

**IN THE CHANCERY COURT OF SHELBY COUNTY TENNESSEE
FOR THE 30TH JUDICIAL DISTRICT AT MEMPHIS**

**DAVID G. MILLS &
JULIA MILLS,**

Plaintiffs,

v.

No. CH-09-0662-2

**FIRST HORIZON HOME LOAN CORPORATION
D/B/A FIRST TENNESSEE HOME LOANS &
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**

Defendants.

FIRST AMENDED COMPLAINT TO QUIET TITLE

TO THE HONORABLE CHANCELLOR OF SAID COURT:

COMES NOW, David G. Mills and Julia Mills (Plaintiffs), complaining of Defendant First Horizon Home Loan Corporation, d/b/a First Tennessee Home Loans (FHHLC), and Defendant Mortgage Electronic Registration Systems, Inc. (MERS), and for cause of action would respectfully show unto this Honorable Court the following:

JURISDICTION AND VENUE

1. Plaintiffs are husband and wife and are resident citizens of Cordova, Shelby County, Tennessee, and have been residents there at all times relevant to the events that form the basis of Plaintiffs' Complaint.

2. This basis of this case arises out of a dispute between the parties concerning the first and second mortgages on Plaintiffs' residence located at 1403 Cedar Run, Cordova, Shelby County, Tennessee.

3. Both Defendants have been served and have filed a joint Motion to Dismiss and Plaintiffs' have filed a Response to that Motion to Dismiss.

4. This court has jurisdiction of the matter pursuant to T.C.A. §16-11-101 *et seq.*

FACTS

5. In January 2008, Mr. Mills requested, by telephone, payoff information on the second mortgage from FHHLC, and paid the balance of that account (approximately \$30,000.00) in late January or early February of 2008.

6. In that January 2008 telephone call, FHHLC's representative told Mr. Mills that within four to six weeks of receipt of full payment, Plaintiffs would be receiving documentation that their second mortgage loan had been paid off and that the second mortgage lien had been released.

7. From the statements of FHHLC's representative, Mr. Mills, based upon his previous experience with buying and selling houses, expected to receive within a reasonable time, the original of the filed Release of Deed of Trust for the second mortgage and the return of the original note for the second mortgage marked "paid" or "paid in full" or other words to that effect.

8. On June 30, 2008, a reasonable time period having elapsed, Mr. Mills called FHHLC to check on the status of the documentation he expected to receive.

9. FHHLC's representative stated that FHHLC had received the payoff on Plaintiff's second mortgage and that FHHLC had released the lien on the second mortgage in February of 2008.

10. In this June 30, 2008 telephone conversation, Mr. Mills requested that FHHLC send him the original of the second mortgage note, but FHHLC's representative declined, stating, "We don't do that anymore."

11. In that same telephone conversation, Mr. Mills told FHHLC's representative that Plaintiffs were entitled to have the original returned, and that in all his prior dealings with mortgage companies, he had received the original note showing it "paid" or "paid in full" when the loan had been paid. (Obviously, Mr. Mills had these prior experiences of having "paid-in-full" notes returned because that is what the Uniform Commercial Code requires). FHHLC's representative merely repeated, "We don't do that anymore."

12. Shortly after that telephone conversation, FHHLC's representative sent a copy of the release of the second mortgage, by facsimile transmission to Mr. Mills, and Plaintiffs have since confirmed that the release was filed with the Shelby County, Tennessee deed registrar.

13. A copy of that release is attached to this complaint as Exhibit "A."

14. Having been refused the return of the documents regarding the second mortgage and the debt related thereto, Mr. Mills determined he needed to locate the original second mortgage note, and to determine the validity of the original release of the second mortgage deed of trust.

15. Based upon the foregoing facts, Mr. Mills feared he would also not receive the original note for the primary mortgage or the original release of the primary mortgage deed of trust, when the obligations in those instruments were satisfied.

