In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

WACHOVIA MORTGAGE FSB., etc.,

Appellees.

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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QUESTIONS PRESENTED

1. A fundamental precept of due process under Article I, §9 of the Florida Constitution is the right to be heard at a meaningful time in a meaningful manner. Does moving forward with trial after removing a *pro se* litigant from the courtroom due to a medical emergency contravene the Constitutional guarantee to due process?

2. Given Florida's strong policies in favor of liberal amendment of the pleadings to ensure the administration of justice and of conducting trials without surprise, did the trial court abuse its discretion in striking a defendant's Amended Answer and Affirmative Defenses on the day of trial, where the plaintiff's motion to strike was filed after the Trial Order's deadline for such motions?

3. Can a court grant judgment of foreclosure to a bank when the Note upon which it is relying is endorsed to a non-party and the bank offers no evidence that it owns the Note?

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee, WACHOVIA MORTGAGE FSB. F.K.A. WORLD SAVINGS BANK, obtained a final judgment of foreclosure against *pro se* Defendant-Appellant, [redacted] ("[redacted] after a trial that it conducted in [redacted] absence after [redacted] had a sudden health episode and was removed from the judge's chambers to seek immediate medical attention. This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(b)(1)(A).[1]

I. The Pre-Trial Proceedings

In 2006, World Savings Bank FSB entered into a $708,000 Note[2] and Mortgage[3] with [redacted] A few years later, WACHOVIA MORTGAGE FSB. F.K.A. WORLD SAVINGS BANK ("the BANK") brought a two-count

[1] References to the record and supplemental record will be respectively cited as "R. ___." and "Supp. R. ___."

[2] R. 708 (Adjustable Rate Mortgage Note).

[3] R. 715 (Mortgage).

foreclosure action against [redacted] alleging non-payment on the loan and seeking to re-establish a lost note.[4]

[redacted] a non-English speaker,[5] filed a *pro se* answer generally denying all allegations, including the allegations that the BANK owned and held the mortgage note.[6] After an extended period of inactivity, the trial court issued a Notice of Lack of Prosecution (and Motion to Dismiss for Lack of Prosecution) in late 2011.[7] New co-counsel for the BANK appeared and the BANK responded to the Notice of Lack of Prosecution.[8]

At its scheduled hearing on its Motion to Dismiss for Lack of Prosecution, the trial court denied the motion and issued an order setting the case for a non-jury trial sometime during a four week trial period beginning May 7, 2012.[9] The Trial

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[4] Supp. R. 1-4 (Complaint). The clerk of court was unable to locate the complaint as filed when preparing the record on appeal. *See* Index at 1. The copy of the Complaint that appears in the supplemental record does not include a copy of the purportedly lost note, but does state that "a copy of the substantial terms of the note" was attached to it. Supp. R. 3 at ¶ 16. Counsel for the BANK argued below that a copy of the Note was attached to the Complaint. Supp. R. 138-139 (July 6, 2012 Tr. at 19:23-20:13).

[5] Supp. R. 37, (Trial Tr. 3:22-24, June 1, 2012).

[6] R. 7 (Answer of Defendant [redacted]

[7] R. 198 (Notice of Lack of Prosecution).

[8] R. 199 (Notice of Appearance); R. 65-66 (Plaintiff's Showing of Good Cause).

[9] R. 101 (Order on Motion to Dismiss); R. 98-100 (Order Setting Non-Jury Foreclosure Trial and Pre-Trial Instructions)("the Trial Order").

Order admonished that "all pre-trial motions…or proceedings related thereto shall have been completed" by "at least **fifteen (15) days** prior to the Monday of the [May 7, 2012] trial period".[10] The order (dated February 10, 2012) also required—in large, bold, capitalized, and underlined type—that the plaintiff "shall immediately serve all parties" with a copy of the trial order.[11] The record indicates that plaintiff's counsel finally served [redacted] with a copy of the Trial Order more than a month later, leaving [redacted] with barely a month to complete all trial preparations.[12]

Coincidentally, [redacted] in February of 2012, filed an amended answer, this time asserting several detailed affirmative defenses.[13] Among other defenses and denials, the Amended Complaint denied that the BANK was the owner or holder of the Note and Mortgage.[14] The BANK replied to this amended pleading, generally denying all of the defenses.[15]

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[10] *Id.* at R. 99 (emphasis in original). Therefore, all pretrial motions were required to be "completed" no later than Friday, April 20, 2012. *Id.*

[11] R. 99 at ¶ 7.

