In the District Court of Appeal
Fifth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellants,

v.

BANK OF AMERICA, N.A. AS SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP, ET AL.,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Question Presented

Is summary judgment proper in a foreclosure case where the Plaintiff provides not a scrap of evidence that it held the Note when it filed suit (or that it complied with conditions precedent), particularly when the Defendants have not yet answered an Amended Complaint that first discloses the existence of an undated endorsement in blank?

II. Appellants' Statement of the Facts

This is a foreclosure case in which Federal National Mortgage Association ("Fannie Mae") seeks to take the property of [redacted] and [redacted] in their individual capacity and as co-[redacted] of the the [redacted] DATED OCTOBER 22, 2008 (collectively, the "OWNERS").[1] The case was bought by, and in the name of, the servicer, BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, L.P. (the "SERVICER") without joining Fannie Mae as a party plaintiff.

The SERVICER filed the Complaint in 2010 alleging that [redacted] signed a promissory note to Countrywide Home Loans, Inc. and that [redacted] and

[1] Complaint, dated February 26, 2010, ¶¶ 2-3, Record on Appeal ("R. __"), pp. 8-9.

STRELECKY executed a mortgage to Mortgage Electronic Registration Systems Incorporated ("MERS").[2] The SERVICER alleged that MERS assigned it the mortgage "[t]ogether with the note" shortly before it filed the Complaint.[3] In addition to claiming it was an assignee of the Note, the SERVICER claimed that it was "holder of the note"—even though the attached copy bore no endorsement.[4] The OWNERS answered the Complaint and denied all the allegations.[5]

The SERVICER then moved for summary judgment accompanied by four affidavits, one of which was an Affidavit of Indebtedness, executed by Benjamin Hills, as an Assistant Secretary of a company identified only as the "servicing agent of the [SERVICER]."[6] Although Mr. Hills asserted, under oath, that "[t]he allegations of the Complaint filed in this action are true and correct,"[7] he also

[2] Complaint, ¶2 (R. 8-9) and attached copy of the InterestFirst Adjustable Rate Note (R. 33).

[3] Complaint, ¶2 (R. 8-9) and attached copy of Mortgage (R. 13).

[4] Complaint, ¶3 (R. 9) and copy of Note, p. 5 (R. 37).

[5] Answer to Complaint, dated March 26, 2010 (R. 69).

[6] Motion for Summary Final Judgment of Foreclosure, dated September 1, 2010 (R. 78); Affidavit of Indebtedness executed by Benjamin Hills, dated June 29, 2010 ("Hills Aff."; R. 76).

[7] Hills Aff., ¶ 2 (R. 76).

claimed that the "Plaintiff" (i.e. the SERVICER, rather than Fannie Mae) owned the loan.[8]

Over a year later, the SERVICER moved for leave to amend its Complaint. The only reason given for the amendment was that the SERVICER had merged into BANK OF AMERICA, N.A. by way of a merger.[9] The attached proposed Verified Amended Complaint, however, differed from the original in more than just the name. It now mentioned nothing about the SERVICER being an assignee of the Note and Mortgage, although it still attached a copy of the assignment.[10] The SERVICER also added the allegation that it "is entitled to enforce the Note pursuant to Florida Statute 673.3011."[11]

Most importantly, the version of the Note attached to this Complaint now contained what purported to be an undated endorsement in blank signed by an Executive Vice President of Countrywide Home Loans, Inc.[12] Thus, the first time

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[8] Hills Aff., ¶ 1 (R. 76).

[9] Motion for Leave of Court to File Verified Amended Complaint, dated October 4, 2011 (R. 95).

[10] Verified Amended Complaint, ¶ 2 (R. 98-99); Assignment of Mortgage (R. 128).

[11] Verified Amended Complaint, ¶3 (R. 99).

[12] Note attached to Verified Amended Complaint, p. 5 (R. 107). Two other apparently identical Verified Amended Complaints, each with the endorsed version of the note, appear in the docket (R. 132, 165).

that an endorsement appeared in the case was over a year and a half after the case was filed.

