In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

BANK OF AMERICA, N.A., et al.

Appellees.

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a foreclosure case in which the Plaintiff, Bank of America, N.A. ("the Bank") obtained a judgment against the Defendant, [redacted] ("the Homeowner") before the case was at issue.

The Bank filed a verified Complaint alleging that it was the servicing agent for the owner of a debt evidenced by a Note originally payable to Key Mortgage Associates and now purportedly endorsed in blank.[1] The Complaint listed five defendants: 1) the Homeowner, 2) [redacted] (a former wife), 3) [redacted], 4) Unknown Tenant No. 1; and 5) Unknown Tenant No. 2.

The Bank filed documents indicating that it had served the Homeowner[2] and [redacted].[3] It also filed Returns of Non-Service indicating that it had not personally served the defendant, Carmen [redacted] or the Unknown Tenants.[5] The Tenants were later dropped as parties.[6] The Bank later filed an affidavit from an

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[1] Complaint filed October 2, 2012, ¶ 4 (R. 2); Note attached to Complaint, dated March 29, 2002 (R. 9).

[2] Return of Service, filed December 7, 2012 (R. 37).

[3] Affidavit of Service filed December 7, 2012 (R. 46).

[4] Return of Non-Service filed December 7, 2012 (R. 40).

[5] Return of Non-Service [Tenant No. 1], filed December 7, 2012 (R. 49); Return of Non-Service [Tenant No. 2], filed December 7, 2012 (R. 52).

[6] Notice of Dropping Party, March 19, 2014 (R. 121).

employee of the Palm Beach Daily Business Review as evidence that it had served Carmen [redacted] by publication.[7]

The Bank also moved to substitute itself with a different Plaintiff, alleging that the mortgage was now held by Bayview Loan Servicing, LLC and attaching two recorded assignments—both prepared in the same office in Pasadena, California. The first was an assignment of the subject Mortgage and Note from the Bank (even though it had claimed only to be the agent of the owner) to the Secretary of Housing and Urban Development ("HUD").[8] The second was an assignment of the Mortgage and Note from HUD to Bayview—executed by Bayview itself as a purported Attorney-in-Fact of HUD.[9] The Bank filed no Power of Attorney from HUD demonstrating that it authorized Bayview to assign the debt to itself. After a hearing, the court granted the motion to substitute Bayview as the Plaintiff, but directed that the caption remain the same.[10]

On that same day—despite the fact that none of the remaining three defendants had answered or been defaulted or dropped—the court entered an order

[7] Affidavit of the Legal Clerk of the Palm Beach Daily Business Review filed February 27, 2013 (R. 80).

[8] Corporation Assignment of Mortgage, May 31, 2013 (R. 85).

[9] Corporate Assignment of Mortgage, dated June 13, 2013 (R. 84).

[10] Order Substituting Party Plaintiff, February 4, 2014 (R. 100).

setting trial.[11] Nearly a month and a half later—six days before the scheduled trial—the Bank moved to default the three remaining defendants: the Homeowner, Carmen and SunTrust.[12] The record contains no order granting that motion prior to trial or the entry of judgment.

On the day of trial, the trial court entered judgment on behalf of the original Plaintiff, Bank of America, N.A., rather than the new Plaintiff, Bayview.[13] Six days after the trial and the entry of judgment, the Clerk entered a default against the Homeowner and Carmen [14] No default as to SunTrust—before or after trial—could be located in the record.

The Homeowner timely filed this appeal.

[11] Order Setting Residential Foreclosure Non-Jury Trial and Directing Pretrial Procedures, February 4, 2014 (R. 94).

[12] Motion for Default, March 19, 2014 (R. 113).

[13] Final Judgment of Foreclosure, March 25, 2014 (R. 130).

[14] Default, March 31, 2014 (R. 175).

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law by setting, and then conducting, trial when none of the defendants that remained in the case had answered or been defaulted. The trial of this case while the pleadings were still open conflicts with the plain wording of Fla. R. Civ. P. 1.440 and the cases that have applied it. Moreover, the clerk's default entered after the judgment cannot retroactively validate the court's order that set trial while the pleadings were open.

