In the District Court of Appeal
Fourth District of Florida

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

[redacted] and [redacted]
Appellants,

v.

LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-FF1, et al.,

Appellee.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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KEY

Record references:

- R. ___= Record on Appeal
- Supp. R. ___= Supplement to Record on Appeal

Abbreviations:

- The Defendants/Appellants, [redacted] and [redacted] = "OWNERS"
- The Plaintiff/Appellee, LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-FFI = "BANK"
- Pooling and Servicing Agreement = "PSA"
- Uniform Commercial Code = "UCC"

STANDARD OF REVIEW

The BANK takes the sanctionably irresponsible position that the trial court's "factual determinations" in entering summary judgment are to be reviewed for "an abuse of discretion."[1] It is elementary that, if the trial court made factual determinations, it erred in entering summary judgment. *Coquina Ridge Properties v. E. W. Co.*, 255 So. 2d 279, 280 (Fla. 4th DCA 1971) (Summary judgment reversed because "[t]he trial court may not try or determine factual issues in [summary judgment] proceedings; … substitute itself for the trier of fact and determine controverted issues of fact.")

Not surprisingly, all the cases cited by the BANK for this standard of review having nothing to do with summary judgment: *King 205, LLC v. Dick Pittman Roof Services, Inc.*, 31 So. 3d 242 (Fla. 5th DCA 2010) (appeal from judgment after non-jury trial); *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla.1980) (dissolution of marriage); *Delno v. Market St. Ry. Co*., 124 F.2d 965 (1942) (federal declaratory action); and *La Rossa v. Glynn*, 302 So.2d 467 (Fla. 3d DCA 1974) (appeal of a final judgment—not final summary judgment—of foreclosure). Even the BANK's quotation from *La Rossa* at page five of its Brief announces in the first line that the standard of review discussed there applies when the trial judge is "sitting as the trier of fact." *Id*. at 468.

[1] Answer Brief, pp. 4-5.

Worse than merely misstating the standard of review, the BANK actually employed this incorrect standard throughout its brief. One glaring instance is the BANK's contention that summary judgment should be affirmed because "there was not enough evidence to allow Judge Sasser to rule in ["the OWNERS'] favor at the summary judgment hearing."[2] Another example is its statement that "[i]t cannot seriously be argued that what the Appellants have identified as evidence…was enough to allow Judge Sasser to make a finding in their favor."[3]

While the BANK's stunningly frivolous assertion regarding the summary judgment standard of review would never have misled this Court, it is nevertheless emphasized here because it is indicative of the BANK's lack of concern for accuracy and candor when addressing both this Court and the court below.

STATEMENT OF THE CASE AND FACTS

Correction to the BANK's Statement of Facts: The BANK tells this Court that the promissory note, mortgage and assignment were "all…duly recorded in the public records."[4] There is nothing in the record to suggest that the promissory note was ever recorded.

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[2] Answer Brief, p. 21.

[3] Answer Brief, p. 20; *see also*, the BANK's argument that "[n]ot allowing the case to proceed to trial is not an abuse of discretion." Answer Brief, p. 16.

[4] Answer Brief, p. 3.

ARGUMENT

I. The Trial Court Erred In Granting Summary Judgment.

A. The Rule 1.510(e) imperative that documents referred to in an affidavit be "sworn or certified" is an authentication requirement.

The BANK concedes that sworn or certified copies of the instruments it needs to foreclose were not attached to, or served with, its summary judgment affidavit.[5] It argues, however, that it complied with the spirit of the rule because the alleged note and mortgage were already on file.[6] While the affidavit may refer tangentially to documents already on file, the "sworn or certified" provision requires the affiant to swear that the documents are what they purport to be—either the originals or "true and correct" copies. *See Coastal Caribbean Corp. v. Rawlings*, 361 So.2d 719, 721 (Fla. 4th DCA 1978) (failure to attach copies excused where affidavit swore that the copies of said note and mortgage attached to the complaint were true and correct.)

