

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

U.S. BANK, N.A.  
AS TRUSTEE OF THE  
RASC SERIES 2007-EMX1 TRUST

Plaintiff,

vs.

ERICA CONGRESS  
et al

Defendants,

Case No.: CV-2009-901113

AFFIDAVIT AND TESTIMONY OF PROFESSOR IRA MARKBLOOM

STATE OF NEW YORK )

COUNTY OF ALBANY )

The deponent, being first duly sworn, deposes and says on oath as follows:

1. My name is PROFESSOR IRA MARK BLOOM.
2. I am currently employed as the Justice David Josiah Brewer Distinguished Professor of Law at the Albany Law School in Albany, New York.
3. My area of expertise is in the law of Trusts, Property, Estates, and Taxation with an emphasis on New York law.
4. Let me briefly summarize my experience for the Court. Since 1979 I have taught at Albany Law School in Albany, New York. The primary focus of my teaching has revolved around the law of Trusts, Property, Estates, and Taxation with an emphasis on New York law. My primary area of scholarship, including co-authorship of national casebooks on trust law, has involved trust law issues. In addition to teaching and writing about New York trust law for over thirty years, I have been involved in the following

professional activities which have enabled me to acquire expertise in the field of New York trust law:

A. Since 1998, I have served in various capacities on the Executive Committee of the Trusts and Estates Law Section of the New York State Bar Association, which consists of approximately 5,000 members. For over 20 years, I have attended numerous Executive Committee meetings where New York trust law issues have been discussed and considered. I am the immediate past Chair of the Section, and currently serve on the Section's Officers' Committee.

B. Since 1993, I have been an elected member of the American Law Institute. For over ten years I have been actively involved in the preparation of the Restatement (Third) of Trusts as a member of the Members' Consultative Group and have attended numerous drafting sessions over the years, which have often included discussions of New York trust law.

C. Since 1993 I have been an elected Academic Fellow of the American College of Trust and Estate Counsel (ACTEC) and for over 10 years have served on ACTEC's State Laws Committee where trust law issues, including New York trust law, are frequently discussed.

D. Since 2009, I have been a liaison to the New York EPTL-SCPA Legislative Advisory Committee, which is actively considering enactment by New York of the Uniform Trust Code, including Article 4 which deals with trust creation issues and Article 8 which deals with trustee duties and powers.

5. I have attached a current copy of my curriculum vitae to this affidavit.

6. I have been retained by the defendants in this matter to opine as to whether the plaintiff in this action is in fact the owner of the promissory note secured by

a mortgage upon which the plaintiff has foreclosed and claimed ownership in its capacity as Trustee.

7. In formulating my opinion, I have relied upon applicable New York law because Section 11.04 of the trust agreement, which is called a Pooling and Servicing Agreement (PSA) and under which plaintiff purports to be Trustee, provides in applicable part that the trust agreement “shall be governed by and controlled in accordance with the laws of the State of New York . . .”

8. In formulating my opinion, I have been guided by the following trust and property law rules under New York law:

A. Unless an asset is transferred into a lifetime trust, the asset does not become trust property. (NY Estates, Powers and Trusts Law § 7-1.18).

B. The assignment of a mortgage without transfer of the underlying promissory note is a nullity. (*Merritt v Bartholick*, 36 N.Y 44 (1867); *Kluge v. Fugazy*, 145 A.D. 2d 537 (1988)).

C. A trustee’s act that is contrary to the trust agreement is void. (NY Estates, Powers and Trusts Law § 7-2.4).

9. In formulating my opinion, I have reviewed the promissory note, the subject mortgage and the mortgage assignment, all of which have been submitted to this Court, and the documents which purportedly created the Trust and named the plaintiff as Trustee. I also reviewed the affidavit of Thomas J. Adams who is another retained expert of the defendants.