Because the Bank failed to carry its burden of defaulting or dropping the defendants it had served, it cannot be heard to complain that it must retry the case. Moreover, it made a significant and fundamental change to its Complaint on the day that the case was set for trial. This means the case would not have been at issue even if the Bank had defaulted the defendants and that, in any event, very little time has passed since the Bank was itself ready to try the case. As a result, the Bank will not be unduly prejudiced by this Court's enforcement of Rule 1.440.

Accordingly, the judgment should be reversed and the case remanded for the Homeowner to appear and participate in a trial on the merits.

STANDARD OF REVIEW

This appeal deals with the application of a procedural rule (Fla. R. Civ. P. 1.440). "[A]ppellate courts apply a *de novo* standard of review when the construction of a procedural rule ... is at issue." *Barco v. School Bd. of Pinellas Cnty.*, 975 So.2d 1116, 1121 (Fla.2008).

Additionally, a trial court decision that does not involve the resolution of disputed facts presents a pure issue of law which is reviewed *de novo*. *See deLabry v. Sales*, 134 So. 3d 1110, 1115 (Fla. 4th DCA 2014); *Sw. Florida Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000). Because the trial court's decision to proceed to trial when the case was not at issue does not involve the resolution of disputed facts, it is pure issue of law to be reviewed *de novo*.

ARGUMENT

The Bank was not entitled to a trial because the case was not at issue, either when it was set for trial or when it was tried.

Fla. R. Civ. P. 1.440(c) provides that a case may be set for trial only after it is "at issue." Rule 1.440(a) specifies that a case is at issue only after any motions directed to the last pleadings are served. Where no responsive pleading has been filed, the action is not at issue until a default has been entered against the non-responsive party or parties. *Bennett v. Cont'l Chemicals, Inc.*, 492 So. 2d 724, 727, n. 1 (Fla. 1st DCA 1986) (citing to Trawick's Florida Practice and Procedure, 1980 Edition section 22-2). The rule is mandatory. *Genuine Parts Co. v. Parsons*, 917 So. 2d 419, 421 (Fla. 4th DCA 2006).

In *Ocean Bank v. Garcia-Villalta*, 141 So. 3d 256 (Fla. 3d DCA 2014), the Third District reversed an order dismissing a foreclosure case after trial, holding that the case was not at issue where two defendants to the lawsuit had neither answered the complaint nor been defaulted. *Garcia-Villalta* thus restates the general rule that a case cannot be set for trial unless and until all defendants to the litigation have answered the complaint or been defaulted:

> [T]he foreclosure case was not properly "at issue" when the trial court issued its *sua sponte* order setting the case for trial because Garcia–Villalta had not filed a responsive pleading, no default had been issued against Garcia–Villalta, and the trial court had not ruled on

> Ocean Bank's motion for default against [another named defendant] Chase Bank.

Ocean Bank v. Garcia-Villalta, 141 So. 3d at 257-58; *see also Jones v. Volunteers of America North & Central Florida, Inc.*, 834 So. 2d 280, 281 (Fla. 2d DCA 2002) ("The case had to be at issue as to both defendants before it could be set for trial."); *Luckhardt v. Pardieck*, 145 So. 2d 542, 543 (Fla. 2d DCA 1962) (holding that "the instant cause was never at issue since certain parties defendant to the cause as described in the complaint had not answered or had decrees pro confesso entered against them."); *Rountree v. Rountree*, 72 So. 2d 794, 795 (Fla. 1954) ("Until all of the defendants had filed answers or had [defaults] entered against them, the cause was not at issue, and the plaintiffs could not be entitled to an order of reference for the taking of testimony."); *Tucker v. Bank of New York Mellon*, ___ So. 3d ___, 39 Fla. L. Weekly D789 (Fla. 3d DCA Apr. 16, 2014) (reversal of judgment where order setting the trial was entered before the case was at issue—"[f]ailure to adhere strictly to the mandates of Rule 1.440 is reversible error." [internal quotations omitted])

Strict compliance with the rule is required because it is designed to safeguard the parties' right to procedural due process. *Brown v. Reynolds*, 872 So. 2d 290, 297 (Fla. 2d DCA 2004). A notice for trial issued before the case is at

issue is simply not viable. *See Precision Constructors, Inc. v. Valtec Const. Corp.*, 825 So. 2d 1062, 1063 (Fla. 3d DCA 2002).