Another defendant, Stonebridge Lakes Homeowners Association, Inc., filed a new answer to the Amended Complaint.[13] No other defendant, including the OWNERS, answered the Amended Complaint. The SERVICER moved for, and obtained, a new clerk's "Default as to Amended Complaint" against Wachovia Bank, N.A., even though it had already defaulted Wachovia as to the original complaint.[14] The SERVICER did not move for, or obtain a default as to the Amended Complaint against the OWNERS.

Almost a year after amending its complaint, the SERVICER filed what it claimed to be the "Original Note" (with the undated endorsement), the Mortgage and the Assignment.[15]

The SERVICER then filed a new affidavit in support of its two-year-old Motion for Summary Judgment and announced that it was "withdrawing" the

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[13] Answer of Stonebridge Lakes Homeowners Association, Inc., dated October, 19, 2011 (R. 163).

[14] Motion for Default, dated September 24, 2012, Entry of "Default as to Amended Complaint," dated October 4, 2012 (R. 228); *compare*, Motion for [and Entry of] Default against Wachovia Bank, N.A. and others, dated September 1, 2010 [entered September 8, 2010] (R. 81).

[15] Notice of Filing, dated September 21, 2012 (R. 197).

previous affidavit executed by Hills from consideration.[16] The new affidavit was signed by James Brandemarte, an Assistant Vice President of the SERVICER. Mr. Brandemarte made no representations about who owns the loan or whether the allegations of the Complaint or Amended Complaint are true.

On the issue of standing, Mr. Brandemarte made one representation: "Plaintiff [i.e. the SERVICER, now BANK OF AMERICA, N.A.] holds the promissory note for this loan."[17] He did not authenticate the Note nor did he authenticate or date the endorsement.

The hearing on the SERVICER's Motion for Summary Judgment was held January 14, 2013.[18] The court entered a Final Judgment which contained no findings of fact, other than the amount due.[19]

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[16] Notice of Filing Affidavit Supporting Plaintiff's Motion for Summary Judgment and Notice of Withdrawing Previous Affidavit of Indebtedness, dated September 28, 2012 (R. 230).

[17] Affidavit Supporting Plaintiff's Motion for Summary Final Judgment, dated October 31, 2011 ("Brandemarte Aff."), ¶ 4 (R. 232).

[18] Final Judgment of Foreclosure, dated January 14, 2013, stating that the action "was tried before the Court…[o]n evidence presented." (R. 239).

[19] Final Judgment (R. 239).

The OWNERS timely filed this appeal of the Final Judgment. For ease of reference the pertinent chronology is as follows:

DATE	EVENT	COMMENT
2/26/2010	Complaint	Alleges that mortgage was assigned to BAC Home Loans Servicing and that FNMA is the owner of the Note while BAC is the holder of the Note, although it is unendorsed. Mortgage was to MERS. Attached assignment is from MERS to BAC, dated 11/18/09.
3/26/2010	OWNERS' Answer	All allegations denied.
9/1/2010	Motion for Default against Wachovia and others.	Default entered September 8, 2010.
9/1/2010	Motion for Summary Judgment and affidavits.	The Hill Affidavit of Indebtedness (later withdrawn).
10/5/2011	Motion for Leave of Court of File Verified Amended Complaint	Only change asserted is to the plaintiff's name—from BAC to BANK OF AMERICA, N.A.—by merger. However, claim of being assignee is dropped and attached note now endorsed. First time that endorsement appears in the case. (Order granting Motion 10/12/2011.)
9/21/2012	Notice of Filing Original Note and Mortgage	
9/24/2012	Motion for Default against Wachovia	Default entered as to Amended Complaint 10/4/12
10/1/2012	New Affidavit Supporting Plaintiff's Motion for Summary Judgment	The Brandemarte Affidavit. Also withdraws previous Affidavit of Indebtedness.
1/14/2013	Hearing and Final Judgment	

