December 23, 2013

BRIEF: Mains v. Citibank, NA: Appellant's Brief -- Filed Dec. 23, 2013 -- in the Indiana Court of Appeals, citing Bigler & Tillman's Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law

Seth Barrett Tillman

For Dockets See 10-A-04-1309-MF-00450

Court of Appeals of Indiana.
Eric P. MAINS, Appellant,
v.
CITIBANK, NA as Trustee for Wamu Series 2007-HE2 Trust, Appellee.
No. 10A04-1309-MF-450.
December 23, 2013.

Appeal from the Clark Circuit Court One
Trial Court Case No. 10C01-1004-MF-248
The Honorable Daniel Moore, Judge
The Honorable Kenneth R. Abbott, Magistrate

Appellant's Brief

Rachele L. Cummins - I.D.#22323-49, Jon M. Schulte - I.D. #29470-10, Smith Carpenter Fondrisi, & Cummins, LLC, 209 E. Chestnut Street, P.O. Box 98, Jeffersonville, IN 47131-0098, (812) 282-7736, Attorney for Appellant.

***ii** TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

***2 STATEMENT OF THE ISSUES**

I. Whether the Trial Court erred in not concluding there was a genuine issue of material fact in violation of Ind. Trial Rule 56 regarding whether the WAMU Series 2007 HE-2 Trust, ("Trust"), with Citibank, NA's as Trustee, was the real party in interest to bring the Complaint against Mains, and whether the Trust met its burden of proof to entitle it to summary judgment against Mains.

. . . .

F. DELAWARE TRUST LAW CONSIDERATIONS.

The Delaware Statutory Trust is created by filing a Certificate of Trust with the Delaware Division of Corporations, and is governed by Chapter 38, Part V, Title 12 of the Delaware Code Annotated (See 12 §§ 3801 through 3862), and the power to determine the rights and responsibilities of the various parties is in the hands of the drafters of the "Trust Agreement" (See ***22** 12 §3801(f)), In Mains, case as is reflected in both the SEC filed PSA and Trust Prospectus for the Trust, which form the Trusts ruling documents. The Trustee holds the legal title to the assets of the trust but is obligated to follow the terms of the Trust Agreement. The beneficial owners hold equitable ownership and they, too, are governed by the terms of the Trust Agreement as to their ability to manage, control or utilize the assets. (See 12 §3802)." Under Delaware law, a Statutory Trust can choose the type of tax structure it would like to operate under. A Delaware Statutory Trust may qualify as a REMIC.

To transfer Mains' loan post "closing date" into the Trust in Delaware is an act which could result in endangering the Trusts' tax exempt status and character as a REMIC, and could void the trust or result in its conversion into another entity such as Partnership. Such post close transfers expose trust investors to multiple taxation on state and federal levels, and in Delaware it would appear such actions would be void on both statutory and public policy grounds as an equitable matter. In the leading case regarding stock issuance, *Triplex Shoe Co. v. Rice & Hutchins, Inc.,* 152 A. 342 (Del. 1930), aff'g 147 A. 317 (Del. Ch. 1929). The Supreme Court of Delaware ruled on whether stock issued in violation of the corporations charter, the General Corporation Law for the State of Delaware ("DGCL"), and issued with no par value would be void ab intio or could be later ratified to make it merely voidable. Authors **Stephen Bigler and Seth Tillman note in a business law journal article entitled *"Void or Voidable? - Curing Defects in Stock Issuances Under Delaware Law"* (*The Business Lawyer; Vol. 63, August 2008*),"** The Delaware Supreme Court ruled the stock was void based on three separate grounds. First, the court ruled that no common stock was "legally issued by the corporation under its original certificate of incorporation." Second, the court ruled that "the amendment to the certificate of incorporation which was authorized February 28, 1921 [at the stockholders' special meeting], ***23** [failed to] validate the no par value [common] stock that was issued" prior to the amendment. Third, no "[common] stock [was] legally issued after the amendment." **Bigler and Tillman also note, "The Court also found the stock invalid as a matter of public policy", as the court stated:**

There is a very good reason for requiring a Delaware corporation to specify in its charter the number of no par value shares it is authorized to issue. The franchise tax law... calculates the tax due from corporations which are authorized to issue no par value shares, at a certain rate upon each share of stock which the corporation is authorized in its charter to issue. This is a sufficient reason for holding that the doctrine of de facto stock, if any there be, could not apply to this case where the charter is silent or meaningless in its reference to the number of such shares the corporation was authorized to issue.

Clearly, the court weighed in heavily on the fact that violating tax law and making the taxable character of the corporation in its charter unclear was to void as a matter of public policy. This makes sense as an investor needs certainty as to what the actual structure of the corporation is to be, how his voting rights will be affected, his income stream, and his taxes.

Ind. Ct. App.) (Appellate Brief)