UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:	
RONALD J. DECONNE and KARIN B. DECONNE, Debtors.	**MEMORANDUM DECISION**
CRAIG MARX, Appellant, v. RONALD J. DECONNE and KARIN B. DECONNE, Appellees.	15 CV 175 (VB)

Briccetti, J.:

Craig Marx appeals from a December 15, 2014, order (the "Order") of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") disallowing and expunging his claims against appellees Ronald J. and Karin B. DeConne.

For the following reasons, the Order is AFFIRMED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8001.

BACKGROUND

On January 22, 2004, appellees entered into a credit line agreement with The Bank of New York by which appellees could borrow up to $400,000. The agreement was secured by a lien on appellees' property at 47 Nimitz Road, Yonkers, New York. On May 20, 2006, appellees obtained a mortgage loan from The Bank of New York for $430,000 against the same property. (Collectively, the two loan agreements are referred to herein as the "Security Notes.").

Sometime thereafter, the Security Notes were allegedly transferred from The Bank of New York to JPMorgan Chase Bank ("Chase"); from Chase to Linear Mortgage Group ("Linear"); and then from Linear to appellant.

On February 1, 2012, appellees filed a Chapter 13 petition with the Bankruptcy Court. Appellant filed proofs of claim Nos. 3-1, 3-2, 3-3, 7-1, 7-2, 7-3, 10-1, and 11-1 (collectively, the "Proofs of Claim") against appellees.

Appellees subsequently filed an adversary proceeding objecting to the Proofs of Claim based on appellant's lack of standing. After discovery was complete, appellant moved for summary judgment. The Bankruptcy Court denied the motion.

At an evidentiary hearing on December 11, 2014, the Bankruptcy Court found appellant did not have the right to enforce the Security Notes due to lack of standing. (Doc. #14-2). The subsequent Order thus disallowed and expunged appellant's Proofs of Claim. (Doc. #14-1).

The issue in the instant appeal is whether the Bankruptcy Court correctly expunged appellant's Proofs of Claim because appellant failed to offer admissible evidence at the December 11, 2014, hearing showing The Bank of New York and Chase merged, or that The Bank of New York transferred the Security Notes to Chase.

Appellant argues the Bankruptcy Court erred in expunging the Proofs of Claim because The Bank of New York and Chase merged and he is a nonholder in possession due to his current possession of the Security Notes.

Appellee argues there is no evidence The Bank of New York actually transferred the Security Notes to Chase or that Chase ever had possession or ownership of them, and this missing link in the chain of title deprives appellant of standing to bring his Proofs of Claim.

DISCUSSION

I. Standard of Review

A district court reviews a bankruptcy court's conclusions of law de novo and its findings of fact under a clearly erroneous standard. See In re Ames Dep't Stores, Inc., 582 F.3d 422, 426 (2d Cir. 2009) (citing In re Momentum Mfg. Corp., 25 F.3d 1132, 1136 (2d Cir. 1994)).

II. Evidence in the Record On Appeal

In his brief, appellant points to several pieces of evidence to support his arguments; namely, a Bank of New York press release, a purchase and assumption agreement between Chase and The Bank of New York, and the deposition testimony of Mr. DeConne. (See Appendices to Appellant's Brief, Nos. 6, 8). However, the Bankruptcy Court excluded these documents as inadmissible at the December 11, 2014, hearing. (Tr. at 26, 32-33 for No. 6; Tr. at 30-31 for No. 8). Appellant does not appeal the Bankruptcy Court's evidentiary rulings, and therefore, the Court declines to consider Appendices Nos. 6 and 8.

III. Appellant's Arguments

Appellant argues he is the assignee and nonholder in possession of the Security Notes because The Bank of New York and Chase merged and he is in physical possession of the original Security Notes. However, appellant fails to explain how the Bankruptcy Court erred on the facts or law when it held there was no evidence in the record to show The Bank of New York and Chase merged or that Chase was ever a holder or nonholder in possession of the Security Notes. Instead, appellant appears to re-argue the points he made before the Bankruptcy Court at the December 11, 2014, hearing. The Court will thus consider these arguments in turn.

