In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] ET AL.,

Appellants,

v.

WELLS FARGO BANK, N.A., AS TRUSTEE OF WAMU MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-PR4., ET AL,

Appellees.

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH 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
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules

Statutes

SUMMARY OF THE ARGUMENT

WELLS FARGO seeks to defend its ill-gotten judgment against a *pro se* World War II veteran and his wife by asking this Court to create a new rule—that all motions to vacate must be verified. While Rule 1.030 Fla. R. Civ. P. would prohibit the adoption of such a requirement, it is particularly inappropriate here where the fraud allegations were specific and supported by evidence (a request to take judicial notice of government records) and where the remaining evidence of fraud was exclusively in WELLS FARGO's possession. Additionally, the allegation that EDITH was never served the notice of trial is properly supported by the record itself.

WELLS FARGO also invites the Court to hold that fraud which is successfully concealed throughout the appeal period is immune from attack. A concealment of fact, such as is alleged here, is not an error of law that must be addressed by a motion for rehearing or appeal, rather than by a Rule 1.540 motion.

Lastly, to justify the striking of the discovery, WELLS FARGO contends that the waived the issue by failing to re-propound the freshly stricken discovery. The bank claims to have argued that the right to discovery was tied to the ministerial act of setting a hearing, rather than the actual determination of colorable entitlement after a hearing—a "gotcha" argument that is, in any event, censurably belied by the record.

ARGUMENT

I. WELLS FARGO's Brief Does Not Contest That the Only Note Presented Was Incomplete and That It Was Never Reestablished.

In their Initial Brief, the [redacted] pointed out that:

> [T]he case went to trial on pleadings that claimed that the note was lost or destroyed. And the note that was presented as the "original" (if any) was incomplete. WELLS FARGO was bound by these pleadings. *Hart Properties, Inc. v. Slack*, 159 So. 2d 236, 238 (Fla. 1963).[1]

WELLS FARGO concedes it did not amend the pleadings to drop its lost note count and does not contest that the court made no findings of fact to reestablish the Note at trial. Instead, it claims that "the original note and mortgage were ultimately filed with the court."[2]

Thus, WELLS FARGO's counterargument hangs by a single thread—that this Court should ignore the pleadings in favor of an "original" which, on its face, is missing every other page (*see*, WELLS FARGO's own Appendix, pp. 34-36)[3].

---

[1] Initial Brief, p. 23.

[2] Answer Brief, p. 2.

[3] While the docket and the scanned version of the court's file (Banner system) indicate that every other page of the note and mortgage were on file at one time, the Notice of Filing (Docket Entry 25) is completely missing from the court file. Because the absence of a document cannot be shown by way of an Appendix, the [redacted] request that this Court take judicial notice of the trial court file in this case or order that the trial court transmit the entire original file to this Court. The absence of the note (or in this case, the partial note) from the appellate record is alone grounds for reversal. *See Duke v. HSBC Mortg. Services, LLC*, 79 So. 3d 778 (Fla. 4th DCA 2011).

What WELLS FARGO is now suggesting is that WAMU's[4] Notice of Filing a note impliedly "amended" its Complaint to drop its count to reestablish the instrument. Yet, by filing only a partial note, WAMU implied just the opposite—that it still intended to reestablish this defective instrument.

Even if WAMU intended its "Notice of Filing" to be a backdoor amendment, it would have been a nullity as to [redacted] because it was filed more than eight months after he answered a complaint which was unaccompanied by a note (even an incomplete one). Without seeking leave of court, such an "amendment" would violate Rule 1.190 Fla. R. Civ. P. *Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375 (Fla. 2d DCA 2012) (judgment reversed where bank failed to request leave of court to "amend" complaint by simply filing a note containing endorsements which were not on the note attached to the complaint).

Such an amendment would also be a nullity as to EDITH [redacted] because, coupled with the amendment introducing a new plaintiff, the Complaint had been radically altered from the original to which she had defaulted. No longer was it an original lender reestablishing a note (essentially a contract action), it was now a stranger claiming to be a holder or assignee of an existing, but incomplete, instrument. WELLS FARGO was required to notify the defaulted party, EDITH

[4] Washington Mutual, F.A. ("WAMU").

and give her an opportunity to deny these new allegations by a new party. *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1233 (Fla. 1st DCA 1995); *see also*, Rule 1.080(a) Fla. R. Civ. P. (new or additional claims must be served on defaulted parties).

