14 made pursuant to Article XVI, Section 50(a)(6), et seq.
15 of the Constitution. So there's no doubt, seems to me,
16 that the issue of the validity of the lien was
17 something to be tried.

18 MR. HOPKINS: Your Honor, I respectfully --

19 THE COURT: Then we get to the issue of
20 burdens of proof.

21 MR. HOPKINS: I respectfully disagree with
22 Your Honor. I've cited 10 or 12 cases in my brief that
23 set out what our burden was. I could have easily cited
24 a hundred or two hundred that set out that across Texas
25 it's very standard in these types of cases for a debt,

1 a lien and default and notices, and that's the extent
2 of the proof.

3 THE COURT: I know. And you cited all --
4 these are all federal court cases, but "To foreclose
5 under a security instrument in Texas ..." -- and I'm
6 reading from your brief --

7 MR. HOPKINS: Yes.

8 THE COURT: -- which quotes Judge Miller, not
9 Judge Smith, by the way -- "the lender must demonstrate
10 (1) a debt exists; (2) the debt is secured by a lien
11 created under Article XVI, Section 50(a)(6) of the
12 Texas Constitution."

13 So, that's your element. That's one of
14 the elements of the mortgagee's prima facie case,
15 right, entitling the mortgagee to foreclose?

16 So item (2) is whether there's a valid
17 lien under the Texas Constitution; correct?

18 MR. HOPKINS: Your Honor, with all respect,
19 you and I can both Wordsmith our briefs. I am trying
20 to articulate for the Court what I believe Texas law is
21 and what's required to be shown at trial.

22 THE COURT: Well, I guess where we're -- and I
23 don't mean to quibble with you, but from reading your
24 brief, you seem to say that the whole issue, entire
25 issue of the validity of the lien, under the Texas

1 Constitution had already been admitted or conceded by
2 the defendants, and I do not think these pleadings
3 support that. In fact, they clearly contradict that.

4 Now, with regard to once the issue is --
5 you know, exactly what your burden of proof is to
6 establish the validity of the lien under the Texas
7 Constitution, I will take a look at those cases that
8 you cited. But it seems to me, just in general, that
9 that is part of your prima facie case, the burden to
10 show that you -- and that this is a lien that's valid
11 under the Texas Constitution.

12 MR. HOPKINS: And, Your Honor, I understand
13 what you're asserting. And if this Court were to so
14 hold that a lender is required to establish these 26
15 elements in connection with foreclosing on a home
16 equity loan, I would argue that this would be the only
17 Court in Texas, state or federal, that has put a
18 lender to such a burden. I believe the issue is only
19 relevant -- and if you look at the Texas Supreme Court
20 in *Wood* that I've set out in my brief, it sets out that
21 a homestead lien that may not have complied with
22 constitutional requirements at the outset --

23 THE COURT: Can be cured, I understand.

24 MR. HOPKINS: -- can be made valid at a later
25 date.

1 THE COURT: Right.

2 MR. HOPKINS: If they give us proper notice
3 and a notice -- if they give us proper notice and
4 opportunity to cure. And then that issue is what's
5 tried as their affirmative defense at trial: What
6 notice did they give us, what actions didn't we take,
7 and was their notice justified? That didn't happen in
8 this case because it wasn't in their pleadings. It
9 wasn't in the case that we came to try, Your Honor, and
10 they did not make it an issue.

11 THE COURT: Okay. You understand that the
12 Burkes represented themselves in this case. They did
13 not have the benefit of counsel at trial?

14 MR. HOPKINS: I understand that.

15 THE COURT: And you understand also that there
16 was no Joint Pretrial Order in this case that was
17 signed that narrowed down the issues at trial, which is
18 common and customary. And in fact, in your brief, the
19 submission, the Proposed Pretrial Order, you know,
20 basically -- it doesn't say we don't have to prove
21 anything with regard to the -- to the existence of a
22 valid lien under the Texas Constitution. It didn't say
23 that.

