AT STAMFORD
123 HOYT STREET
STAMFORD, CT 06905

DOCKET NO. FST-CV23-6059906-S : SUPERIOR COURT

U.S. BANK TRUST NATIONAL ASSOCIATION : JUDICIAL DISTRICT OF

NOT IN ITS INDIVIDUAL CAPACITY BUT : STAMFORD/NORWALK

SOLELY AS OWNER TRUSTEE FOR RCF 2 : AT STAMFORD

ACQUISITION TRUST

V.

EUGENE VENANZI, AKA EUGENE T. : MAY 14, 2024

VENANZI ET AL.

2024 MAY 14 P 12:10

MEMORANDUM OF DECSION ON MOTION TO DISMISS (#117.00)

In this residential foreclosure action, the defendant moves "to dismiss this action for lack of subject matter jurisdiction because the plaintiff, . . . lacks standing to maintain this action as it never was the owner and holder of the subject note." (#117.00).

The operative complaint in this litigation is the Revised Complaint dated January 3, 2024 (#116.00) sounding in two counts; foreclosure of the April 19, 2002, first mortgage in the face amount of $450,000 issued by Washington Mutual Bank, PA and reformation due to an incorrect legal description in the mortgage deed. Paragraph 4 of the Revised Complaint admits that the plaintiff does not have possession of the original note and alleges a lost note situation.

> "4. The Plaintiff is not in possession of, but is entitled to enforce, the Note. Headlands Residential 2017-RPL1 Grantor Trust, U.S. Bank Trust National Association, as Indenture Trustee, the previous holder of the Note, inadvertently lost, misplaced, or destroyed the original Note not as a result of an assignment, pledge, or hypothecation, and it cannot be located despite diligent efforts to do the same. The Plaintiff acquired the rights to enforce the Note from Headlands Residential 2017-RPL1 Grantor Trust, U.S. Bank Trust National Association, as Indenture Trustee, on October 29, 2021."

Revised Complaint, Paragraph 4 (#116.00).

The Motion to Dismiss (#117.00) was supported by a Memorandum (#118.00). The plaintiff filed an opposition Memorandum (#123.00) and the defendant filed a Reply

117.04

Memorandum (#120.00). None of these Memoranda contained any documents or exhibits attached to the Memorandum. No evidence or testimony was taken at the duly assigned remote court hearing on April 3, 2024, before this court. No request was made of this court that the court take judicial notice of any documents. Without objection from either party, counsel referred to some assignments that were in the file that are alleged to have incomplete language.

This court is citing settled Connecticut law on the proper method to proceed on presenting a Motion to Dismiss for lack of subject matter jurisdiction before a Superior Court.

> "Trial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to § 10–31(a)(1) may encounter different situations, depending on the status of the record in the case. As summarized by a federal court discussing motions brought pursuant to the analogous federal rule, "[l]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir.2001). Different rules and procedures will apply, depending on the state of the record at the time the motion is filed.
>
> When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, "it must consider the allegations of the complaint in their most favorable light.... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Filippi v. Sullivan,* supra, 273 Conn. at 8, 866 A.2d 599; see also *Shay v. Rossi,* 253 Conn. 134, 140, 749 A.2d 1147 (2000), overruled in part by *Miller v. Egan,* 265 Conn. 301, 325, 828 A.2d 549 (2003); see, e.g., *Federal Deposit Ins. Corp. v. Peabody, N.E., Inc.,* supra, 239 Conn. at 99–100, 680 A.2d 1321 (deciding jurisdictional question on pleadings alone).
>
> In contrast, if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss; Practice Book § 10–31(a); other types of undisputed evidence; see, e.g., *Kozlowski v. Commissioner of Transportation,* supra, 274 Conn. at 504 n. 7, 876 A.2d 1148 (photographs and deposition testimony); *Ferreira v. Pringle,* 255 Conn. 330, 336, 766 A.2d 400 (2001) (lease agreement); *Shay v. Rossi,* supra, 253 Conn. at 139 n. 7, 749 A.2d 1147 (official records of department of children and families); and/or public records of which judicial notice may be taken; *Cox v. Aiken,* supra, 278 Conn. at 217, 897 A.2d 71 (state employees' collective bargaining agreement); the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts "and need not