Citing to this Court's discussion of the Rule in *Ferris v. Nichols*, 245 So. 2d 660 (Fla. 4th DCA 1971) as requiring that the documents be "identified" in the affidavit, the BANK claims compliance with the rule because the affiant "identified" them in Paragraphs 2 of the affidavit.[7] The affiant's purported

[5] Answer Brief, p. 31.

[6] Answer Brief, p. 31.

[7] Answer Brief, p. 31, 32.

"identification" of the documents, however, merely states that "Plaintiff is the owner and holder of the Note and Mortgage described in the Plaintiff's Complaint."[8]

In evidentiary terms, to "identify" a document means to prove its authenticity,[9] not merely mention it in passing. Having 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, the BANK did not comply with Rule 1.510(e) and, as a result, did not authenticate them for purposes of summary judgment. *See Servedio v. U.S. Bank Nat. Ass'n*, 4D10-1898, 2010 WL 4226399 (Fla. 4th DCA 2010) (summary judgment reversed where note and mortgage were not timely authenticated, filed and served).

NOTE: Had the BANK complied with Rule 1.510(e), it would have authenticated the note without an expert. The BANK also advances the alarmist contention that ruling for the OWNERS on this issue is tantamount to announcing that instruments can be authenticated only through an expert.[10] In reality, as discussed above, compliance with Rule 1.510(e)—submitting sworn testimony of a qualified records custodian that the documents are what they purport to be—would

[8] Affidavit of Indebtedness (**R. 155**).

[9] "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).

[10] Answer Brief, pp. 6, 16..

have satisfied the authentication requirement. Instead the BANK relied on the representations of counsel alone. *See, id*. (court cannot rely on attorney's unverified statements as evidence). To adapt the BANK's own metaphor: the bare, unsworn statement of its attorney that something looks like a duck and quacks like a duck is not evidence of a duck.

B. The mortgage and assignment of mortgage are not self-authenticating.

1. The evidence rule for the self-authentication of "commercial papers" (§90.902(8)) is expressly limited to that which the UCC declares to be self-authenticating.

The BANK takes the unprecedented position that mortgages and assignments of mortgage are self-executing under §90.902(8) Fla. Stat. (2009) because they are "related to" commercial paper.[11] The only case cited by the BANK is *United States v. Varner*, 13 F.3d 1503 (11th Cir. 1994), which is a federal court decision interpreting a federal rule of evidence. That rule—Fed. R. Evid. 902(9)—differs from the Florida rule in one critical respect. The federal self-authentication rule includes documents relating to commercial paper to the extent provided by general commercial law**.** In stark contrast, the Florida Rule embraces related documents only to the extent provided in the Uniform Commercial Code.

[11] Answer Brief, pp. 11-13; 23-25.

The *Varner* decision was specifically predicated on the phrase that is more expansive than the Florida rule, holding that "[t]he language of Fed.R.Evid. 902(9) encompasses a broader range of self-authenticating documents than does Article 3 of the UCC." *Id*. at 1510. The BANK's invitation to extend Florida's self-authentication rule to mortgages and assignments should be rejected.

2. The assignment is not self-authenticating under §90.902(10) merely because it is notarized.

The BANK next argues that the assignment was self-authenticating under §90.902(10) Fla. Stat. (2009), which applies to "[a]ny document properly certified under the law of the jurisdiction where the certification is made." Without citation to authority, the BANK assumes that "certification" is equivalent to "notarization."[12] The OWNERS were unable to locate a single passing comment in the case law or the legislative history interpreting the term "certification" in this statute, much less, any that suggest it is synonymous with "notarization."

In context, a "certification" could only mean that the document is certified as authentic. *See*, Black's Law Dictionary (2004) ("certification" means attest, which in turn, is to affirm to be genuine or authentic). This meaning comports with the use of "certification" in other sections of §90.902, such as the certification of copies public records and business records (subsection (4) and (11)). Notarization does not certify that the document is authentic.

[12] Answer Brief, p. 13.