16. Therefore, in late July 2008, Mr. Mills demanded in writing that FHHLC send him the original second mortgage note, of which Plaintiffs had fully paid, and the original release

thereof. Mr. Mills further demanded therein that FHHLC show him proof that FHHLC also held Plaintiffs' note on Plaintiffs' first mortgage.

17. That letter making that demand is attached to this complaint as Exhibit "B."

18. FHHLC failed to respond in writing to that demand.

19. After numerous phone calls to various places and to various persons who seemed to know nothing about his demand letter, Mr. Mills was finally able to get in touch with another representative of FHHLC at FHHLC's home office who knew something about it. This particular representative acknowledged receipt of the demand letter and told Mr. Mills that Plaintiffs would not be getting the original note that had been paid off, nor would Plaintiffs be allowed to see the first mortgage note they were still paying on. Based upon this representative's statements, the Plaintiffs' deemed a suit was necessary, and filed their Original Complaint.

20. Subsequent to the filing of Plaintiffs' Original Complaint, Mr. Mills was contacted by house counsel for FHHLC who confirmed that the second mortgage note was probably destroyed and unavailable to be returned to the Plaintiffs.

21. Subsequent to the filing of Plaintiffs' Original Complaint, Mr. Mills was also told by the same house counsel for FHHLC, that his first note had been sold, and that FHHLC was only servicing the note but that the note was believed to still be in FHHLC's possession (a copy of that correspondence is attached to this complaint as Exhibit "C").

22. Plaintiffs' first mortgage deed of trust, which is attached as Exhibit "D" to this complaint, states that FHHLC is the lender but that MERS is "a separate corporation that is acting solely as *nominee* (our italics) for Lender and Lender's successor and assigns." It further states that, "MERS is the beneficiary under this security instrument."

23. Moreover, a search of the Shelby county deed records indicates that there was never a recordation of an assignment of the first mortgage Deed of Trust.

24. Plaintiffs continue to make payments on their first mortgage note and have every intention to do so during the pendency of this litigation.

**DISCUSSION OF RECENT LEGAL HISTORY
OF MISSING MORTGAGE NOTES
AND ITS APPLICATION TO THE INSTANT CASE**

25. In jurisdictions where judicial foreclosures are required and have recently occurred, MERS, as nominee for the lender, has often been the party seeking foreclosure.

26. In jurisdictions where judicial foreclosures are required, the inability of MERS, and/or the trustee and/or lender, to produce the original note in question has become a recent and unfortunate pattern and practice.

27. Affidavits of lost notes have also become a recent pattern and practice, and many judges in these jurisdictions are putting foreclosure proceedings in abeyance until such time as MERS, the trustee, and/or lender can produce the original note.

28. In these foreclosure cases, the usual reason given for the inability to produce the original notes is that the notes have been sold off to secondary mortgage market entities, which have bundled the notes in tranches, and sold them as part of a mortgage-backed security trust to investors.

29. Many of such trusts, or their owners, have become insolvent or have just gone out of business; in short, the original notes have simply vanished and can't be found, or their owners no longer exist or no effort is made to find them.

30. In many of these foreclosure actions brought by MERS, the actions have been dismissed for lack of standing, because MERS is little more than a shell entity, which is made up

of a group of members who are primarily loan originators, used to facilitate the “flipping” of loans, from a loan originator to a secondary mortgage market entity, who then packages the loans as part of a mortgage-backed security trust.

31. MERS members decided it was too costly to pay recordation fees on loans that might be flipped numerous times, so according to MERS, MERS was chosen as *nominee* for the lender and its assigns in these deeds of trust, for the purpose of “immobilizing the mortgage lien while transfers of the promissory notes and servicing rights could continue to occur without the expense of recordation” (MERS’ own explanation of what it does, from the reported case, *Mortgage Electronic Systems, Inc. v. Nebraska Department of Banking and Finance*, 704 N.W. 2d. 884, 786 (2005), a copy of which is attached hereto as Exhibit “E”).

