

Docket NO.: F-025354-12

**DEFENDANTS MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Kieran Maloney, Defendant, respectfully moves this Honorable Court to grant this motion to dismiss Docket NO.: F-025354-12 with prejudice. GMAC Mortgage, LLC (hereinafter referred as "lender") and its counsel have failed to state a claim upon which relief can be granted.

I, Kieran Maloney, of age and competent to testify, state as follows based on my own personal knowledge:

On September 29, 2012 I sent a letter regarding a NOTICE OF VALIDATION (See Attachment). The basis for my letter is that GMAC, LLC was required to provide proof of legal standing to substantiate their claim, as a person entitled to collect a debt on me. However, as of 2/15/2013 the "lender" has failed or refused to supply these legal requirements. Their responds is being denied because of the following defects:

1. I am unable to find any documentation considered Evidence Admissible in Court that verifies I owe this debt or that "lender" has any legal standing to collect anything (if any liability even exists). I also don't have any documentation that "lender" had any legal standing to collect this alleged debt or a portion thereof in the past; therefore, I may have paid them in error.
2. I am not in receipt of any document which verifies that "lender" has standing to sue in any Court by virtue of being duly registered as "lender" or by "lender" meeting the minimum contacts requirements for *in personam* jurisdiction.
3. I am not in receipt of legal proof of ownership on the original note, which entitles "lender" to be THE NOTE HOLDER of the debt in claim.
4. I am not in receipt of legal proof of existence of the original note in question.
5. I am not in receipt of legal proof of assignment (bearing my signature) to substantiate their claim, specifically the past note holder naming "lender" as a person entitled to collect a debt against me.

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SUPERIOR COURT
CLERK'S OFFICE

6. I am not in receipt of any notification of assignment, sale or transfer for this promissory note.
7. I am not in receipt of the complete records of the general ledger and accounting of the alleged unpaid promissory note is really due and owing in the note.
8. My credit report has derogatory information from this matter. As "lender" does not have legal standing to collect this debt, shall be not any data furnished to the credit report agencies.

Sincerely,



Kieran Maloney

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Memorandums of Law

**SUPERIOR COURT
CLERK'S OFFICE**

**Memorandum of law in support of the point of law that party
Alleging to be creditor must prove standing**

GMAC, LLC has failed or refused to produce the actual note or other debt obligation that **GMAC, LLC** alleges **Kieran Maloney** owes. Where the complaining party cannot prove the existence of the note, then there is no note. To recover on a promissory note, the plaintiff must prove: (1) the existence of the note in question; (2) that the party sued signed the note; (3) that the plaintiff is the owner or holder of the note; and (4) that a certain balance is due and owing on the note. See *In Re: SMS Financial LLC v. Abco Homes, Inc.* No.98-50117 February 18, 1999 (5th Circuit Court of Appeals.) Volume 29 of the New Jersey Practice Series, Chapter 10 Section 123, page 566, emphatically states, "...; and no part payments should be made on the bond or note unless the person to whom payment is made is able to produce the bond or note and the part payments are endorsed thereon." It would seem that the mortgagor would normally have a Common law right to demand production or surrender of the bond or note and mortgage, as the case may be. See Restatement, Contracts S 170(3), (4) (1932); C.J.S. Mortgages S 469 in *Carnegie Bank v Shalleck* 256 N.J. Super 23 (App. Div 1992), the Appellate Division held, "When the underlying mortgage is evidenced by an instrument meeting the criteria for negotiability set forth in N.J.S. 12A:3-104, the holder of the instrument shall be afforded all the rights and protections provided a holder in due course pursuant to N.J.S. 12A: 3- 302" Since no one is able to produce the "instrument" there is no competent evidence before the Court that any party is the holder of the alleged note or the true holder in due course. New Jersey common law dictates that the plaintiff prove the existence of the alleged note in question, prove that the party sued signed the alleged note, prove that the plaintiff is the owner and holder of the alleged note, and prove that certain balance is due and owing on any alleged note. Federal Circuit Courts have ruled that the only way to prove the perfection of any security is by actual possession of the security. See *Matter of Staff Mortg. & Inv. Corp.*, 550 F.2d 1228 (9th Cir 1977), "Under the Uniform Commercial Code, the only notice sufficient to inform all interested parties that a security interest in instruments has been perfected is actual possession by the secured party, his agent or bailee." Bankruptcy Courts have followed the Uniform Commercial Code. In *Re Investors & lenders, Ltd.* 165 B.R. 389 (Bkrtcy.D.N.J.1994), "Under the New Jersey Uniform Commercial Code (NJUCC), promissory note is "instrument," security interest in which must be perfected by possession..."

**Memorandum of law in support of the point of law that to prove damages for default of a debt,
party must enter the account and general ledger statement into the record through a competent fact
witness**

To prove up claim of damages, creditor must enter evidence incorporating records such as a general ledger and accounting of an alleged unpaid promissory note, the person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger. See Pacific Concrete F.C.U. V. Kauanoë, 62 Haw. 334, 614 P.2d 936 (1980), GE Capital Hawaii, Inc. v. Yonenaka 25 P.3d 807, 96 Hawaii 32, (Hawaii App 2001), Fooks v. Norwich Housing Authority 28 Conn. L. Rptr. 371, (Conn. Super.2000), and Town of Brookfield v. Candlewood Shores Estates, Inc. 513 A.2d 1218, 201 Conn. 1 (1986). See also Solon v. Godbole, 163 Ill. App. 3d 845, 114 Il.