[12] R. 200 (Plaintiff's Notice of Service of Trial Order dated March 20, 2012).

[13] R. 67-97 (Defendant's Amended Answer and Affirmative Defenses).

[14] *Id.* at ¶ 3, ¶ 18 and Defenses ¶ 7.

[15] R. 115-116 (Plaintiff's Reply to Defendants' Amended Answer and Affirmative Defenses).

More than a month after it filed its reply—and after the Trial Order's deadline for resolving all pretrial motions—the Bank moved to strike [redacted] Answer, arguing she had filed it without properly obtaining leave of court.[16] [redacted] still acting *pro se*, filed in response her own Motion to Strike the BANK's Motion to Strike.[17] While titled a Motion to Strike, [redacted] response explained that circumstances had changed significantly since the BANK initially filed suit. The amended answer specifically addressed these important additional factors. Her motion also pointed out that the BANK would not be prejudiced by the change because the BANK had not timely opposed the amendment and had not prosecuted the case during the preceding two years.[18] Despite the Trial Order requiring that all motions be resolved fifteen days prior to the commencement of the trial term, the BANK noticed its Motion to Strike for hearing on the morning of trial.[19]

[16] R. 180-182 (Plaintiff's Motion to Strike Defendant's Amended Answer and Affirmative Defenses).

[17] R. 193-207 (Defendant's Motion to Strike Plaintiff's Motion to Strike Defendants' Motion for Reiterating [sic] and Requesting Trail [sic] By Jury).

[18] *Id.* at ¶ 10.

[19] R. 2 (docket entry reflecting Notice of Hearing).

II. The Trial and [redacted] Removal from the Courtroom.

At trial, the BANK appeared with two attorneys.[20] [redacted] however, appeared *pro se*, along with her son, Harry Oliva, who acted as her translator, and a family friend, Duane Woodman.[21] Neither [redacted] nor either one of her companions that day was an attorney.[22]

The BANK first argued its motion to strike [redacted] amended answer and affirmative defenses.[23] With the court translating for the record, [redacted] attempted to argue that the motion to strike was untimely,[24] but the court nonetheless granted the motion and struck all of [redacted] defenses.[25]

Soon after the trial began, [redacted] (who had a history of health problems[26]) began crying.[27] In response, the court told [redacted] "If you cry, it

[20] Supp. R. 36 (Trial Tr. 2:1-5).

[21] Supp. R. 37-39 (Trial Tr. 3:19-5:3).

[22] *Id.*

[23] Supp. R. 40-41 (Trial Tr. 6:22-7:20).

[24] Supp. R. 42-43 (Trial Tr. 8:24-9:16).

[25] Supp. R. 44 (Trial Tr. 10:12-16).

[26] Supp. R. 63 (Trial Tr. 29:15).

[27] Supp. R. 44-45 (Trial Tr. 10:19-11:24).

has no affect [sic] on me whatsoever" and [redacted] replied, in broken English, "Please, it's no cry, it's no cry. It's pain."[28]

The judge immediately declared, in no uncertain terms, that the trial would proceed regardless of the severity of [redacted] physical malady or whether she could attend her own trial:

> THE COURT: If you want to call 911, go ahead, but we are going on with the trial, okay?
>
> Does she have a medical condition?
>
> Mr. OLIVA: Yes.
>
> THE COURT: What is it?
>
> MR. OLIVA: She has lupus.
>
> THE COURT: Well, we are going to go on with the trial, so I am just letting you know. Call 911, but we are going on with the trial.
>
> Take her outside, Albert [the bailiff]. Call 911. We are going on with the trial.
>
> Tell her to go outside. Outside. Albert, take her out.
>
> For the record, she is grabbing her chest, she is bent over. Her son is in a panic. I am telling them to call 911. Nobody is calling 911.
>
> MR. OLIVA: Please, we have to go.
>
> THE BAILIFF: I've got to go. I've got to go. Please take her, take her outside.
>
> (The defendant and Mr. Oliva leave the judge's chambers).
>
> THE COURT: Okay, just leave her there. Let's go.
>
> Call your first witness.[29]

[28] Supp. R. 44 (Trial Tr. 10:19-23).

