In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

J.P. MORGAN MORTGAGE ACQUISITION CORP.,

Appellee.

ON APPEAL FROM THE 11th JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

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KEY:

The following abbreviations are used in this Brief:

- "R." refers to the Record on Appeal.
- "Supp. R." refers to the Supplement to the Record filed with this Brief.

- "T. 11/17/11" refers to the transcript of the hearing held November 17, 2011.
- "T. 11/7/12" refers to the transcript of the hearing held November 7, 2012.
- "The Bank" refers to Plaintiff, J.P. Morgan Mortgage Acquisition Corp.
- "The [redacted] refers to Defendants, [redacted] and [redacted]

ARGUMENT

I. The trial court erred in granting summary judgment because there remained genuine issues of material fact as to the Bank's standing

A. The Bank never conclusively established that it had standing when it filed the case.

The Bank spends four pages citing well over a dozen cases to establish that it had standing at the time of judgment—which was never raised as an issue in this appeal. The issue on appeal is whether it had standing at the time it filed the case. The Bank must demonstrate both. *Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 555 (Fla. 5th DCA 2012). More precisely, the issue is whether there was an issue of fact as to the Bank's standing at the inception of the case.

On this issue, the Bank says very little, leaving only two kernels of argument to be winnowed from the chaff. The first was that "[t]he complaint attached a copy of the note bearing a blank endorsement as evidence of JPMorgan's pre-filing possession of the endorsed note."[1] At the risk of stating the obvious, an attachment to the Complaint is not evidence (summary judgment or otherwise), particularly when the Complaint is not verified. *Eco-Tradition, LLC v. Pennzoil-Quaker State Co.*, 137 So. 3d 495, 496 (Fla. 4th DCA 2014) (error for the trial judge to rely solely on unsworn complaint and unauthenticated attachments).

[1] Answer Brief, p. 14 (emphasis added).

Additionally, while one of the copies of the Note attached to the Complaint is endorsed—which would provide a common-sense inference that the Note was endorsed before filing—it provides no inference as to the location of the original. Mere possession of a copy of an endorsed Note does not make the Bank an Article 3 holder. Moreover, the Bank expressly averred in the lost note count of its Complaint that it was not in possession of the original at the time it filed this action.[2] If inferences from the Complaint are to be considered, this inference of non-possession has at least the same value and persuasiveness as the inference from the attachment that the Note was already endorsed.

The Bank's second point relies upon the single, bald statement by the summary judgment affiant that "Plaintiff held the Note prior to the date the Complaint was filed on 4/16/2009."[3] First, the [redacted] were unfairly prevented from cross-examining this unsupported statement when the court denied their request to depose the affiant. Second, because the affiant concedes that all her knowledge comes from records (i.e. she makes no claim of having independent knowledge of the facts)—she was required to attach a sworn or certified copy the record, if any, upon which she relied to determine the date the Plaintiff took

[2] Count II of Complaint, Reestablishment of Lost Note (R. 9-10).

[3] Answer Brief, p. 14, citing to R. 389.

possession of the Note. Fla. R. Civ. P. 1.510(e) (requiring that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith"). In the absence of any such attachment to her affidavit, either her testimony is unauthenticated hearsay from documents not in evidence or it is made completely from whole cloth. In either case, it is not competent to support the summary judgment.

The Bank also appears to concede that the recorded assignment dated four days after the complaint contradicts its position, but argues that it was not required to rely on the assignment.[4] This misses the point—the [redacted] were entitled to rely on the assignment to demonstrate that there still exists an issue of fact.

To be clear, the assignment in question (from MERS to the Plaintiff Bank) was filed on behalf of the Bank in the bankruptcy court[5] to support its claim that the transfer happened April 20, 2009—four days after it filed the Complaint in this case.[6] An employee of the Plaintiff's servicer (Lori Harp) swore under oath that this and the other documents filed in the bankruptcy court on behalf of the Bank

[4] Answer Brief, p. 16.

[5] R. 546.

[6] EMC Mortgage Corporation's Motion for Relief from the Automatic Stay, March 30, 2010 (R. 520), ¶ 6 (R. 521).

were "true and accurate copies of the original documents."[7] In addition to the assignment itself, the [redacted] were entitled to rely on these sworn representations on behalf of the Plaintiff to demonstrate an issue of fact. These sworn allegations of an employee of the Bank's servicer would be of at least equal evidentiary quality as that of Ms. Samuel—the employee of the Bank's new servicer who claimed the Bank possessed the Note on an earlier date. Indeed, given that Ms. Harp's affidavit was executed closer to the time of the transfer and the filing of the Complaint, Ms. Harp's affidavit arguably has greater evidentiary value.[8]

[7] Affidavit in Support of Motion for Relief from the Automatic Stay, February 25, 2010 (R. 551), ¶ 11 (R. 552).