SUMMARY OF THE ARGUMENT

The trial court erred in entering summary judgment where the only evidence of the Plaintiff's standing at the time the Complaint was filed was an affidavit which claimed that a new servicing entity—not that which had filed the Complaint—"holds" the Note as of the date of the affidavit (years after the suit was initiated). Even if the affiant had said that the servicing agent that filed the suit "held" the note at that time, the affidavit was legally insufficient. It did not state when, if ever, the original plaintiff came into possession of the note or when the undated endorsement in blank (which first appeared years after the case was filed) was put on the Note. Nor did it specify how the affiant would have personal knowledge of these things when he never claimed to have worked for the original entity. Nor were any sworn and certified copies of any document from which such knowledge could have been gleaned identified or attached to the affidavit.

Because the OWNERS denied the allegations in the original Complaint that the SERVICER held the Note and had complied with conditions precedent, the SERVICER had the burden of proving those elements of its claim at summary judgment. Moreover, because the OWNERS had never answered the Amended Complaint, the SERVICER was obligated to disprove all possible defenses and affirmative defenses.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo.* *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *Willingham v. City of Orlando*, 929 So. 2d 43, 47 (Fla. 5th DCA 2006). "The moving party for summary judgment has the burden to demonstrate conclusively the nonexistence of any genuine issue of material fact." *Id*. "A reviewing court will consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the nonmoving party. If the slightest doubt exists, summary judgment cannot stand." *Id*.

ARGUMENT

I. The SERVICER provided nary a scrap of summary judgment evidence that it was the holder of the Note when it filed the Complaint.

In the original Complaint, the SERVICER alleged that it had standing to bring an action on a Note and Mortgage for which it was neither the original lender (Countrywide Home Loans, Inc.), the original mortgagee (MERS), or even the current owner of the loan (Fannie Mae). It made three different claims as to its entitlement to bring the action: 1) it was a holder of the [unendorsed] Note; 2) it was authorized by Fannie Mae; and 3) it was an assignee of the Mortgage (and Note).

All three of these versions of standing were denied by the OWNERS, but only the first two survived to summary judgment. The SERVICER dropped its "assignee" theory in the Amended Complaint, and even if it had not, it never authenticated the purported assignment. The SERVICER, therefore, was required to produce evidence that it was either the holder of the Note or an authorized agent of the owner.

A. The SERVICER was not the holder of the version of the note attached to the original Complaint.

It is axiomatic that one cannot be the holder of an instrument that is neither specially endorsed nor endorsed in blank. § 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"); *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.)

B. Even under the Amended Complaint and the new affidavit, there was no evidence that the SERVICER was the holder of the Note at the time it filed suit.

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. *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). In *McLean*, the court reversed summary judgment because, as in this case, an endorsed version of the note did not appear until after the complaint was filed and the summary judgment affidavit (which was executed after the inception of the case) did not specify when the bank became the note owner. In *McLean*, the affiant had merely stated that the bank "is" the holder, rather than "was" the holder before filing the action. Here, the affiant also used the present tense: "Plaintiff holds the

promissory note for this loan."[20] Thus, the bank in *McLean*, like the SERVICER here, "failed to submit any record evidence proving that it had the right to enforce the note on the date the complaint was filed." *Id*. at 174. *See also Saver v. JP Morgan Chase Bank*, 114 So. 3d 352 (Fla. 4th DCA 2013) (summary judgment reversed and remanded where affidavits did not indicate when bank became the owner of the note); *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012) (summary judgment reversed where bank failed to prove it had standing to file suit at its inception).

Even if the affiant had meant to say that the SERVICER "was" the holder when the Complaint was filed, the affiant did not assert any personal knowledge of how the SERVICER would have come to hold the note. *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 is not satisfied by the statement that he has personal

[20] Brandemarte Aff., ¶ 4 (emphasis added) (R. 232).

knowledge; there should be stated in detail the facts showing that he has personal knowledge." [emphasis added]).