- **Insufficiency of the pleadings to support a default judgment is fundamental error.**

WELLS FARGO asserts that EDITH cannot now complain that she was denied the chance to defend against these new claims of standing because she never articulated that specific argument to the trial court.[5] The disagree and submit that their motion was sufficient to apprise the trial court of the thrust of this argument. The motion pointed out that EDITH was entitled to be present at trial, which was the very same day that WELLS FARGO substituted itself as the plaintiff without prior notice to the parties.[6] The argued that, as a result, they were entitled to discovery to contest the claimed transfer.[7]

---

[5] Answer Brief, pp. 26-27.

[6] Defendants, Individually and as Trustee of the Edward Patrick Revocable Trust Agreement Dated October 31, 2003, and Edith Motion to Vacate Final Judgment, dated November 24, 2010 ("Motion to Vacate"), pp. 4, 6-7 (A. 89, 91-92).

[7] *Id*. at 7 (A. 92).

Even if this were insufficient, EDITH [redacted] is free to raise this argument for the first time on appeal because "[a]dequate notice is a fundamental element of the right to due process." *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d at 1235. The court in *Hooters* expressly rejected the case WELLS FARGO relies upon[8] where a defaulted party was not given notice of claims absent from the complaint. The rationale is that the original complaint is insufficient to support (or fails to state a cause of action for) the resulting judgment. *Cabral v. Diversified Services, Inc.*, 560 So. 2d 246, 247 (Fla. 3d DCA 1990) (a defaulted party permitted to contest the sufficiency of the complaint on appeal); *see also DeCarlo v. Hubbard*, 571 So. 2d 82 (Fla. 4th DCA 1990) ("It is true that a 'default judgment must be reversed if founded upon a complaint insufficient to form a legal basis for the judgment.'") (citation omitted); *Opti, Inc. v. Sales Eng'g Concepts, Inc.*, 701 So. 2d 1234, 1235 (Fla. 4th DCA 1997) (default should be set aside where complaint fails to state a cause of action); *Lee & Sakahara Associates, AIA, Inc. v. Boykin Mgmt. Co.*, 678 So. 2d 394, 396 (Fla. 4th DCA 1996) (reversal to permit defaulted defendant to be served with amended complaint "and be provided with an opportunity to respond."); *cf. Johnston v. Hudlett*, 32 So. 3d 700, 703 (Fla. 4th DCA 2010) (error of failure to state a cause of action could not be considered

[8] *Abrams v. Paul*, 453 So.2d 826 (1st DCA 1984) cited in Answer Brief, p. 27.

fundamental where plaintiff submitted an actual—and presumably complete—note).

Another way the courts have reached the same result is by declaring that default judgments based on defective pleadings are void. *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989) ("Failure to state a cause of action, unlike formal or technical deficiencies, is a fatal pleading deficiency not curable by a default judgment"); *Southeast Land Developers Inc. v. All Florida Site and Utilities Inc*., 28 So. 3d 166, 168 (Fla. 1st DCA 2010) ("A default judgment is void and should be set aside when the complaint fails to state a cause of action.").

Because the WAMU Complaint could not support a judgment in favor of WELLS FARGO that does not reestablish the incomplete note, the judgment is void as to EDITH

II. The Record Is Uncontroverted That EDITH Was Not Served the Notice of Trial.

WELLS FARGO would have this Court adopt a new requirement not found in Rule 1.540 Fla. R. Civ. P.—an obligation to verify motions to vacate.[9] Such a new requirement would contravene Rule 1.030 Fla. R. Civ. P. that expressly relieves a party from verification, unless otherwise provided by rule or statute.

[9] *See*, Answer Brief, pp. 14-22.

Nor does the case cited by WELLS FARGO, *Citibank, FSB v. PNC Mortg. Corp. of Am.*, 718 So. 2d 300 (Fla. 2d DCA 1998), support such a gloss upon Rule 1.540. *Citibank* merely reiterates the longstanding rule that a claim of excusable neglect must be supported by sworn evidence. *Id*. at 302. Excusable neglect is not at issue here.