The court then conducted the trial without [redacted] presence or participation.[30] The court told [redacted] distraught and weeping son "I hope your mom feels better" when he briefly reentered the room, but continued with the trial.[31] The BANK proceeded to introduce into evidence objectionable testimony by a corporate representative who had not been timely disclosed, as well as objectionable documentary evidence, unfettered by objection or cross-examination.[32] Because Mr. Woodman was not an attorney, the court would not allow Mr. Woodman to even look at the exhibits offered into evidence until the end of the trial, much less interject on [redacted] behalf.[33]

After the BANK rested its case, the court conducted its own questioning of the BANK's witness, including questions regarding an endorsement on the back of

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[29] Supp. R. 44-46 (Trial Tr. 10:19-12:2).

[30] Supp. R. 46-62 (Trial Tr. 12-29).

[31] Supp. R. 47-48 (Trial Tr. 13:20-14:12). His response (in Spanish) was not recorded by the court reporter, although the court reporter, judge, and BANK counsel discussed the fact that he had spoken. *Id.*

[32] Supp. R. 47-59 (Trial Tr. 13:15-25:16); *see also* R. 117 (Plaintiff's Witness & Exhibit List Served April 5, 2012); R. 367 (Amended Plaintiff's Witness and Exhibit List served May 25, 2012); R. 643 (Second Amended Plaintiff's Witness and Exhibit List served May 31, 2012).

[33] Supp. R. 52-53 (Trial Tr. 18:24-19:1); Supp. R. 54 (Trial Tr. 20:7-18).

the original Note. The endorsement was from the original lender, World Savings Bank, to a stranger to this litigation, Bank of New York:[34]


PAY TO THE ORDER OF
THE BANK OF NEW YORK
WORLD SAVINGS BANK
A FEDERAL SAVINGS BANK
BY:
NAME: MEREDITH MEADOR
TITLE: ASSISTANT CUSTODIAN
OF RECORDS.

The BANK had offered evidence showing that World Savings Bank had become Wachovia Mortgage, F.S.B., which then became Wells Fargo Bank Southwest,[35] but it offered no assignment or other documentary evidence to explain the endorsement to Bank of New York.[36] The BANK never pled, nor did it ask to amend its pleadings to reflect, a theory that it was a non-holder in possession with the rights of a holder, nor did it ever dismiss or otherwise amend its complaint to omit the lost-note claim.[37] The BANK did move to substitute the party name to reflect the name change to Wells Fargo at trial, at the prodding of the trial court, but this did not address the issue of the endorsement to a non-party.[38]

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[34] Supp. R. 59 (Trial Tr. 25:17-26:16).

[35] *Id.*

[36] *Id.*

[37] *Id.*, Supp. R. at 1-4.

[38] Supp. R. 60-61 (Trial Tr. 26:17-27:5).

At the end of the trial, the Bailiff returned to the room and reported that [redacted] had not yet gone to the hospital, but she was under the care of paramedics, who were monitoring her blood pressure due to her history of heart attacks.[39]

III. The Motion for Relief from Judgment

[redacted] moved for relief from the judgment, in a *pro se* pleading, and requested an evidentiary hearing.[40] [redacted] argued to the trial court:

> I didn't have the opportunity to defend myself last time because I was taken to the hospital. You told my son to leave the room…Because of my pain you told me to leave.[41]

Among other things, [redacted] also argued that the BANK's witness was only disclosed the day before trial, and that although she attempted to review the court file prior to the trial it was never available for review, and she never received a copy of the original endorsed Note.[42]

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[39] Supp. R. 62-63 (Trial Tr. 28:6-29:23).

[40] Supp. R. 5-33; Supp R. 82 (14:18-24). Because [redacted] made this motion after filing her notice of appeal, the trial court did not have jurisdiction to conduct these post-trial hearings. *In re Forfeiture of $104,591 in U.S. Currency*, 589 So. 2d 283, 285 (Fla. 1991) (a party abandons a post-trial judgment motion by filing a notice of appeal).

[41] Supp. R 84 (Hearing Tr. 16:11-25).

[42] Supp. R. 86-88 (Hearing Tr. 18:8-20:15).

The court conducted a hearing on the motion and expressed some concern regarding the last minute substitution of witnesses and the endorsement on the Note.[43] The court did not take additional evidence, however, and refused to vacate the judgment.[44] This timely appeal follows.

[43] Supp. R. 93-108 (Hearing Tr. 25:22-40:11).

[44] Supp. R. 122-141 (Hearing Tr. 3:25-22:8).

