

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

33013

U.S. Bank, N.A., as trustee for Morgan Stanley Loan)
Trust 2006-16AX,)
Plaintiff/Counter-Defendant,)

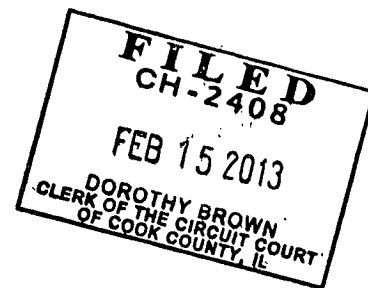
vs.)

RICHARD DANIGGELIS,)
Defendant/Counter-claimant and)
Cross-claimant,)

Joseph Younes, Mortgage Electronic Registration Systems,)
Inc., as nominee for HLB Mortgage, Unknown Heirs and)
legatees f Joseph Younes and unknown owners,)
Defendants/Cross-Defendants,)

Paul Shelton, Erika Rhone and Stewart Title of Illinois.)
Cross-Defendants.)

No.: 07 CH 29738



DEFENDANT RICHARD DANIGGELIS' REPLY IN SUPPORT OF
HIS MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II AND III
OF PLAINTIFF'S THIRD AMENDED COMPLAINT

NOW COMES the Defendant, RICHARD DANIGGLIS, by and through his attorney Andjelko Galic, and as his reply to Plaintiff's response to DANIGGELIS' motion for summary judgment states as follows:

1. On January 18, 2013 Plaintiff filed its response to Defendant's Motion for Summary Judgment on Counts I, II and III of Plaintiff's Third Amended Complaint. In its response to Defendant's Motion for Summary Judgment on Counts I, II and III of Plaintiff's Third Amended Complaint Plaintiff is ignoring the facts taken from exhibits attached to several verified complaints so far filed by the Plaintiff in this case.
2. In paragraph number 5 of Plaintiff's response Plaintiff admits that on October 17, 2007 "GMAC Mortgage LLC filed a verified complaint". Even though Plaintiff fails to attach a copy of this verified complaint filed on October 17, 2007 this is an important admission for purposes of ruling on Defendant's Motion for Summary Judgment on Counts: I, II and III of Plaintiff's Third Amended Complaint because Defendant's motion for summary judgment is based on exhibits that have been

attached to Plaintiff's original verified complaint and all subsequent verified complaints filed by the Plaintiff.

3. Plaintiff's response to Defendant's Motion for Summary Judgment is based on Plaintiff's mistaken belief that by amending its original verified complaint Plaintiff can avoid consequences of judicial admissions made in its original verified complaint. That is simply not the law in Illinois.
4. A judicial admission is a deliberate, clear, unequivocal statement by a party about a concrete fact within that party's knowledge. *Estate of Rennick*, 181 Ill.2d 395, 407, 692 N.E.2d 1150, 1156 (1998). Once made, a judicial admission conclusively binds the party to the statement made and the party cannot later contradict the statement. *Estate of Rennick*, 181 Ill.2d 395, 407, 692 N.E.2d 1150, 1156 (1998).
5. In its original verified complaint, and in all three subsequent amended complaints Plaintiff has alleged that attached as Exhibit "B" is a "true copy of the Note secured by Defendant's mortgage. The attached Exhibit "B" in every verified complaint so far filed by the Plaintiff was not endorsed to anyone after it was given to HLB, the original lender.
6. Unlike ordinary evidentiary admissions, which can be contradicted or explained, a judicial admission cannot be contradicted or explained. This means that a judicial admission cannot be contradicted in a motion for summary judgment. *Schmahl v. A.V.C. Enterprises, Inc.*, 148 Ill.App.3d 324, 331, 499 N.E.2d 572, 577 (1st Dist. 1986). Thus, Plaintiff in this case cannot introduce an affidavit or testify contrary to a prior judicial admission. *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.* 71 Ill.App.3d 562, 568, 390 N.E.2d 60 (1979).
7. In Illinois, not only can the party not testify contrary to the judicial admission, the party may not offer contrary testimony from other occurrence witnesses or experts. *Caponi v. Larry's 66*, 236 Ill.App.3d 660, 671, 601 N.E.2d 1347, 1355 (2nd Dist 1992).
8. Therefore in practice judicial admissions are "not evidence at all but rather have the effect of withdrawing a fact from contention." *Pryor v. American Central Transport, Inc.*, 260 Ill.App.3d 76, 85, 629 N.E.2d 1205, 1211 (5th Dist. 1994) citing M. Graham, Evidence Text, Rules, Illustrations and Problems, at 146 (1983).
9. In Illinois, verified pleadings constitute a judicial admission. *Rynn v. Owens*, 181 Ill.App.3d 232, 235, 536 N.E.2d 959, 962 (1st Dist. 1989). Further, though an amended complaint normally supersedes a prior complaint, where the prior complaint was verified, any admissions that were not the product of mistake or inadvertence are binding judicial admissions. *Rynn v. Owens*, 181 Ill.App.3d 232, 235, 536 N.E.2d 959, 962 (1st Dist. 1989). So far Plaintiff has not claimed in any of its pleadings and/or motions that its Exhibit "B", a true copy of the Note, that was attached to its previous complaints and is attached to its current Third Verified Complaint is a