32. This immobilization of the mortgage lien now makes it terribly difficult for a borrower to track the holder of his note because deeds of trust are no longer assigned; and therefore, new holders of the notes do not record assignments of the deeds of trust when they purchase mortgages.

33. But the fact that MERS is a shell entity, means MERS never holds these notes (again citing from the reported case of *Mortgage Electronic Systems, Inc. v. Nebraska Department of Banking and Finance, supra* where MERS explains what it does), and means that Defendant MERS can’t legitimately claim it has lost notes that were never in its possession, and means Defendant MERS can’t legitimately file affidavits of lost notes; and therefore, numerous courts have held it lacks standing to bring a foreclosure action when it can’t produce the original note or show that it holds it. [Attached to this Amended Complaint as Exhibit “F” is a copy of *Mortgage Electronic Registration System, Inc. v. Southwest Homes of Arkansas* (Ark. Sup.Ct. slip opinion March 23, 2009), where the Supreme Court of Arkansas held that MERS, which

claimed to be both a *nominee* and *beneficiary*, had no interest in the Deed of Trust in question, was not a beneficiary despite language in the Deed of Trust stating it was, did not possess any rights as a lender, did not hold any legal title, and was therefore not entitled to be a party to a foreclosure action where the lender, its principal, was a party].

34. Even foreclosure suits brought by originating lenders, who have retained service rights to the notes, also fail to qualify as a party with standing to sue when the notes are lost, because they too fail to qualify to make proper affidavits of lost notes, or make other proper proof of the lost note's enforceability; and moreover, when pressed, these loan originators can't even show that they have any deed of trust rights because their interests in the notes have been previously assigned.

35. Although the instant case is not a foreclosure action, many of the same problems arise in it, as have occurred in judicial foreclosure cases of other jurisdictions, because Tennessee law requires: (1) that original notes must be kept, (2) that original notes must returned to the borrower upon payment in full, (3) that original notes must be produced when the lender or its representative has demanded payment and the borrower requests to see proof of an original note's existence, and (4) that a lender's representative show proof of authority to demand payment when the borrower requests the lender's representative to do so.

36. Moreover, in the event a mortgage lender or its representative cannot prove that a Tennessee mortgage original note still exists, Tennessee law requires proof of certain things before a lost note will be deemed enforceable, just as the jurisdictions requiring judicial foreclosures do; and furthermore, Tennessee courts also require compliance with the Tennessee laws of trusts, assignments, and agency as they pertain to real estate cases.

CAUSES OF ACTION AND REQUESTS FOR RELIEF

37. Regarding Plaintiffs' second mortgage note, Defendant FHHLC was required, pursuant to T.C.A. § 47-3-501(b), to surrender said note upon full payment of it, and FHHLC has wholly failed to do so; and since it has failed to do so, there is a presumption that the note is not enforceable, unless proven to be so by FHHLC, who has the burden to prove its enforceability.

38. Given Defendant FHHLC's admission by its agent that it can not return Plaintiffs' second mortgage note as required by T.C.A. § 47-3-501(b), Plaintiffs' either demand that FHHLC prove the second mortgage note's enforceability, as is required by T.C.A. § 47-3-309(a) for a lost or destroyed note, or return their second note payments.

39. The release that Defendant FHHLC gave Plaintiffs for their second mortgage, recites that Defendant FHHLC is the "legal owner and holder of the note described in and secured by said deed of trust," and Plaintiffs demand that FHHLC prove that this statement was true when made, by first proving under T.C.A. § 47-3-309(a) that FHHLC was entitled to enforce the note when the note went missing.

40. Should FHHLC meet its burden of proof by showing the second mortgage note is enforceable under T.C.A. § 47-3-309(a) when said note went missing, Plaintiffs would show that FHHLC must also give Plaintiffs adequate protection against any loss that might occur to them, by reason of a claim by another person, in accordance with T.C.A. § 47-3-309(b) to prevent FHHLC from being required to refund Plaintiffs' second mortgage note payments.

