In the District Court of Appeal
Fifth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

BAYVIEW LOAN SERVICING, LLC, et al.,

Appellees.

ON APPEAL FROM THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE AND FACTS

I. Introduction

This appeal arises from a foreclosure case brought by SUNTRUST BANK against [redacted] and [redacted] ("the Homeowners") for repayment of money borrowed from a similarly named, but different entity, SunTrust Mortgage Inc. Ten days before trial, a new bank was substituted in as the party plaintiff, BAYVIEW LOAN SERVICING, LLC. The Plaintiff will be referred to herein as "the Bank," or where necessary, as "SunTrust" or "Bayview."

II. Statement of the Facts

A. The Pleadings

SunTrust filed a Complaint alleging that it "owns and holds [a] note and mortgage" executed by the Homeowners in favor of SunTrust Mortgage Inc.[1] No note was attached and the Bank alleged that it had been lost.[2]

The Homeowners responded by filing a *pro se* denial of the Complaint coupled with an objection to service of process.[3] Later, the Homeowners filed a

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[1] Complaint, filed August 5, 2009, ¶ 3 (R. 6); Mortgage attached to Complaint dated March 26, 2007 (R. 16).

[2] Complaint, Count II, (R. 7-8).

[3] *See*, handwritten notes on copy of Complaint (R. 54).

Motion to Dismiss which pointed out that "no evidence of a promissory note has been submitted…".[4] The Bank responded by filing a note and a notice dropping the lost note count of the Complaint.[5] The Bank represented that the "copy of the note contains an indorsement transferring ownership to Plaintiff,"[6] but in reality, it had none.[7] The Bank did attach, however, an assignment executed nearly five months after the case was filed which purported to transfer the mortgage from Mortgage Electronic Registration Systems, Inc. ("MERS") to SunTrust.[8]

At the hearing on the Homeowners' Motion to Dismiss, the Court ordered the Homeowners to plead in response to the Complaint.[9] The Homeowners, now with the assistance of counsel, filed an Answer with five Affirmative Defenses.[10] A year and three months later, the Bank filed a document entitled "Reply to Affirmative Defenses," but which asked the Court to "strike each affirmative defense..."[11]

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[4] Motion to Dismiss, filed November 2, 2009 (R. 100).

[5] Plaintiff's Response to Defendant's Motion to Dismiss, filed January 4, 2010 (R. 105); Note (R. 109); Notice Dropping Count II, dated December 28, 2009 (R. 104).

[6] Plaintiff's Response to Defendant's Motion to Dismiss, ¶ 5 (R. 106).

[7] *See*, Note, p. 3 (R. 111).

[8] Assignment of Mortgage (R. 129).

[9] Order Requiring More Definite Statement, dated May 27, 2010 (R. 133).

[10] Answer and Affirmative Defenses filed July 30, 2010 (R. 136).

[11] Reply to Affirmative Defenses, filed November 1, 2011 (R. 174).

The Homeowners then moved for leave to amend the Answer to allege additional affirmative defenses.[12] The Bank served another "Reply to Affirmative Defenses" that again asked the Court to "strike each affirmative defense…"[13]

Six months later, the Homeowners (represented by new counsel) moved a second time to amend the Answer.[14] The Bank, once again, filed its standard "Reply" asking the Court to "strike each affirmative defense…"[15]

Upon obtaining leave to amend, the Homeowners' filed their new pleading entitled "Defendants, [redacted] and [redacted] Second Amended Answer to Complaint and Affirmative Defenses."[16] In response, the Bank, filed its fourth "Reply" asking the Court to "strike each affirmative defense…"[17]

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[12] Defendant's Motion to Amend Defendant's Answer and Incorporated Memorandum of Law, filed November 8, 2011 (R. 178).

[13] Reply to Affirmative Defenses, filed November 18, 2011 (R. 216).

[14] Defendants, [redacted] and [redacted] Motion for Leave to Amend Answer and Affirmative Defenses, filed May 22, 2012 (R. 250).

[15] Reply to Affirmative Defenses, filed June 18, 2012 (R. 267).

[16] Defendants, [redacted] and [redacted] Second Amended Answer to Complaint and Affirmative Defenses filed January 28, 2013 (R. 292).

[17] Reply to Affirmative Defenses, filed May 30, 2013 (R. 306).

The Court then issued an order setting trial.[18] The Homeowners moved to strike the trial order on the grounds that the Bank's "Reply" was actually a motion to strike the affirmative defenses and that the pendency of such a motion prevents the case from being at issue.[19] The Homeowners also moved to strike the Bank's witnesses because they had not been disclosed in accordance with the trial order.[20] The court denied the motion to strike the trial order.[21]

On the appointed day of trial, the court addressed the Bank's failure to comply with the disclosure requirements of the trial order. Over the Homeowners' objection, the court continued the trial for ten days to remedy the prejudice caused by the nondisclosure.[22] After the court declared the continuance, the Bank announced that it was moving to substitute the party plaintiff and presented a written motion which stated that the "pleadings should be amended to reflect that

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[18] Order Setting Docket Sounding/Case Management Conference and Non-Jury Trial, dated October 10, 2013 (R. 310).