At best, the affiant, Brandemarte, makes the conclusory claim that he has personal knowledge of records of the new servicer, BANK OF AMERICA, N.A. He does not explain what knowledge, if any, that he would have of the records of the original servicer, BAC Home Loans Servicing, LP, or whether he even worked for that entity. *See Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 783 (Fla. 4th DCA 2011) (affidavit of indebtedness constituted inadmissible hearsay where affiant had no personal knowledge of previous servicer's records); *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 4D12-3363, 2013 WL 4525318 (Fla. 4th DCA 2013) (trial testimony constituted inadmissible hearsay where affiant had no personal knowledge of previous servicer's records).

Moreover, if Brandemarte was referring to a business record that established that the SERVICER was in possession of an 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 an exception to hearsay).

The only thing attached to Brandemarte's affidavit is a redacted printout of "part of the business records," which does not address who might be the owner and holder of the loan.[21] Without such a record, Brandemarte's statement that the SERVICER is the holder is merely an impermissible factual and legal conclusion. *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).

That a purported assignment from MERS was attached to the SERVICERS' pleadings does not avail the SERVICER for several reasons. First, the SERVICER dropped its assignee theory when it amended its Complaint. Second, the assignment was never mentioned in the motion for summary judgment or the supporting affidavit; thus the SERVICER never authenticated the assignment or laid any foundation for a hearsay exception. Third, being an assignee of a mortgage does not make one the holder of the Note as Brandemarte claimed—mortgages are said "to follow" notes, not the other way around. And finally, even though the assignment also claims to transfer the Note, there is absolutely no

[21] Brandemarte Aff., ¶ 5 (R. 232) and attachment (R. 234).

evidence that MERS was ever in possession of the Note (so as to confer the status of holder) or was authorized by Fannie Mae to transfer its rights as the alleged owner.

C. There was no evidence that the SERVICER was authorized by the alleged owner of the loan to bring the lawsuit.

Nothing was attached to the complaint to prove the SERVICER's claim that Fannie Mae was the owner of the loan or that it had authorized the SERVICER to file suit. Neither the Hill affidavit nor the Brandemarte affidavit stated anything (or attached anything) about either of these alleged facts. At most, Hill said that "[t]he allegations of the Complaint filed in this action are true and correct."[22] But the SERVICER had withdrawn the Hill affidavit before the summary judgment hearing. And such bald parroting of the allegations is, in any event, insufficient for summary judgment. *Nour v. All State Pipe Supply Co.*, 487 So.2d 1204, 1205 (Fla. 1st DCA 1986) (affidavit which amounts to nothing more than a statement by an officer of the company that the allegations of the complaint are true is insufficient for summary judgment).

Its claim to be an authorized agent of Fannie Mae flies in the face of its own pleading which did not join Fannie Mae as a party plaintiff. Fla. R. Civ. P. 1.210

[22] Hill Aff., ¶ 2 (R. 76).

(requiring—with several exceptions not applicable here—that if an agent of the real party in interest brings the action in its own name, its principal must be joined as a party). If the SERVICER's allegations were true, then Fannie Mae was a necessary party. *See Standard Lumber Co. v. Florida Indus. Co.*, 141 So. 729, 733 (Fla. 1932) (it is proper to join together as parties plaintiff in such a suit, all of those who are together the owners of the entire interest in the cause of action brought before the court for adjudication).

This agency theory of standing also conflicts with its noteholder theory, because Article 3 of the Uniform Commercial Code ("UCC") supports only the transfer of the entire bundle of rights that exist in a negotiable instrument. By its very terms, Article 3 does not apply to transfers where the transferor (here, Fannie Mae) intends to retain its rights as owner of the note:

> If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

§ 673.2031(4) Fla. Stat. (UCC § 3-203); § 673.2011 Fla. Stat. (UCC § 3-201) (one may only become a "holder" through "negotiation.").[23] Thus, if Fannie Mae gave

[23] While the courts often cite to § 671.201(21) for the broad concept of 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," the fact that this

the SERVICER possession of the Note for the sole purpose of enforcing it as Fannie Mae's agent, that transfer was not a "negotiation." Therefore, Article 3 of the UCC does not apply, and the SERVICER is not the holder.