Here, the Homeowner (and two other defendants) were never defaulted before trial. The Foreclosure Trial Form completed by the Bank and filed on the day of trial is left blank in the columns where it would indicate that a defendant filed an answer, was defaulted, or was dropped:[15]

Absence of entries is notice by the Bank to the trial court that the case was not at issue.

Nor is there any order granting the Bank's motion for default before trial. Instead, the clerk entered a default nearly a week after the entry of the judgment.

[15] Foreclosure Trial Form, filed March 25, 2014 (R. 143).

This belated default, however, cannot retroactively validate the trial order that was entered before the pleadings were closed. Nor did it close the pleadings as to SunTrust.

This Court's enforcement of Rule 1.440 will not result in undue hardship or prejudice the Bank. First, it cannot be heard to complain when it bore the burden of prosecuting its case and, as shown by the Foreclosure Trial Form, knew that the pleadings were not closed.

But additionally, on the same day that the court set trial, the Bank effected a fundamental alteration to its Complaint—not only to change the very party purporting to have standing to enforce the Note, but to inject an entirely new issue—whether its standing could be predicated on new assignments of mortgage signed by purported agents without any evidence of the authority to execute such assignments.

More specifically, the new Plaintiff now alleged that an agent (the original Plaintiff) had assigned the debt from its undisclosed principal to HUD, after which a purported agent of HUD (Bayview) transferred the debt to itself.[16] The record is devoid of any authorization for these agents to make the assignments or to bring

[16] Corporation Assignment of Mortgage, May 31, 2013 (R. 85); Corporation Assignment of Mortgage, June 13, 2013 (R. 84).

this action. Nor did the Bank verify these new allegations to its verified Complaint.

Notably, the Bank's pleadings changed on February 4, 2014, just shy of eight months after § 702.015, Fla. Stat. went into effect. That statute requires foreclosure plaintiffs who are mere agents of the entity entitled to enforce the note to "describe the authority of the plaintiff and identify, with specificity, the document that grants the plaintiff the authority to act on behalf of the person entitled to enforce the note." A plaintiff in possession of the original promissory note must also file a sworn certification setting forth the location of the note.

While this legislation, by its terms, applies only to cases "filed on or after July 1, 2013,"[17] the change wrought by the substitution of the Plaintiff in this case is tantamount to a new case filed by a new Plaintiff. At a minimum, these statutory requirements—indisputably applicable if Bayview had filed a separate action—underscore the importance of proof of authority and actual possession of the Note, particularly in a foreclosure environment still reeling from the robo-signing scandal.