product of mistake or inadvertence and thus the contents of that exhibit must be considered a judicial admission for purposes of adjudicating Defendant's motion for summary judgment on Counts I, II and III of Plaintiff's Third Amended Complaint because Plaintiff is precluded from changing that judicially admitted fact.

10. Since pleadings in a case include the exhibits attached to the complaint, the facts in the exhibits may be deemed judicial admissions. *El Rincon Supportive Services Organization, Inc. v. First Nonprofit Mutual Insurance Co.*, 346 Ill.App.3d 96, 100, 803 N.E.2d 532, 535 (1st dist 2004). Thus, "... a party may not create a genuine issue of material fact by taking contradictory positions, nor may he remove a factual question from consideration just to raise it anew when convenient." *Schmahl v. A.V.C. Enterprises, Inc.*, 148 Ill.App.3d at 331, 499 N.E.2d at 577.
11. In case at bar Plaintiff is attempting to create a genuine issue of material fact by introducing a new version of the Note and by claiming that the possession of this new version of the note gives it right to take Defendant's property.
12. Plaintiff's argument overlooks two salient facts: The first is that in its current Third Amended Complaint, and in all prior complaints, Plaintiff has made a repeated judicial admission that its Exhibit "B" is a true copy of the Note subject to this litigation. That "true copy" conclusively shows that at all relevant times the owner of that Note was HLB, the original lender, and not this Plaintiff. The second salient fact being ignored by the Plaintiff is that the mortgage subject to this litigation (and the Note securing it) was placed against Defendant's property without Defendant's consent and thus Plaintiff's efforts to foreclose a fraudulent mortgage is nothing short of an open admission that Plaintiff wishes to secure for itself the benefits of a fraudulent transaction and that Plaintiff continues to engage in additional fraud to secured the benefits of that original fraudulent transaction.
13. Moreover, all the exhibits attached to Plaintiff's original verified complaint and to all subsequently filed amended complaint are also judicial admissions and under the above cited applicable law, Plaintiff is precluded from taking positions contradictory to those stated in its various assignments, and in particular in its "Lost Assignment Affidavit" attached to its original complaint. This affidavit clearly states that the mortgage subject to this litigation was transferred from GMAC MORTGAGE, LLC to LaSalle Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2006-16AX prior to the filing of the original complaint in October of 2007. Given this judicial admission from Plaintiff's original verified complaint, all subsequent transfers, as a matter of law, must be construed as fraudulent and thus Defendant's Motion for Summary Judgment on Counts I, II and III of Plaintiff's Third Amended Complaint must be granted because Plaintiff is precluded from introducing any additional evidence to contradict its prior judicial admissions on this point. Consequently Plaintiff's argument in paragraph number 29 of its "Answer" to Defendant's Motion for Summary Judgment simply misses the mark because judicial

admissions form verified pleadings and exhibits attached to them cannot be simply "corrected" as indicated in Plaintiff's argument.