3. Admitting the assignment into evidence would only create another issue of fact.

Even if one of the self-authentication rules applied, it is not conclusive on the issue of authenticity.[13] It merely serves to have the assignment admitted as summary judgment evidence on that issue. The record, however, contained other evidence calling authenticity into question: the unexplained difference in the purported signatures of the person who executed the assignment;[14] the conflicting evidence as to whether she was employed by the assignor or the assignee;[15] the fact that the assignment was executed long after the trust was closed;[16] the BANKS' inability to produce any trust documentation to prove counsel's claim that the BANK, as trustee, was in possession of the original note [when the case was filed];[17] and perhaps most importantly, the PSA itself which evidences an entirely different ownership chain.

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[13] *See*, discussion in Initial Brief, at 25-26.

[14] Initial Brief, p. 20.

[15] Initial Brief, pp. 20-22.

[16] Initial Brief, pp. 31-33. New York law—which governs the BANK's Trust (PSA, p. 153; **Supp. R. 159**)—requires actual delivery of the fund or property to the trustee. *See Brown v. Spohr*, 180 N.Y. 201, 73 N.E. 14 (1904). An attempt to acquire the subject loan after the closing date would be void because it violates the express terms of the trust agreement. *See* N.Y. Est. Powers & Trusts Law § 7-2.4 (McKinney) (unauthorized acts of trustee are void). Additionally, because the closing date is also the "startup day" for treatment as a REMIC (PSA, p. 72; **Supp. R. 78**), the trust cannot acquire property after closing without significant tax consequences. *See* 26 U.S.C. 860G(d)(1).

[17] Initial Brief, pp. 4-6, 30-31.

Specifically, the assignment claims that the transfer occurred between First Franklin Financial Corporation directly to the plaintiff BANK (LaSalle Bank National Association as Trustee for plaintiff's trust). The PSA, however, states that all the loans in the plaintiff's trust were sold by, and transferred from, the "Depositor,"[18] identified as Merrill Lynch Mortgage Investors, Inc.[19] Admission of the assignment into evidence, therefore, would simply create an issue of fact that barred summary judgment.

C. The BANK's attempt to jettison the embattled assignment post-judgment should be rejected.

As often occurs when a proffered assignment of mortgage encounters evidentiary snags, the BANK now claims that it "does not need the Assignment to prevail in this case."[20] The BANK, however, attached the purported assignment to the Complaint,[21] and specifically alleged that the "Note and Mortgage were assigned to Plaintiff" by virtue of that document.[22] It even refers to the original lender as "Plaintiff's Assignor."[23] Having failed to adduce evidence to support its

[18] Section 2.01, PSA (**Supp. R. 69**)

[19] PSA, pp. 1, 36 (**Supp. R. 7, 42**);

[20] Answer Brief, p. 17; Answer Brief, pp. 9-11.

[21] Exhibit C to Complaint (**R. 1-30**).

[22] Complaint, ¶ 3 **(R. 2)**.

[23] Complaint ¶ 2 **(R. 2)**.

allegations of standing, the BANK cannot now change to a different allegation of standing during the appeal.

Furthermore, the BANK's only affiant in the case, Mr. Orsini, specifically testified that the assignment was the only document upon which he relied when he claimed he had "personal knowledge that the Plaintiff is the owner and holder of the Note and Mortgage…"[24] Without an authenticated assignment, therefore, Mr. Orsini's testimony is hearsay.

D. The BANK's inability to show that the mortgage presented is an original is further evidence that it was not the owner and holder of the loan when the case was filed.

The BANK ridicules the OWNERS insistence that the original mortgage be authenticated as "bizarre" because "if it is not the document they executed, they should feel free to say so."[25] Quoting the trial court judge during an evidentiary hearing, the BANK suggests that the OWNERS should know if the BANK's documents are authentic, simply by looking to see if its terms match the copy they received at closing.[26] Matching terms, however, do not establish that the BANK's version is an original.

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[24] Affidavit of Indebtedness ¶2 (R. 155).

[25] Answer Brief, p. 24.

[26] Answer Brief, p. 24, quoting Judge Cook, Transcript of Hearing on May 4, 2009, p. 10 (**R. 142**).