SUMMARY OF THE ARGUMENT

Fundamental constitutional law guarantees all citizens the right of due process which, among other things, means that a party must be given a meaningful opportunity to be heard before being deprived of property. *See* Art. I, § 9, Fla. Const., U.S. Const., Amend. 5. Here, the court deliberately forged ahead with trial even after [redacted] had become so ill that the court ordered she be removed from the courtroom and emergency services be summoned. The decision to proceed in [redacted] absence deprived her any opportunity to be heard, much less a "meaningful" one. When due process has been denied, the judgment must be reversed. *See, e.g., Vollmer v. Key Dev. Prop., Inc.,* 966 So.2d 1022 (Fla. 2d DCA 2007).

Moreover, a trial court abuses its discretion when it strikes a *pro se* party's amended answer on the day of trial, particularly when the motion asking for such a radical last-minute change to the pleadings violates its own Trial Order.

Finally, the BANK lacked standing to foreclose because the Note was endorsed to a different entity. Because the BANK received relief outside of the four corners of the complaint and did not submit sufficient evidence of its right to foreclose, the final judgment must be reversed.

STANDARD OF REVIEW

The trial court's refusal to continue the trial in the wake of [redacted] health crisis is reviewed for an abuse of discretion. *Bryan v. Bryan*, 824 So. 2d 920, 923 (Fla. 3d DCA 2002).

The trial court's complete disregard for its own scheduling order in granting the BANK's motion to strike, rather than granting [redacted] motion—effectively a request for leave to amend—is also reviewed for an abuse of discretion. *Wayne Creasy Agency, Inc. v. Maillard*, 604 So. 2d 1235 (Fla. 3d DCA 1992).

Finally, this Court reviews the trial court's judgment for competent and substantial evidence, and where "the trial court's decision is manifestly against the weight of the evidence, or unsupported by competent substantial evidence, it becomes this Court's duty to reverse." *Desvigne v. Downtown Towing Co.*, 865 So. 2d 541, 542 (Fla. 3d DCA 2003).

ARGUMENT

I. The Trial Court Deprived *Pro Se* Litigant [redacted] Due Process By Conducting the Trial Without Her in the Wake of Her Medical Emergency.

A party, whether *pro se* or represented by counsel, has a due process right to a "full and fair opportunity to be heard." *Vollmer v. Key Development Properties, Inc.*, 966 So. 2d 1022 (Fla. 2d DCA 2007), *citing County of Pasco v. Riehl*, 635 So. 2d 17, 18 (Fla. 1994). At a trial or other evidentiary hearing, this right includes the right to present witnesses, testify, present argument on points of law, and cross-examine witnesses. *Id.* By conducting the trial after removing [redacted] from chambers, the trial court violated her fundamental due process rights.

In determining whether the refusal to continue a trial is an abuse of discretion, appellate courts consider three factors, including 1) whether the movant suffers injustice from the denial of the continuance; 2) whether the underlying cause for the continuance was unforeseen by the movant or a dilatory tactic; and 3) whether prejudice and injustice will befall the opposing party if the trial is continued. *Vollmer v. Key Development Properties, Inc.*, 966 So.2d 1022 (Fla. 2d DCA 2007); *see also Bryan v. Bryan*, 824 So. 2d 920, 923 (Fla. 3d DCA 2002) (applying same test and finding an abuse of discretion in refusing to grant

continuance). Applying these factors here, the trial court clearly violated [redacted] rights.

The Florida courts have long held that "where the physical or mental condition of either counsel or client prevents the fair and adequate presentation of a case, the refusal to grant a continuance is reversible error." *Myers v. Siegel*, 920 So. 2d 1241, 1243 (Fla. 5th DCA 2006), *citing Citrin v. De Venny*, 833 So. 2d 871, 872 (Fla. 4th DCA 2003) (error to deny continuance where medical emergency made party unable to participate in trial); *SSJ Mercy Health Sys., Inc. v. Posey,* 756 So.2d 177, 179 (Fla. 4th DCA 2000); *Lopez v. Lopez,* 689 So. 2d 1218 (Fla. 5th DCA 1997) (error to conduct hearing in absence of *pro se* litigant who sought continuance due to mental and physical ailments); *Ziegler v. Klein*, 590 So. 2d 1066 (Fla. 4th DCA 1991)(reversing where appellant acting *pro se* was denied opportunity to cross examine witnesses and present testimony and other issues due to appellant's health problems).