24 MR. HOPKINS: Your Honor, I did not try the
25 case but I also -- and I'm not taking cover for that

1 fact, but I also don't believe any pretrial filing on
2 behalf of a party can actually change their required
3 burden of proof under the law.

4 THE COURT: Okay. But it does make a
5 difference as to whether or not an issue has been
6 conceded and admitted in an answer. You agree with me
7 there; right?

8 MR. HOPKINS: Your Honor, when I try cases, I
9 look at the pleadings.

10 THE COURT: I do, to.

11 MR. HOPKINS: And in this case I looked at the
12 Burke's pleadings.

13 THE COURT: And their pleadings say they
14 didn't agree that your home equity lien was valid under
15 the Texas Constitution. So that issue was in play in a
16 general way. Now, I think, you know, you're focusing
17 on the particular elements, whether or not all the 26
18 elements, there has to be proof of all those. May be
19 or may not be according to the cases that you cited,
20 and I will take a hard look at those.

21 MR. HOPKINS: Yes. And I wanted to impress
22 upon the Court, to the extent possible, that the
23 allegation -- the general allegation that the loan does
24 not comply with the Texas Constitution is insufficient
25 as determined by both the Supreme Court in *Wood* and

1 also the Dallas Court of Appeals in *Curry*, where they
2 require specific allegations with respect to what the
3 defect is so the bank can specifically focus and
4 address the concerns as they're combing through the
5 entire loan documents. That's what I believe Texas
6 State Court law is.

7 THE COURT: All right.

8 Ms. Pfeiffer, do you have anything to
9 offer in this -- on these points?

10 MS. PFEIFFER: Very briefly, Your Honor, and I
11 think Mr. Hopkins and I are both in difficult positions
12 trying to speak to a record that we haven't lived
13 through and a trial that we haven't lived through.

14 I am a hundred percent confident that
15 where the validity of the lien is at issue, then the
16 burden is on the lender to prove that they have a valid
17 lien to foreclose on. And I do agree with Your Honor
18 that the pleadings don't seek the validity of the lien.

19 THE COURT: What about the particular
20 elements -- assuming, then, that the validity of the
21 lien is an issue to be tried at trial, in your view,
22 what is the burden of the lender, what do they have to
23 show to meet that burden?

24 MS. PFEIFFER: Well, in my view, the burden
25 would be to show whatever particular defects are

1 alleged, that they are not actually defects. And so I
2 would agree with Mr. Hopkins that you don't have to go
3 through and show every single of the 26 requirements
4 unless they're all at issue, which I think in most
5 cases they wouldn't be. So it would be a
6 defect-by-defect showing.

7 THE COURT: Well, how do you -- is it an
8 affirmative defense? Does the homeowner have to allege
9 affirmatively, as an affirmative defense, the lien is
10 not valid because it does not meet X, Y, Z or 1, 2, 3
11 requirements?

12 MS. PFEIFFER: No, it's not an affirmative
13 defense because then the burden would be on the
14 homeowner. It's simply -- it's a denial. It's simply
15 putting at issue --

16 THE COURT: Right.

17 MS. PFEIFFER: -- that there is a valid lien
18 that could be foreclosed on.

19 THE COURT: And so obviously, in most cases
20 they go to trial. It's unusual to go to trial where
21 one side is represented by counsel and the other side
22 is not. Ordinarily, if both sides are represented at
23 trial, then counsel work together to narrow down the
24 issues and then the Court proceeds. In this case that
25 didn't happen. And so, again, I'd like to have an idea

1 from you, from your perspective as to what it was that
2 the bank would be required to prove.