10. My opinion is based on facts contained in documents which have been presented to the Court and on facts that defendants’ counsel requested I assume. These

facts are set forth below. In addition, I have also relied on the opinions expressed in the affidavit of Thomas J. Adams who is another retained expert of the defendants.

A. Section 1.01 (Page 11 of 117) of the PSA defines the closing date as March 12, 2007.

B. There is no evidence that the promissory note was actually conveyed to the plaintiff by March 12, 2007.

C. Pursuant to Section 10.01(i) of the PSA, the Trustee was prohibited after March 12, 2007 from accepting “any contributions of assets to any REMIC unless . . . the Trustee shall have received an Opinion of Counsel . . . to the effect that the inclusion of such assets in any REMIC will not cause [adverse tax consequences.]”

D. Section 8.02(b) similarly bars the Trustee from accepting any contribution of assets after executing the Certificates unless “an Opinion of Counsel [is] to the effect such contributions” would not cause adverse tax consequences. Section 2.05(b) of the PSA effectively required that the Certificates be issued on March 12, 2007.

E. On July 29, 2008, the Congress Mortgage was assigned to the plaintiff by a document entitled “Assignment of Mortgage.” This document also stated that “note and indebtedness secured by the Mortgage” were transferred to the plaintiff.

F. There is no evidence that the promissory note was actually conveyed to the plaintiff on or before July 29, 2008.

G. As of July 29, 2008, the Mortgage loan was in default and therefore could not have qualified as a “qualified mortgage loan” for REMIC purposes (Thomas Adams Affidavit, Paragraph 10).

H. After July 29, 2008, the Mortgage loan continued to be default.

I. The promissory note, with a blank endorsement, may have been delivered to the Trustee in the fall of 2008 but there are no other endorsements or allonges to the promissory note.

J. Whenever the promissory note was delivered to the Trustee, the Mortgage loan was in default and therefore could not have qualified as a "qualified mortgage loan" for REMIC purposes.

K. No opinion of counsel has been proffered that acceptance of the promissory note would not have caused adverse tax consequences.

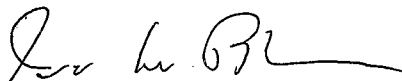
11. Based upon the assumed facts set out in paragraph 10, I am of the opinion that the plaintiff is not, and never has been, the owner of promissory note secured by a mortgage upon which the plaintiff has foreclosed and claimed ownership. My opinion is based on the following:

A. Because the promissory note was not actually transferred to the Trustee by the March 12, 2007 Closing Date under the PSA, the promissory note did not then become an asset of the Trust.

B. The July 29, 2008 assignment of the mortgage without the actual transfer of the promissory note was a nullity.

C. The Trustee's post-July 29, 2008 act of receiving the promissory note would have been void in contravention of the trust agreement for which no exception applies. Because the Mortgage loan was then in default, the Trustee was effectively barred from accepting the contribution as it would have caused adverse tax consequences.

Further affiant saith not.

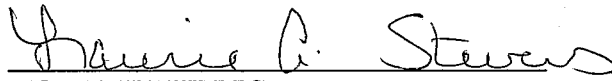
  
\_\_\_\_\_  
Professor Ira Mark Bloom  
Affiant

STATE OF NEW YORK )  
COUNTY OF ALBANY )

**ACKNOWLEDGEMENT**

BEFORE ME, the undersigned, a Notary Public, personally appeared the Affiant, Ira Mark Bloom, who is known to me and who being by me first duly sworn, subscribed to the foregoing Affidavit, and acknowledged before me that being duly informed of the contents of the Affidavit, he executed the same voluntarily.

WITNESS my hand and official seal of office, this the 20<sup>th</sup> day of May 2010.

  
\_\_\_\_\_  
NOTARY PUBLIC  
State of New York  
My Commission Expires: 2/26/11

LAURIE A. STEVENS  
Notary Public, State of New York  
Qualified in Albany Co., No. 01ST6161765  
Commission Expires Feb. 26, 2011