41. However, should FHHLC be unable to meet its burden of proving it was entitled to enforce the second mortgage note when said note went missing, then Plaintiffs would request that the court order the FHHLC to make an accounting of all of Plaintiffs' payments to FHHLC, and to enter a judgment that FHHLC return all monies to Plaintiffs from the date the note went

missing, or from the date of first payment, if the date the note went missing cannot be accurately ascertained.

42. Finally, with regard to this second mortgage note, Plaintiffs request that after a determination of whether FHHLC was entitled to enforce said note when it went missing, the court enter an order that clears Plaintiff's title with respect to the second Deed of Trust.

43. Regarding Plaintiffs' first mortgage note, Plaintiffs would show that the first mortgage note is also not presumed to be enforceable, and that the Defendants have the minimum burden of proving its enforceability under T.C.A. § 47-3-501 and perhaps have the greater burden of proving its enforceability under T.C.A. § 47-3-309 if the first mortgage note is also missing.

44. FHHLC, through its house counsel, has admitted in writing that FHHLC has sold Plaintiffs' first mortgage note, but claims it still possesses the note, and still claims it has the right to make demand for payment under said note as the servicer for the holder of the note.

45. Though Plaintiffs have made repeated demands on FHHLC to "exhibit" the first mortgage note, and to present Plaintiffs' with reasonable evidence that FHHLC has the authority to make demands upon the Plaintiffs if it does not own the first mortgage note, both being required by T.C.A. § 47-3-501(b)(2), FHHLC continually refuses to comply with both requirements of this statute.

46. Plaintiffs would show that because FHHLC refuses to comply with T.C.A. § 47-3-501(b)(2), Plaintiffs are entitled to the relief provided to them pursuant to T.C.A. § 47-3-501(b)(3). They therefore request that this court enter an order determining that Plaintiffs can refuse to make payment on the first mortgage note without dishonor, until such time as FHHLC

exhibits the note as required by the statute and shows reasonable evidence it possesses the authority to make demand on the note owner's behalf.

47. Moreover, should FHHLC be unable to exhibit the first mortgage note as required by T.C.A. § 47-3-501(b)(2), because the first mortgage note has been lost or destroyed, Plaintiffs would again demand that before FHHLC be permitted to make further demand for payment upon the Plaintiffs, that FHHLC first prove that the note is enforceable under T.C.A. § 47-3-309(a) and give Plaintiffs adequate protection under T.C.A. § 47-3-309(b) before they are permitted to show authority to demand payment; and, Plaintiffs' aver it is FHHLC's burden to do so.

48. Should FHHLC be unable to exhibit the first note but nevertheless be able to meet its burden of proving the enforceability of the first mortgage note under T.C.A. § 47-3-309(a), and should FHHLC be able to meet its burden of showing the authority to continue to demand payment of the Plaintiffs, Plaintiffs still request the court to enter an order that Plaintiffs be given adequate protection against any loss Plaintiffs might have by reason of a claim of another person in accordance with T.C.A. § 47-3-309(b).

49. Should FHHLC fail to produce the original first mortgage note for Plaintiffs' inspection, or should FHHLC fail to meet its burden of proving the enforceability of the first mortgage note, or should it fail to meet its burden of proving it has the authority to demand payment of the Plaintiffs on said note, or should it fail to give any adequate protection the court requires, the Plaintiffs request this court issue a cease and desist order to FHHLC from further demanding payment of Plaintiffs on said note.

50. Additionally, should FHHLC fail to meet its burden of proving the enforceability of the first mortgage note, or should it fail to meet its burden of proving that it has the authority to make demands for payment, then Plaintiffs request the court order the FHHLC to make an

accounting of all of Plaintiffs' payments to FHHLC on the first mortgage note and to enter a judgment that FHHLC return all monies to Plaintiffs from the date the note went missing, or from the date of first payment, if the date the note went missing cannot be accurately ascertained, or from the date the note was sold.

