In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No. CACE

Appellant,

v.

DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE FORMERLY KNOWN AS BANKERS TRUST COMPANY,

Appellee.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This appeal arises from a foreclosure action filed on behalf of a trustee of an unidentified trust, DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE FORMERLY KNOWN AS BANKERS TRUST COMPANY ("the Bank"). The action seeks to take the home of [redacted] ("the Homeowner"). The Homeowner appeals a summary judgment granted in favor of the Bank.

II. Summary of the Facts

The Bank filed a Complaint which alleged that it "owns and holds" a lost promissory note that the Homeowner had executed in favor of a different entity ("the Note"). No copy of the Note was attached to the Complaint. Nearly a year later, the Bank amended its Complaint to drop the lost note count, but still did not attach a copy of the Note. When the deficiency was pointed out by the Homeowner, the Bank filed a copy of the Note which was accompanied by an allonge bearing a single, undated endorsement to a non-party, National City Mortgage Co.

Nearly twenty-one months later, the Bank filed another copy of the Note. The allonge now contained three undated endorsements, the last being to the trust-less trustee, the nominal Plaintiff.

At the first of two summary judgment hearings, the trial court expressly held that it would hear no further argument on two of the Homeowner's affirmative defenses which the court had determined to be "legally insufficient and do not preclude the entry of Summary Final Judgment."[1] One of those affirmative defenses was that:

> The Plaintiff lacks standing to pursue its claims against the Homeowner(s) inasmuch, and/or lacked standing at the time this action was filed as the Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action.[2]

At the second hearing, the court granted Final Summary Judgment of Foreclosure from which this appeal was taken.

[1] R. 461-462.

[2] R. 231.

CHRONOLOGY	
DATE	**EVENT**
12/5/08	Complaint (no Note attached; Note alleged to be lost)
11/12/09	Amended Complaint (no Note attached)
12/10/09	First Notice of Filing Copy of the Note (one endorsement)
9/1/11	Second Notice of Filing Copy of the Note (three endorsements)
10/24/12	Order finding affirmative defense of standing legally insufficient to prevent summary judgment.
2/12/13	Final Summary Judgment of Foreclosure

III. Question Presented

Was the trial court correct in striking the Homeowner's affirmative defense of standing when: 1) the first time the Note appeared in the case—over a year after the case was filed—it was endorsed to some entity other than the Bank; and 2) the purported chain of additional endorsements to the Bank did not appear until nearly two years after that?

IV. Appellant's Statement of the Facts

A. The Bank files its first Complaint and a Motion for Summary Judgment.

The Bank filed a Complaint which alleged that it "owns and holds" a lost promissory note that the Homeowner had executed in favor of an unmentioned non-party: Prime Lenders, Inc.[3] No copy of the Note was attached to the Complaint. The Bank also alleged it was an assignee of the Mortgage based on an assignment attached to the Complaint.[4] That assignment, however, described a transfer from yet another non-party, National City Mortgage Co.—which was not the original mortgagee.[5]

Subsequently, the Bank filed a Motion for Summary Judgment.[6] The Motion refers to the Note as being "held by the Plaintiff" but does not otherwise mention the assignment or anything about the reestablishment of the lost note.[7]

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[3] Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, dated December 5, 2008 (R. 1) and attached Mortgage (R. 4).

[4] Complaint, ¶ 4 (R. 1).

[5] Assignment of Mortgage and Promissory Note, dated October 3, 2002 (R. 22).

[6] Motion for Summary Final Judgment of Foreclosure and Taxation of Attorney's Fees and Costs, dated July 29, 2009 (R. 48).

[7] *Id*. at ¶ 3.

Despite the reference to an affidavit in support of the motion, no such affidavit appears in the record at that point.[8]

Shortly thereafter, the Homeowner appeared through counsel and moved to dismiss the complaint for failure to state a cause of action.[9] The motion pointed out, *inter alia*, that the assignment was not from the original lender and the Bank could not be holder of a Note that was lost (and therefore, not in its possession).[10] As a result, the parties entered into an agreement permitting the Bank to amend its Complaint.[11]

B. The Bank files an Amended Complaint and later discloses a Note that is endorsed—but not to the Bank.

The Amended Complaint to Foreclose the Mortgage added another assignment to the chain—one from the original lender to National City Mortgage

[8] *Id*. at ¶ 4.