[19] Defendant, [redacted] and [redacted] Motion to Vacate Trial Order filed November 1, 2013 (R. 325).

[20] Defendants, [redacted] and [redacted] Motion for Sanctions for Failure to Comply with Court Order and Motion in Limine, filed December 19, 2013 (R. 338).

[21] No order in the record for hearing noticed for November 27, 2013 (R. 328), *but see*, Transcript of Trial Before the Honorable Raul Zambrano, December 30, 2013 (R. 436) (hereinafter "T. __"), p. 11.

[22] Transcript of Hearing Before the Honorable Raul A. Zambrano, December 20, 2013 (R. 655-677).

Assignee is the holder of the Note and Mortgage."[23] Attached to the motion was an assignment executed nearly six months earlier purporting to assign the mortgage to Bayview.[24]

The Homeowners objected to the last-minute amendment to the pleadings and pointed out that the new complaint would not state a cause of action.[25] The court ruled that Bayview could be substituted as the party plaintiff and that the Homeowners could, as a result, amend their Answer:

> THE COURT: Well, I'll grant your motion to substitute the parties and amend the case style and I'll allow you to amend your pleadings.[26]

When the court indicated that the trial would still be taking place in ten days, the Homeowners explained that their response to the amended complaint could very well be a motion to dismiss, which would mean the case would not be at issue.[27] The trial court, nevertheless, ordered that the trial would go forward.[28]

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[23] Motion for Substitution of Parties and Amend Case Style filed December 20, 2013 (R. 351)(emphasis added); R. 679.

[24] Corporate Assignment of Mortgage, dated June 27, 2013 (R. 354); R. 679

[25] R. 681.

[26] R. 681.

[27] R. 681-682.

[28] R. 682.

The written orders from this hearing declared that Bayview was substituted as party plaintiff,[29] that the trial was continued for ten days,[30] and that the Homeowners were permitted to respond to the newly amended Compliant:

> Defendants can amend their response to the pleadings as amended by December 26, 2013.[31]

The Homeowners then filed a timely seven-page motion to dismiss.[32] Simultaneously, the Homeowners moved to vacate the trial order on the grounds that the case was not at issue.[33]

On the day of trial, the Homeowners argued their motion to dismiss and motion to vacate the trial order,[34] pointing out that the case was not at issue for two reasons: 1) the original trial order was a nullity having been issued when the Bank

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[29] Order Granting Motion for Substitution of Parties and Amend Case Style, December 20, 2013 (R. 350).

[30] Order Continuing Trial, December 20, 2013 (R. 347).

[31] *Id*.

[32] Defendants, [redacted] and [redacted] Motion to Dismiss Amended Complaint, served and filed December 26, 2013 (R. 358).

[33] Defendant, [redacted] and [redacted] Amended Motion to Vacate Trial Order, served and filed December 26, 2013 (R. 366).

[34] T. 6.

had a pending motion to strike affirmative defenses; and 2) the Homeowners had not yet answered the new complaint.[35] The court denied both motions.[36]

The Bank then, in an "abundance of caution" withdrew its reply to affirmative defenses.[37] The Homeowners pointed out that the case still would not be at issue (due to the absence of an answer), and in any event, would not have been at issue when the trial order was entered.[38] The court initially conceded, saying that the Homeowners could have twenty days to file an answer, but that trial would be held on the twenty-first day.[39] The Homeowners, however, objected to the trial being set while the pleadings were still open.[40] The court again denied the motion to vacate the trial order and started the trial without the new complaint having been answered.[41]

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[35] T. 10-11.

[36] T. 11-12.

[37] T. 12-15.

[38] T. 15-16.

[39] T. 16.

[40] T. 16-17.

[41] T. 20.

B. Trial

The Bank called two witnesses—Luis Carlo, who worked for SunTrust Mortgage, Inc. as a Default Proceedings Officer, and Ricardo Martinez, who worked at Bayview as a Litigation Manager.[42]

On the issue of whether SunTrust was an owner or holder of the Note payable to SunTrust Mortgage, Inc., Mr. Carlo introduced (over objection) what was stipulated to be a copy of the unendorsed Note that was in the court file (Plaintiff's Exhibit 1).[43] He also introduced (over objection) the Assignment of Mortgage from MERS to SunTrust (Plaintiff's Exhibit 3),[44] as well as a Corrective Corporate Assignment of Mortgage from MERS to SunTrust (Plaintiff's Exhibit 4).[45]

Mr. Carlo could not testify when the alleged transfer between MERS and SunTrust took place, without looking at another document that was never proffered as an exhibit.[46] He did not know why the original assignment indicated an "effective" date of "on or before July 27, 2009":

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[42] T. 26, 89-90

[43] T. 30; R. 374.

[44] T. 35; R. 393.

[45] T. 44; R. 394.

[46] T. 87.