3 MS. PFEIFFER: Well, is it -- is it --

4 THE COURT: Go ahead.

5 MS. PFEIFFER: -- the case that the Burkes
6 were pro se during the trial?

7 THE COURT: They were -- they were pro se
8 during the trial. In fact, they were initially
9 represented by counsel, I believe, at the time the
10 answer was filed. But about that time their counsel
11 withdrew or they were no longer represented. So, for
12 the great balance of this litigation up to the time of
13 trial, they were representing themselves.

14 MS. PFEIFFER: I mean, I do think when you're
15 the party with the burden of proof, especially when
16 your opponent is pro se, you would want to go above and
17 beyond what would ordinarily be required. But if there
18 were no clarity on which particular defects the Burkes
19 were alleging, the defendant has to prove every last
20 part of the Constitution was complied with.

21 THE COURT: Of course, at trial, though, we
22 did have testimony from Mr. Burke with regard to what
23 he felt like was the problem with the loan application.

24 MS. PFEIFFER: It sounds like that went
25 unrefuted.

1 THE COURT: Well, it was. There were no
2 witnesses called by the bank. They weren't -- the only
3 people that testified at trial were Mr. and Mrs. Burke.

4 MR. HOPKINS: Your Honor, for the purpose of
5 clarity for our record --

6 THE COURT: Yes.

7 MR. HOPKINS: -- while Deutsche Bank didn't
8 call its own witnesses, it certainly did object to
9 Mr. Burke's testimony with respect to these issues.

10 THE COURT: Object? You mean object to the
11 testimony itself?

12 MR. HOPKINS: Yes, Your Honor.

13 THE COURT: Okay, in not overruling the
14 objections that were made -- in fact, I do recall
15 sustaining some hearsay objections, but the evidence
16 came in.

17 MR. HOPKINS: Your Honor, if the implication
18 is that Deutsche Bank elected that these matters were
19 to be tried by consent, the record squarely reflects
20 that trial counsel objected to this testimony and the
21 issues were not tried by consent and they are not
22 supported by the pleadings.

23 THE COURT: Which issues are you talking
24 about? I'm talking about the validity of the law and
25 also the -- okay.

1 MR. HOPKINS: Yes, Your Honor.

2 THE COURT: So you're saying that -- okay,
3 well, I'll go back and read the transcript and see if
4 there was specific objection to this testimony.

5 MR. HOPKINS: Yes, Your Honor.

6 THE COURT: All right. Then I suppose that
7 brings me to the third issue, which I guess I would
8 like counsel to enlighten me because I'm still
9 confused. I am -- I have read the Fifth Circuit's
10 ruling several times and I guess I am just dense. It's
11 still incomprehensible to me. Perhaps my original
12 opinion was unclear, it must have been, because it
13 seems to me that the Fifth Circuit opinion and my
14 decision seemed to be like two ships passing in the
15 night. Maybe we were driving down two different
16 highways in different directions. But let me throw
17 this out to both sides and you can tell me where you
18 think I'm wrong.

19 I totally get and understand and don't
20 dispute that MERS has the authority and the capacity to
21 act as both beneficiary and nominee. Texas law, that's
22 clear. So they can act both as a principal and as an
23 agent regarding homestead property rights. They have
24 rights as a beneficiary. They act as an agent on
25 behalf of banks who also have rights in the property.

1 I don't dispute that at all.

2 In fact, that's not really a novel or
3 surprising proposition because most legal entities and
4 individuals have the right to act both as a principal
5 and on behalf of other people. They can act both as
6 principal on their own behalf and as an agent for
7 somebody else. Attorneys make a living doing that.
8 They act on behalf of others, their clients. And yet
9 attorneys can also act on their own behalf. For
10 example, they sign an office lease. They're acting and
11 they're on the line.

12 So it seems important for attorneys, just
13 like any other entity, to spell out when they execute a
14 contract in what capacity they're executing a contract.
15 What hat are they wearing, the principal on their own
16 behalf or as an agent on behalf of somebody else? I
17 mean, is there anything controversial about that? I
18 don't -- I don't see that there is.