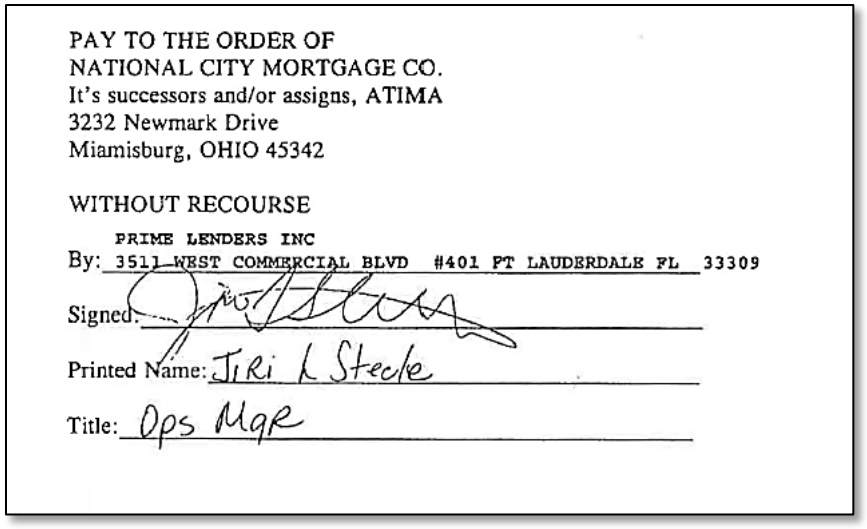
[9] Notice of Appearance, dated August 11, 2009 (R. 51); Defendants Motion to Dismiss for Failure to State a Cause of Action, dated August 11, 2009 (R. 52).

[10] *Id*.

[11] Order Granting Agreed Motion for Leave of Court to File Amended Complaint, dated November 16, 2009 (R. 86).

Co.[12] Although the new complaint no longer contained a lost note count, a copy of the Note was still conspicuously missing.[13]

The Homeowners again moved to dismiss, pointing out that a copy of the Note was not attached to the Amended Complaint as required by the rules.[14] The Bank then filed a Notice of Filing Copy of the Promissory Note.[15] Attached to the copy of the Note was an allonge that contained a single, undated endorsement from the original lender to National City Mortgage Co.:[16]



PAY TO THE ORDER OF
NATIONAL CITY MORTGAGE CO.
It's successors and/or assigns, ATIMA
3232 Newmark Drive
Miamisburg, OHIO 45342

WITHOUT RECOURSE
PRIME LENDERS INC
By: 3511 WEST COMMERCIAL BLVD #401 FT LAUDERDALE FL 33309
Signed:
Printed Name: Jiri L Steele
Title: Ops Mgr

[12] Assignment of Mortgage, dated August 13, 2012 (R. 110).

[13] Amended Complaint to Foreclose Mortgage, dated November 12, 2009 (R. 90).

[14] Defendants Motion to Dismiss Plaintiff's Amended Complaint, dated November 28, 2009 (R. 125).

[15] Notice of Filing Copy of the Promissory Note, dated December 10, 2009 (R. 157).

[16] Allonge (R. 161).

Despite the fact that the Note was endorsed to an entity other than the Bank, the Homeowner's Motion to Dismiss was denied.[17]

C. The Bank's affidavit in support of its summary judgment motion makes its way to the file.

The Bank then filed a Notice of Hearing of the Motion for Summary Judgment, attaching its 2009 motion and, for the first time, the year-old affidavit in support of the motion.[18]

The affiant, Laura Cauper, having executed the affidavit long before the Amended Complaint, swore that "each and every allegation in the Complaint [not the Amended Complaint] is true, except that the Plaintiff has recovered the Original Note."[19] Cauper asserted that "Plaintiff is the designated holder of said Note and Mortgage…" without explaining what the limiting adjective "designated" could mean in that context.[20] Cauper did not mention the assignments and did not

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[17] Order denying Defendant's Motion to Dismiss, dated December 15, 2009 (R. 164).

[18] Notice of Hearing, dated September 8, 2010 (R. 176) and attached Motion for Summary Final Judgment of Foreclosure and Taxation of Attorney's Fees and Costs, dated July 29, 2009 (R. 179) and Affidavit in Support of Plaintiff's Motion for Summary Judgment, dated July 15, 2009 ("Cauper Aff.") (R. 183).

[19] Cauper Aff. ¶ 4 (R. 182).

[20] Cauper Aff. ¶ 5 (R. 182) (emphasis added).

attach sworn and certified copies of the assignments (one of which did not appear until after she executed the affidavit).

D. The Homeowner files an answer and affirmative defenses challenging the Bank's standing.

The Homeowner then filed his Answer which denied that the Bank owns and holds the Note and that it is the assignee of the Mortgage.[21] The affirmative defenses alleged that the Bank was not the proper party in interest and lacked standing because it did not hold the Note.[22] Other defenses also alleged that the Bank was not the holder of the Note.[23]

E. The parties change counsel and their pleadings.

The Bank then filed a Joint Stipulation which substituted a new attorney for its original counsel.[24] The Homeowner also changed counsel and filed a new Answer and Affirmative Defenses, which still denied the Bank's allegations of standing and affirmatively alleged, among other things, that the Bank lacked

[21] Defendant [redacted] Michael [redacted] Answer and Affirmative Defenses, dated September 24, 2010, ¶¶ 4, 5. (R. 213).