> conclusively presume the validity of the allegations of the complaint." *Shay v. Rossi,* supra, at 140, 749 A.2d 1147. Rather, those allegations are "tempered by the light shed on them by the [supplementary undisputed facts]." Id., at 141, 749 A.2d 1147; see also *Barde v. Board of Trustees,* 207 Conn. 59, 62, 539 A.2d 1000 (1988). If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counter affidavits; see Practice Book § 10–31(b); or other evidence, the trial court may dismiss the action without further proceedings. See, e.g., *Ferreira v. Pringle,* supra, at 344–45, 766 A.2d 400; *Amore v. Frankel,* 228 Conn. 358, 364, 367–69, 636 A.2d 786 (1994). If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations; *Connecticut Hospital Assn. v. Pogue,* 870 F.Supp. 444, 447 (D.Conn.1994); or only evidence that fails to call those allegations into question; *Ostow & Jacobs, Inc. v. Morgan–Jones, Inc.,* 189 F.Supp. 697, 698 (S.D.N.Y.1960); the plaintiff need not supply counter affidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. See id.
>
> Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. *Gordon v. H.N.S. Management Co.,* 272 Conn. 81, 92, 861 A.2d 1160 (2004) ("[w]hen issues of fact are necessary to the determination of a court's jurisdiction ... due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses" [internal quotation marks omitted]); *Schaghticoke Tribal Nation v. Harrison,* 264 Conn. 829, 833, 826 A.2d 1102 (2003) (same). Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. *Lampasona v. Jacobs,* 209 Conn. 724, 728, 553 A.2d 175 ("[i]n some cases ... it is necessary to examine the facts of the case to determine whether it is within a general class that the court has power to hear"), cert. denied, 492 U.S. 919, 109 S.Ct. 3244, 106 L.Ed.2d 590 (1989). An evidentiary hearing is necessary because "a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." *Coughlin v. Waterbury,* 61 Conn.App. 310, 315, 763 A.2d 1058 (2001).

Conboy v State of Connecticut, 292 Conn. 642, 650-654 (2009).

The court finds that this Motion to Dismiss (#117.00) was submitted to the court on the complaint alone supported by citations of law in the various Memoranda. The court therefore has reviewed this file from the limited basis of the complaint alone prescribed by the Conboy case.

"Standing requires no more than a colorable claim of injury; a party ordinarily establishes... standing by allegations of injury." *Electrical Contractors, Inc. v Department of*

Education, 303 Conn.402, 411 (2012). This colorable claim element of standing is applicable in foreclosure litigation, *BNY Western Trust, v Roman,* 295 Conn. 194, 209 (2010). "For a claim to be colorable the . . . need not convince the... court that he necessarily will prevail; he must demonstrate simply that he might prevail." *Sena v American Medical Response of Connecticut, Inc.* 333 Conn. 30, 45 (2019).

This court must consider the allegations of the operative complaint in their most favorable light. "In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." Filippi v Sullivan, 273 Conn. 1, 8 (2005). This residential foreclosure involves litigation of a Washington Mutual Bank residential mortgage. The history of the failure of Washington Mutual Bank and successful foreclosures of its loans secured by a mortgage are well known. Furthermore, this is a lost note foreclosure. The methods of proceeding with the foreclosure of a mortgage in which the note has been lost are equally well known. The court finds that the plaintiff has standing to commence and litigate this foreclosure based upon the courts review.

Much was made by the defendant of one of the many assignments that failed to contain language referencing the mortgage note. It appears that one of the assignments may have failed to reference an assignment of the note, which the defendant claims deprives this court of subject matter jurisdiction. The court rejects this claim based on Gen. Stat. § 49-17 and the case law discussing that statute.

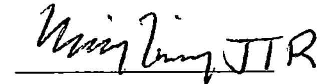
> "Even if we were to assume arguendo that the assignment of the mortgage from MERS to the plaintiff was invalid, the defendant's claim fails. "General Statutes § 49-17 permits the holder of a negotiable instrument that is secured by a mortgage to foreclose on the mortgage even when the mortgage has not yet been assigned to him. *Fleet National Bank v. Nazareth,* [supra, 75 Conn.App. at 795, 818 A.2d 69]. The statute codifies the

> common-law principle of long standing that 'the mortgage follows the note,' pursuant to which only the rightful owner of the note has the right to enforce the mortgage. *New Milford Savings Bank v. Jajer,* 244 Conn. 251, 266, 708 A.2d 1378 (1998); Restatement (Third), Property, Mortgages § 5.4, p. 380 (1997)." *Bankers Trust Co. of California, N.A. v. Vaneck,* 96 Conn.App. 390, 391–92, 899 A.2d 41, cert. denied, 279 Conn. 908, 901 A.2d 1225 (2006). Our legislature, by adopting § 49-17, has "provide[d] an avenue for the holder of the note to foreclose on the property when the mortgage has not been assigned to him." *Fleet National Bank v. Nazareth,* supra, at 795, 818 A.2d 69."

Chase Home Finance, LLC v Fequiere, 119 Conn. App. 570, 576-77 (2010)

For the reasons stated, the defendant's January 17, 2024, Motion to Dismiss For Lack of Subject Matter Jurisdiction (#117.00) is denied.

BY THE COURT



Kevin Tierney, JTR