> Q So you don't know if July 27 was a date chosen because that's when transfer occurred or if it was just chosen because that's prior to the complaint being filed, do you?
>
> A I do not.[47]

Mr. Carlo also testified that, from his experience, assignments of mortgage never transfer the note.[48]

The Bank's other witness, Mr. Martinez, introduced the third assignment of mortgage which purports to document an assignment from SunTrust to Bayview (Plaintiff's Exhibit 7).[49] But Mr. Martinez explained that the purpose of the assignment is to inform that Bayview was now the servicer for the loan.[50] He conceded that the assignment says nothing about transferring the note and that the note was never physically transferred to Bayview because it was in the court file at the time that Bayview became the servicer.[51]

More importantly, despite all the assignments in evidence, Mr. Martinez—the only Bayview representative to testify—believed that Bayview did not own the note or the mortgage:

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[47] T. 87.

[48] T. 89.

[49] T. 95; R. 414.

[50] T. 115-16.

[51] T. 116, 119.

Q Does Bayview Loan Servicing own the note and mortgage?

A From my knowledge we do not own the note. Bayview Loan does not own the note.

Q Who does?

A I believe it's a subsidiary of Bayview Loan Servicing.

Q A subsidiary of Bayview Loan Servicing owns the note?

A I don't have 100 percent verification of that.[52]

* * *

Q Do you know who [Bayview] serviced it for?

A For Bay -- for -- no, I do not.[53]

* * *

Q Was the note ever transferred to Bayview Loan Servicing?

A A copy -- you mean a copy of the note for records?

Q No, I mean the rights of the note. You work for Bayview Loan Servicing?

A Yes.

Q Does Bayview Loan Servicing have any right to enforce the note in this action?

A I can't answer that question.

MR. PEREZ [Bank's counsel]: Objection. Calls for legal conclusion.

THE COURT: Sustained.[54]

[52] T. 114-15.

[53] T. 115.

[54] T. 117-18.

* * *

Q Is Bayview Loan Servicing the owner of the note?

A We are the servicer of the mortgage.

Q Is that -- are they not the owner then?

A I'm not sure.

Q Does Bayview Loan Servicing own the mortgage?

A In this particular case I'm not sure they own the mortgage. I know they service the mortgage.[55]

At the close of the Bank's case, the Homeowners moved for an involuntary dismissal on the grounds, among others, that the Bank had not proven standing—either SunTrust's standing at the inception of the case or Bayview's standing at the time of the trial.[56] In response, the Bank argued that SunTrust's standing was established by the original assignment which counsel asserted—in contradiction to Mr. Carlo's testimony—transferred the note.[57] The Bank also argued that SunTrust was entitled to bring the case as a nonholder in possession with the rights of a holder, citing to *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618 (Fla. 5th DCA 2010). The court denied the motion without comment.[58]

[55] T. 118.

[56] T. 121-26.

[57] T. 129.

[58] T. 138.

After the Homeowners rested their case, they again moved to dismiss on the grounds that there had been no evidence of the Bank's standing.[59] The court, nevertheless, granted judgment in favor of the Bank,[60] from which this appeal was taken.

[59] T. 145-59.

[60] T. 165; Final Judgment for Plaintiff, December 30, 2011 (R. 370).

SUMMARY OF THE ARGUMENT

The trial court erred in denying the Homeowners' motion for involuntary dismissal and in entering judgment for the Bank because there was no competent evidence that SunTrust had standing when it filed the Complaint or that Bayview had standing at the time of trial. Neither bank was a holder of the Note, because the Note was not endorsed. The assignment from MERS was ineffective to transfer the Note because there was no evidence that either MERS or its principal, the original lender, was a holder of the Note at the time of the alleged transfer. Moreover, there was no evidence that the alleged transfer occurred before SunTrust filed the case because the SunTrust representative did not, and could not, resolve the conflicting dates on the face of the assignment of mortgage.

Although the Bank did not adduce evidence of a *prima facie* case, it should never have been tried. The Bank's motion to strike affirmative defenses was still pending when the court set the trial. Moreover, ten days before trial, the court granted the Homeowners leave to respond to the Bank's belated substitution of Bayview as the party plaintiff. The Homeowners' filed a motion to dismiss which was denied at trial. The trial court erred, therefore, by proceeding to trial, over objection, even though the Homeowners had filed no answer to Bayview's complaint.

STANDARD OF REVIEW

Issue 1. Whether the Bank adduced evidence of its standing: When an action has been tried by the court without a jury, the sufficiency of the evidence is an issue of law reviewed *de novo*. *Norman v. Padgett*, 125 So. 3d 977, 978 (Fla. 4th DCA 2013); *see State v. Hawkins*, 790 So. 2d 492, 495 (Fla. 5th DCA 2001). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987).

The standard of review for the trial court's denial of the Homeowners' motion for involuntary dismissal is also *de novo*. *Lizio v. McCullom*, 36 So. 3d 927 (Fla. 4th DCA 2010) (citing *Brundage v. Bank of Am.*, 996 So. 2d 877, 881 (Fla. 4th DCA 2008)).

Issue 2. Whether it was error to set and conduct trial in contravention of Fla. R. Civ. P. 1.440: Decisions refusing to apply Rule 1.440 are based on a pure issue of law and are reviewed *de novo*. *Mourning v. Ballast Nedam Const., Inc.*, 964 So. 2d 889, 892 (Fla. 4th DCA 2007).

