In the District Court of Appeal
Second District of Florida

CASE NO. [redacted]
(Circuit Court Case No. [redacted])

[redacted] and [redacted]
Appellants,

v.

BAYVIEW LOAN SERVICING, LLC,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

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I. It is Undisputed that the BANK was Not the Mortgagee.

The BANK does not dispute that: 1) it pled it owned the mortgage by virtue of an assignment of mortgage;[1] 2) no assignment of mortgage existed at the time the case was filed; 3) the alleged assignment, which was not served or late served, was executed *after* this case was filed;[2] and 4) the amended affidavit of amounts due and owing and the motion for summary judgment do not mention anything about an assignment. Therefore, it is also undisputed that another entity was the mortgagee at the time the Complaint was filed and that no assignment existed at that time. Nevertheless, the BANK alleges that it became the mortgagee because the mortgage followed the note. Such an assertion is without merit for several reasons. First, it was not pled; second, by agreement the mortgage was not to follow the note; and third, there was no prior transfer of the mortgage.

A. Summary judgment cannot be granted on issues the BANK failed to plead.

It is elementary that summary judgment cannot be granted based on grounds not pled. The BANK could have asserted in its Complaint that it owned the mortgage based on a previous equitable transfer, but it did not. Further, the BANK

[1] Complaint, ¶¶ 3, 11 (R. 4, 5).

[2] Notice of Filing Copy of Assignment of Mortgage, filed February 23, 2010 (R. 125-26).

could have moved to amend its complaint pursuant to Florida Rule of Civil Procedure 1.190. This also was not done. "[I]ssues in a cause are made solely by the pleadings . . . ." *Terra Firma Holdings v. Fairwinds Credit Union*, 15 So. 3d 885, 886 (Fla. 2d DCA 2009) (citing *Hart Props., Inc. v. Slack*, 159 So.2d 236, 239 (Fla.1963)). Because the pleaded basis asserted for the BANK's standing as mortgagee was not proven, and because standing based on a previous equitable transfer was not pled, summary judgment must be reversed.

B. The Note and Mortgage, by agreement, were to be held separate and apart from each other.

Even if the BANK had pled that the mortgage followed the note, such a theory is inconsistent with the agreement in this case. The note in this case was made out to USMoney Source and the mortgage was made out to Mortgage Electronic Registration Systems, Inc. Under the BANK's own authority, if there is a prior transfer of the note and mortgage where the assignment of mortgage is executed improperly, "the mortgage in equity passes as an incident to the debt, *unless there be some plain and clear agreement to the contrary*." *WM Specialty Mortgage v. Salomon*, 874 So. 2d 680, 681-83 (Fla. 4th DCA 2004) citing *Johns v. Gillian*, 184 So. 140, 143 (Fla. 1938). In this case, there is a plain and clear agreement to the contrary which is based on the parties' intention that the note be held separate from the mortgage. The BANK urges this Court to ignore the mortgage.

C. There was no prior transfer in this case.

The case law cited by the BANK requires a prior transfer of the mortgage. *See WM Specialty*, 874 So. 2d at 681-83; *Johns v. Gillian*, 184 So. at 143. In *WM Specialty*, the assignment itself indicated that a transfer had occurred prior to the execution date. 874 So. 2d at 681. This conflict on the face of the assignment entitled the alleged mortgagee to an evidentiary hearing to demonstrate that it owned the mortgage prior to filing suit.

Similarly, in the *Johns* case, a company executed a defective assignment of mortgage to the substituted plaintiff assignee. 184 So. At 143. The court held that the substituted plaintiff was entitled to foreclose in equity based on the previous defective assignment. *Id.* Any other discussion in *Johns* is *dicta*. Also, the BANK relies on *Riggs v. Aurora Loan Servs., LLC*, 36 So. 3d 932, 933 (Fla. 4th DCA 2010). The only issue in *Riggs* concerned the authenticity of a note endorsed in blank. Unlike this case, the *Riggs* case did not involve a pleading alleging ownership of a mortgage "by virtue of an assignment" of mortgage. Since there is no allegation or proof of a prior transfer of any sort in this case, the record shows the BANK was not the mortgagee when this case was filed.

Even if there was a prior transfer in this case, it would conflict with the assignment that was executed after the case was filed. Therefore, an evidentiary hearing on whether a bank acquired an interest in a mortgage prior to the filing of a

complaint would be the appropriate forum to resolve such a conflict. *WM Specialty*, 874 So. 2d at 681-83.