The PSA requires that the trust take custody of the original note and the original mortgage.[27] Whether the mortgage is an original, therefore, is relevant to proving (or disproving) the BANK's standing as the alleged owner and holder of the mortgage loan. If the BANK cannot adduce evidence to authenticate the mortgage—as the original—the OWNERS are entitled to the reasonable inference that the mortgage loan is not in the trust and the BANK has no standing.

E. The OWNERS need not plead fraud to dispute authenticity.

In a classic "straw man" argument, the BANK first claims that the OWNERS' evidentiary objection to the authenticity of the BANK's documents is really a disguised action for fraud.[28] The BANK then easily defeats this straw man—the imaginary fraud action—on the grounds that such a claim had never been pled with particularity (or at all, for that matter) and thus, had been waived.[29] From this, the BANK concludes that it is somehow relieved from proving authenticity of the documents it wants to introduce as evidence.[30]

Not surprisingly, the BANK cited no authority for the curious assertion that a party need not comply with the authentication requirement of Florida's Evidence

[27] PSA, Section 2.01(A) and (B) (**Supp. R. 69**).

[28] Answer Brief, pp. 10-11.

[29] Answer Brief, p. 11.

[30] *Id*.

Code if the opposing party has not plead fraud. There simply is no such exception to §90.901 Fla. Stat. (2010).

F. The BANK's appellate argument relies on yet another document never identified or authenticated as "summary judgment evidence."

The BANK asks this Court to consider a document it produced in discovery (a packet of highly-redacted papers it claims is the mortgage schedule) as evidence that it owned the note.[31] Because the BANK seeks to rely on this document for the first time on appeal, it cannot qualify as summary judgment evidence. Rule 1.510(c) Fla. R. Civ. P. (the motion for summary judgment must "specifically identify" materials on which the movant relies). Nor does it avail the BANK to direct this Court to even more documents that were never authenticated.

Nor was it accurate for the BANK to claim that these issues were raised for the first time at summary judgment.[32] Quite clearly, these issues were central to the OWNERS' discovery requests in the case and the resulting disputes when the BANK sought to block that discovery.[33]

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[31] Answer Brief, p. 28.

[32] Answer Brief, p. 27.

[33] *See* Initial Brief, pp. 4-6, 30-31, 41-44.

G. A genuine issue of fact remained as to whether [redacted] was a mortgagor.

The BANK's argument that the judgment ensures that Ms. [redacted] was not liable on the note misses the point. For the court to assist the BANK in forcing her from the home she owns, she must be a mortgagor. That the mortgage has contradictory descriptions of her as a "borrower" and a "non-borrower," there exists—at the very least—an issue of fact. Although apparently an issue of first impression in Florida, other courts have held that signing as a "non-borrower" negates other references to the signor as a "borrower" (*Nat'l City Bank v. Engler*, 777 N.W.2d 762, 765 (Minn. Ct. App. 2010)) and that a "non-borrower" on a mortgage may be immune to foreclosure (*see In re DeRee*, 403 B.R. 514, 520 (Bankr. S.D. Ohio 2009)).

II. The Trial Court Erred in Denying Discovery Regarding Ownership of the Note.

The BANK incorrectly claims that the OWNERS "abandoned their efforts to [acquire] the Trustee's certification."[34] The BANK points to Judge's Cook's[35] concern that Request No. 1, which referenced the PSA, was not sufficiently clear for the BANK to understand because the OWNERS had not submitted a copy of

[34] Answer Brief, p. 37.

[35] The BANK erroneously attributes these comments to Judge Sasser.

the BANK's own PSA along with their request.[36] The Request for the Trustee's Certification, however, was Request No. 3.

As to Request No. 3, the court did not hold that the request was unclear, but rather, agreed with the BANK that, by filing the note and mortgage, it had produced everything that it had that was relevant to show ownership.[37] The judge did comment that if (as is the case here) a trust document showed the BANK had no right to enforce the mortgage, "then maybe [the OWNERS will] be able to win the case"[38] But having denied discovery aimed at unearthing just such a document, the court impermissibly deprived the OWNERS of proof of their defense.

