

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

WELLS FARGO BANK, NA,

Plaintiff,

v.

CASE NO.51-2009-CA-6509-WS/G

CHRISTOPHER J. CHESNEY, et al.,

Defendant.

ORDER ON MOTION TO DISMISS

This matter came before the court on February 9, 2010 upon the Motion to Dismiss filed herein by Defendant, Christopher J. Chesney. The court has had the benefit of the arguments and memoranda of counsel and the court is otherwise fully advised in the premises. Based on the foregoing, it is

ORDERED as follows:

1. As indicated in *General Motors Acceptance Corp. v. Honest Air Conditioning & Heating, Inc., et al.*, 933 So. 2d 34 (Fla. 2d DCA 2006), the Note in this case does not qualify as a "negotiable instrument" under § 673.1041(1)(c). As in *General Motors Acceptance Corp.*, the Note in this case provides for an NSF fee and late charges. In addition, there are provisions obligating the borrower to re-execute loan documents under certain specified conditions. Consequently, the law concerning the transfer of negotiable instruments, as set forth in *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680 (Fla. 4th DCA 2004), does not apply to this Note.

2. While "non-negotiable" instruments may also be assigned, there is no assignment attached to the Complaint filed herein. The Note and Mortgage attached to the Complaint are made in favor of Washington Mutual, not the current Plaintiff, Wells Fargo Bank, NA. The failure to attach an assignment was condemned in *Jeff-Ray*

Corporation v. Jacobson, 566 So. 2d 885 (Fla. 4th DCA 1990). See also *Progressive Express Insurance Company v. McGrath Community Chiropractic*, 913 So. 2d 1281 (Fla. 2d DCA 2005). Although the decision is not yet final as of the date of this order, the failure to demonstrate "standing" by attaching a proper assignment also appears to be condemned in *BAC Funding Consortium, Inc. v. Jean-Jaques, et al.*, ____ So. 3d ____, 2010 WL 476641 (Fla. 2d DCA 2010).

3. Based upon the foregoing, the aforementioned Motion is hereby **GRANTED**. The Plaintiff has twenty (20) days from the date of this order to amend its Complaint.

DONE AND ORDERED in chambers in New Port Richey, Pasco County, Florida this ____ day of February, 2010

ORIGINAL SIGNED

FEB 22 2010

STANLEY R. MILLS
CIRCUIT JUDGE

STANLEY R. MILLS
Circuit Court Judge

673.1041 Negotiable instrument.--

(1) Except as provided in subsections (3), (4), and (11), the term "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(a) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(b) Is payable on demand or at a definite time; and

(c) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain:

1. An undertaking or power to give, maintain, or protect collateral to secure payment;

2. An authorization or power to the holder to confess judgment or realize on or dispose of collateral; or

3. A waiver of the benefit of any law intended for the advantage or protection of an obligor.

Copies for
Jillian Te
Matthew