This case is virtually identical to *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990) . In *Jeff-Ray*, a lender attempted to foreclose using an assignment of mortgage dated four months after the lawsuit was filed. The Fourth District held that the "complaint could not have stated a cause of action at the time it was filed based on a document that did not exist until some four months later." *Id*. at 886. The BANK argues that *Jeff-Ray* does not apply because it did not involve evidence of transfer of a note or mortgage prior to the assignment.[3]

But there is no evidence of a prior transfer here either. The allonge although dated, does not establish the date of transfer, because transfer is not complete until delivery and there is no evidence of delivery – other than the assignment from MERS which claims to be conveying the mortgage and note to the BANK. At best, the allonge sets up a conflict like *WM Specialty*, which could only be resolved through an evidentiary hearing. It is an issue of fact that precludes summary judgment.

II. The OWNERS' Second Affirmative Defense Satisfies the Specificity And Particularity Requirement of Rule 1.120(c).

The Bank does not and cannot dispute that it failed to factually refute or disprove the OWNERS' second affirmative defense but instead argues that the

[3] Answer Brief, p. 14-15.

affirmative defense is legally insufficient because it was not particularly pled. The Complaint alleges that all "conditions precedent to the filing of this action have been performed or have occurred."[4] The OWNERS' second affirmative defense states:

> Defendants assert that Plaintiff failed to give proper notice of the default in the payments on the note and mortgage. Plaintiff is therefore stopped from accelerating said debt. [5]

Accordingly, in response to the BANK's general allegation, the OWNERS' specifically pled that there was no proper notice of default under the mortgage. The only way the allegation could have been more specific would have been to provide the paragraph number and verbatim language requiring notice of default in the mortgage; which is not required. *See Frost v. Regions Bank*, 15 So. 3d 905 (Fla. 4th DCA 2009) (a defense alleging failure to provide notice of default need not contain language from the mortgage so long as the mortgage attached to the complaint contained language requiring notice of default.)

A. Affirmative defenses are part of the pleadings.

Affirmative defenses are addressed in the Florida Rules section entitled "General Rules of Pleading." Additionally, mistaken designations of affirmative defenses shall be treated as if there had been proper designation if justice so

[4] Complaint, ¶ 18 (R. 6).

[5] Answer (R. 32).

requires. *See* Fla. R. Civ. P. 1.110(d). Also, although there was a denial in this case, even if there was an admission, the general rules of construction dictate that specific language controls over the general, therefore, the allegations of the affirmative defense control. The affirmative defense was pled with particularity.

Despite the specific language of the affirmative defense, the BANK argues that it was not pled with particularity because the Answer states that the Defendants are without knowledge and therefore deny the allegation.[6] As support, it cites *Cooke v. Ins. Co. of North America*, 652 So. 2d 1154,1156 (Fla. 2d DCA 1995). In *Cooke*, the defendant denied the allegations concerning conditions precedent generally in its pleading. *Id.* The court held that it failed to preserve the issue in its pleadings because the general denials were not pled with particularity. The case here is distinguishable because the OWNERS specifically pled the affirmative defense in their pleading. The BANK's argument ignores the second affirmative defense, which is part of the answer and is therefore part of the pleading.

The BANK mistakenly relies on *Southern Waste Sys., LLC v. J & A Transfer, Inc.*, 879 So. 2d 86, 86-87 (Fla. 4th DCA 2004). *Southern Waste* involved an affirmative defense of fraud in the inducement. The court held the defense was insufficient without supporting facts. Unlike a general fraud claim,

[6] Answer Brief, p. 19

the second affirmative defense here specifically states that notice was not provided as required by the mortgage.

B. The BANK confuses its burden on summary judgment.

The BANK misapprehends the law concerning affirmative defenses when it argues that it had no burden to refute the affirmative defenses. To support its argument it cites *W. J. Kiely & Co. v. Bituminous Casualty Corp.*, 145 So. 2d 762, 762-763 (Fla. 3d DCA 1962). The court in *W.J. Kiely* simply held that the defendant had the burden to prove its affirmative defense at trial, an assertion the OWNERS do not dispute. This case was decided at summary judgment, not trial.

Interestingly, the BANK compares the *W. J. Kiely* case to a case that was decided at summary judgment, *Howdeshell v. First National Bank of Clearwater*, 369 So. 2d 432 (Fla. 2d DCA 1979).[7] *Howdeshell* is directly on point. In *Howdeshell*, a bank sued to foreclose a mortgage. *Id.* at 433. The defendants' answer raised affirmative defenses. *Id.* The bank submitted nothing, but later argued the defenses were insufficient. *Id.* The trial court granted summary judgment but was reversed by this Court when it held:

> [T]he burden is on the moving party to show lack of any genuine issue of material fact. Without any evidentiary submissions by [the bank] to refute the affirmative defenses, [the defendant] has no duty to submit any evidence in support of its defenses.