[22] *Id*. at Defendant's First Affirmative Defense (R. 210-211).

[23] *Id*. at Defendant's Second and Third Affirmative Defenses (R. 211).

[24] Joint Stipulation for Substitution of Counsel, dated February 18, 2011 (R. 214).

standing at the time the action was filed (Affirmative Defense Number 5).[25] While the record does not indicate that the Homeowner moved for leave to amend his Answer, an agreed order permitting the amendment was entered eight months later.[26]

Shortly after the [Amended] Answer was filed, the Bank changed counsel yet again.[27] The new counsel filed a Notice of Dropping Count II (which did not exist in the Amended Complaint).[28]

F. The Bank files another copy of the Note with new endorsements on the allonge.

Two years and nine months after filing the Complaint, the Bank filed another copy of the Note.[29] The allonge now contained three undated endorsements, the last being to the trust-less trustee, the nominal Plaintiff:[30]

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[25] Notice of Appearance, dated May 27, 2011 (R. 221); Order Substituting Counsel, dated June 15, 2011 (R. 239); Homeowner(s)' Answer and Affirmative Defenses, dated June 14, 2011 (R. 227); *Id*. at Affirmative Defenses to the Complaint, ¶ 5 (R. 231).

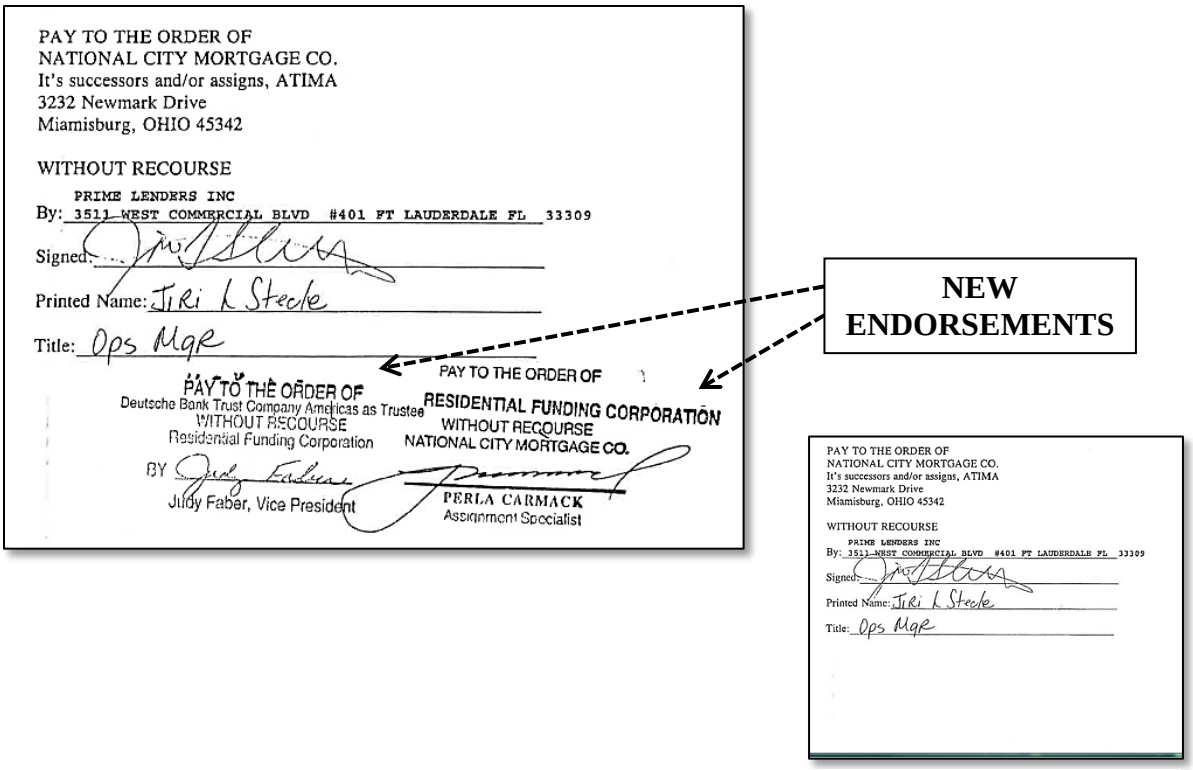
[26] Agreed Order on Defendant's Motion for Leave to Amend Answer and Affirmative Defenses to Complaint, dated February 21, 2012 (R. 330).

[27] Joint Stipulation for Substitution of Counsel, dated August 29, 2011 (R. 242).