Memorandum in support of the point of law that when jurisdiction is challenged, the party claiming that the court has jurisdiction has the legal burden to prove that jurisdiction was conferred upon the court through the proper procedure. Otherwise, the court is without jurisdiction.

Whenever a party denies that the court has subject-matter jurisdiction, it becomes the duty and the burden of the party claiming that the court has subject matter jurisdiction to provide evidence from the record of the case that the court holds subject-matter jurisdiction. Bindell v City of Harvey, 212 Ill.App.3d 1042, 571 N.E.2d 1017 (1st Dist. 1991) ("the burden of proving jurisdiction rests upon the party asserting it."). Until the plaintiff submits uncontroversial evidence of subject-matter jurisdiction to the court that the court has subject-matter jurisdiction, the court is proceeding without subject-matter jurisdiction. Loos v American Energy Savers, Inc., 168 Ill.App.3d 558, 522 N.E.2d 841(1988) ("Where jurisdiction is contested, the burden of establishing it rests upon the plaintiff."). The law places the duty and burden of subject-matter jurisdiction upon the plaintiff. Should the court attempt to place the burden upon the defendant, the court has acted against the law, violates the defendant's due process rights, and the judge has immediately lost subject-matter jurisdiction.

Prepared and submitted by:

KIERAN MALONEY Kieran Maloney

Kieran Maloney

DECLARATION

Fifteen days from the verifiable receipt of this motion to dismiss, an order shall be prepared and submitted to the court for ratification, unless prior to that time, "lender" presents a competent fact witness to rebut all articles of Kieran Maloney's affidavit, making their statements under penalty of perjury, supporting all the rebutted articles with evidence which would be admissible at trial, and sets the matter for hearing.

Prepared and submitted by:

KIERAN MALONEY

Kieran Maloney

Kieran Maloney

CERTIFICATE OF SERVICE

I, Kieran Maloney hereby certify that on February 15, 2013 I mailed a true and correct copy of the above and foregoing motion to dismiss via certified mail to the persons listed below:

**Superior Court Clerk's Office, Foreclosure
Processing Services**

Attention: Objection to Notice of Intention

To Foreclose

P.O. Box 971

Trenton, New Jersey 08625

Certified No. 70082810000181148519

**D. Brian O'Dell of Bradley Arant Boult
Cummings LLP**

One Federal Place

1819 Fifth Ave North, Birmingham, AL

35203-2119

Certified No. 70082810000181147925

Kieran Maloney

Kieran Maloney

QUALIFIED WRITTEN REQUEST

CERTIFIED MAIL NO. 70081140000070688974

Kieran Maloney
Niamh Boland
173 Washington Ave
Little Ferry, NJ 07643
(201) 681-3067

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FEB 19 2013

SUPERIOR COURT
CLERK'S OFFICE

GMAC Mortgage
Attn: Customer Service
P.O. Box 1330
Waterloo, IA 50704-1330

September 21, 2012

Re: Loan Number # 0602089555

Attention Customer Service:

You are in receipt of a QUALIFIED WRITTEN REQUEST pursuant to Section 6 of RESPA (12 USC 2605) and a NOTICE OF VALIDATION under the authority of The Fair Debt Collections Practices Act regarding the loan number cited above.

I have reason to believe that the certain loan terms were misrepresented to me at the time of application, as well as certain statements were not provided for my approval prior to closing. Also, I feel I was ill advised at the time of closing on one of the most important financial decision of my life. Therefore, I am writing to request:

1. Copies of all signed documents pertaining to the origination of my mortgage including my loan application, Right to Cancel, Deed of Trust, note, adjustable rate note, addendum to the note for the interest only payment period, Truth in Lending statement, Good Faith Estimate (GFE), HUD1, appraisal, and all required disclosures and rate sheets associated with this transaction for the above referenced loan.
2. Produce a copy of the account and general ledger statement showing the loan history including all payments made, all fees incurred, what has been paid out of the escrow account, and how all payments were applied. This information should cover the entire life of the loan.

The "Beneficiary" has 14 business days to respond to this letter accurately. If more time is in need it may be requested so in writing. If this matter is not corrected within 14 business days I will have no other choice but to initiate complaints against "beneficiary" for violations of the law with the applicable administrative agencies.

10/16/12 Cust service

In addition, we will also submit the basis for our argument and all correspondence to a legal firm specializing in Class Action Lawsuits.

Also, I understand that under Section 6 of RESPA you are required to acknowledge our request within 20 business days and must try to resolve the issue within 60 business days.

Regards,



Kieran Maloney



Niamh Boland

Cc: ~~US Department of HUD~~ ~~CERTIFIED MAIL NO. 7008050000057128265~~
Cc: New Jersey AG CERTIFIED MAIL NO. 00805000000571210206

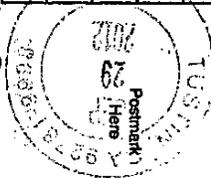
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Sent to

Street, Apt. No.,
or PO Box No.

City, State, ZIP+4

GA 30034
2472100, IA 50704-1330

PS Form 3800, August 2005 See Reverse for Instructions

AAW: CUSTOMER SERVICE
GWA C MORTGAGE