Appellant first argues evidence in the record on appeal shows that The Bank of New York and Chase merged. However, Appendices Nos. 6 and 8 are not being considered by the

Court on the instant appeal. (See supra, Section II). And, the statement from the Office of the Comptroller of the Currency ("OCC") approving Chase's application to acquire certain assets from The Bank of New York – which the Bankruptcy Court did consider – does not evidence that The Bank of New York and Chase merged. (Appendix No. 5). Under New York law, merger takes effect "upon the filing of the certificate of merger . . . by the department of state." N.Y. Bus. Corp. Law § 906(a). The statement from the OCC is not a certificate of merger—rather, it is an approval of Chase's application to "acquire certain assets and assume certain deposits from The Bank of New York." (Appendix No. 5). Moreover, The Bank of New York exists independently of Chase, now as The Bank of New York Mellon, and as such, cannot have merged with Chase. See N.Y. Bus. Corp. Law § 906 (referencing the "surviving or consolidated corporation" of a merger). Therefore, the OCC's statement is not proof that The Bank of New York and Chase merged, and appellant has not pointed to any other evidence in the record on appeal showing a merger between the two entities. Accordingly, the Bankruptcy Court correctly held appellant failed to adduce evidence showing a merger between The Bank of New York and Chase.

Appellant next argues that because he is in possession of the original Security Notes, and because there are no competing claims to them, the burden of disproving his ownership is on appellees. Appellant did not make this argument at the December 11, 2014, hearing, and so, the Court cannot consider it on appeal. See In re Barquet Grp., Inc., 486 B.R. 68, 73 n.3 (Bankr. S.D.N.Y. 2009). And, even if the Court were to consider such an argument, it has no merit. Appellant cites no authority to support shifting the burden of proof to appellees, and the Court likewise has found none to support this proposition.

Lastly, appellant argues he is a nonholder in possession of the Security Notes with the rights of a holder.

The Court disagrees.

Two persons are entitled to enforce an instrument: (i) "the holder of the instrument," and (ii) a "nonholder in possession of the instrument who has the rights of a holder." Bank of N.Y. Mellon v. Deane, 41 Misc. 3d 494, 499 (Sup. Ct., Kings Cty. 2013) (internal quotation marks omitted).

A "holder" is, inter alia, "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." NYUCC § 1–201(21). The parties acknowledge the Security Notes were not indorsed, and as such, Chase, Linear, and appellant are not entitled to holder status.

A nonholder in possession must "account for his possession of the unindorsed paper by proving the transaction through which he acquired it. Proof of a transfer to him by a holder is proof that he has acquired the rights of a holder." Comment 8 to NYUCC § 3-201. "[P]hysical delivery of the note . . . is sufficient to transfer the obligation." GRP Loan, LLC v. Taylor, 95 A.D.3d 1172, 1173 (2d Dep't 2012); see also Revised UCC § 3-203(a) ("An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving the delivery the right to enforce the instrument."). "Under revised article 3, the only occasions for allowing a person not in possession of an instrument to enforce it are where the instrument has been lost, destroyed or stolen." Bank of N.Y. Mellon v. Deane, 41 Misc. 3d at 501.

Appellant repeatedly emphasizes that he is in physical possession of the Security Notes. However, appellant has not shown The Bank of New York transferred the Security Notes to

Chase. In fact, there is no evidence in the record that Chase ever possessed the Security Notes. Appellant has also failed to show Chase lost the Security Notes, or that they were destroyed or stolen. Therefore, Chase was not conferred "nonholder in possession" status.

"Transfer of an instrument vests in the transferee such rights as a transferor has therein." NYUCC § 3-201; see also Comment 1 to NYUCC § 3-201 ("Any person who transfers an instrument transfers whatever rights he has in it."); cf. Matter of Int'l Ribbon Mills, 36 N.Y.2d 121, 126 (1975) ("It is elementary ancient law that an assignee never stands in a better position than his assignor."). Chase could not transfer to Linear rights to enforcement it did not have. The same is true of Linear's transfer to appellant. The break in title between The Bank of New York and Chase is the missing link in the chain. It is the reason the Bankruptcy Court disallowed appellant's claim. To put it simply—it matters not if appellant is in possession of the Security Notes now if he cannot show that Chase was once in possession of them. Therefore, this Court agrees with the Bankruptcy Court. Appellant does not have standing to enforce the Security Notes.

Accordingly, appellant's arguments fare no better on appeal than they did below. The Bankruptcy Court did not err on the facts or law when disallowing and expunging appellant's Proofs of Claim because appellant lacked standing to bring them.

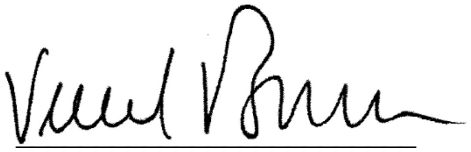
CONCLUSION

The Order of the Bankruptcy Court is AFFIRMED.

The Clerk is instructed to terminate the pending appeal and close this case.

Dated: September 1, 2015
White Plains, NY

SO ORDERED:



Vincent L. Briccetti
United States District Judge