ARGUMENT

I. There Was No Evidence of the Bank's Standing.

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 Bank Nat. Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). Here, the Bank alleged standing on the basis that "it owns and/or holds said note and mortgage."[61]

A. There was no evidence that SunTrust was the owner or holder of the note when it filed the case.

The Bank was required to prove that SunTrust had standing at the time it filed the foreclosure action. *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285 (Fla. 5th DCA 2013). Because the Bank was bound by its pleadings, it must prove that SunTrust was the owner or holder of the Note at the time it filed suit. *Sobel v. Mut. Dev., Inc.*, 313 So. 2d 77, 79 (Fla. 1st DCA 1975) (trial court without authority to grant relief based upon a legal theory never pled).

1. SunTrust was not the holder of the Note.

SunTrust was not the holder of the Note because the Note is payable to SunTrust Mortgage Inc., a Virginia Corporation, rather than SunTrust Bank (a

[61] Complaint, ¶ 3 (R. 6); *see also*, Complaint, ¶ 18 alleging the Plaintiff "is the owner and holder of the subject Note and Mortgage." (R. 8).

Georgia Corporation[62]), and because the Note is neither endorsed in blank nor endorsed to SunTrust Bank.[63] § 671.201(21)(a), Fla. Stat. ("Holder" means "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"); *Lyttle v. BankUnited*, 115 So. 3d 425 (Fla. 5th DCA 2013) ("If the note does not name the plaintiff as the payee, the note must bear an endorsement in favor of the plaintiff or a blank endorsement"; *quoting Richards v. HSBC Bank USA*, 91 So. 3d 233, 234 (Fla. 5th DCA 2012); *citing Gee v. U.S. Bank Nat'l Ass'n*, 72 So.3d 211, 213 (Fla. 5th DCA 2011)); *see Khan v. Bank of Am., N.A.*, 58 So. 3d 927, 928 (Fla. 5th DCA 2011) (judgment reversed where plaintiff bank alleged that it was a holder, but the note was endorsed to a different entity).

2. SunTrust was not the "owner" of the note.

Alternatively, there was no evidence that SunTrust owned the Note, much less that it owned the Note prior to filing suit. No witness testified that SunTrust

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[62] SunTrust's state of incorporation is outside the record, but is not subject to debate. *See Cotteleer v. Suntrust Bank*, 4D13-3845, 2014 WL 1400129 (Fla. 4th DCA 2014) (naming SunTrust Bank as Georgia Banking Corporation); and public records, *e.g.*, Securities and Exchange Commission 2011 Form 10-K of SunTrust Banks, Inc., available at:

http://www.sec.gov/Archives/edgar/data/750556/000075055612000053/sti-123111x10k.htm

[63] T. 73; R. 374-76.

owned the Note and there was no proof of purchase of the debt. *See Gee*, at 213 (listing sworn testimony—an "affidavit of ownership"—as a means of establishing standing.); *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 939 (Fla. 2d DCA 2010) (listing "proof of purchase of the debt" as one of the means of establishing standing).

3. SunTrust was not a "nonholder in possession of the instrument who has all the rights of a holder."

At trial, the Bank's primary argument for SunTrust's standing was that it was a nonholder in possession of the Note as described in *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618 (Fla. 5th DCA 2010).[64] Leaving aside that the Bank never alleged a right to enforce as a nonholder in possession under §673.3011, Fla. Stat., it failed to make an evidentiary showing that it qualified as a party "who has all the rights of a holder."

Because the Bank relied on the assignment from MERS, SunTrust would have no more rights than those held by MERS when it made the assignment. *Farkus v. Florida Land Sales & Dev. Co.*, 915 So. 2d 688, 689 (Fla. 5th DCA 2005) (an assignment gives the assignee no greater rights against the principal debtor than those held by the assignor); *see Nieto v. Mobile Gardens Ass'n of Englewood, Inc.*, 130 So. 3d 236, 238 (Fla. 2d DCA 2013) (assignment ineffective

[64] T. 130, 160-161.

where assignor had nothing to assign). MERS, therefore, would need to itself be a holder or otherwise have "all the rights of a holder," in order to assign those rights to SunTrust.

While Florida assignment law requires that MERS be a holder to be able to assign the rights of a holder to SunTrust, Article 3 of the UCC compels the same result. In the official Comment, the drafters of the UCC made clear that one could not enforce a note as a nonholder in possession without proving that he or she received the note from a holder:

> Subsection (b) [of §3-203 UCC; Florida equivalent: §673.2031(2)] states that transfer vests in the transferee any right of the transferor to enforce the instrument "including any right as a holder in due course." If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 [Florida equivalent: §673.3011, Fla. Stat.] if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. … Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder. …

Uniform Commercial Code Comment to §3-203 UCC (§673.2031, Fla. Stat. Ann.) (emphasis added). SunTrust, therefore, was required to prove that MERS was a holder before it could claim the status of a nonholder in possession.

MERS, however, was not a holder because there is no evidence it was ever in possession of an endorsed note or that the note was negotiated to MERS.