Here, the record demonstrates that [redacted] sudden health episode prevented her from exercising her basic rights of participation in the trial. As she clutched her chest in pain and her son began to panic, the trial court removed

from the room and brusquely announced it would conduct the trial without her and then proceeded to do just that.[45]

Nor did Mr. Woodman's presence protect in her absence. Woodman is not an attorney and, in any event, was not allowed to speak on behalf or otherwise participate in the trial.[46] Instead, the court (correctly) told him, in no uncertain terms, that his only role would be to observe and review documents once the trial was completed.[47] This did not provide with the opportunity to be heard that due process requires.

Moreover, a continuance would not have prejudiced the BANK, which had not prosecuted the case for several years; it was only in the face of a dismissal for lack of prosecution that new counsel entered the case and began to actively pursue judgment.[48] An additional delay of a few days to accommodate sudden illness would not have substantively affected the BANK's rights (to the extent it had any rights, see Part III, *infra*). But failing to continue the trial did, in fact, have dire consequences to

[45] Supp. R. 44-46 (Trial Tr. 10:19-12:2).

[46] Supp. R. 38 (Trial Tr. 4:-21).

[47] *Id.*

[48] R. 199 (Notice of Appearance); R. 65-66 (Plaintiff's Showing of Good Cause).

II. The Trial Court Abused Its Discretion in Striking the Amended Answer and Defenses based on a Motion that Violated the Pre-Trial Order and Refusing to Allow the Amendment.

[redacted] filed her Amended Answer even before the trial court's ruling on the Motion to Dismiss for Lack of Prosecution, and the BANK replied without giving any indication that it considered the Amended Answer a "nullity."[49] This should have estopped the BANK from denying the viability of the pleading. *See, e.g., Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So. 2d 38, 41 (Fla. 1st DCA 1970) ("The general rule has long been established in Florida and other jurisdictions that litigants are not permitted to take inconsistent positions in judicial proceedings").

[redacted] response to the BANK's untimely motion to strike pointed out that the motion was untimely, and asked the court to allow her amendment.[50] The trial court should have construed that motion liberally, and treated it as a motion for leave to amend. *Martinez v. Fraxedas*, 678 So. 2d 489, 491 (Fla. 3d DCA 1996)("liberal construction should be given to *pro se* pleadings.").

Moreover, the court should have granted [redacted] requested amendment, rather than striking it. "Amendments to pleadings and amendments to

[49] R. 67-97 (Defendant's Amended Answer and Affirmative Defenses); R. 115-116 (Plaintiff's Reply to Defendants' Amended Answer and Affirmative Defenses).

[50] R. 193-207 at ¶ 10 (Defendant's Motion to Strike Plaintiff's Motion to Strike Defendants' Motion for Reiterating [sic] and Requesting Trail [sic] By Jury).

conform with the evidence should be freely granted by the trial court unless by doing so, the opposing party will be prejudiced in maintaining his action or defense upon the merits." *Lasar Mfg. Co., Inc. v. Bachanov*, 436 So. 2d 236, 237 (Fla. 3d DCA 1983). Here, at the time [redacted] attempted to amend her complaint, the BANK had taken no action on the file for more than a year, and the case was not yet set for trial.[51] The amendment was intended to reflect defenses [redacted] uncovered during discovery and the development of foreclosure law since the time she filed her more elementary *pro se* answer.[52]

Moreover, [redacted] was entitled to believe the pleadings were closed because the BANK failed to file any motion directed at the Answer within the time required by the Trial Order.[53] By contrast, hearing and granting motions that were time-barred by the Trial Order constitutes the kind of "trial by ambush" disapproved by the Florida Supreme Court in *Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981) (internal quotes omitted) (approving trial court's right to exclude witnesses not named on witness list).

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[51] R. 67-97 (Defendant's Amended Answer and Affirmative Defenses).

[52] R. 193-207 at ¶ 10 (Defendant's Motion to Strike Plaintiff's Motion to Strike Defendants' Motion for Reiterating [sic] and Requesting Trail [sic] By Jury).

[53] R. 98-100 (Order Setting Non-Jury Foreclosure Trial and Pre-Trial Instructions)("the Trial Order").