19 And so even when a party has the authority
20 or the capacity to exercise such a right, whether it
21 has in fact exercised that right in that capacity is a
22 separate issue, seems to me. Okay? And it seems to me
23 especially important to be clear in a contract when the
24 attorney and the client both share an interest in the
25 subject matter. So, for example, if they were -- the

1 attorney and his client were co-owners of a certain
2 piece of property and the attorney would be asked to
3 draw up deeds or contracts regarding that property.

4 And so maybe it would help -- maybe it
5 would help you to follow me and tell me where I'm
6 wrong. We take a hypothetical. Assume that
7 Mr. Hopkins has a 10 percent interest in a building
8 and his client, the client bank, owns the remaining 90
9 percent. The client bank asks Mr. Hopkins to prepare a
10 contract, assigning the client bank's interest in that
11 property to another bank, assignee bank. And
12 Mr. Hopkins prepares a contract, he signs the contract
13 on behalf of his client; in fact, below the signature
14 states "Attorney Acting on Behalf of Client Bank."

15 Now, Mr. Hopkins, again, owns 10 percent,
16 client bank owns 90 percent. Now, is there any
17 question in your mind or anybody's mind that, as a
18 result of that signature, the assignee bank acquires
19 only the 90 percent interest of Mr. Hopkins' client?

20 Mr. Hopkins, do you disagree with that?

21 MR. HOPKINS: Your Honor, I, like you, have
22 examined the Fifth Circuit's opinion in this case when
23 they say: We appreciate that the assignment is in the
24 name of MERS as nominee, not as beneficiary, and we
25 think the fact -- we appreciate the distinction and we

1 find it unimportant.

2 THE COURT: I didn't see they said anything
3 about appreciating the distinction. They said they
4 didn't find any case --

5 MR. HOPKINS: I put that in my own
6 parenthetical.

7 THE COURT: -- that found it, okay.

8 MR. HOPKINS: Usually, they speak with a
9 purpose. So, to answer your question and your
10 hypothetical, I believe 90 percent interest in the
11 property was conveyed.

12 THE COURT: Okay, all right. Then what if
13 then the assignee bank comes back and says, "Wait a
14 minute, Mr. Hopkins, you signed this contract. You
15 also own 10 percent. And so, in fact, we acquired your
16 10 percent, as well as your client's 10 percent"? I
17 mean, that would be a bogus argument; right?

18 MR. HOPKINS: I believe XXX doesn't get
19 anything.

20 THE COURT: Okay, all right. So there would
21 be no intent, based on the facts as I've presented
22 here, to transfer your own interest, Mr. Hopkins, only
23 your client's interest, okay. And we know that based
24 on the language of the contract.

25 So I suppose, though, it's possible that

1 if you, Mr. Hopkins -- again, in my hypothetical
2 situation, I'm sorry to pick on you. But if you had
3 intended also to transfer your 10 percent, as well as
4 your client's 90 percent, probably there would be a
5 separate signature line for that where you would be
6 signing as principal on your own behalf, and then
7 another signature line where you're signing on behalf
8 of your client. But absent that or some other evidence
9 of intent, I don't think that any court in Texas would
10 find that you had assigned away your own 10 percent
11 interest in that property.

12 Okay, so take it one step further. Assume
13 the same facts, but assume that client bank, your
14 client, had already sold its rights to the property to
15 a third party, so that at the time of this assignment
16 it had no interest in the property. In that event,
17 seems to me, the assignee bank would acquire no rights
18 in the property because that would be a null and void
19 assignment. I mean, my understanding is, seems to me,
20 I think this is pretty much Hornbook Law, isn't it,
21 that an assignor cannot assign away rights it doesn't
22 have.

23 So you see where I'm heading with all of
24 this. You substitute MERS in place of Mr. Hopkins in
25 these transactions and you have what I view as the

1 assignment in this lease; that you apply the same
2 rules, contract construction that apply in any other
3 normal contract case, this assignment or that
4 assignment would be void.