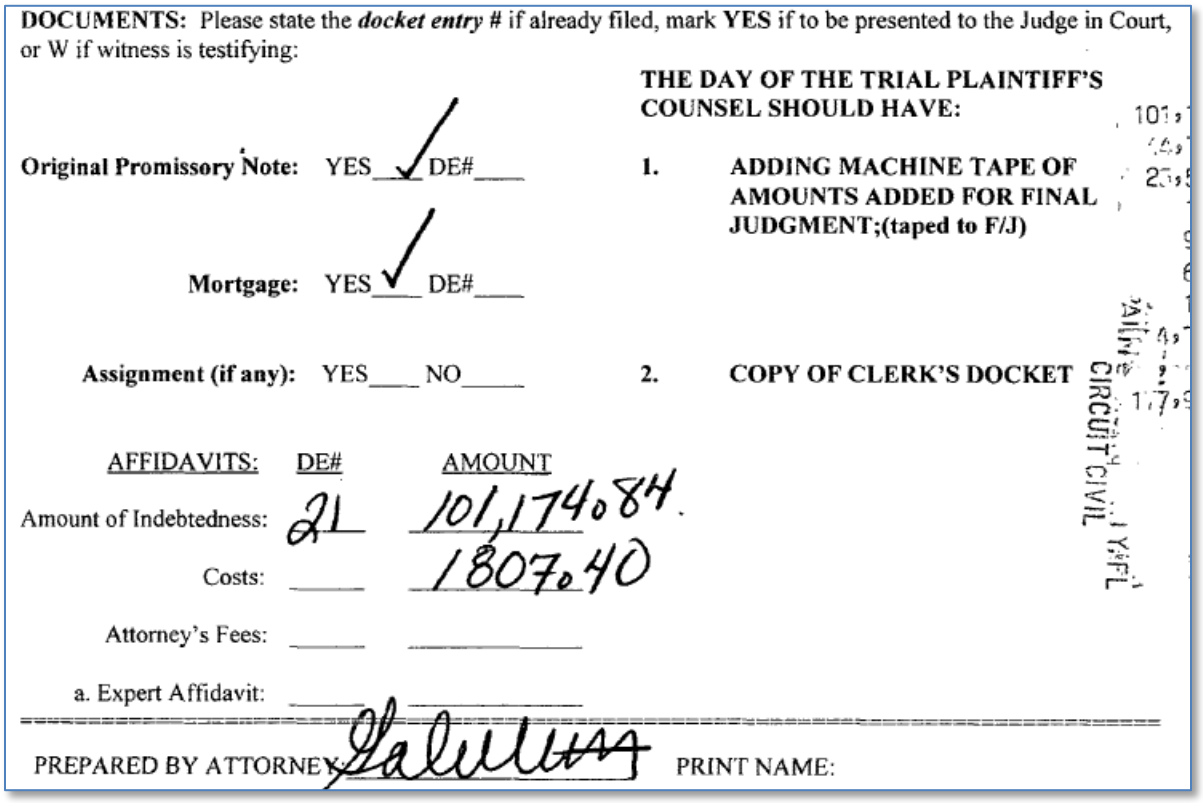
[17] Ch. 2013-137, § 8, Laws of Fla. *See also In Re: Amendments to the Florida Rules of Civil Procedure*, Case No. SC13-2394 (Fla. December 11, 2014) and new proposed Fla. R. Civ. P. 1.115 Pleading Mortgage Foreclosures.

More importantly, the statute's emphasis of these issues demonstrates that the substitution was a crucial change to the Bank's pleading—one so critical to the essence of the pleading that the defendants would have been entitled to respond, even if they had been defaulted. Fla. R. Jud. Admin. 2.516 ("No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them must be served in the manner provided for service of summons."); *Kitchens v. Kitchens*, 162 So. 2d 539, 541 (Fla. 3d DCA 1964) ("Even the most minimal standards of due process would require that notice be given to a party who had suffered a default … where the complaint has been amended in a matter of substance after the entry of such default."); *State Farm Mut. Auto. Ins. Co. v. Horkheimer*, 814 So. 2d 1069, 1074 (Fla. 4th DCA 2001) (that a defaulted party is entitled to notice of a change in the pleadings or the issues to be litigated at trial is an issue of elementary due process); *see Yawt v. Carlisle*, 34 So. 3d 217, 220 (Fla. 4th DCA 2010) (a defaulted party may rely on the limitation that a plaintiff cannot be granted relief not supported by the pleadings or the law applicable to the pleadings and is, therefore, entitled to respond to significant changes, "unfettered by the original default").

Stated differently, the Homeowner's lack of response to the original verified Complaint, in no way conceded the new unverified allegations—that Bayview had

become entitled to enforce the loan by way of a transfer to itself. Thus, the Bank's own actions in amending the fundament of its cause of action meant that the case was not at issue and not ready to be tried, even if all the defendants had answered or been defaulted. There could be no unfair prejudice to the Bank in setting the clock back to that date, allowing the Homeowner to respond and permitting this case to be tried on the merits.