The BANK also suggests that the Trustee's Certificate simply may not exist.[39] If the BANK truly does not have a document that the PSA says the trust would have were it the owner and holder of the note, the OWNERS were entitled

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[36] Answer Brief, p. 38, citing to the Transcript of Hearing Before the Honorable Jack H. Cook, May 4, 2009, pp. 1-6 (**R. 138-139**). In reality, the request was propounded with a copy of the PSA attached (to be provided by motion to supplement the record; *see*, Docket Entry for May 7, 2009). The BANK responded that the court had already disallowed the discovery (**Supp. R. 522**). After the court overruled this objection at yet another hearing (**R. 160**), the BANK finally admitted it had no additional documents to provide (**Supp. R. 539**).

[37] Hearing Before the Honorable Jack H. Cook, May 4, 2009, p. 11 (**R. 140)**; *see also*, Order Compelling Discovery dated May 8, 2009 (**R. 129**), which merely states that the objections to various requests, including Number 3, are sustained.

[38] Hearing Before the Honorable Jack H. Cook, May 4, 2009, p. 11 (**R. 140)**

[39] Answer Brief, p. 39.

to a discovery response clearly admitting that fact. Such an admission would have created a factual issue defeating summary judgment.

III. The Trial Court Erred in Entering a Sanction Against the OWNERS' counsel.

Citing to page 587 of the Supplemental Record (a page within the summary judgment hearing transcript), the BANK claims that the trial court "found that the use of the term 'the document' was misleading as it indicated Ms. Lord had reviewed the records in this file when in fact she had not."[40] No such finding is stated on that page or any other page of the hearing transcript. While the BANK made that argument quite vociferously[41] and the court asked some questions about it,[42] in the end, the trial court was concerned about the use of a "bastard" expert's opinion in multiple cases[43] and questioned the evidentiary value of such an affidavit where the expert did not review the file.[44] The judge never held the

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[40] Answer Brief, p. 40.

[41] Transcript of Hearing Before the Honorable Meenu Sasser, March 11 2010 ("Hrg."), p. 19 (**Supp R. 577**).

[42] Hrg., pp. 20, 22 (**Supp R. 578, 580**)

[43] Hrg., pp. 22-23, 26, 29 (**Supp. R. 580-81, 584, 587**); Answer Brief, p. 40.

[44] Hrg., p. 21 (**Supp. R. 579**)("THE COURT: Then what good is her affidavit really?"); Hrg., p. 29 ("THE COURT: …It's just essentially a worthless piece of paper. …")(**Supp. R. 587**). Of course, even if the opinion is so mundane and self-evident as to have little or no evidentiary value, its presentation is hardly sanctionable.

affidavit was misleading or even potentially misleading. Indeed, the word "misleading" appears nowhere in the transcript.

So, while the BANK argues that the required findings of bad faith may appear "on the face of the record,"[45] it never identifies where in the record those findings are, or that defense counsel was ever granted the due process right to present evidence prior to any findings.

And although the court does indeed have inherent authority to sanction counsel, the only motion regarding the Rita Lord affidavit ever noticed for hearing was the BANK's §57.105 motion. That the BANK did not mention §57.105 anywhere in its brief is a tacit admission that it did not properly serve the motion in advance of filing. Because the BANK had not complied with the statute, the trial court had no discretion to order such sanctions, and therefore, abused its discretion as a matter of law.

CONCLUSION

Based upon the foregoing facts and case law, the summary judgment in this case should be reversed and the case remanded with instructions to permit the requested discovery of the Trustee's Certificate. The Order on Plaintiff's Motion for Determination of Fraud or in the Alternative to Strike Affidavit of Rita M. Lord and Motion for Sanctions, entered on March 11, 2010, should also be vacated.

[45] Answer Brief, p. 39.

Dated November 29, 2010

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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 November 29, 2010 on all parties on the attached service list.

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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 and has been typed in Times New Roman, 14 Point.

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