§ 671.201, Fla. Stat. (defining "holder" as a person in possession of a negotiable instrument that is payable either to bearer or to that person); §673.2011 (one only becomes a holder by way of a negotiation—a transfer of the instrument). For the same reasons—that it was never in possession of the note—MERS was never a "nonholder in possession." Thus, it could not transfer the rights of a holder or a nonholder in possession to SunTrust.

Moreover, even if MERS is considered to be an agent of the lender—as this Court did in *Taylor*—SunTrust still could not enforce the Note as a nonholder in possession because it did not prove that MERS' principal, the lender, was the holder of the Note at the time MERS purports to assign the lender's rights to SunTrust—i.e. that it still had possession of the Note. Because the two assignments to SunTrust do not purport to show a physical delivery of the Note (at best, they show only an assignment of the rights to the debt) they prove nothing as to who had possession of the Note at the time they were executed (much less, at some indeterminate "effective" date in the past).[65]

Thus, *Taylor* is not controlling or even helpful here, because the key point here was never addressed: that a plaintiff bank is not a nonholder in possession

[65] Since even SunTrust did not have possession of the Note when it filed suit (*see*, lost note count of the Complaint, R. 7-8), its whereabouts on some unidentified day "on or before July 27, 2009" remains a complete mystery.

unless it proves that either MERS or its principal was a holder. In fact, the MERS case upon which this Court relied in *Taylor* underscores the Homeowners' point here. That case, *Mortgage Elec. Registration Sys., Inc. v. Azize*, 965 So. 2d 151 (Fla. 2d DCA 2007), did not hold that MERS has standing to bring suit irrespective of whether it has possession of the note—but just the opposite. The court in *Azize* said over and over again that MERS could have standing as a holder if it were able to prove, as it had alleged, that it had possession of the note:

- "Specifically, MERS alleged that because the note was in its possession when it was lost, MERS was entitled to enforce the note." *Id*. at 152.
- "The complaint did not allege the circumstances by which MERS came into possession of the note, specifying only that MERS was the owner and holder of the note." *Id*. at 152.
- "Here, MERS's counsel explained to the trial judge at the hearing that, in these transactions, the notes are frequently transferred to MERS …" *Id*. at 153.
- "Assuming that the complaint properly states a cause of action to reestablish the note and that MERS can show prima facie proof of such allegations, MERS would have standing as the owner and holder of the note and mortgage to proceed with the foreclosure." *Id*. at 154.
- …in light of the allegations of the complaint, the language contained in the note and mortgage, and Azize's failure to contest the allegations, the issue of MERS's ownership and holding of the note and mortgage was not properly before the trial court for resolution at this stage of the proceedings. *Id*. at 154.

The court went so far as to describe MERS's failure to allege how it became a holder as a "deficit" that was not before the court at that time. *Id*. at 154, n. 2. Unlike the defendant in *Azize*, the Homeowners here did contest MERS's standing, or more precisely, MERS's ability to confer standing upon SunTrust. Unlike *Azize*, this case is not at the pleadings stage, but at the proof stage, and the Bank did not prove the essential element of standing.

In summary, without proof that either MERS or the lender had possession of the Note at the time of an alleged transfer to SunTrust, SunTrust cannot enforce the Note as a nonholder in possession. *See Bank of New York v. Silverberg*, 926 N.Y.S.2d 532, 539 (N.Y. App. Div. 2011) (error not to dismiss complaint where plaintiff bank claimed standing through assignment from MERS, but MERS was never the lawful holder or assignee of the notes); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009) (MERS assignment purporting to transfer mortgage "together with any and all notes and obligations" a nullity where there was no evidence that MERS held the promissory note or was given authority to transfer the promissory note.) *Culhane v. Aurora Loan Services of Nebraska*, 826 F. Supp. 2d at 372 ("Without a claim to the underlying debt,

MERS therefore cannot exercise the power of sale, regardless of the language in the mortgage contract giving it this power.").[66]

This analysis comports with the testimony of the Bank's own witnesses, both of whom testified that the assignments in this case do not transfer the note. As to the MERS assignments to SunTrust, SunTrust's own representative, Mr. Carlo, testified that such assignments never transfer the note:

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[66] *Taylor* also relied upon language in the mortgage (also present in the subject mortgage) that:

> "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) *has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property*…"

Id. at 620. (italics original, highlighting added). The critical word in this sentence is the demonstrative pronoun "those" which limits the remainder of the sentence because it refers back to the antecedent: "the interests granted by Borrower in this Security Instrument." Those interests are merely lien interests—in fact, they are merely nominal legal title to the lien interests. Those interests, therefore, do not include the right to foreclose without also being the owner and holder of the note. Because this language does not grant MERS the unfettered right to foreclose even when it does not possess the note, it cannot assign this nonexistent right to another. Nor is this language blanket authority to exercise the note holder's rights as its agent, particularly when there is no evidence that either one of these entities possessed the Note.

Additionally, the "if necessary to comply with law or custom" restriction means that, for MERS to take any action for the benefit of the note holder, the law must require, not merely permit, it. *Culhane v. Aurora Loan Services of Nebraska*, 826 F. Supp. 2d at 372.

