

A12-1618

STATE OF MINNESOTA
IN COURT OF APPEALS

David C. Embree and Kristie M. Embree,

Appellants,

vs.

U.S. Bank National Association, as trustee for
structured asset investment loan trust, mortgage
pass-through certificates, series 2006-BNC3,

Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. FAILURE BY U.S. BANK TO COMPLY WITH MINN. STAT. § 580.05.

In a foreclosure of a mortgage by advertisement, the issue is not just whether the authority of a power of attorney exists. The issue under Minn. Stat. § 580.05 is both the existence of the authority and whether the authority is placed of record with the county recorder prior to the sale.

The asserted failure of U.S. Bank to establish their authority of record goes to the scope of the Limited Power of Attorney, found at Addendum page 11; also RES APP 013.

Both parties are bound by what is of record when there is an issue of compliance under Minn. Stat. § 580.05. When the Embrees claim that the Limited Power of Attorney does not grant to U.S. Bank authority to foreclose their mortgage, the Embrees are not speculating what the service agreements say. The Embrees are asserting that no matter what the servicing agreements say, the attempted foreclosure by advertisement in this case is void because of the failure of U.S. Bank to establish their authority of record prior to the foreclosure sale.

It is not the Embrees' argument that the Limited Power of Attorney has to identify each mortgage for which it grants power to an attorney-in-fact. A power of attorney can grant blanket authority.

U.S. Bank's problem in this case is that the Limited Power of Attorney upon which they are trying to rely was not a grant of blanket authority. The authority in this particular power of attorney was substantially limited, and U.S. Bank in its brief completely ignores those stated limitations.

The Limited Power of Attorney grants authority to execute documents in connection with debt collection of "certain mortgage loans" "held" by U.S. Bank as Trustee "provided however that the documents described below may only be executed and delivered by said Attorney-In-Fact if such documents are required or permitted under the terms of the related servicing agreements and no power is granted herewith to take any action that would be adverse to the interests of the Trustee of the Holder."

The Limited Power of Attorney does not grant to U.S. Bank the authority to foreclose the Embree mortgage because a document that grants authority to act only where other documents require or permit the action is not a grant of any authority in the absence of the other documents.

The limitation here is not trivial or metaphysical. The Limited Power of Attorney grants no authority in the absence of the servicing agreements.

The lack of authority without the servicing agreement should be clear to U.S. Bank. Let us consider the hypothetical of a corporation asking U.S. Bank for a loan. If U.S. Bank asked for authority from the corporation to take out the loans

and got a limited power of attorney from the corporation that said the corporate officers had authority to sign for the loan provided the loan documents were required or permitted under the terms of corporate by-laws, there would be no loan from U.S. Bank to the corporation without the by-laws being provided. The by-laws would be considered essential to the authority required for signing for the loan.

In the same way, the Limited Power of Attorney in this case cannot, absent one or more of the referred to servicing agreements, be relied upon by U.S. Bank as conferring authority to Chase to act.

Minn. Stat. § 580.05 does not require the recording of servicing agreements to loans. It requires the recording of authority. However, where, as here, authority under a power of attorney does not exist unless a servicing agreement requires or permits action, the power of attorney cannot be relied upon in the absence of the applicable servicing agreement.

II. THE EMBREES DID NOT WAIVE THE ISSUE OF CHASE'S AUTHORITY TO ACT AS AGENT FOR U.S. BANK.

There is no waiver of the issue of Chase's authority. The Embrees raised that issue in front of the trial court. "There has not been a showing that, as a matter of law, the limited power of attorney granted authority for Chase to act on behalf of Defendant in connection with the foreclosure of the Embree mortgage."

Plaintiff's Memorandum of Law in Response to Defendant's Notice for Summary Judgment, page 7.

What was not argued or cited by the parties in the trial court were cases on agency. The trial court implicitly held that the authority of an agent in this case was not a question of fact for the jury by granting the motion for summary judgment.

This Court should take into account how the Limited Power of Attorney at issue here came up in the trial court. Summary Judgment was brought by U.S. Bank relying on a different document, a document recorded in Hennepin County, for the authority required by Minn. Stat. § 580.05. In response to a Request for Admission from the Embrees, U.S. Bank said there were no other documents of record upon which they were relying. The Embrees' responsive brief to the summary judgment motion argued against the authority of Chase under the previously relied upon document. Then, in a reply brief to the Embrees' argument as to summary judgment, with attached exhibits, U.S. Bank provided a copy of the Limited Power of Attorney which we are now arguing about. Given that history, there is no proper argument that the Embrees failed to preserve their argument that Chase's authority is a question of fact for a jury.

Unless this Court finds that the Limited Power of Attorney on its face unambiguously establishes the authority of U.S. Bank to act to foreclose the

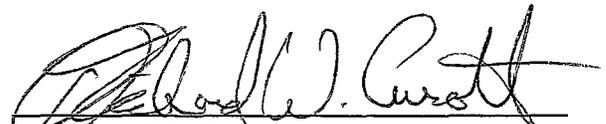
Embree mortgage, summary judgment was improperly granted. As previously argued, the Limited Power of Attorney does not unambiguously establish authority because of the reference to there being no power to act absent the authority of the servicing agreements, and the reference to mortgages "held" by U.S. Bank and the lack of reference to mortgages to later be acquired by the bank.

III. CONCLUSION.

Because the Limited Power of Attorney does not grant authority from U.S. Bank to Chase to act without the additional authority of a related servicing agreement, and there is nothing else of record giving Chase authority to act, Chase's action in connection with this foreclosure does not comply with Minn. Stat. § 580.05.

Respectfully submitted,

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Dated: November 21, 2012

FORM 132. CERTIFICATION OF BRIEF LENGTH

STATE OF MINNESOTA

IN COURT OF APPEALS

CASE TITLE:

David C. Embree and Kristie M. Embree,

Appellant,

CERTIFICATION OF BRIEF LENGTH

vs.

APPELLATE COURT CASE NUMBER: A12-1618

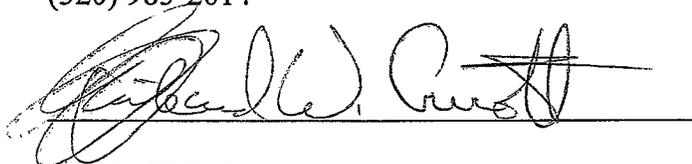
U.S. Bank National Association, as trustee for
structured asset investment loan trust, mortgage
pass-through certificates, series 2006-BNC3,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a monospaced proportional font. The length of this brief is 1054 words. This brief was prepared using Microsoft Office Word 2007.

DATED: November 21, 2012

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A handwritten signature in black ink, appearing to read "Richard W. Curott", is written over a horizontal line.

SIGNATURE