

STATE OF VERMONT

SUPERIOR COURT  
Orange County

CIVIL DIVISION  
Docket No. 227-10-10 Oecv

U.S. Bank National Association  
Plaintiff

v.

Ernest Dunham and Samantha Dunham  
Defendants

Decision on Defendants' Motion to Dismiss

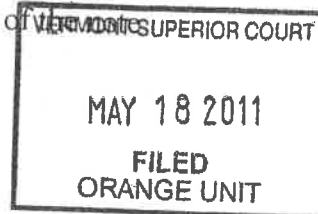
Defendants Ernest Dunham and Samantha Dunham seek dismissal of this foreclosure complaint on the ground that plaintiff U.S. Bank National Association has not demonstrated its standing to enforce the promissory note.

In the original complaint, plaintiff alleged that it held the mortgage deed by assignment and the promissory note by allonge. As defendants pointed out in their motion to dismiss, however, the documents attached to the complaint did not show any endorsement of the note from the original lender. As such, the complaint did not establish whether this particular plaintiff was entitled to seek foreclosure. See *Bank of New York v. Raftogianis*, 13 A.3d 435, 448 (N.J. Super. Ch. 2010) (explaining that “a party seeking foreclosure must own or control the underlying debt, and may not proceed based on his control of the mortgage alone”).

In response, plaintiff sought to amend the complaint. Plaintiff now alleges that it holds the note as bearer paper, by virtue of an endorsement in blank. Plaintiff has submitted a new copy of the note, showing the blank endorsement.

Defendants reply that the amendment should be viewed as “suspect” because plaintiff has now filed two different copies of the promissory note—one without any endorsement, and one showing two endorsements stamped on the back of the note (the first a special endorsement from the original lender to an intermediary, and the second a blank endorsement by the intermediary). Defendants also argue that the endorsements lack credibility because the same person signed both endorsements as a “funder” on behalf of both the original lender and the intermediary. Finally, defendants argue that dismissal is required because the amended complaint does not allege that plaintiff became a holder of the note before commencing the foreclosure action.

Of these issues, the most important is whether plaintiff was entitled to enforce the note at the time it filed the complaint. As many recent decisions have explained, “in order to enforce a mortgage note, a plaintiff must show that it was the holder of



at the time the complaint was filed.” *In re Densmore*, 445 B.R. 307, 312 (Bankr. D. Vt. 2011); *In re Parker*, 445 B.R. 301, 305–06 (Bankr. D. Vt. 2011). Aside from the obvious prudential interest in ensuring that the foreclosure complaint is filed by one who is entitled to enforce the note, there is also an interest in ensuring that defendant-homeowners learn—at the outset of the litigation—the identity of the party who is authorized to negotiate a workout of the mortgage terms, towards the goal of avoiding foreclosure if at all possible. See 2009 (Adj. Sess.), No. 132 (encouraging mediation in foreclosure proceedings).

In most cases, possession of the note at the commencement of the action can be inferred from the fact that a copy of the note is attached to the original complaint, along with any endorsements, as required by Vermont Civil Procedure Rule 80.1(b)(1). In this case, however, defendants argue that such an inference is not possible because the endorsement was not shown until several months after the original complaint was filed. Defendants argue that defects in standing cannot be cured; a foreclosure plaintiff must become the holder of the note before, and not after, the foreclosure complaint is filed. *Deutsche Bank Nat’l Trust Co. v. Parisella*, No. S0758-09 CnC, 2010 WL 4567694 (Toor, J., Oct. 25, 2010); *Parker*, 445 B.R. at 306; see also 13A Wright & Miller et al, Federal Practice and Procedure: Juris. 3d § 3531 (explaining that “standing must exist at the time an action is filed,” and that post-filing events should be disregarded for purposes of the inquiry).