Whether EDITH was served the Notice of Trial is determined from the record—specifically, the absence of her name and address on the certificate of service. *Grahn v. Dade Home Services, Inc.*, 277 So. 2d 544, 546 (Fla. 3d DCA 1973) (where the record fails to show a certificate of service of a vital notice upon a party, "the interests of justice would best be served by reversal of the judgment and remand of the cause…"). WELLS FARGO did not dispute this record evidence that EDITH was never served the notice—much less, offer any evidence to the contrary.

A. At a minimum, EDITH is entitled to a trial on unliquidated damages.

Even if EDITH were precluded from contesting the claims of the eleventh-hour newcomer, WELLS FARGO, she was entitled to contest unliquidated damages. While focused on attorneys' fees as an example of such damages, everything beyond the principal amount of the loan was unliquidated. This is because nothing more than the principal amount was either

stated in the Complaint or calculable from any document attached to the Complaint (or even the partial note later submitted). *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 662 (Fla. 5th DCA 1983) ("Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law."). The unliquidated portion of the damages amounts to $40,831.48.

WELLS FARGO invites this Court to reject the *Bowman* line of cases that hold that attorneys' fees are unliquidated damages.[10] In doing so, it never addresses *Roggemann v. Boston Safe Deposit & Trust Co.*, 670 So. 2d 1073 (Fla. 4th DCA 1996)—already cited by the [redacted] n which this Court specifically relies upon *Bowman* for the holding that "[a] 'reasonable attorney's fee' is an unliquidated item of damages…" *Roggemann*, at 1075. That holding was eight years after the Fifth District authored the lengthy footnote extensively quoted in WELLS FARGO's Answer Brief.[12] WELLS FARGO's request, therefore,

[10] Answer Brief, p. 24.

[11] Initial Brief, p. 20.

[12] *West v. West*, 534 So. 2d 893, 895 n.1 (Fla. 5th DCA 1988), quoted at Answer Brief, p. 24.

would require an *en banc* overruling of *Roggemann*. *See*, Rule 9.331 Fla. R. App. P. and Committee Notes.

B. The unliquidated damages significantly impacts EDITH right of redemption.

WELLS FARGO's final attempt to excuse the failure to provide EDITH with a notice of trial is that a trial on unliquidated damages would make no practical difference to her liability as a non-borrower.[13] But her liability is not the issue. Her interest as a mortgagor is to save the home. Under §45.0315 Fla. Stat. (2012), she has a right of redemption. The amount she must pay to cure the indebtedness and prevent a sale may have been unduly padded with over $40,000 in unliquidated damages which she was never allowed to contest. Remand for a new trial—even if just on unliquidated damages—would make a significant difference. The error is not harmless.

III. The Allegations of Fraud Are Sufficiently Specific to Show "Colorable Entitlement."

As shown earlier, there is no rule that motions to vacate must be verified. Nor should the Court shun all such motions that allege fraud, but which are unaccompanied by an affidavit. Such a rule would immunize fraud where, as here, the relevant, admissible evidence of the misconduct is in the hands of the accused.

[13] Answer Brief, p. 25.

Here, for example, the [redacted] asked the trial court to take judicial notice of government records showing the WELLS FARGO trust does not exist.[14] WELLS FARGO never denied the allegation or claimed that it was frivolous. An affidavit from the [redacted] or counsel that they think the trust does not exist (based on the absence of government records) would add no evidentiary gravitas because it would not be based on personal knowledge and would violate the best evidence rule.[15]

If such a trust exists outside of the public records, only WELLS FARGO would have the documentation to show when, if ever, it acquired the subject loan, and the exact date that the trust closed its doors to the loans it was assembling. Only WELLS FARGO would have the information requested in the discovery propounded by the [redacted] discovery stricken before WELLS FARGO would have to affirm under oath that its trust actually exists.

---

[14] Motion to Vacate, p. 5. (A. 90).

[15] That the [redacted] used the proper evidentiary mechanism (judicial notice) distinguishes this case from *U.S. Bank Nat. Ass'n v. Paiz*, 68 So. 3d 940 (Fla. 3d DCA 2011) in which the trust's nonexistence was a mere assertion of counsel. *Id.* at 942. Additionally, in *Paiz*, the bank produced a Pooling and Servicing Agreement "demonstrating the existence of the trust and its authority to enforce the mortgage and note, which was endorsed in blank and which was in U.S. Bank's possession at the time it filed the foreclosure action." *Id.* Here, WELLS FARGO produced nothing to demonstrate the trust's existence and was not in possession of the (complete) note either when WAMU filed this action or when the court entered judgment (WELLS FARGO's Appendix, pp. 32-36).