[8] According to the affidavits, EMC Mortgage Corporation was the servicer in February of 2010 (R. 551, 553) and JP Morgan Chase Bank, N.A. was the servicer in July of 2012 (R. 388, 391) having received the servicing rights from EMC (Affidavit of Addie Pike ¶ 6, R. 418). Presumably EMC was the servicer when this case was filed and when the assignment was prepared—by the same lawyers who filed this case (R. 546). The summary judgment affiant, Ms. Samuel, only avers personal knowledge of the records of her employer, JP Morgan Chase Bank. She never testifies to any personal knowledge of the records of the previous servicer, EMC, or that her employer had any procedures to verify the veracity or accuracy of EMC information. *See Holt v. Calchas, LLC*, 4D13-2101, 2014 WL 5614374, at *4 (Fla. 4th DCA 2014) (finding that new servicer's witness was not qualified to testify about previous servicer's records where witness did not testify that the new servicer "had procedures in place to check the accuracy of the information that it received from the previous [servicers]").

Thus, the Bank's assertion that there is "not a scintilla of contrary evidence in the record" to dispute its claim to have possessed the Note prior to filing[9] turns out to be true in a sense—there is actually far more than a scintilla. In fact, there is equal, if not more, persuasive evidence that the Bank did not gain possession of the Note until after if filed the case.

B. The Bank did not refute the non-negotiability defense.

In response to the [redacted] argument that the Bank failed to refute the affirmative defense that the subject Note was not negotiable under Article 3 of the UCC, the Bank takes the position that all promissory notes are negotiable and cites to cases in which negotiability was not an issue on appeal.[10] This, of course, is not the law. *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209 (Fla. 2d DCA 1975).

C. The [redacted] identified evidence to refute the summary judgment.

And finally, the Bank argues that the [redacted] "failed to rebut JPMorgan's summary judgment evidence with any affidavits or sworn statements.[11] Actually, the [redacted] rebutted the Bank's evidence with the sworn statement of the

[9] Answer Brief, p. 17.

[10] Answer Brief, p. 18-19.

[11] Answer Brief, p. 14.

employee of its own employee (who laid the foundation for the assignment which the Bank relied upon in the bankruptcy proceeding). But even if that were not the case, the [redacted] had no obligation to file affidavits—the Bank must first factually refute the affirmative defenses. *Bryson v. Branch Banking & Trust Co.*, 75 So. 3d 783, 786 (Fla. 2d DCA 2011).

D. Judicial estoppel did not apply to bar the defenses raised by the [redacted]

While the Bank does not concede that its judicial estoppel arguments were without merit, it makes no effort to defend them on appeal.[12] The Court is left to its own imagination as to how estoppel could possibly be "appropriate" when there was no evidence the [redacted] claim was inconsistent or that the Bank was misled or changed its position in any way.[13]

[12] Answer Brief, p. 19.

[13] Initial Brief, p. 21-22.

II. Summary judgment was precluded because the [redacted] were prevented from obtaining documents or deposing the individuals who signed the affidavits in support of the Bank's motion for summary judgment.

The Bank argues that "[a]t the time JPMorgan filed its motion for summary judgment, discovery was closed."[14] It does not cite to an order, but to a representation of its own counsel at the summary judgment hearing.[15] No order closing discovery could be located in the record—this case had not been set for trial. Nor is such an order mentioned in the Bank's motion for protective order.[16] Trial counsel could only have meant there was no pending discovery at the time it filed its summary judgment.

Nor does the record demonstrate that discovery was closed at the time judgment was entered—other than the fact that the judge simultaneously granted the Bank's motion for a protective order. Despite the Bank's representations to this Court, there was nothing prohibiting the discovery requested by the [redacted]

The Bank makes much ado of the fact—both in the trial court and on appeal—that the [redacted] discovery was propounded "three and half years after

[14] Answer Brief, p. 20.

[15] Answer Brief, p. 20, citing to Supp. R. 35.