5 Now, obviously, Fifth Circuit didn't agree
6 with that and I'm trying to understand why. It seems
7 to me two possibilities would come to mind. One, a
8 Court was rejecting, you know, centuries worth of
9 common law regarding principal and agent and capacity
10 to contract. Certainly, that would be ridiculous. I
11 mean, I can't contemplate that that's what they
12 intended. Or the Court is saying those rules that
13 apply to any other legal entity in Texas don't apply to
14 MERS, that MERS is unique in Texas law.

15 Now, maybe that's the view they took and
16 that seems to be, you know, what they said there in the
17 footnote. They said they hadn't found a single case
18 from any Texas State Court that made that distinction
19 between MERS signing a contract or executing an
20 assignment as a principal versus MERS signing as an
21 agent. In other words, it seems to me the Court is
22 saying that whenever MERS' signature appears on a
23 document, they are always acting both as principal and
24 agent regardless of what the language may say, even if
25 the language says MERS signed solely as nominee or

1 agent for their member bank. And the Court said, no,
2 Texas -- Texas court ruled otherwise.

3 And so that's where, seems to me, every
4 bank comes in because that opinion distinguishes
5 between MERS acting as a beneficiary versus MERS acting
6 as a nominee. I grant you the context is different and
7 it deals with an argument regarding the assignment of a
8 note, I think, rather than a deed. It doesn't involve
9 a Deed of Trust, I grant you that. But, at least, you
10 have a Texas Court of Appeals recognizing the
11 distinction that seems to -- that I was drawing and
12 that Texas law always draws with regard to other legal
13 entities in Texas that you can act sometimes as an
14 agent, sometimes as a principal, and the language of
15 the document determines which it is.

16 So it seems to me that we now have a
17 Texas Court recognizing the distinction that the Fifth
18 Circuit said did not exist or they couldn't find a
19 Texas case that said it existed.

20 So, walking all that through, how can I
21 be sure then that the Fifth Circuit might not rule
22 differently if they don't -- if they are confronted
23 with this new case from the Texas Court of Appeals?

24 Mr. Hopkins?

25 MR. HOPKINS: First of all, Your Honor, you

1 asked if MERS was different from anyone in Texas and I
2 point out that Texas Statute, speaking with a smirk,
3 says book entry system.

4 THE COURT: I understand.

5 MR. HOPKINS: And nowhere are you and I listed
6 as a book entry system, so they are unique in some
7 degree. Your question regarding the *EverBank* case, the
8 *EverBank* addresses MERS' rights and capacities if it
9 were a note holder and also its rights and capacities
10 if it were acting as a beneficiary. The language Your
11 Honor has focused on was MERS as a note holder. And
12 there could be a distinction as -- not implied, but as
13 discussed modestly in *EverBank*, whether MERS can hold a
14 note as a nominee. *EverBank* was relying on *Nueces*
15 *County vs. MERSCORP*, and you remember the news where all
16 the counties were suing MERS.

17 THE COURT: Okay.

18 MR. HOPKINS: That *Nueces County* opinion
19 further fleshed out the distinction Your Honor was
20 talking about. That case was subsequently dismissed.
21 Its sister case, *Harris County vs. MERS*, went to the
22 Fifth Circuit and the Fifth Circuit rejected the
23 arguments that were within the District Court case in
24 *Nueces County*.