[28] Plaintiff's Notice of Dropping Count II, dated September 1, 2011 (R. 246).

[29] Notice of Filing, dated September 1, 2011 (R. 247).

[30] *Id*. (attached Note and Allonge) (R. 251).



ORIGINAL ALLONGE

A month later, the Bank also filed what it claimed to be the "Original Note and Mortgage"—which also included the now embellished "Original Allonge."[31]

G. The Bank moves to strike the Homeowner's affirmative defenses.

In the interim, the Bank moved to strike all the "purported defenses" in the Homeowner's original Answer on the grounds that they were all insufficient as a

[31] Notice of Filing, dated October 5, 2011 (R. 284).

matter of law.[32] While claiming that all the allegations were conclusory and unsupported by fact, the Bank's motion did not address the Homeowner's specific allegation that "[t]here is no endorsement on the Promissory Note from National City Mortgage Co. to the Plaintiff and no endorsement in blank" (on the only allonge on file at that time).[33] In the agreed order granting the Homeowner leave to amend his Answer, the parties agreed that the "Plaintiff may amend [the pending motion to strike Affirmative Defenses] as necessary."[34]

H. One trial court judge rules that the standing defense is legally sufficient.

Although the record does not disclose that the Bank ever amended its motion to strike, a hearing was held in which the trial court struck six of the Homeowner's affirmative defenses (with leave to amend). The Homeowner withdrew ten of his affirmative defenses. The trial court (Judge Marina Garcia-Wood), however, denied the motion to strike "as to Affirmative Defenses 5 and 6."[35] One of those

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[32] Plaintiff's Motion to Strike Legally Insufficient Affirmative Defenses, dated September 26, 2011 (R. 267).

[33] *Id*.

[34] Agreed Order on Defendant's Motion for Leave to Amend Answer and Affirmative Defenses to Complaint, dated February 21, 2012 (R. 330).

[35] Order on Plaintiff's Motion to Strike Legally Insufficient Affirmative Defenses, dated May 18, 2012 (R. 335).

affirmative defenses expressly contended the Bank lacked standing at the inception of the case: [36]

> 5. The Plaintiff lacks standing to pursue its claims against the Homeowner(s) inasmuch, and/or lacked standing at the time this action was filed as the Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action.

I. The Bank files a new motion for summary judgment and new supporting affidavit.

The Bank then filed a new motion for summary judgment which alleged that it "is, and was as of the filing of this action, the owner and holder of the Loan Documents and entitled to enforce the Note and Mortgage."[37]

The Bank also filed a supporting affidavit executed by Timothy R. Justice, a "Default Litigation Coordinator employed by the servicer, PNC Mortgage, a division of PNC Bank, N.A.[38] Like the first affiant—whose affidavit was never withdrawn—Mr. Justice also claimed that the allegations of the Complaint (not the

[36] R. 231.

[37] Plaintiff's Motion for Summary Final Judgment Including Taxation of Attorney's Fees and Costs, dated August 29, 2012 (R. 337); *Id*. at ¶ 10 (R. 339).

[38] Affidavit of Default and Indebtedness in Support of Plaintiff's Motion for Entry of Summary Final Judgment, dated August 16, 2012 ("Justice Aff."), ¶ 1 (R. 347).

Amended Complaint) were true.[39] He also swore that the attached copies of the Note and Mortgage were true and correct.[40] Finally, he swore to the legal conclusion that the Bank is the owner and holder of the Note (and was when it filed the Complaint), expressly identifying "the endorsements on [the] original Allonge to the Note filed with the Court on or about October 5, 2011"[41] as the evidence for his belief. He did not mention the assignments, much less attach sworn or certified copies of them to his affidavit.

J. At the summary judgment hearing, a different trial court judge rules that the standing defense is legally insufficient.

At the summary judgment hearing, a different trial court judge[42] apparently overruled the earlier decision of Judge Garcia-Wood and decided that "the Court will hear no further argument" with respect to the Homeowner's fifth affirmative defense (standing) "which the Court has determined [is] legally insufficient and do[es] not preclude the entry of Summary Final Judgment."[43] The court reserved

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[39] *Id*. ¶ 4 (R. 349).

[40] *Id*.

[41] *Id*. at ¶ 10 (R. 350).

[42] The record is silent as to which judge heard the summary judgment motion, but it is believed to have been Senior Judge Joel Lazarus.

[43] Order On Plaintiff's Motion for Summary Final Judgment Including Taxation of Attorney's Fees and Costs, dated October 24, 2012 (R. 461).

ruling on the remainder of the motion to provide the Homeowner an opportunity to conduct discovery.[44]

Although both parties sought additional discovery,[45] ultimately, no fruits of that discovery were filed for the court's consideration prior to the entry of final summary judgment in February of 2013.[46]

This appeal ensued.