In this case, plaintiff alleges in the amended complaint that it holds the note as bearer paper. If what plaintiff means by this is that it held the note as bearer paper *at the time the original complaint was filed*, and that the original complaint was simply mistaken on this point, then the defect is solely in the pleadings, and there is no reason why plaintiff should be prevented from amending the complaint. See *U.S. Bank National Association v. Wyman*, No. 466-6-09 Rdcv (Cohen, J., Oct. 20, 2009) (explaining that defects in foreclosure complaints are curable by amendment), available at <http://www.vermontjudiciary.org/20062010%20TCdecisioncvl/2009-10-29-1.pdf>.

It is also possible, however, that plaintiff did not actually hold the note as bearer paper at the time the complaint was filed. If that was the case, then the cases make clear that the proper remedy is to dismiss the complaint without prejudice to refile. See *Raftogianis*, 13 A.3d at 455 (“In actions involving a negotiable note, plaintiff should generally be in a position to establish that it did have possession of the note as of the date the complaint was filed as required by the UCC. Where that cannot be established, the complaint may be subject to dismissal, without prejudice to the filing of a new action.”).

Because there is a factual question here as to whether plaintiff held the note as bearer paper at the time the complaint was filed, the proper course of action is to set the matter for an evidentiary hearing at which plaintiff bears the burden of establishing its standing. See *Deutsche Bank Nat’l Trust Co. v. Bialobrzewski*, 3 A.3d 183, 189 (Conn. Ct. App. 2010) (courts should hold an evidentiary hearing to resolve question of whether plaintiff was a holder of note at the time foreclosure complaint was filed); see also 13B Federal Practice and Procedure, *supra*, at § 3531.15 (favoring use of evidentiary hearing

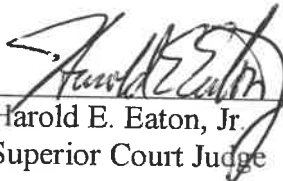
on motion to dismiss to resolve discrete questions of standing). Of course, plaintiff is in the best position to know whether or not a hearing is required on this issue. If plaintiff did not actually hold the note as bearer paper at the time the complaint was filed, it can save the expense of a hearing by seeking dismissal of this action without prejudice under Rule 41(a)(2) and then commencing a new suit. This court will not grant defendants' request for dismissal "with prejudice" under these circumstances.

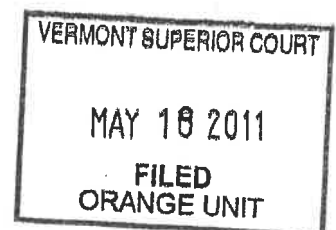
If there is a hearing, defendants may also raise the issue of the validity of the endorsements. It should be noted, however, that unauthorized signatures may be ratified by the principal under the UCC. See *Parker*, 445 B.R. at 305 (explaining that "[o]nce a signature is ratified, it becomes effective as if authorized at the time made"). Ratification thus provides an avenue for determination of the validity of the endorsements without engendering the need for Mr. Guzman to travel to Vermont for the evidentiary hearing. *Id.*

### ORDER

Defendant's Motion to Dismiss (MPR #1), filed Nov. 18, 2010, shall be set for an evidentiary hearing of one half-hour in length in approximately thirty days.

Dated at Chelsea, Vermont this 18 day of May, 2011.

  
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Harold E. Eaton, Jr.  
Superior Court Judge



STATE OF VERMONT

SUPERIOR COURT  
Orange County

CIVIL DIVISION  
Docket No. 204-9-09 Oecv

Kaser USA, LLC  
Plaintiff

v.

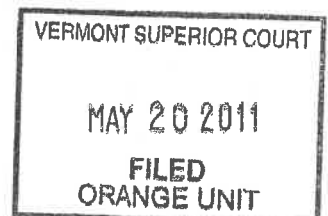
Seabreeze Trading Corp.  
Defendant

Decision on Defendant's Motion to Dismiss

At issue is whether the agency agreement identifies Vermont as a non-exclusive forum for the resolution of this dispute. See *International Collection Service v. Gibbs*, 147 Vt. 105, 107 (1986) (explaining that parties may contractually agree not to contest the assertion of jurisdiction in a chosen forum). The problem is one of contract interpretation, and it arises because the parties did not simply choose to litigate their dispute in “the state courts of Vermont” or some other similarly specific designation. Instead, they consented to non-exclusive jurisdiction in “the courts of the principal’s place of business.”