25 So I would present to the Court that the

1 Fifth Circuit has been presented with the possibility
2 of this distinction in the Harris County case. They
3 specifically rejected it. They also specifically
4 objected that it's important in our case. I'm not a
5 judge. I'm not an appellate judge. I don't have the
6 wisdom that those justices have. But as a litigator
7 handling thousands of foreclosures, whether MERS is
8 acting as a nominee or a beneficiary does not seem to --

9 THE COURT: Doesn't seem to matter?

10 MR. HOPKINS: I didn't say that. It doesn't
11 seem to be where any of the arguments focus, and the
12 parties --

13 THE COURT: Well, I recognize -- I recognize
14 that this tact that I seem to be -- that I am taking or
15 this is -- hasn't been taken by another court, other
16 than in every other contract -- in every other contract
17 situation, Texas Courts, the U.S. Supreme Court has
18 ruled on this distinction between someone signing a
19 contract as an agent versus someone signing as a
20 beneficiary. Justice John Marshall's court made that
21 distinction. That's an ancient common law distinction
22 to make, whether you're signing a contract and what
23 capacity you're signing as principal or agent.

24 And so I don't understand -- I understand
25 MERS is a new entity, but the reason why I gave you

1 the parallel of an entity of someone who acts both as
2 principal and agent as an attorney, seems to me, I
3 don't understand why there should be any difference.
4 MERS has rights of its own as beneficiary and they can
5 also act on behalf -- or exercise the rights as an
6 agent of their member banks. That's the same thing
7 that an attorney does. That's the same thing that
8 anybody does that can act both as a principal and an
9 agent.

10 And so I'm just flummoxed as to why it
11 should make a difference. If MERS and MERS' -- the
12 attorneys prepare documents and they sign documents and
13 MERS says, "I am acting solely as nominee for this
14 bank," it seems to me, that seems -- if you're reading
15 the English language and understanding the English
16 language, that means MERS is not acting on its own
17 behalf. We're not asserting the rights as beneficiary.
18 I guess we could, just like MERS has the authority as
19 the mortgagee under Texas law to foreclose or they can
20 give that right to somebody else. And my understanding
21 is, as a manner of policy, MERS doesn't foreclose on
22 their own.

23 And so I don't, for the life of me, I
24 can't understand why we have this exception for MERS
25 that doesn't apply to any other legal entity under the

1 law.

2 MR. HOPKINS: Your Honor, my response, I'm in
3 District Court, but I was retained after the case was
4 tried, so as appellate counsel --

5 THE COURT: Sure.

6 MR. HOPKINS: -- that I appreciate Your
7 Honor's argument and that is not the argument that I
8 see being advanced in the state court or at federal
9 court level because they look beyond MERS as nominee or
10 beneficiary. And I suggest to the Court, I appreciate
11 that Your Honor closed the evidence in the case, but if
12 we wanted to let ourselves out of the trap with respect
13 to whether or not Deutsche Bank really had standing to
14 foreclose, Your Honor says perhaps the assignment's
15 defective. I challenge that argument, and I have.

16 THE COURT: And the Fifth Circuit agreed with
17 you.

18 MR. HOPKINS: And I suggested to Your Honor
19 that, while not required, Deutsche Bank was more than
20 capable of presenting the original note, which is a
21 separate avenue to foreclose. Of course, that didn't
22 come into evidence. I asked the Court to consider that
23 and that had been rejected. So here we are
24 discussing --

25 THE COURT: You're asking for a new trial --

1 you're asking for a do-over again, and that --

2 MR. HOPKINS: Within your discretion, Your
3 Honor, I just say --

4 THE COURT: I understand.

5 MR. HOPKINS: -- in my mind equity -- the
6 facts of the case tell me, even had MERS not been able
7 to foreclose as beneficiary, it certainly could have
8 pursued its rights as a note holder. Also, not in the
9 case that was presented to the Court, just like the home
10 equity violations weren't presented to the Court. It
11 could have taken a much different case.

12 THE COURT: Thank you, Mr. Hopkins.

13 Ms. Pfeiffer, I mean, I realize you, in
14 your submission you seem to agree with Mr. Hopkins that
15 *EverBank* doesn't change things.

16 MS. PFEIFFER: That's correct, Your Honor.
17 And I do want to make an important clarification, which
18 is we don't necessarily agree that the Fifth Circuit
19 was correct in reversing this Court's judgment. But
20 the question presented to us was: Does *EverBank* give
21 the Court a basis as regarding Fifth Circuit opinion?
22 We don't see that.