[44] *Id.*

[45] Plaintiff's Second Request for Production to Defendant, dated October 29, 2012 (R. 463); Plaintiff's Objection to Defendant's Notice of Taking Deposition Duces Tecum, dated November 13, 2012 (R. 477); Order On Plaintiff's Objection to Defendant's Notice of Taking Deposition Duces Tecum, dated November 28, 2012 (R. 515).

[46] Final Summary Judgment of Foreclosure, dated February 12, 2013 (R. 583). The Homeowner filed additional materials not relevant to this appeal. Notice of Filing Sworn Declaration of Roseanna and General Power of Attorney from to John and Roseanna dated February 8, 2013 (R. 589); Notice of Filing Securitization Audit and Stress Compliance Audit, dated February 8, 2013 (R. 596).

SUMMARY OF THE ARGUMENT

The trial court erred in determining that a challenge to standing is not a legally sufficient defense. A lack of standing at the inception of the case is always a defense, and here, the record is brimming with inferential facts that the Bank was not the holder of the Note when it filed suit—all of which must be viewed in a light most favorable to the Homeowner.

The fact that the Bank could not attach even a copy of the Note and Allonge to its Complaint (along with the allegation that the Note was lost) implies that it was not in possession of the Note at that time. Had nothing more happened here than the belated appearance of a properly endorsed Note, the Court could still appropriately infer that the endorsement was placed on the Note after the Bank filed the case.

But what actually happened in this case is far more telling. Here, the first time the Note appeared in the case, it was neither endorsed to the Bank nor endorsed in blank. It was endorsed to another entity. All the necessary endorsements did not appear until a new, substantially changed version was filed nearly a year and nine months later. The Bank offered no explanation for the change. And the only natural inference is that someone placed the necessary endorsements on the Allonge in the interim between the two filings.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*. *Reeves v. North Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. 4th DCA 2002); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla 2002).

In order to determine the propriety of a summary judgment, the Court must resolve whether there are any "genuine issue[s] as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The "burden of proving the absence of a genuine issue of material fact is upon the moving party." *Palm Beach Pain Management, Inc. v. Carroll*, 7 So. 3d 1144, 1145 (Fla. 4th DCA 2009) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). The Court must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party, the Homeowners, and if there is slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See id*.

ARGUMENT

I. A Challenge to a Plaintiff's Standing is a Legally Cognizable Defense.

The trial court erred in finding that the Homeowner's Fifth Affirmative Defense was legally insufficient. Specifically, that defense challenged the Bank's standing as of the inception of the case:

> The Plaintiff lacks standing to pursue its claims against the Homeowner(s) inasmuch, and/or lacked standing at the time this action was filed as the Plaintiff has not, and cannot establish it is the real party in interest to enforce the mortgage and/or note that is the subject of the above-styled action.[47]

A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it had standing to foreclose—not just at the time of summary judgment—but also at the time it filed the complaint. *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195, 1196 (Fla. 4th DCA 2012). "A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing." *Venture Holdings & Acquisitions Grp., LLC v. A.I.M. Funding Grp., LLC*, 75 So.3d 773, 776 (Fla. 4th DCA 2011); *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285, 1288 (Fla. 5th DCA 2013) ("To establish standing to foreclose for purposes of summary judgment, the plaintiff must show that it acquired the right to enforce the note before it filed suit.").

[47] R. 231.

Accordingly, there was no basis for the trial court's holding that an affirmative defense as to standing was "legally insufficient."[48] The trial court erred as a matter of law.

Nor can it be argued that the court really meant that the Homeowner had not presented sufficient evidence of a standing defense. The court declared it would entertain no further argument on standing, despite giving the Homeowner sixty more days to conduct discovery and to depose both the Bank's Corporate Representative and Mr. Justice (the second affiant)—all in the same order. It is readily apparent, therefore, that the court did not believe any amount of evidence would breathe life into the defense.

Even if it had been appropriate to strike the affirmative defense as legally insufficient, the Bank had affirmatively alleged that it "owns and holds" a note that is payable to a different financial institution. The Homeowner had denied these allegations in his Answer. So, despite case law declaring that "lack of standing is and affirmative defense that must be raised by the defendant"[49] that rule cannot apply where a complaint itself alleges the facts necessary for standing and those

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[48] R. 461-62.

[49] *Glynn v. First Union Nat. Bank*, 912 So. 2d 357, 358 (Fla. 4th DCA 2005).

facts are disputed in the answer. *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."), *citing*, *Carapezza v. Pate*, 143 So.2d 346, 347 (Fla. 3d DCA 1962).

At summary judgment, therefore, the Bank was required to show that there were no justiciable issues of disputed fact as to all its allegations—including its allegation that it was the owner and holder of the Note.