[16] Plaintiff's Emergency Motion for Protective Order, October 18, 2012 (R. 567).

the complaint was filed."[17] Leaving aside that this includes the period in which the case was stayed due to bankruptcy, the discovery included requests to depose the summary judgment affiants about whom the [redacted] could not have possibly known until the Bank filed their affidavits. The [redacted] requested the depositions almost immediately upon learning of the affiants.[18]

Moreover, the Bank's objection to these depositions was not timeliness, but relevance. The Bank contended that because it was now confined to an *in rem* relief due to the bankruptcy,[19] the amounts due and owing in the affidavits were irrelevant.[20] This is obviously inconsistent with the fact that the Bank filed the affidavits after the bankruptcy discharge, continued to rely on the affidavits at the hearing, and obtained a judgment with an amount due and owing based on the

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[17] Answer Brief, p. 20.

[18] *See*, Supp. R. 36 ([redacted] counsel stating that she personally requested the affiants' deposition three days after receiving the affidavits); R. 502-513; 498 (Notices filed five days after filing of Notice of Hearing). The written discovery was propounded even earlier (R. 489, 494).

[19] Plaintiff's Emergency Motion for Protective Order, October 18, 2012, pp. 7-8 (R. 573-74).

[20] Notably, in this section of its Answer Brief, the Bank argues that the Samuel's affidavit was "limited in scope" and "primarily identified the amounts due and owing to JPMorgan." (Answer Brief, p. 24). Yet, earlier, it had specifically relied on her affidavit as its evidence of "its pre-suit possession of the original endorsed note." (Answer Brief, p. 14, citing to Samuel's affidavit at R. 389).

affidavits. In fact, its judgment exceeded the amount that it claimed the [redacted] agreed to in their bankruptcy petition by $ 207,428.56.[21]

The relief from stay that the bankruptcy court granted the Bank simply allowed it to pursue its remedies in state court. There was no proceeding to determine whether the Bank was entitled to enforce its claim of lien or else the bankruptcy court would have simply granted title of the house to the Bank. The [redacted] therefore, were entitled to contest all the Bank's allegations, including the Bank's standing at inception, its compliance with conditions precedent, and even the amounts of its claims. As a consequence, the [redacted] were entitled to cross-examine the affiants on their conclusory assertions about the Bank's allegations.

The Bank also mentions three times that the [redacted] cancelled the depositions in advance of the summary judgment hearing[22] in an apparent effort to make this Court believe that the [redacted] had abandoned the discovery. In reality, the [redacted] agreed to reset the depositions in advance of the simultaneously scheduled motion for protective order—as a professional courtesy to the Bank's

[21] *Compare*, Final Judgment of $ 783,328.56 (R. 657) *with*, Schedule D of bankruptcy petition indicating a claim of $ 575,900.00 (R. 286). This also exceeds the amount claimed by the Bank itself in the bankruptcy (R. 521).

[22] Answer Brief, p. 8, 21, 25.

lawyers. The cancellations themselves contain a footnote that they "are being cancelled at the request of Plaintiff to allow Plaintiff's Emergency Motion for Protective Order to be heard."[23]

And finally, the Bank argues that the [redacted] "discovery argument is tantamount to a request to continue the summary judgment proceedings" that should be denied in the absence of a Rule 1.510(f) affidavit attesting to the need for, and the unavailability, of additional evidence.[24] First, the notion that the trial court needed counsel's sworn statement to recognize that cross-examination of the Bank's only witnesses was crucial to due process—or that depositions of summary judgment affiants could not be requested until their identities are revealed[25]—exalts form over function. *See Firestone v. Time, Inc.*, 231 So. 2d 862, 865 (Fla. 4th DCA 1970) (citing to Rule 1.510(f) as contemplating that summary judgment

[23] R. 605-616.

[24] Answer Brief, p. 22.

[25] Ironically, the fungibility of the financial industry's summary judgment affiants makes it all the more important to depose the specific individual proffered, rather than a generic corporate representative. This is because the primary and most fruitful area for cross-examination is the witness's lack of personal knowledge of the facts to which they attest. This simple step of cross-examination through deposition of an affiant was at the core of exposing and diminishing the banking litigation practice that scandalized the nation, called "robo-signing."

be deferred in that case even though motion for continuance was oral and the opinion mentions no affidavit supporting the motion).

But more importantly, the [redacted] discovery argument was not "tantamount" to a request to continue the summary judgment proceedings. Once the trial court granted the protective order (an abuse of its discretion), there was no additional discovery pending for which a continuance was necessary. The Bank's argument would only be applicable if the court had denied the Bank's protective order and then entered summary judgment without waiting for the depositions to take place.

The [redacted] therefore, were unfairly prejudiced by the arbitrary denial of their right to depose and cross-examine the two witnesses that the Bank had arrayed against them.

CONCLUSION

The Final Summary Judgment in favor of the Bank should be reversed, and the case remanded for further proceedings.

Dated: November 25, 2014.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210(a)(2) and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 25, 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.

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