[7] Answer Brief p. 18.

Id. at 433. *Howdeshell* is indistinguishable from this case. The answer here, like in *Howdeshell*, raised affirmative defenses. The BANK submitted nothing, but then argued the affirmative defenses were legally insufficient. Consistent with its holding in the *Howdeshell* case, this Court should hold that the BANK failed to meet its summary judgment burden.

It is beyond dispute that the BANK, as the moving party at summary judgment, has the burden of proof. Despite such a burden, the BANK failed to refute the second affirmative defense. Its motion for summary judgment simply states that "The Affirmative Defenses filed by Defendant(s), [redacted] are legally insufficient to preclude the entry of Final Summary Judgment."[8] Additionally, the BANK's unsworn reply to the affirmative defenses states "Plaintiff has complied with the notice requirement of the mortgage."[9] Such a statement is no more than a denial of the affirmative defense. Rule 1.100(a) does not require a reply to an affirmative defense for mere denials, therefore, the BANK's reply was superfluous. Fla. R. Civ. P. 1.100(a); *see also Moore Meats, Inc. v. Strawn In and For Seminole County*, 313 So. 2d 660, 662 (Fla. 1975). As such, the BANK neither established the legal insufficiency of the affirmative defenses nor did it attempt to factually refute such defenses.

[8] Motion for Summary Judgment (R. 43).

[9] Reply to Affirmative Defenses (R. 53).

The BANK, in an attempt to inflame the Court, states that the OWNERS made no attempt whatsoever to cure the default or reinstate the mortgage. There is absolutely no support for this assertion in the record. Additionally, once a bank accelerates the debt, it generally will not accept payments.

The BANK then urges this Court to ignore the terms of the mortgage. Specifically, it asks the Court to hold that it satisfied the condition precedent to bringing suit by bringing suit. The language requiring notice in the mortgage is clear and is not subject to interpretation. The BANK's request is unprecedented. This Court must not change the terms of the mortgage.

Since the BANK did not meet its burden, the OWNERS were under no obligation to prove any matter. *See Frost v. Regions Bank*, 15 So. 3d 905 (Fla. 4th DCA 2009); *see also Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992); *Spradley v. Stick*, 622 So.2d 610 (Fla. 1st DCA 1993). Accordingly, summary judgment was improper.

III. The Amended Affidavit Of Amounts Due and Owing Was Not Made on Personal Knowledge.

The BANK concedes that sworn or certified copies of the documents it needs to foreclose were not attached to the affidavit.[10] The BANK nevertheless argues that it did not need to attach documents because the affidavit claims to be made on personal knowledge. While it is undisputed that an affidavit can be made

[10] Answer Brief, p. 25.

on personal knowledge, the affiants mere self serving declaration that she has personal knowledge does not suffice.

A review of the affidavit shows that Ms. Sovic had no personal knowledge. Ms. Sovic admits her knowledge came from records:

> The information hereinafter given . . . is contained in the original books and records maintained in the office of said servicing agent.[11]
>
> I have personally reviewed the records of BAYVIEW LOAN SERVICING, LLC.[12]

Despite admittedly reviewing such records, none were attached to the affidavit.

Ms. Sovic does not and cannot state an independent basis for her knowledge except to refer to records. The BANK did not originate this loan. Its officers had no personal knowledge of the loan transaction until after it was executed. Yet, the affidavit goes on to list the specific amounts of principal balance, accrued interest for certain months, late charges, taxes, inspection fees, insurance advance, BPO, legal fees, and borrower credit.[13] Clearly, Ms. Sovic had no personal knowledge of such information. Since her knowledge was based on a separate document, that document must be attached. Fla. R. Civ. P. 1.510(e), *CSX Transp. Inc. v. Pasco County*, 660 So. 2d 757 (Fla. 2d DCA 1995); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988).

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[11] Amended Affidavit of Amounts Due and Owing, (R. 109).

[12] Amended Affidavit of Amounts Due and Owing, (R. 109).

[13] *Id.* (R. 110).

Rule 1.510(e) applies to cases just like this because the only possible value of Ms. Sovic's testimony would be to authenticate documents. Her testimony would not be admissible at trial for any other purpose because she had no personal knowledge about the loan transaction. This is why the rule requires that documents be "identified" by the affidavit. *See Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971). In evidentiary terms, to "identify" a document means to prove its authenticity,[14] not merely mention it in passing.