14. Supreme Court Rule 201(j) provides that matters obtained in discovery are not conclusive, but may be contradicted by other evidence. Generally a party's testimony at a deposition is treated only as an evidentiary admission. *Lindenmier v. City of Rockford*, 156 Ill.App.3d 76, 87, 508 N.E.2d 1201, 1209 (2nd Dist. 1987). However, with respect to certain discovery admissions, the courts have adopted the judicial admission doctrine. Supreme Court Rule 212(a)(2) provides that an admission by a party in a discovery deposition may be used to the same extent as any other admission by that party. Rule 213(h) provides that answers to interrogatories may be used to the same extent as a discovery deposition. Both deposition and interrogatory answers can be treated as either judicial or evidentiary admissions depending upon the content and context.
15. So where "statements may be 'so deliberate, detailed, and unequivocal, as to matters within the party's personal knowledge' the statements can be held to be judicial admissions." *Caponi v. Larry's* 66, 236 Ill.App.3d at 671, 601 N.E.2d at 1355. Thus a number of cases have held that testimony at discovery depositions may constitute judicial admissions. See cases cited in *Estate of Rennick*, 181 Ill.2d at 408, 692 N.E.2d at 1156.
16. Interrogatory answers may constitute judicial admissions in the same way as answers to questions in a discovery deposition. See *list of cases in Estate of Rennick*, 181 Ill.2d at 408, 692 N.E.2d at 1156. Thus, where a party was asked about contentions being made in a case, the Illinois Supreme Court held that the party alone knew what its contentions were and its answers in discovery were a judicial admission. *Vans Material Co. v. Dep't. of Revenue*, 131 Ill.2d 196, 212, 545 N.E.2d 695, 703 (1989).
17. On November 15, 2012 a partial deposition of Rashad Blanchard was taken and during his partial deposition Rashad Blanchard, according to Defendant attorney's notes, has made additional judicial admissions including the fact that he did not review any of Plaintiff's complaints before he signed his affidavit in support of Plaintiff's motion for summary judgment. The original transcript of his deposition was not yet available at the time of filing of this Reply and thus Defendant reserves his right to supplement this Reply with the actual transcript as soon as it becomes available.
18. A judicial admission must be an unequivocal statement of fact. *Hansen v. Ruby Construction Co.*, 155 Ill.App.3d 475, 480, 508 N.E.2d 301, 303-304 (1st Dist. 1987). The American Heritage Dictionary defines "equivocal" as being "capable of two or more interpretations" and *Hansen* cites Webster's dictionary as equating "equivocal" with "ambiguous." American Heritage Dictionary Second College Edition (1982) and *Hansen* 155 Ill.App.3d at 480, 508 N.E.2d at 304.

19. Whether a statement is unequivocal is a question of law to be decided by the court. *Hansen* 155 Ill.App.3d at 480, 508 N.E.2d at 304. "Therefore, in the absence of ambiguity or equivocation in the contract or the statement, as the case may be, interpretation is the province of the court and may be done by summary judgment." *Hansen* 155 Ill.App.3d at 480, 508 N.E.2d at 304. Thus the judge decides if a statement is unequivocal and whether a statement constitutes a judicial admission. The judge does not make this determination in a vacuum, but in light of the party's entire testimony, not just a part of it. *McCormack v. Haan*, 20 Ill.2d 75, 78, 169 N.E.2d 239, 240-241 (1960), *Caponi v. Larry's* 66, 236 Ill.App.3d at 672, 601 N.E.2d at 1356.
20. Formal admissions in open court, admissions pursuant to requests to admit and stipulations also constitute judicial admissions. *Brummet v. Farel*. 217 Ill.App.3d 264, 267, 576 N.E.2d 1232, 1234 (5th Dist. 1991).
21. In paragraph number 9 of its response to Defendant's motion for summary judgment plaintiff alleged that "Daniggelis has never plead any affirmative defense based on Plaintiff's standing. Daniggelis now raises standing for the first time in his unverified motion for summary judgment, 5 years after the case was filed". This claim is simply false. The order entered on July 24, 2012 clearly indicates that Defendant has raised this issue of standing prior to Defendant's Motion for Summary Judgment. Moreover, in his verified Answer to Plaintiff's Third Amended Complaint Defendant RICHARD DANIGGELIS has denied Plaintiff's capacity as alleged in paragraph number 3(j) of Plaintiff's Third Amended Complaint. In addition, Defendant's Answer to Plaintiff's Third Amended Complaint incorporates Defendant's Affirmative Defenses filed together with Defendant's Answer to Plaintiff's Second Amended Complaint.
22. In paragraph number 16 of his response to Defendant's Motion for Summary Judgment plaintiff argues that Defendant's "Exhibit 1", the August 1, 2006 assignment, is void because it was not in recordable form, it was not recorded and it does not identify the mortgage which it purported to assign. In addition, plaintiff argues that this assignment is void because it was executed by HLB Mortgage, the principal, and not by its nominee, Mortgage Electronic Registration Systems, Inc. Plaintiff does not support its position with any authority because there is no authority for this claim advanced by the Plaintiff. Plaintiff's argument is without any merit because assignments in Illinois do not have to be recorded in order to be valid. In Illinois recording is relevant only for purposes of adjudicating priorities between different lien claimants and it has nothing to do with the validity of the assignment.
23. In paragraph number 19 of its response Plaintiff argues that DANIGGELIS has the burden to prove that this August 1, 2006 assignment from HLB Mortgage to American Home Mortgage was recorded. This argument also fails because this assignment was produced by the Plaintiff in response to Defendant's discovery.