50. Lastly, Plaintiffs would show that there is no presumption of the validity or enforceability of Plaintiffs first mortgage Deed of Trust and demand strict proof thereof by Defendants who have the burden of proving its enforceability.

51. Plaintiffs would show the Court that the interest FHHLC had in Plaintiffs' first mortgage Deed of Trust as lender, was derived from its interest in Plaintiffs' first mortgage note. Plaintiffs would show that when FHHLC sold Plaintiffs' first mortgage note (as FHHLC's house counsel has indicated it has done), FHHLC lost all interest it might have had as lender in Plaintiffs' Deed of Trust. Moreover, since FHHLC did not assign its interest as lender in the Deed of Trust at the time it sold the note, Plaintiffs would show that it cannot do so now, since it no longer has any interest as lender to assign.

52. Moreover, Plaintiffs would also show that MERS, "as nominee for FHHLC as lender" in the Plaintiffs' first mortgage Deed of Trust, only had the rights of an agent whose principal was FHHLC. The rights to act as nominee are the rights of an agent. Plaintiffs would show that MERS' rights to act as an agent of FHHLC were solely derived from the rights of FHHLC who was its principal. Since FHHLC no longer has any rights as a principal, because its rights of those as a lender were lost (if FHHLC's house counsel's representations that the note has been transferred are correct), MERS has no rights as nominee.

53. Plaintiffs would show that since neither FHHLC nor MERS have rights of a lender and there has been no assignment of these rights, any rights given by Plaintiffs to the lender in their first mortgage Deed of Trust no longer exist.

54. Moreover, Plaintiffs would also show that the Deed of Trust in *Southwest Homes, supra*, has language identical to the Plaintiffs' first mortgage Deed of Trust stating that MERS is the beneficiary. However, just like in *Southwest Homes*, MERS cannot be a beneficiary of Plaintiffs' first mortgage Deed of Trust despite the language, because MERS has never had any rights to Plaintiffs first mortgage note payments.

55. Plaintiffs would also show that FHHLC was not named as beneficiary in Plaintiffs' first mortgage Deed of Trust, so since neither MERS nor FHHLC is a beneficiary, there is no beneficiary of the trust.

56. Plaintiffs would therefore show that neither FHHLC nor MERS has any interest whatsoever in Plaintiffs first mortgage Deed of Trust, either as lenders or as beneficiaries; but regardless, Plaintiffs aver that it is the Defendants who have the burden of proving they have any interest in any capacity in the first mortgage Deed of Trust.

57. Plaintiffs would further show that when FHHLC sold Plaintiff's first mortgage note without an assignment of the Deed of Trust at the time of the note's sale, Plaintiffs first mortgage note became an unsecured note.

58. Plaintiffs therefore pray for a judgment against MERS and FHHLC setting aside the first mortgage Deed of Trust and removing any cloud on Plaintiffs property due to the first mortgage Deed of Trust.

**PRE-JUDGMENT AND POST-JUDGMENT INTEREST,
COSTS AND ATTORNEYS FEES**

59. Plaintiffs request this Court enter judgment against Defendants for both pre-judgment and post-judgment interest at the maximum rate allowed by law on each and every element of damages awarded.

60. Plaintiffs requests this Court find Defendants liable to pay all costs of Court which Plaintiffs incur or become obligated to pay as a result of the instigation, filing, and prosecution of this lawsuit.

61. It was necessary for one of the Plaintiffs, Julia Mills, to employ an attorney to represent her in this cause of action and she requests an award of attorneys' fees for representation of her interests.

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray for the relief requested in this complaint and pray for costs of court, pre-and post judgment interest as provided by law, and reasonable attorneys fees.

Respectfully submitted,

Mills & Associates

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been emailed to and received by Kristine L. Roberts and Robert F. Tom, at their offices on 165 Madison Avenue, Suite 2000, Memphis, TN, 38103 on this 8th day of September 2009.

David G. Mills