D. The SERVICER's inclusion of a reference to § 673.3011 Fla. Stat. in its Amended Complaint did not provide another basis for enforcing the note.

In the process of amending its Complaint, the SERVICER not only dropped its "assignee" theory, but surreptitiously added one additional statement regarding standing—that it was "entitled to enforce the Note under § 673.3011 Fla. Stat."[24] That section states that a holder of the instrument is a "person entitled to enforce" that instrument, so its inclusion in the Amended Complaint appears to be nothing more than a clarification as to the statutory basis for claiming it could enforce the Note as its holder.

While § 673.3011 also provides other ways in which one may become entitled to enforce a note, the SERVICER did not plead them or mention them in either the motion for summary judgment or the supporting affidavit. For example, § 673.3011(2) allows a "nonholder ... who has the rights of a holder" to enforce an

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general definition is subject to context and "definitions contained in other chapters" (§ 671.201 Fla. Stat.) is often overlooked.

[24] Verified Amended Complaint, ¶ 3 (R. 99).

instrument. This description would, in fact, appear to fit the agency theory of standing had the SERVICER's proven that it was the agent of the Note holder. But the SERVICER's representative swore in an affidavit just the opposite—that the SERVICER is a holder, not a "nonholder." Nor did the SERVICER or its affiant adduce a scintilla of summary judgment evidence to support the notion that it had somehow become endowed with the rights of the actual holder.

The record is also devoid of any pleading or proof that it would fall into the third category mentioned in § 673.3011—a person not in possession, but who can reestablish a lost instrument under § 673.3091 Fla. Stat. Once again, its affiant testified under oath to the opposite—that the SERVICER was a holder (i.e. in possession of the Note).

E. Because the SERVICER alleged it was the holder of the Note when it filed its Complaint, it had the burden of proving that at summary judgment.

The movant has the burden of conclusively proving the non-existence of a genuine issue of material fact and that proof must overcome all reasonable inferences which may be drawn in favor of the opposing party. *Stop & Shoppe Mart, Inc. v. Mehdi*, 854 So. 2d 784, 786 (Fla. 5th DCA 2003). Here, the SERVICER pled in its original Complaint that it was, at that time, a holder of Note

("Plaintiff is the holder of the note").[25] The OWNERS denied that allegation.[26] The SERVICER, therefore, had the burden of proving that fact at summary judgment. *Carapezza v. Pate*, 143 So.2d 346, 347 (Fla. 3d DCA 1962) (reversing a summary decree of foreclosure and stating, "[w]here 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.").

Accordingly, if the OWNERS' answer to the original complaint was still valid after the SERVICER amended the Complaint, then the SERVICER failed to prove with admissible summary judgment evidence its allegation that it was the holder of the note.

[25] Complaint, filed January 26, 2010, ¶ 3 (R. 9) (emphasis added).

[26] Answer to Complaint, dated March 26, 2010 (R. 69).

II. Because the OWNERS never answered the Amended Complaint, the SERVICER was required to disprove every possible defense and affirmative defense.

A. The SERVICER was required to prove its standing, even if it had not specifically alleged it held the note.

At the time of summary judgment, the OWNERS had not answered the Amended Complaint. The Amended Complaint substantially changed the original, both because it was accompanied by a materially different Note (one ostensibly endorsed) and because it dropped the assignee theory of standing. The OWNERS were required to answer the amended pleading. Fla. R. Civ. P. 1.190 ("A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders."); *see*, Committee Notes to 1980 Amendment (amendment restores rule requiring a response to each amended pleadings). The Homeowner Association answered the Amended Complaint.[27] The SERVICER moved for a default against Wachovia Bank, N.A., even though it had already defaulted to the original Complaint.[28] The clerk entered the default

[27] R. 163.

[28] Motion for Default and Entry of Default against Wachovia Bank, N.A. and others in 2010 (R. 81); Motion for Default and Entry of Default as to Amended Complaint against Wachovia Bank, N.A. in 2012 (R. 228).

against Wachovia as to the Amended Complaint.[29] The SERVICER, however, did not move for default against the OWNERS for failing to answer the Amended Complaint. Accordingly, at the time of summary judgment, the OWNERS had not answered the operative pleading.