> Q In your experience with assignments of mortgage, do they transfer the mortgage or do they transfer the note?
>
> A Mortgage.
>
> Q Do they ever transfer the note?
>
> A No.[67]

Additionally, Bayview's representative testified that assignments merely transfer servicing rights.[68]

4. Even if SunTrust acquired the right to enforce the Note by way of the assignment, there was no evidence that it acquired the right before filing the case.

The actual date of the alleged transfer to SunTrust was never proven. First, there was no specific date of transfer in the assignments; the superseded assignment merely states that it was "effective on or before July 27, 2009."[69]

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[67] T. 88-89.

[68] T. 115. Note that the MERS Vice-President who signed the Corrective MERS Assignment to SunTrust, Sandra Lancaster, is the very same person who, as the Vice-President of SunTrust, executed the assignment to Bayview. This is typical of MERS assignments, which are often executed by employees or attorneys of the transferee bank posing as vice-presidents of the transferor (MERS). *See*, Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 118 (2011) and *Culhane v. Aurora Loan Services of Nebraska*, 826 F. Supp. 2d 352, 369 (D. Mass. 2011) *aff'd*, 708 F.3d 282 (1st Cir. 2013) (describing MERS's system of corporate officer self-appointment). The Bank's use of such self-dealing assignments as proof of ownership mocks the trial court's obligatory fact-finding inquiry regarding standing and this Court's task of analyzing the legal effect of the assignments.

[69] Plaintiff's Exhibit 3 (R. 393).

Second, SunTrust's representative testified that he did not know when the transfer occurred and would have to look at documents that he did not bring to court to make that determination.[70] Most importantly, he did not know whether the "effective" date was chosen because that was when the transfer occurred or because that was prior to the filing of the complaint.[71]

The trial was the Bank's opportunity to bring evidence to resolve the conflict apparent on the face of the assignment between the execution date and the "effective" date. *WM Specialty Mortg., LLC v. Salomon*, 874 So. 2d 680, 683 (Fla. 4th DCA 2004). Having failed to adduce any evidence of the actual date of the alleged transfer, the conflict remained, and the trier of fact had no basis to choose one over the other.

In *Vidal v. Liquidation Props., Inc.*, 104 So. 3d 1274 (Fla. 4th DCA 2013), the Fourth District reversed a summary judgment based upon an assignment that contained similar "effective" date language (but without the expansive "on or before" modifier). The court commented that two inferences can be drawn from the effective date language: 1) that ownership of the note and mortgage were equitably transferred on the stated date; or 2) that the parties to the transfer were

[70] T. 87.

[71] T. 87.

attempting to backdate an event to their benefit. The court held that "[b]ecause the language yields two possible inferences, proof is needed as to the meaning of the language, and a disputed fact exists." *Id*. at 1277. Here, the first inference is greatly attenuated by the equivocal hedging of the "on or before" language not present in the *Vidal* case. But if two equal inferences could be drawn, it was incumbent upon the Bank to bring evidence to trier of fact as to the "meaning of the language."

The Bank, therefore, failed to prove that SunTrust had acquired standing before it filed suit. *See Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285 (Fla. 5th DCA 2013); *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012).

B. The evidence conclusively proved that Bayview was not the owner or holder of the note at the time of judgment.

1. Bayview admitted it did not own the note at the time of trial.

Even if the Bank had proven that SunTrust had standing at the time it filed the Complaint, Bayview's own undisputed evidence proved it had no standing at the time of trial. The half-hearted attempt to prove Bayview's standing consisted of a single document—an assignment of mortgage dated six months before the

trial.[72] Bayview's own representative, however, quickly dispelled any notion that this document transferred any rights to the Note. He unequivocally testified that the purpose of the document was to transfer servicing rights and that it did not mention transferring the note.[73]

More importantly, he testified that Bayview does not currently own the note:

> Q Does Bayview Loan Servicing own the note and mortgage?
>
> A From my knowledge we do not own the note. Bayview Loan does not own the note.[74]

He thought a subsidiary of Bayview may own the note, but then admitted "I don't have 100 percent verification of that."[75] Moreover, he did not know who owned the mortgage or for whom Bayview serviced the mortgage:

> Q Does Bayview Loan Servicing own the mortgage?
>
> A In this particular case I'm not sure they own the mortgage. I know they service the mortgage.[76]
>
> * * *
>
> Q Do you know who they serviced it for?
>
> A For Bay -- for -- no, I do not.[77]

[72] Plaintiff's Exhibit 7 (R. 414).

[73] T. 115-16.

[74] T. 114-15 (emphasis added).

[75] T. 114-15.

[76] T. 118.

[77] T. 115.

Accordingly, whatever legal import the purported assignment from Suntrust to Bayview may have had six months before trial, as of the day of trial, the only evidence was that Bayview did not own the Note, and may not own the mortgage. That evidence was from the mouth of Bayview itself.

2. The court did not find that Bayview owned the note when it permitted it to make that allegation as the new party plaintiff.

