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Main Contents

[Complaint for Emergency Injunctive and Declaratory Relief and to Stay Foreclosure Sale](#)

April 30, 2009

IN THE MAUI-SECOND CIRCUIT COURT

) Case No.:

)

)

Plaintiffs,)

)

v.)

) COMPLAINT FOR EMERGENCY

BANK OF NEW YORK AS TRUSTEE FOR THE) **INJUNCTIVE AND DECLARATORY**

CERTIFICATEHOLDERS OF CWABS, INC.) **RELIEF AND TO STAY**

ASSET-BACKED CERTIFICATES, SERIES) **FORECLOSURE SALE**

2006-ABC1, NORTHWEST TRUSTEE)

SERVICES INC., and COUNTRYWIDE HOME)

LOANS,)

Defendants.)

_____)

Plaintiffs sue Defendants for emergency injunctive and declaratory relief and to stay an imminent foreclosure sale, and state:

A. Parties and Jurisdiction

1. Plaintiffs are of majority age and are residents of Maui, State of Hawai'i residing in their home located at (hereafter the "Property")
2. Defendant BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-ABC1 ("BNY") is and was, at all material times hereto, a foreign corporation whose corporate domicile and alleged authority to do business in the State of Hawai'i is unknown. Defendant BNY is a corporate entity functioning as an alleged trustee for another corporation (that being CWABS, INC., domicile and authority to do business in Hawai'i also being

unknown) which, on information and belief, issued securities which may or may not have been properly registered and in the form of either collateralized mortgage obligations (CMOs) or collateralized debt obligations (CDOs) or other form of exotic investment vehicle which may or may not be collateralized in whole or in part by the mortgage the subject of this action, and where the Certificateholders of the subject securities may or may not have an interest, in whole or in part, in the mortgage and or the Note the subject of this action.

3. Defendant NORTHWEST TRUSTEE SERVICES, INC. ("NWTS") is and was at all times material hereto, on information and belief, a foreign corporation organized under the laws of the State of California and acting as an agent of Defendant BNY and Defendant COUNTRYWIDE HOME LOANS.
4. Defendant COUNTRYWIDE HOME LOANS ("Countrywide") is the alleged "servicer" of the loan and purported agent for Defendant BNY in connection with a non-judicial foreclosure proceeding as to the Property. On information and belief, Defendant Countrywide has no legal interest in either the mortgage or the Note the subject of this action.

B. Background Material Facts

- A.
 1. Defendant BNY, through its agent Defendant NWTS, instituted a non-judicial foreclosure proceeding to foreclose on a mortgage as to the Property which mortgage was originally issued in the name of non-party Encore Credit Corporation ("Encore"), a foreign corporation organized under the laws of the State of California. Encore was also the originating "lender" on the Note.
 2. Defendant BNY has taken the unverified position, through its counsel, that non-party Encore previously assigned the mortgage issued by Encore as to the Property to Defendant BNY.
 3. However, no such Assignment has ever been produced to the Plaintiffs, and Defendant BNY has failed to prove or even take the position that it is the holder of all rights under

the Note, which is the instrument of indebtedness which would permit the legal holder thereof to declare a default which would trigger a foreclosure.

4. Further, Defendant BNY, as alleged "Trustee" for unnamed "Certificateholders" of a series of mortgage-backed securities, has failed to demonstrate that it, and not the Certificateholders, is the party with the true ownership interest in the Mortgage the subject of this action, or that the Certificateholders have acceded or legally assigned their rights to and under the subject Mortgage to Defendant BNY, specifically the right to seek a foreclosure.
5. As such, Defendant BNY has not demonstrated that it has suffered an actual or threatened injury as a consequence of any default, which distinct and palpable injury is legally required under applicable Hawai'i law in order for Defendant BNY to satisfy the legal prerequisite to prove that it has a sufficient personal stake in and legal standing to institute the foreclosure on the Property.
6. Further, there is a cloud on the title to the Property which Defendant BNY has failed to extinguish as it has chosen to institute a non-judicial foreclosure. The cloud arises out of the filing of an action styled "Notice of Foreclosure of Common Lien in Fact" filed by Plaintiff, which case has been filed in this Court under Case No. . The subject action seeks to foreclose on the same Property which is the subject of the mortgage originally issued by non-party Encore herein.
7. Defendant BNY, through its counsel, has notified Plaintiffs that the foreclosure sale on the Property has been scheduled to take place on Thursday, November 20, 2008.
8. On November 13, 2008, Plaintiffs, through their counsel, forwarded a letter to counsel for Defendant BNY setting forth the facts above with a request that the November 20, 2008 foreclosure sale be cancelled.
9. No response to the subject request has been received as of the date of this Complaint.
10. This Complaint is thus being timely filed in accordance with applicable law to challenge the foreclosure prior to the issuance of any Certificate of Title following sale.