23 And I will add -- and Ms. Hassan Ali might
24 want to comment on this as well -- I do think the
25 Court's hypothetical and understanding of centuries of

1 common law is correct, and it may just be that MERS is
2 unique.

3 MS. HASSAN ALI: Yes, Your Honor. In my
4 research in this matter or in this issue, I could find
5 no other case where in the distinction -- well,
6 actually, as the Fifth Circuit opinion notes in
7 *Casterline*, there is, you know, understanding that MERS
8 acting as a nominee could do what it did similar to
9 what it did here. But perhaps MERS is just a creature
10 or a statute and, as such, is able to -- it may be
11 difficult to distinguish between it acting as a nominee
12 and a beneficiary in the way that you set out in your
13 hypothetical with the bank versus the attorney.

14 THE COURT: All right. Mr. Hopkins?

15 MR. HOPKINS: Your Honor, while we're here --

16 THE COURT: Yes, ma'am, -- yes, sir, excuse me.

17 MR. HOPKINS: You -- I read your footnotes,
18 Your Honor, and you had suggested that the bank isn't
19 relieved from any obligation it had with respect to
20 mediating this case. And you had indicated you had
21 instructed that mediation occur twice, and I wanted to
22 address that issue, Your Honor.

23 THE COURT: Okay, go ahead.

24 MR. HOPKINS: First, trial counsel, I believe,
25 was required to mediate prior to trial, and there was

1 discussion on your record how that did not occur
2 because of an accident in scheduling, no one's
3 intentional election not to mediate.

4 After I was retained, we were here before
5 Your Honor and you indicated that you would be signing
6 an order requiring mediation, but prior to the entry of
7 that order, the case was once again taken back to the
8 Fifth Circuit. So this Court, I believe, didn't enter
9 that order. As soon as the case was remanded back to
10 you and you appointed Ms. Pfeiffer, I did call
11 Ms. Pfeiffer and introduce myself. I did send written
12 correspondence that we would mediate the case at any
13 time. We have engaged in that discussion. It hasn't
14 been fruitful and I'll let -- I didn't directly engage
15 the Burkes because they in the past have been rather
16 hostile --

17 THE COURT: Yeah, that hasn't been very
18 fruitful, yes.

19 MR. HOPKINS: And I believe Ms. Pfeiffer --
20 I'll let her speak for herself -- might also suggest
21 that any mediation or settlement discussions be between
22 counsel, that involving the actual litigants in the
23 mediation might not be fruitful.

24 THE COURT: Okay. Ms. Pfeiffer?

25 MR. HOPKINS: But I wanted the Court to know

1 that we have tried to comply with your request.

2 THE COURT: Thank you.

3 Ms. Pfeiffer?

4 MS. PFEIFFER: I can agree with everything
5 that's just been said.

6 THE COURT: Uh-huh.

7 MS. PFEIFFER: I don't -- I don't know if I
8 can see this case settling very easily.

9 THE COURT: Uh-huh.

10 MS. PFEIFFER: So I'm certainly open to the
11 concept and idea.

12 THE COURT: Yeah, you know, I had sensed that
13 from your indirect exposure to your dealings with your
14 clients. What is your reaction to the possibility of
15 reopening the record or retrying the record -- or
16 retrying the case?

17 MS. PFEIFFER: Well, I mean, as it stands
18 right now, it sounds like the only evidence is that the
19 bank did not fully comply with the Constitution when
20 making this loan, so that there is not a valid lien.
21 So, if that's the Court's understanding of the state of
22 the record, I'd like to keep the record as it is.