II. The Record Is Replete with Evidence, and Inferences from Evidence, That Create a Genuine Issue of Fact as to the Bank's Standing.

At summary judgment "the court must draw every reasonable inference in favor of the nonmoving party." *Fine Arts Museums Found. v. First Nat. in Palm Beach, a Div. of First Union Nat. Bank of Florida*, 633 So. 2d 1179, 1180 (Fla. 4th DCA 1994). Here, every inference consistently paints the picture that the Bank acquired the Note (and the necessary endorsements) after filing suit.

A. The original Complaint provides an inference that the Bank was not the holder of the note when it filed suit.

It is axiomatic that one cannot be the holder of a note it does not possess. § 671.201(21) Fla. Stat. ("holder" is a "person in possession of a negotiable instrument …"). The original Complaint alleged that the Note had been lost and

was not in the Bank's possession.[50] Apparently, it was so lost that not even a copy could be located to attach to the Complaint.

Although the original Complaint may be a "preliminary pleading" to which the Bank is not bound,[51] its Amended Complaint never represented anything to the contrary—i.e. that the Note was not lost when the suit was filed. It merely expressed the Bank's relationship to the Note in the present tense: "The Plaintiff owns and holds the Note…"

Moreover, the Cauper affidavit—which was never withdrawn—affirms the allegations of the original Complaint, such that they became summary judgment evidence that undermined the Bank's claim. Specifically, the language of Cauper's affidavit permits of only one interpretation—that the Bank regained possession of the Note after the case was filed:

> "[E]ach and every allegation in the Complaint is true, except that the Plaintiff has recovered the Original Note."[52]

Moreover, even though she executed her affidavit long after the Complaint was filed, Cauper states only that the Bank "is the designated holder of said Note

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[50] R. 3.

[51] *See Vann v. Hobbs*, 197 So. 2d 43, 45 (Fla. 2d DCA 1967).

[52] R. 182 (emphasis added). The use of the present perfect auxiliary "has" rather than the pluperfect "had" means that the recovery of the Note did not take place until after the Complaint was filed.

and Mortgage," rather than "was" the holder at time if filed the suit.[53] *See McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012) (summary judgment reversed where the affiant had merely stated that the bank "is" the holder, rather than "was" the holder before filing the action); *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d at 1288 (affidavit that states only that the bank "holds the Note" did not establish that the bank held the note at the time it filed suit because the affidavit was dated more than two years later).

Corroborating the inference that the Bank was not the holder at the inception of the case is the ambiguity of the term "designated holder," which is not a term used in Article 3 of the Uniform Commercial Code ("UCC"). "Designated" means to have been chosen for a particular—often future—position or purpose.[54] It also implies that some unidentified person or entity is doing the "designating." This conflicts with the notion woven throughout the Bank's allegations that it was possessed of all the rights in the Note—i.e., according to the Bank, it is not just the holder of the Note, but it is also the owner and the assignee of the loan documents.

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[53] R. 182 (emphasis added).

[54] *See*, definition of "designate" or "designee," *Black's Law Dictionary* (9th Edition for the iPhone/iPad/iPod touch, ver. 2.12 (B13195), 2013); "designate." Merriam-Webster.com. 2013. http://www.merriam-webster.com (September 14, 2013).

And finally, the absence of even a copy of the Note for more than a year also bolsters the inference that the Bank did not possess the Note, and therefore, was not the holder when it filed suit.

B. The Bank was not the holder of the first version of the note produced in the case.

The first time the Note and its Allonge appeared in the case was a year after the case was filed. And while the freshly disclosed Allonge exhibited an undated endorsement, the Bank was not the endorsee. Thus, the Bank was still not the holder. § 671.201(21) Fla. Stat. ("holder" is 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"); *Henderson v. Litton Loan Servicing, LP*, 92 So. 3d 301 (Fla. 4th DCA 2012) (summary judgment reversed where note endorsed to a specific entity which was not the plaintiff); *Richards v. HSBC Bank USA*, 91 So. 3d 233, 234 (Fla. 5th DCA 2012) (summary judgment reversed where note did not name the plaintiff as the payee and the note was not endorsed in favor of the plaintiff or in blank).

Viewed in a light most favorable to the Homeowner, the natural inference is that the Bank was still not the holder on the day of that post-Complaint filing—December 10, 2009. Indeed, that the requisite endorsements were absent that day

may be taken as a fact established by the Bank's own admission. First, the Notice of Filing Copy of the Promissory Note was signed by counsel as an officer of the court and as an agent of the Bank (acting within the scope of her authority), and therefore, should be treated as an admission by the Bank. *Dicus v. Dist. Bd. of Trustees for Valencia*, 734 So. 2d 563, 564 (Fla. 5th DCA 1999) ("A party is … bound by factual concessions made by that party's attorney before a judge in a legal proceeding."); *Parhiala v. State*, 368 So. 2d 672, 673 (Fla. 1st DCA 1979) ("An attorney may make admissions or statements which will affect his client provided that the statement is made during the performance of duties of his employment within his authority.").