The only argument the Bank offered at trial as to why Bayview should still be considered the note owner—despite the testimony to the contrary from its own witness—was that the trial court had already found that the rights to the note had been transferred when it granted the motion to substitute party plaintiff.[78]

At the risk of belaboring the obvious, there was no evidentiary hearing, no stipulation, no findings of fact, or anything else approaching a factual determination of Bayview's standing when the motion was made *ore tenus* immediately following the continuance of the original trial.[79] It is nonsensical for the Bank to pretend that the court had made a final determination of Bayview's standing when it granted the Bank's motion because, by simultaneously granting

[78] T. 131.

[79] R. 677-683.

the Homeowners leave to respond to the new allegations, the court clearly deemed that the issue was still in the pleadings stage.[80]

* * *

The judgment which found that Bayview was entitled to foreclose was not based on the evidence and the motion for involuntary dismissal should have been granted.

[80] R. 681.

II. The Trial Court Erred in Trying the Case Before It Was at Issue.

Even if the Court were to conclude that the Bank had proven standing, both when it filed the case and at the time of trial, the judgment should be reversed as a nullity because the case was noticed for trial (and tried) before it was "at issue." Fla. R. Civ. P. 1.440(a) provides that "an action is at issue after any motions directed to the last pleading served have been disposed of." An action is not at issue until the pleadings are closed. *Precision Constructors, Inc. v. Valtec Construction Corp*., 825 So. 2d 1062 (Fla. 3d DCA 2002). Strict compliance with Florida Rule of Civil Procedure 1.440 is required and failure to do so is reversible error. *Lauxmont Farms, Inc. v. Flavin*, 514 So. 2d 1133, 1134 (Fla. 5th DCA 1987).

A. The Bank's motion to strike was pending.

This case was not at issue when the case was noticed for trial for two reasons. First, while each of the Bank's four responses to the answer and amended answers in this case were all styled as "Reply to Affirmative Defenses," the relief that the Bank requested was that the court strike the affirmative defenses:[81]

[81] R. 174, 216, 267, 306.

> 2. Each Affirmative Defense fails to state a legal defense to Plaintiff's claim.
>
> WHEREFORE, Plaintiff requests the Court strike each affirmative defense and grant the relief sought by Plaintiff in its Complaint.

Each of these filings, therefore, should be construed as a motion to strike, or at a minimum, as including a motion to strike. *See In re Adoption of D.P.P.*, 39 Fla. L. Weekly D1073, *2, n. 1 (Fla. 5th DCA 2014) ("A pleading is not governed by its label, but by its substance."); *Impact Computers & Electronics, Inc. v. Bank of Am., N.A.*, 852 So. 2d 946, 948 (Fla. 3d DCA 2003) (the true nature of a motion must be determined by its content and not by the label the moving party has used to describe it); *Estate of Willis v. Gaffney*, 677 So. 2d 949, 951 (Fla. 2d DCA 1996) ("[a] pleading will be considered what it is in substance, even though mislabelled." [internal quotations omitted]).

This case, therefore, could not be at issue until the Bank's motion to strike the Second Amended Answer to Complaint and Affirmative Defenses was disposed of by the court or withdrawn by the Bank.[82] Fla. R. Civ. P. 1.440; *Leeds v. C. C. Chem. Corp.*, 280 So. 2d 718, 719 (Fla. 3d DCA 1973) (the cause is not at

[82] R. 292, 306. The Bank's withdrawal of the motion at trial (T. 14-15) did not resolve the problem because it was not until that moment that the pleadings were closed and the case could be set for trial. And even then, the trial could not take place for another thirty days. Fla. R. Civ. P. 1.440.

issue while a motion to strike all or part of a pleading—simultaneously filed with a response to that pleading—remains undisposed of). Because it was improper to set trial, it was, of course, improper to actually conduct the trial. *Loss v. Loss*, 608 So. 2d 39, 40 (Fla. 4th DCA 1992) ("Where pending motions directed to the pleadings are yet to be heard, it is error to conduct a 'final' hearing in the cause of action.").

B. The Homeowners had not answered the amended complaint.

The second reason the case was not at issue at the time of trial—and perhaps, the more compellingly egregious of the two—was because the Homeowners had not yet answered the Bank's amended complaint. Ten days before trial, the trial court granted the Bank leave to amend its complaint to allege that a different party (Bayview) had become the real party in interest. The court simultaneously granted the Homeowners leave to respond to the new pleadings:

> THE COURT: Well, I'll grant your [the Bank's] motion to substitute the parties and amend the case style and I'll allow you [the Homeowners'] to amend your pleadings.[83]

At that moment, the pleadings had been reopened and the trial needed to be reset with a new trial order with at least a thirty-day lead time before trial.

Moreover, as forecast by Homeowners' counsel at the time, the Homeowners moved to dismiss the amended complaint on the grounds that the

[83] R. 681.

new plaintiff, Bayview, failed to state a cause of action.[84] As a result, the scheduled trial was set to take place before the Homeowners had answered. Consequently, the Homeowners also moved to vacate the trial order on the grounds that the case was not at issue.[85]

The trial court denied both motions immediately before trial began.[86] The Homeowners again objected that the trial was proceeding while the case was still not at issue.[87] At first, the court ruled that the Homeowners would be granted twenty days to answer the complaint and that trial would begin on the twenty-first day.[88] The Homeowners pointed out, however, that the case could not be tried on the twenty-first day because the case still was not at issue, and therefore, a trial order could not be issued until after the Homeowners answered (and even then, not for another twenty days unless the Bank waived that time period).