23 THE COURT: Well, what about the -- you know,
24 again, I'm not inclined to keep retrying cases over and
25 over again, even a second trial. That seems to me to

1 be just fundamentally unfair. And if we get into the
2 habit of trying cases and then we get it resolved and
3 one side says, "Oh, well, I could have done something
4 else, Judge, just give me another shot," that's a
5 receipt for disaster. We'll never get any finality in
6 litigation if that happens. So there has to be a good
7 reason for a new trial other than, okay, there may be
8 some imperfections in the way the case initially was
9 tried. So I'm not inclined at this point to reopen the
10 record.

11 But, Ms. Pfeiffer, you did say that there
12 was some -- a lack of clarity or -- I mean, I guess
13 what I'm asking is would counsel -- do you want
14 another round of briefing? I hesitate to impose that
15 obligation on parties since this case has been going on
16 for so long already. I know it's been -- it's time
17 consuming and expensive, so --

18 MS. PFEIFFER: I kind of hate to do that to
19 you, but that actually might be the best solution here.
20 And part of the issue is we didn't get the full record
21 until very, very recently.

22 THE COURT: Okay.

23 MS. PFEIFFER: And so I just don't -- I don't
24 feel that I have a mastery of it. That's part of the
25 lack of clarity.

1 And so if the Court were inclined to keep
2 the record closed, I think it would be helpful to have
3 one more round of understanding exactly what the state
4 of the record is.

5 THE COURT: Mr. Hopkins, one more round of
6 briefs?

7 MR. HOPKINS: Your Honor, I believe that my
8 brief adequately sets out what we think our burden of
9 proof was. If Your Honor wants to engage us with
10 respect to the 26 elements of the Texas Constitution,
11 I'm going to resist that that's ever my burden, but I'm
12 happy to set that out in Paragraph No. 1 that it's not
13 our burden and then address those issues to the Court.

14 THE COURT: I think that may be good. At
15 least the counsel can join issue as to, you know, what
16 specifically needs to be proven and what elements were
17 fairly at issue in the case as it went to trial, and
18 why it wasn't -- well, what the bank's burden was and
19 what your client's burden was, Ms. Pfeiffer.

20 So, all right, I'll allow -- we'll set
21 another round of briefing, then. Hopefully, it will be
22 the final round.

23 Timetable?

24 MS. PFEIFFER: I would ask for a month.

25 THE COURT: All right. Mr. Hopkins?

1 MR. HOPKINS: We'll make a month work, Your
2 Honor.

3 MS. PFEIFFER: And let me say this: If you
4 want more, I could easily agree to more. It's going to
5 be difficult to do it earlier than a month.

6 MR. HOPKINS: I don't want to say --

7 THE COURT: Yeah, I don't think he was holding
8 out for more time.

9 MS. PFEIFFER: Okay.

10 MR. HOPKINS: No, my client believes these
11 matters needs to be resolved.

12 THE COURT: I understand. Right.

13 MR. HOPKINS: It's only my schedule that's at
14 issue within the 30 days and I'll make it work.

15 MS. PFEIFFER: Okay.

16 THE COURT: Okay, all right. So today's the
17 27th. Say February 28th --

18 MS. PFEIFFER: That works.

19 MR. HOPKINS: Yes, Your Honor.

20 THE COURT: -- for briefing on that burden of
21 proof issue.

22 MS. PFEIFFER: Thank you, Your Honor.

23 THE COURT: All right. Anything else this
24 afternoon, Mr. Hopkins?

25 MR. HOPKINS: No, Your Honor.

1 THE COURT: Ms. Pfeiffer?

2 MS. PFEIFFER: No, Your Honor.

3 THE COURT: Thank you both for your
4 presentations.

5 All right, court is adjourned.

6 **[2:56 p.m. - Proceedings adjourned]**

7

8 C E R T I F I C A T I O N

9

10 I certify that the foregoing is a correct
11 transcript of the electronic sound recording of the
12 proceedings in the above-entitled matter.

13

14

15 /s/ Gwen Reed

16 2-4-17

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