

# BERGMAN ON MORTGAGE FORECLOSURES

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## Danger: Lost Note Affidavit Fails

It is an unfortunate aspect of modern mortgage commerce that related to the conveyance of mortgages, notes can be lost. Most often this is not a problem because a lost note affidavit (with some detail as to how the note was lost) will suffice. But that situation was challenged vigorously in a recent case and the plaintiff lost—its judgment of foreclosure and sale was denied with the appeals court going back to the earlier summary judgment motion and denying that for want of the plaintiff's sufficient demonstration that the note was lost.<sup>1</sup>

Not only is this a warning, but it should be observed too that the case was somewhat confusing and just might create even more peril for mortgage holders.

The underlying issue was that the borrower challenged the plaintiff's standing in the foreclosure (hardly uncommon), which therefore required the plaintiff to demonstrate that it was the holder or assignee of the note at the time the action was commenced.

Upon summary judgment, the plaintiff conceded that the original note had been lost.<sup>2</sup> The court stated that a plaintiff seeking to recover upon a lost note must provide "due proof" of the plaintiff's ownership of the note, the facts which prevent production of the note and the note's terms.<sup>3</sup> (So far this is not unusual and would typically not create a problem.)

Here, however, the plaintiff failed to meet the tasks. While there was a lost note affidavit, it was signed by the purported predecessor in interest to the plaintiff stating that the note was deemed lost as of a certain date and that predecessor was "in possession of the original Note prior to its whereabouts becoming undeterminable."<sup>4</sup> But this evidence was held not to establish that the plaintiff itself was ever in physical possession of the subject note.<sup>5</sup> Well, if it had been lost by its predecessor, of course, it could not have been in physical possession of the note at the inception of the action.

Apparently, the problem might have been solved if the plaintiff was able to demonstrate ownership of the note by written assignment. That, of course, is an alternative to actual delivery of the note, but the party that signed the assignment here could not demonstrate its authority for having done so. Thus, the assignment branch was an insufficient substitute.

Still, further, the court emphasized that the plaintiff failed to demonstrate the facts preventing production of the lost note. The affidavit submitted by the plaintiff failed to identify who conducted the search for the lost note and failed to explain "when or how the note was lost" but instead described only approximately when the search for the note was conducted and when the loss was discovered which was "on or about" the date the affidavit was executed.<sup>6</sup>

So, what might be the ultimate lesson arising from this case? First, it asserts some of the detail necessary to create a satisfactory lost note affidavit. Second, it confirms that in the absence of such an affidavit, a valid assignment of the note and mortgage would appear to be an acceptable substitute. Both avenues are worthy of special consideration in case the lost note is ever challenged.<sup>7</sup>

### Endnotes

1. *U.S. Bank Trust, N.A. v. Rose*, 176 A.D.3d 1012, 1014, 110 N.Y.S.3d 700 (2d Dep't 2019).
2. *Id.*
3. *Id.*
4. *Id.* at 1014-1015.
5. *Id.* at 1015.
6. *U.S. Bank Trust, N.A.*, 176 A.D.3d at 1015-1016.
7. For further discussion see 2 Bergman on New York Mortgage Foreclosures § 20.07[8][a], LexisNexis Matthew Bender (rev. 2021).