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[84] R. 681-683; Defendants, [redacted] and [redacted] Motion to Dismiss Amended Complaint, filed December 26, 2013 (R. 358).

[85] Defendant, [redacted] and [redacted] Amended Motion to Vacate Trial Order, filed December 26, 2013 (R. 366).

[86] T. 11-12.

[87] T. 16.

[88] T. 16.

Upon hearing this objection, the trial court again denied the motion to vacate the trial order and started the trial.[89] Given that the Homeowners had not yet answered the amended complaint, what defenses might have been raised and what defenses were actually tried was left to the imagination.

The Bank's position that its substitution of Bayview as party plaintiff ten days before trial was not an amendment of the complaint[90] is unavailing. While it is improbable that changing a complaint to allege an entirely different real party in interest is not a *de facto* "amendment" of that pleading, this Court never need reach that issue. The determinative fact is that, as a result of the substitution, the court granted the Homeowners leave to amend their pleadings.[91]

Notably, when the Bank moved to substitute Bayview as the plaintiff, the Homeowners objected and advised the court that they preferred to forego the ten-day continuance and proceed with trial that very day.[92] The court refused that request, but provided the Homeowners an opportunity to adjust their defenses to the new plaintiff. At that time, the Bank did not object to this resolution of its

[89] T. 20.

[90] T. 17, 161.

[91] R. 681.

[92] R. 678-679.

motion to substitute.[93] Nor has it preserved the issue for review by way of a cross-appeal. Even if the Bank had objected, the court was well within its discretion to permit the Homeowners to amend. *See Miami Airlines, Inc. v. Webb*, 114 So. 2d 361, 363 (Fla. 3d DCA 1959) ("If it appears to the court [after permitting a substitution of party plaintiff] that further pleading prior to trial is necessary or appropriate, the court would in our view be authorized to declare a mistrial and proceed to trial at a subsequent date."); *Schmidt v. Mueller*, 335 So. 2d 630, 631 (Fla. 2d DCA 1976) ("Florida Rules of Civil Procedure are sufficiently flexible to allow the court to grant any further relief by way of continuance, discovery or otherwise to protect the defendants even if the court chose [to grant a substitution of the party plaintiff]").

An order setting trial when the case is not at issue is a legal nullity and reversible error. "[A] notice of or motion for trial filed at a time when the case is not at issue, as here, is a nullity…" *Alech v. General Ins. Co.*, 491 So. 2d 337, 338 (Fla. 3d DCA 1986); *see also Fallschase Development Corp. v. Sheard*, 655 So. 2d 214, 215 (Fla. 1st DCA 1995) ("Accordingly, the action was not at issue, and the notice for trial was a nullity"); *Precision Constructors, Inc.*, 825 So. 2d at 1063 (holding that a notice for trial was no longer viable when the case is not *at issue*).

[93] R. 681-683.

Most importantly, "[f]ailure to adhere strictly to the mandates of Rule 1.440 is reversible error." *Id*.

Lastly, this is not a case where there was "no ambush or violation of the procedural safeguards that Rule 1.440 was designed to protect." *Labor Ready Se. Inc. v. Australian Warehouses Condo. Ass'n*, 962 So. 2d 1053, 1056 (Fla. 4th DCA 2007). The Homeowners had but ten days to prepare for trial against an entirely different entity. Up to that point, all of their discovery regarding standing had been directed to SunTrust's claimed entitlement as the real party in interest.[94] With only ten days to prepare, the Homeowners were precluded from any discovery regarding Bayview's claim to be the new real party in interest. Given that standing became a central issue at trial—and the crux of this appeal—the only way in which the Homeowners would not be prejudiced by this eleventh-hour substitution, is if this Court finds (as it should) that the Bank failed to prove Bayview's standing at trial.

[94] Mortgage Loan Ownership Interrogatories and Notice of Service, served May 16 2012 (R. 245); Note Authenticity/Ownership Interrogatories and Notice of Service, served May 16, 2012 (R. 243); Defendants, [redacted] and [redacted] Request for Production Regarding MERS Tracking served May 16, 2012 (R. 247); Defendants' Notice of Production from Non-Party [MERS], served May 16, 2012 (R. 238); Plaintiff's Response to Defendants' Request for Production Regarding MERS Tracking, served January 4, 2013; Defendants, [redacted] and [redacted] Request for Production Regarding Entitlement to Enforce Loan Documents, served October 16, 2013 (R. 318).

CONCLUSION

This Court should reverse and remand for entry of judgment in favor of the Homeowners on the grounds that the Bank adduced no evidence that it had standing prior to filing its case or at the time of trial. If the Court should find such evidence, it should reverse for a new trial.

Dated: June 30, 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 June 30, 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 June 30, 2014.

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