15. As a severance of the ownership and possession of the original Note and Mortgage has occurred and as the true owner and holder of both the original Note and Mortgage are unknown as a result of one or more alleged assignments and the parsed sale of certain rights under the Note in part to at least one third party (Defendant Countrywide), Defendant BNY is legally precluded from foreclosing on the Property unless and until it can demonstrate full legal standing to do so.

COUNT I: EMERGENCY TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

- A. 1. Plaintiffs reaffirm and reallege paragraphs 1 through 14 hereinabove as if set forth more fully hereinbelow.
 17. This is an action for emergency temporary and permanent injunctive relief which is brought pursuant to applicable law.
 18. Plaintiffs have a clear legal right to seek temporary and permanent injunctive relief as Plaintiffs reside in the Property and as Defendant BNY is seeking, without satisfying the necessary legal standing requirements to institute a foreclosure, to take possession, custody, and control of the Property and ultimately remove the Plaintiffs from their home.
 19. Plaintiffs have no adequate remedy at law to redress the harm complained of, and the sale of the Plaintiffs' property, under the circumstances of record, is contrary to equity and good conscience in that such sale is being instituted by parties who have no legal standing to institute or maintain the foreclosure *ab initio*.
 20. The specific facts set forth in this Complaint demonstrate that unless an emergency temporary injunction against the foreclosure sale set for Thursday, November 20, 2008 is not granted that Plaintiffs will suffer the irreparable injury, loss, and damage of the loss of their home and eviction therefrom.
 21. Under the circumstances where the foreclosure sale is set for less than five (5) calendar days (which include a Saturday and Sunday) from the date of the filing of this Complaint, the irreparable loss to the Plaintiffs will result if the emergency relief requested herein is not granted immediately.
 22. As Defendant BNY has no legal standing to institute or maintain a foreclosure of the Property, there is no harm to said Defendant with the granting of the requested relief, and any claimed harm is substantially outweighed by the irreparable harm to the Plaintiffs if the relief requested herein is not granted.
 23. The granting of the relief requested herein is in the public interest, as the consuming public, including Plaintiffs, will continue to be harmed by the illegal and unlawful conduct of the Defendant BNY if the relief requested herein is not granted.

24. Under the circumstances where there is no harm to Defendant BNY with the granting of the requested relief, no bond should be required as a prerequisite to the granting of the relief requested herein as there are no costs or other damages which could be contemplated on the part of Defendant BNY with the granting of the requested relief for which a bond would otherwise be necessary.

WHEREFORE, Plaintiffs respectfully request that this Court immediately take jurisdiction of this matter and enter an Order granting temporary and permanent injunctive relief expressly precluding and cancelling the foreclosure sale presently scheduled for November 20, 2008 for the reasons set forth herein, and for any other and further relief which is just and proper.

COUNT II: DECLARATORY RELIEF

25. Plaintiffs reaffirm and reallege paragraphs 1 through 14 hereinabove as if set forth more fully hereinbelow.
26. This is an action for declaratory relief which is being brought pursuant to applicable law to declare that Defendant BNY has no legal or equitable rights in the Note or Mortgage for purposes of foreclosure and that said Defendant has no legal standing to institute or maintain foreclosure on the Property.
27. Plaintiffs have no adequate or alternative remedy at law with reference to the relief requested herein.
28. As set forth above, Defendant BNY does not possess the requisite legal rights to foreclose on the Property.
29. As set forth above, Defendant BNY has provided no evidence that it has full legal interest in and title to the Mortgage, and has provided no evidence that it has any interest in the Note.
30. The declaration by this Court that Defendant BNY has no legal right and cannot satisfy the legal standing requirements to institute and maintain a foreclosure is proper subject matter for declaratory relief.
31. As set forth above, Defendant BNY, as the alleged foreclosing party, was not a party to the original mortgage contract documents; was not named as a payee in the Note; and has failed to demonstrate any valid assignment of either the Mortgage or the Note, and is thus legally precluded from instituting or maintaining a foreclosure.
32. As set forth above, Defendant Countrywide is only the servicer of the Note, and as such cannot institute or maintain a foreclosure proceeding either directly or indirectly as agent of Defendant BNY.

WHEREFORE, Plaintiffs demand that the court adjudge:

- (a) that Defendant BNY has no legal standing or the proper legal or equitable interest in

- (b) that the attempt by Defendant BNY to conduct a foreclosure sale of the Property is legally defective and precluded from enforcement; and
- (c) that the Plaintiffs recover their costs as provided by law.

W. Jeff Barnes, Esq.

Dated this 19th day of November, 2008.

Respectfully submitted,

W. Jeff Barnes By:

(counsel to seek admission pro hac vice) (Hawai'i Bar No. 235542)

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