III. The BANK Lacked Standing to Foreclose Because the Note Produced at Trial Was Endorsed to a Third Party.

"A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose." *McLean v. JP Morgan Chase National Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). Where a note bears a special endorsement to someone other than the plaintiff, the plaintiff must prove that the note is either further endorsed to the plaintiff, or endorsed "in blank" and so payable to the bearer. *Riggs v. Aurora Loan Services*, LLC, 36 So. 3d 932, 933 (Fla. 4th DCA 2010). Alternatively, the plaintiff may submit evidence of an assignment from the payee to the plaintiff or other evidence of ownership. *Verizzo v. Bank of New York*, 28 So. 3d 976, 978 (Fla. 2d DCA 2010). This basic premise is codified in Florida's version of the Uniform Commercial Code, which expressly defines who is entitled to enforce a negotiable instrument. § 673.3011, Fla. Stat.; § 671.201(21), Fla. Stat. (defining a "holder" as a "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."). If a party brings suit on a note for which it is not the holder, it must prove it is the owner, and thus a "nonholder in possession of the instrument who has the rights of a holder." § 673.3011(2), Fla. Stat.

Here, the BANK alleged in its complaint that it "owns and holds the Mortgage Note."[54] Even [redacted] original Answer, which was revived when the trial court struck her Amended Answer, denied this fact,[55] placing the burden squarely on the BANK to prove its standing as part of its *prima facie* case. *Carapezza v. Pate*, 143 So. 2d 346, 347 (Fla. 3d DCA 1962); *see also Lizio v. McCullom*, 36 So. 3d 927, 929 (Fla. 4th DCA 2010) ("Where the defendant denies that the party seeking foreclosure has an ownership interest in the mortgage, the issue of ownership becomes an issue the plaintiff must prove"). But at trial, it produced a Note with a special endorsement to a third party completely unrelated to this case, the Bank of New York.[56] Because the Note was not endorsed to the BANK or in blank, the BANK was not a holder of the Note under the statutory definition. § 671.201(21), Florida Statutes. To demonstrate a right to bring an action on the Note, the BANK was therefore required to provide other evidence that it owned the Note or was entitled to enforce it. § 673.3011(2), Fla. Stat.[57]

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[54] Supp. R. 2 at ¶ 3.

[55] R. 7 (Answer of Defendant [redacted]

[56] Supp. R. 714 at back (back of original note).

[57] Of course, even this would only provide the BANK the right to collect a money judgment. Foreclosure, being an equitable action, required an additional showing that it was a mortgagee or had equitably obtained rights under the mortgage. Because the BANK failed to even establish the right to enforce the Note, the Court need not reach the issue of the Mortgage.

The BANK's witness, upon questioning by its counsel, never testified as to who owned the Note, testifying only that she worked for Wells Fargo and identifying the Note as original.[58] After the BANK's counsel rested its case, the court questioned the witness about the endorsement on the Note.[59] The witness acknowledged that the Note was endorsed to a third party, stating "it's just a custodian of records at that time."[60] Thus, the only evidence the court had of the debt was the Note—and it was made payable to a third party. The BANK made no attempt to introduce testimony or other evidence that it was the owner of the Note.

Because the BANK failed to prove it was the proper party to enforce the Note, the judgment should be reversed. The precedent is well-established that the party seeking foreclosure bears the burden to "present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action." *Gee v. U.S. Bank Nat. Assn*, 72 So. 3d 211, 213-14 (Fla. 5th DCA 2011).

At the very least, this problem apparent on the face of the Note further underscores the prejudice to [redacted] occasioned by her exclusion from the courtroom. Among other things, she could have pointed out to the judge—as the trier of fact—that the only evidence before the court belied the BANK's standing,

[58] Supp. R. 48-49 (Trial Tr. 14:14-15:22).

[59] Supp. R. 59-60 (Trial Tr. 25:17-26:2).

[60] *Id.*

and that the cryptic remark that the Bank of New York was a "custodian" was nonsensical and ultimately self-defeating. The fact that [redacted] was denied the opportunity to cross-examine the BANK's witness on this point only underscores the prejudice of proceeding with the trial without her.

CONCLUSION

The trial court denied [redacted] [redacted] the most basic due process when it continued to conduct the foreclosure trial despite [redacted] medical episode. The court erred in striking [redacted] Amended Answer, and awarded the BANK a judgment even though it failed to prove that it was the proper party to enforce the Note. Because the BANK failed to prove the most essential element of its case, even in [redacted] absence, the judgment should be reversed with directions to enter judgment in favor of [redacted] Alternatively, at the very least, the case should be REVERSED and REMANDED for a trial on the merits.

Dated: February 25, 2013

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this February 25, 2013, to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties.

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