24. In paragraph 20 of his response Plaintiff's argument is incoherent. In its relevant part paragraph 20 of Plaintiff's response reads as follows: "Plaintiff's capacity to bring foreclosure agency the IMF at section 15-1504(a)(3)(N) provides in part that:

"Capacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the indebtedness, a pledge, an agent, the trustee under a trust deed or otherwise, as appropriate)".

The sentence following the above quotation is not comprehensible and it reads as follows: "Plaintiff as Trustee is the Plaintiff and its agent Ocwen, a power of attorney was attached to the Affidavit of Rashad Blanchard, Answer Exhibit B." This incomprehensible paragraph must be stricken.

25. In paragraph 21 of its response to Defendant's Motion for Summary Judgment Plaintiff is arguing that, pursuant to Section 1504(a)(b) of the Illinois Mortgage Foreclosure Law, Plaintiff's complaint is sufficient. Sufficiency of Plaintiff's Third Amended Complaint, however, was not raised in Defendant's Motion for Summary Judgment and thus this paragraph should also be stricken.
26. In paragraph number 23 of its response to Defendant's Motion for Summary Judgment Plaintiff claims that "Daniggelis' Motion does not conform to Illinois law since Plaintiff is the holder of the Note". Again, Plaintiff fails to take into account judicial admissions made in its original and in all subsequent amended complaints thus precluding the Plaintiff from contradicting itself on this point and introducing additional exhibits to create a material factual dispute.
27. Defendant's Motion for Summary Judgment on Counts I, II and III of Plaintiff's Third Amended Complaint is based on documents that were attached to Plaintiff's verified complaints and on one document produced by the Plaintiff in response to Defendant's discovery request.
28. These documents, after excluding the one produced by Plaintiff in response to Defendant's discovery, being judicial admissions clearly show, as a matter of law, that Plaintiff's claim against RICHARD DANIGGELIS, as framed by the allegations in Plaintiff's Third Amended Complaint, is a complete sham because the judicial admissions made by the Plaintiff contain no evidence that the note and mortgage attached to Plaintiff's original and all subsequently amended complaints was ever transferred from American Home Mortgage to anyone else.
29. If indeed, at all relevant time, Plaintiff was the holder of the Note endorsed in blank, this court can only speculate as to why Plaintiff failed to attach a copy of that Note to any of its four verified complaints filed in this case so far.
30. According to Plaintiff's judicial admissions made in its original verified complaint, as confirmed in paragraph number 5 of Plaintiff's response to Defendant's Motion for Summary Judgment, GMAC MORTGAGE, LLC transferred all its interest in the

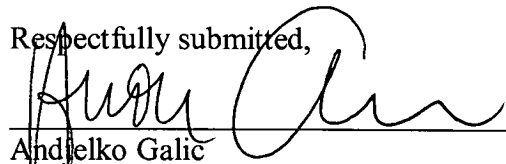
mortgage and note subject to this litigation, prior to October 17, 2007, the date of filing of Plaintiff's original verified complaint. Consequently, GMAC MORTGAGE, LLC had nothing to assign to anyone else neither in November of 2009 nor in July of 2011 and, thus, Defendant's Motion on Counts I, II and III of Plaintiff's Third Amended Verified Complaint must be granted, as a matter of law, because Plaintiff is no longer in a position to contradict its previously made judicial admissions.