In *Kaplan v. Morse*, 870 So. 2d 934, 935 (Fla. 5th DCA 2004), this Court reversed a summary judgment where defendant had answered the original complaint, but not the amended complaint. The dissent expressed disagreement with the appellant's argument—that appears to tacitly underpin the majority opinion—that the plaintiff's recourse was to default the defendant. Yet, the dissent agreed that the "answer to the original complaint is of no value [because the] old rule permitting an initial response to stand over to an amended pleading was abrogated in 1981." *Id*. at 937, n. 1.[30]

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[29] *Id*.

[30] Relying on Fla. R. Civ. P. 1.110 (e) entitled Effect of Failure to Deny, the dissenting judge believed that a failure to answer the amended complaint operated as an automatic default—an admission that all the allegations were true. This analysis overlooks the meaning of the definite article "the" in the Rule which states: "Averments in a pleading to which a responsive pleading is required … are admitted when not denied in the responsive pleading." (emphasis added). The dissent interpreted this as if the Rule had used an indefinite article—that allegations will be admitted if not denied in a responsive pleading. But the language of the Rule requires that allegations be uncontested in a responsive pleading before they may be deemed admitted.

"When a plaintiff moves for summary judgment before the defendant has filed an answer, 'the burden is upon the plaintiff to make it appear to a certainty that no answer which the defendant might properly serve could present a genuine issue of fact.'" *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 937-38 (Fla. 2d DCA 2010), *quoting*, *Settecasi v. Bd. of Pub. Instruction of Pinellas County*, 156 So.2d 652, 654 (Fla. 2d DCA 1963); *St. Tropez II, LLC v. Adlerov*, 50 So. 3d 40, 41-42 (Fla. 3d DCA 2010) (incumbent upon movant to establish that no answer that the non-movant could properly serve or affirmative defense it might raise could present such a genuine issue of fact). "[T]he burden for such a movant is extremely heavy in that the movant must demonstrate conclusively that the defendant cannot plead or otherwise raise a genuine issue of material fact." *Gick v. Wells Fargo Bank, N.A.*, 68 So. 3d 989, 990 (Fla. 5th DCA 2011), *citing*, *Greene v. Lifestyle Builders of Orlando, Inc.*, 985 So.2d 588 (Fla. 5th DCA 2008).

The SERVICER, therefore, was obligated, not only to prove its allegation that it was the holder of the Note when it filed suit, but to disprove all possible affirmative defenses, such as an expressly stated and more detailed challenge to the SERVICER's standing.

B. The SERVICER was also required to disprove the potential affirmative defense of failure to comply with conditions precedent.

Likewise, because there was no answer to the operative complaint, the SERVICER was obligated to affirmatively show that it had complied with conditions precedent. Notably, Paragraph 22 of the Mortgage, requires the SERVICER to send the OWNERS a notice of acceleration prior to filing suit.[31] Neither the motion for summary judgment nor the Brandemarte affidavit mentions compliance with this condition precedent. Thus the motion for summary judgment should have been denied. *Zervas v. Wells Fargo Bank, N.A.*, 93 So. 3d 453 (Fla. 2d DCA 2012) (summary judgment reversed where no answer had been filed and mortgagee failed to show that it complied with thirty-day notice provision of mortgage); *Dominko v. Wells Fargo Bank, N.A.*, 102 So. 3d 696 (Fla. 4th DCA 2012) (where no answer had been filed, genuine issue of material fact as to whether mortgagee provided pre-suit notice of default precluded summary judgment).

[31] Mortgage, ¶ 22 (R. 22).

CONCLUSION

Accordingly, the trial court erred in entering summary judgment against the OWNERS. The judgment should be reversed and remanded for further proceedings.

Dated: September 9, 2013

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this September 9, 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this September 9, 2013 to all parties on the attached service list.

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