Nor would it be burdensome for the Bank or the trial court to re-try the case given that the record indicates that no witness was called and no documents were formally received as exhibits. The Foreclosure Trial Form indicates that the Bank "presented" the Original Promissory Note and Mortgage (but no assignments) without the testimony of a witness:



DOCUMENTS: Please state the ***docket entry #*** if already filed, mark **YES** if to be presented to the Judge in Court, or W if witness is testifying:

THE DAY OF THE TRIAL PLAINTIFF'S COUNSEL SHOULD HAVE:

Original Promissory Note: YES ✓ DE#____

1. **ADDING MACHINE TAPE OF AMOUNTS ADDED FOR FINAL JUDGMENT;(taped to F/J)**

Mortgage: YES ✓ DE#____

Assignment (if any): YES____ NO____

2. **COPY OF CLERK'S DOCKET**

AFFIDAVITS:	DE#	AMOUNT
Amount of Indebtedness:	21	101,174.84
Costs:	____	1807.40
Attorney's Fees:	____	____
a. Expert Affidavit:	____	____

PREPARED BY ATTORNEY: [illegible] PRINT NAME:

Also according to the Form, the amount of indebtedness was proven by Docket Entry 21—the affidavit submitted in support of a nonexistent motion for summary judgment.[18] The Form also indicates—as does the record itself—that the

[18] Notice of Filing Affidavit Supporting Plaintiff's Motion for Summary Final Judgment and Payment History, filed February 22, 2013 (R. 70). Notably, the Homeowner was charged with attorneys' fees for the preparation of the summary judgment motion, setting a hearing for the motion, and a letter to the court regarding the motion—none of which is in the record. Affidavit of Attorneys' Fees and Costs filed March 25, 2014 (R. 137) at ¶6 (R. 140).

Bank submitted no expert affidavit to support the reasonableness of the attorney's fees claimed and the Bank's witness list discloses no expert witness.[19]

The Judgment itself indicates that no witness was called to establish the attorneys' fees—that the figure was determined based on the "filed affidavit."[20] As an aside, the only affidavit for fees in the record—the one filed the same day as the trial—states that the Bank paid its attorneys a flat fee of only $2,250 for uncontested foreclosures such as this case was at the time of trial.[21] Indeed, the attorney with the firm performing the services opined under oath that the reasonable fee would be:

> …$2,250.00, based on the flat fee agreement, together with necessary and applicable reasonable time expended to respond to any issue raised by a Defendant and/or where applicable, time expended to resolve all issues necessary to obtain final judgment, based on an hourly rate of $175.00 per hour.[22]

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[19] Plaintiff's Amended Witness and Exhibit Lists, February 12, 2014 (R. 102). Notably the Homeowner was charged with the preparation of an Affidavit of Reasonable Attorneys' Fees (including communication with an expert) which does not appear in the record. Affidavit of Attorneys' Fees and Costs filed March 25, 2014 (R. 137) at ¶6 (R. 140).

[20] Final Judgment of Foreclosure, ¶ 2 (R. 131).

[21] Affidavit of Attorneys' Fees and Costs filed March 25, 2014 (R. 137), at ¶ 2 (R. 138).

[22] Affidavit of Attorneys' Fees and Costs filed March 25, 2014(R. 137), at ¶ 10 (R. 141).

Although no issue was raised by any defendant that would trigger the expenditure of more time or a departure from the flat fee arrangement, the Judgment awarded—without explanation—more than twice the flat fee amount.[23]

It is apparent from the record, therefore, that the judgment in this case was entered on documentation rather than live witness testimony and that the documentation was less than that normally submitted to obtain summary judgment. As a result, the Bank and the trial court will not be unduly burdened by a holding that requires a "new trial."

[23] Final Judgment of Foreclosure, ¶ 1.H. (R. 131).

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

Dated: December 12, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby 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 AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this December 12, 2014 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. I also certify that this brief has been electronically filed this December 12, 2014.

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