31. On October 7, 2011, Plaintiff filed its Third Amended Verified Complaint without amending deficiencies that have been identified in Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint. The Third Amended Complaint is in essence identical to the Second Amended Complaint in all relevant respects except for the so called "Corrective Assignment of Mortgage" attached to the Third Amended Complaint as Exhibit "C".
32. Plaintiff withdrew Count I of its Second Amended Complaint after Defendant raised the question of Plaintiff's standing to sue.
33. The Third Amended Verified Complaint fails to provide any basis for allowing the current trustee for Morgan Stanley Loan Trust 2006-16AX to proceed with this litigation.
34. Plaintiff's Exhibit "C", the "Corrective Assignment of Mortgage" attached to Plaintiff's Third Amended Verified Complaint is executed on July 7, 2011 and it states that GMAC Mortgage, LLC as authorized agent did hereby assign...and deliver to BANK OF AMERICA, N.A. AS TRUSTEE FOR MORGAN STANLEY LOAN TRUST 2006-16AX (the Assignee), its successors and assigns, prior to 06/06/2011, the mortgage subject to this litigation.
35. Plaintiff's exhibit "C", even if we assume its validity, does not indicate when the current plaintiff acquired any interest in this mortgage and note nor does it indicate the principal on whose behalf the GMAC assigned this mortgage to BANK OF AMERICA, N.A. AS TRUSTEE FOR MORGAN STANLEY LOAN TURST 2006-AX.
36. Since this foreclosure complaint was filed in October of 2007 Plaintiff must show that it had standing to sue prior to filing this foreclosure action in October of 2007.
37. This 'corrective assignment of mortgage' appears to be nothing else but an attempt to divert the court's attention from the fact that according to the assignment (another judicial admission), that was attached to Plaintiff's Second Amended Complaint in support of Plaintiff's standing to sue, was executed in November of 2009, more than two years after this foreclosure complaint was filed.
38. Plaintiff's Second Amended Complaint did not allege anything about how GMAC acquired any interest in this property, and the assignment from GMAC to LaSalle Bank National Association, that is now "corrected", is invalid on its face.

39. The so called "Corrective Assignment of Mortgage" is correcting the previous assignment dated November 23, 2009, and thus, even if this "correction" was legal and even if retroactive assignments of mortgages were legal in Illinois, it would still fail because it would provide the Plaintiff with standing to sue two years after this foreclosure action was filed.
40. Plaintiff fails to provide any legal and/or factual basis for its implied assumption that retroactive corrections of this kind are allowed in Illinois and Plaintiff fails to allege anything that would suggest that the original assignment dated November 23, 2009 contained typographical errors and/or other errors that can be classified as scrivener's errors, or anything along those lines, so that this "correction" clearly does not qualify as a correction of that sort. Under the very terms of this "correction" it is impossible to determine when the actual assignment of this mortgage was done and thus this "correction" cannot correct the fact that at the time of filing its original complaint this Plaintiff did not have any interest in the note and mortgage subject to this litigation.

Wherefore, Defendant prays for an order granting RICHARD DANIGGELIS' Motion for Summary Judgment on Counts I, II and II of Plaintiff's Third Amended Verified Complaint.

Respectfully submitted,



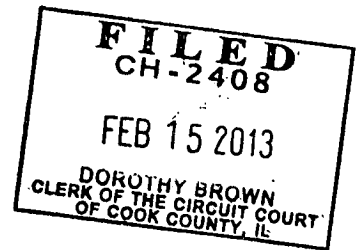
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NOTICE OF FILING

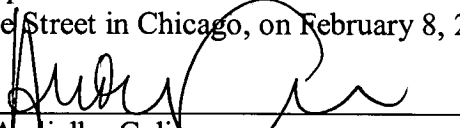
TO: See attached Service list

You are hereby given notice that on February 8, 2013, we mailed to the Clerk of the Circuit Court of Cook County our Reply in support of Defendant's Motion for Summary Judgment on Counts I, II and III of Plaintiff's Third Amended Verified Complaint, a copy of which is attached and hereby served upon you.


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CERTIFICATE OF SERVICE

I, Andjelko Galic, an attorney, certify that I caused this Notice of Filing to be served by placing a copy of it in an envelope addressed the above parties at the above addresses and depositing the same in the U.S. mailbox at 134 North LaSalle Street in Chicago, on February 8, 2013 with proper postage prepaid.


Andjelko Galic

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