It is undoubtedly true that the parties understood this to refer to this court at the time the agreement was signed: they identified the principal as “Kaser NA” in the agency agreement and noted that the principal’s place of business was Bradford, Vermont. But the relevant time for interpreting forum-selection clauses is not the time of the agreement—it is rather the moment when the complaint is filed. See *Chase Commercial Corp. v. Barton*, 153 Vt. 457, 459–60 (1990) (declining to enforce forum-selection clause where party had moved its place of business between the time of the agreement and the time of the complaint); see also *Yakin v. Tyler Hill Corp.*, 566 F.3d 72, 76–77 (2d Cir. 2009) (interpreting agreement to litigate in “the courts of Nassau County” as meaning the state courts of that county because the only federal courthouse moved to a different county between the time the agreement was signed and the time the complaint was filed).

In this case, the principal’s identity and place of business changed between the time of the agreement and the filing of the complaint. Kaser NA was administratively dissolved, and it expressly assigned all of its “currently existing agreements” to Kaser USA on the understanding that the new company would “be entitled to all benefits and assume all obligations under such agreements *in place of* Kaser North American, Inc.” See *Agreement by and between Kaser North American, Inc. and Kaser USA, LLC dated May 1, 2009*, Attached to Affidavit of Rupert Kaser, filed Dec. 3, 2010 (also clarifying that the import of the agreement was that Kaser USA “shall succeed to all rights and benefits enjoyed by Kaser North American, Inc. under such agreements”) (emphasis added). It is very clear that Kaser USA stood “in place of” Kaser NA for purposes of the agency agreement.



Interpreting the agency agreement as of the time the complaint was filed, therefore, the court reads Kaser USA “in place of” Kaser NA, and thus the “courts of the principal’s place of business” are the courts of *Kaser USA*’s place of business—not the place of business of an entity that no longer existed. It is undisputed that Vermont is not Kaser USA’s place of business.

Plaintiff argues that the parties meant to choose Vermont regardless of what intervening events may have transpired. Had the parties truly intended to provide for that result, however, they could have “drafted a different forum selection clause that communicated that intent.” *Yakin*, 566 F.3d at 76–77. Because this court must enforce the contract as it is written, and not as it might have been written, the court concludes that the forum-selection clause did not vest any jurisdiction in Vermont under the circumstances present at the time the complaint was filed. The motion to dismiss is therefore granted for lack of jurisdiction.

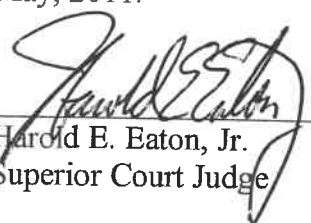
In the alternative, even if the clause did refer to Vermont, the court would conclude that it is unreasonable to conduct the litigation here. *Barton*, 153 Vt. at 459–60; 14D Wright, Miller & Cooper, Federal Practice and Procedure: Juris. 3d § 3803.1. Any connection between this litigation and this state ceased when Kaser NA was administratively dissolved and its interests were assigned to another company. There is simply no reason why Vermont courts should remain involved with this litigation any longer.

In reaching these conclusions, the court is aware that this decision may create its own issues concerning the availability of another forum, especially in light of the contractual limitations provision. To the extent that those issues are raised, however, it must be noted that the forum-selection clause was non-exclusive; other forums were available to plaintiff that did not involve the same considerations as are present here. The role of this court is not to relieve plaintiff from the tactical choices it has made, but rather to interpret the agreement as it was written.

### ORDER

For the foregoing reasons, Defendant’s Motion to Dismiss (MPR #3), filed March 17, 2010, is **granted**. All other pending motions are denied as moot.

Dated at Chelsea, Vermont, this 20 day of May, 2011.

  
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Harold E. Eaton, Jr.  
Superior Court Judge