Second, attachments such as the Note and its Allonge[55] become part of the pleadings. *See Nicholas v. Ross*, 721 So. 2d 1241, 1243 (Fla. 4th DCA 1998). And because the BANK is bound by that pleading, no further evidence was needed to prove what the Allonge looked like that day. *Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956) ("…parties-litigant are bound by the allegations of their pleadings and … admissions contained in the pleadings … are accepted as facts without the

[55] While the copies of the Note and Allonge were actually filed shortly after the Amended Complaint (to avoid dismissal), the parties treated the filing as if the Note and Allonge had been attached to the pleading—a procedure expressly approved by this Court. *Deutsche Bank Nat. Trust Co. v. Taperi*, 89 So. 3d 996, 997 (Fla. 4th DCA 2012).

necessity of supporting evidence"); *Pac. Mills v. Hillman Garment, Inc.*, 87 So. 2d 599, 601 (Fla. 1956) ("a party is bound by the allegations of its complaint").

Accordingly, at this point in the proceedings, the Homeowner would have been entitled to a judgment on the pleadings in his own favor on the issue of standing. That the Bank later filed additional endorsements and a new affidavit cannot overcome or expunge these admitted facts. At most, the Bank's subsequent filings simply created issues of fact within its own evidence.

C. The Bank's pleadings at the time of the summary judgment hearing did not include the altered allonge.

Two years and nine months after filing the Complaint (and a year and nine months after filing the Note), the Bank filed another copy of the Note with a modified allonge that now contained the required endorsements.[56] The Bank did not move to amend the Amended Complaint to attach the now modified Note, nor did it request that they be considered attachments that would supplant the first Note it had filed. Because the Homeowner had answered the Amended Complaint (twice), the Bank was required to seek leave to amend its pleading. *Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375, 376 (Fla. 2d DCA 2012).

[56] R. 247, 251.

Thus, if the Notice of Filing was intended to change the Amended Complaint in any way, it was a nullity. *Id*. The trial court was required to consider summary judgment in the context of an Amended Complaint that was, at best, dependent upon a Note endorsed to a different entity. *Id*. At summary judgment, therefore, the Bank was still bound by its pleading that it held only a partially endorsed note. At a minimum, the conflicting Allonges created a genuine issue as to a material fact making summary judgment improper.

D. Even under the new summary judgment motion and affidavit, there is still a triable issue of fact as to whether the Bank was the holder of the Note at the time it filed suit.

The Bank subsequently filed a new motion for summary judgment along with a new affidavit which claimed, for the first time, that the Bank was the holder when the case was filed. In doing so, the affiant (Mr. Justice) specifically and exclusively relied upon the altered Allonge that the Bank had filed years after it initiated this lawsuit:

> Plaintiff is, and was as of the date of the filing of this action, the owner and holder of the Note and Mortgage, … and entitled to enforce same as evidenced by the endorsements on original Allonge to the Note filed with the Court on or about October 5, 2011.[57]

[57] R. 350 (emphasis added).

Thus, the only basis cited for the affiant's legal conclusion that the Bank was the owner and holder of the Note as of the date of the filing was the existence of the altered allonge. Mr. Justice did not swear, or even suggest, that all the undated endorsements were present on the Allonge when the Bank filed the case, nor did he even attempt to explain how the earlier version—on which the necessary endorsements were missing—came to be filed.

Even if Mr. Justice had meant to say that the Bank held the fully endorsed Note when the Complaint was filed, he never claimed any personal knowledge of how or when the endorsements were made. *See Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375, 377 (Fla. 2d DCA 2012) ("The affidavit of indebtedness provided no assistance in this regard because the affiant did not assert any personal knowledge of how [the bank] would have come to own or hold the note."); Fla. R. Civ. P. 1.510(e) (requiring an affirmative showing that the affiant is competent to testify to the matters stated in the affidavit) and the Author's Comment to that Rule ("The requirement that it show affirmatively that the affiant is competent to testify to the matters stated therein <u>is not satisfied by the statement that he has personal knowledge</u>; there should be stated in detail the facts showing that he has personal knowledge." [emphasis added]).

Moreover, if Mr. Justice had consulted some record (other than the altered Allonge itself) to conclude that the Bank was in possession of a fully endorsed version of the Note when it filed the Complaint, he was required to attach a sworn and certified copy of that record. Fla. R. Civ. P. 1.510(e) ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."); *see Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (equating the requirement to provide a sworn copy with the admissibility prerequisites of authentication and a hearsay exception).