The documents in this case were not identified because Ms. Sovic failed to state under oath that the documents described in the Complaint (or any other documents filed in the case), were originals or even "true and correct" copies of the instruments. Accordingly, the BANK did not comply with Rule 1.510(e) and, as a result, did not authenticate them for purposes of summary judgment. *See BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 939 (Fla. 2d DCA 2010) (reversing summary judgment where unauthenticated assignment did not constitute admissible evidence establishing bank's standing to foreclose).

Astonishingly, in the face of the recent nationwide scandal concerning bank employees "robo-signing" summary judgment affidavits (all of whom make the empty claim of having personal knowledge), the BANK argues for less court

[14] "Identify" is defined as "to prove the identity of…" and "identity" means "authenticity." Black's Law Dictionary (2004); *see*, §90.901 Fla. Stat. (2010) (using "identification" and "authentication" interchangeably).

supervision of these affidavits, and more reliance on the bare, unsupported statements of these affiants. The BANK brazenly suggests that the affidavit—prepared specifically for this litigation and based entirely upon records that it does not provide or verify—is a document of independent evidentiary significance that alone entitles it to summary judgment. Perhaps the BANK sincerely believes that it can create evidence in this way, but it is, of course, unadulterated hearsay. *See Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (testimony based upon public records, authenticated copies of which were not provided, was hearsay—Rule 1.510(e) required reversal of summary judgment); *Topping v. Hotel George V*, 268 So. 2d 388 (Fla. 2d DCA 1972) (attorney's affidavit that he was familiar with his client's records and that the records reflected certain information constituted pure hearsay—summary judgment reversed under Rule 1.510(e)).

The affidavit was legally insufficient and therefore summary judgment was improper.

IV. [redacted] Cannot Be Liable On a Note He Did Not Sign.

It is undisputed that [redacted] cannot be liable on the note. The BANK seemingly acknowledges this fact but nevertheless argues that it is premature to raise the argument. The BANK argues that the issue can be raised when it seeks a deficiency judgment against Mr. [redacted] The BANK misses the

point which is that there should be no personal judgment against Mr. in the first place.

Further, the assertion that a judgment cannot differentiate between the liability of a debt and the foreclosure of a security interest is totally without merit. The fact that the BANK is even arguing against this ground is indicative of its willingness to urge this Court to depart with black letter law. As a matter of law, the Judgment cannot hold Mr. liable on the note. It is of no consequence that Mr. interest in the mortgage may be subject to foreclosure.

CONCLUSION

The BANK did not meet its burden of proving that the BANK was the mortgagee at the time the case was filed or that it provided notice of the default to the OWNERS. This is not surprising because on these issues the BANK did not even know it had such a burden. Further, the BANK repeatedly asks this Court to depart with the law. The BANK specifically asked the Court to:

- Ignore the pleadings and the fact that it did not prove what it pled,
- Ignore the terms of the mortgage and note, first, by pretending the mortgage by its terms required it to be held separate from the note, and then, by asking this Court to dispense with a condition precedent required by the mortgage,
- Ignore the rules of procedure concerning what is required for affidavits, and worse
- To hold that somebody can be liable on a note that he or she did not sign.

The terms of the mortgage, the rules of procedure, and the record show that the BANK did not meet its burden. Accordingly, we ask that the Court reverse the final summary judgment and remand to the trial court for further proceedings.

Dated December 9, 2010

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. STATE RD. 7, SUITE D
ROYAL PALM BEACH, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

By: 
ENRIQUE NIEVES III
Florida Bar No. 41736

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this December 9, 2010 on all parties on the attached service list.

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. STATE RD. 7, SUITE D
ROYAL PALM BEACH, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

By: 
ENRIQUE NIEVES III
Florida Bar No. 41736

SERVICE LIST

Brian L. Rosaler, Esq.
LAW OFFICES OF POPKIN & ROSALER, P.A.
1701 W Hillsboro Blvd
Suite 400
Deerfield Beach, FL 33442-1572
Telephone: (954) 360-9030
Facsimile: (954) 420-5187
Appellee's counsel

Elizabeth L. Hapner, Esq.
304 S. Plant Ave.
Tampa, FL 33606
Telephone: (813) 250-0357
Appellant's counsel below

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. STATE RD. 7, SUITE D
ROYAL PALM BEACH, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

By: 
ENRIQUE NIEVES III
Florida Bar No. 41736