Without such a record, Mr. Justice's statement that the Bank has been the holder since the inception of the case is merely an impermissible factual and legal conclusion—if not rank speculation. *See Florida Dept. of Fin. Services v. Associated Indus. Ins. Co., Inc.*, 868 So. 2d 600, 602 (Fla. 1st DCA 2004) (affidavit in support of summary judgment may not be based on factual conclusions or conclusions of law); *Zoda*, at 1226 (same); *LeMaster v. Glock, Inc.*, 610 So. 2d 1336, 1338 (Fla. 1st DCA 1992) (summary judgment reversed where based in part on affidavits containing rank speculation).

E. The inferences creating a triable issue of fact arise from the Bank's own evidence.

The Homeowner is well aware (as was the Bank, apparently) that this Court has held that standing at the time suit is filed may be proven by an "affidavit of ownership"—that "it is sufficient if the body of the affidavit indicates that the plaintiff was the owner of the note and mortgage before suit was filed." *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d at 174; *Saver v. JP Morgan Chase Bank*, 114 So. 3d 352, 353 (Fla. 4th DCA 2013).

But this Court has never held, nor should it, that such declarations by affiants are dispositive at summary judgment regardless of any other facts before the court—that affidavits somehow trump all contrary evidence in the record. Such a ruling would be contrary to decades of decisions holding that all facts, and inferences from those facts, must be viewed in a light most favorable to the non-movant. And entrusting such an extraordinary power to affidavits would be particularly misplaced when, as in this case, the affiant has expressed no personal knowledge of when the operative endorsements were stamped on the Allonge.

Here, the Homeowner's evidentiary burden was never triggered because the Bank failed to prove the absence of a genuine issue of material fact as to its standing when it filed suit. *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966). Yet, as

shown above, even without affidavits or other submissions from the Homeowner, the record is replete with facts, and inferences from those facts, that arise from the Bank's own pleadings, affidavits and other filings—and from the instruments themselves. This admissible summary judgment evidence was properly before the court and should have been considered even though it ran contrary to the Bank's interests.

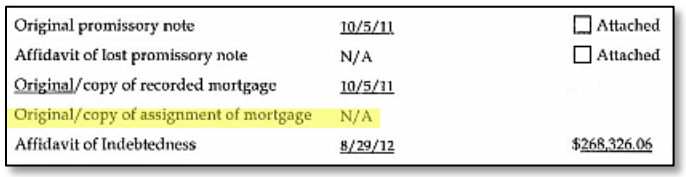
The affidavit of Mr. Justice, therefore, does not conclude the matter. It merely sets up a disputed issue of fact that required that summary judgment be denied.

F. The assignments do not avail the Bank.

That the Bank also submitted a chain of assignments of the Mortgage does not avail the Bank for several reasons. First, the assignments (or the assignee theory) were never mentioned in either of the motions for summary judgment or the supporting affidavits. Fla. R. Civ. P. 1.510(c) ("The motion [for summary judgment] shall state with particularity the grounds upon which it is based").

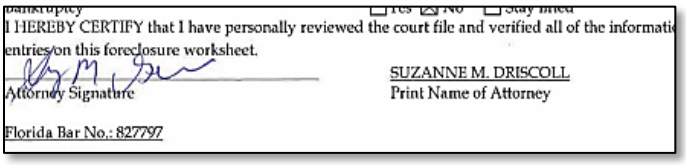
Second, the Bank's affiants never authenticated any assignments or laid any foundation for a hearsay exception because no sworn or certified copies were attached to the affidavits. Indeed, on the Foreclosure Worksheet, the Bank's

counsel represented to the court that copies of the assignments were "N/A" (not applicable) for purposes of obtaining a judgment:[58]



Original promissory note	10/5/11	☐ Attached
Affidavit of lost promissory note	N/A	☐ Attached
Original/copy of recorded mortgage	10/5/11	
Original/copy of assignment of mortgage	N/A	
Affidavit of Indebtedness	8/29/12	$268,326.06

* * *



I HEREBY CERTIFY that I have personally reviewed the court file and verified all of the informati entries on this foreclosure worksheet.

Attorney Signature

SUZANNE M. DRISCOLL
Print Name of Attorney

Florida Bar No.: 827797

Additionally, the only places where the assignments appear in the file is attached to the Complaint and the Amended Complaint—neither of which was verified. And finally, being an assignee of a mortgage would not prove the affiants' claims that the Bank was the holder of the Note—mortgages are said "to follow" notes, not the other way around.

[58] Amended Seventeenth Judicial Circuit Uniform Foreclosure Worksheet, dated September 7, 2012 (R. 389).

CONCLUSION

This Court should reverse the summary judgment and remand for further proceedings.

Dated: September 17, 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 September 17, 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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