The cases cited by WELLS FARGO for this notion (that fraud allegations must be proven even before evidence may be gathered by way of discovery) did not so hold, but turned instead on the lack of specificity of the allegations and a failure to explain "how [the fraud] would entitle the defendants to have the judgment set aside." *U.S. Bank Nat. Ass'n v. Paiz*, 68 So. 3d 940, 944 (Fla. 3d DCA 2011); *Fed. Home Loan Mortg. Corp. v. De Souza*, 85 So. 3d 1125, 1126 (Fla. 3d DCA 2012) (same).

Here, the [redacted] were specific about the fraud—that WELLS FARGO's trust does not exist, and even if it does, it cannot be the owner of the loan. The allegation affects the outcome because, if proven, WELLS FARGO has no standing[16] and the judgment must be set aside. Despite WELLS FARGO's

[16] WELLS FARGO's argument that "because WaMu had standing to bring the foreclosure action at the time the complaint was filed, the standing of its substituted successors or assigns is not subject to challenge"[16] flies in the face of established law of this District. *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011) ("even a party in default does not admit that the plaintiff in a foreclosure action possesses the original promissory note"); *see also Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 555 (Fla. 5th DCA 2012) (plaintiff is required to "prove its right to enforce the note as of the time the summary judgment is entered, even if [the defendant] had waived the right to challenge the bank's standing as of the date suit was filed.") (emphasis added). Moreover, WAMU's standing at the inception of the case was the very target of the fraud portion of the [redacted] Rule 1.540 motion: WELLS FARGO could only have become the note owner by taking ownership years before the case was filed—meaning that WAMU was not, as it

suggestion, the fact that the [redacted] owe money to someone is insufficient to support a judgment in its favor. Existence of a debt does not mean that fraud in taking ownership of that debt is *de minimis* or irrelevant. In short, WELLS FARGO cannot falsify its way into a windfall merely because there is "debt in the air."

IV. The [redacted] Discovery Was Stricken Because "Colorable Entitlement" Had Not Yet Been Determined—Not Because a Hearing Had Not Been Set.

Although WELLS FARGO's use of gamesmanship to elude discovery was harshly criticized in the Initial Brief, it pales in comparison to the new waiver argument in its Answer Brief. WELLS FARGO contends that it persuaded Judge Lewis to deny the [redacted] right to discovery as premature, only so it could engineer a revival of that right two days later when it directed the Court to set the motion to vacate for hearing. WELLS FARGO would have this Court believe that it troubled itself to have the discovery stricken, and then took immediate steps to undo the effect of that order. According to WELLS FARGO, this crafty, procedural two-step required the [redacted] to re-propound discovery that had

---

alleged, the owner when it initiated the proceedings. Tellingly, WELLS FARGO has never denied this allegation.

just been stricken 48 hours before. And not having done so, the [redacted] waived that right.

In reality, WELLS FARGO never argued that entitlement to discovery was dependent on the ministerial act of setting a hearing. It argued that a hearing on colorable entitlement had to be held and the issue determined before discovery could commence:

> [T]heir discovery requests are premature, because the Court has not found that they have [colorable] entitlement… This motion has never been heard, and it needs to be heard before they're entitled to propound any discovery requests…[17]

Likewise, in ruling that the parties must "fulfill" a previous court order before discovery would be considered, Judge Lewis did not hold that merely setting a hearing would fulfill the order. Nor did she direct that the discovery would have to be re-propounded.[18] The order to be fulfilled was an agreed order that stated that the "Motion to Vacate Final Judgment is reserved for ruling after a hearing to be specially set."[19]

At the hearing on the motion to vacate, [redacted] counsel expressly restated his objection to the denial of discovery which had severely crippled, even

---

[17] Hearing Before the Honorable Diana Lewis, October 5, 2011, p. 4. (A. 124)

[18] *Id*. at 4-5 (A. 124-125).

[19] Agreed Order on Motion to Vacate Final Judgment, dated January 10, 2011 (A. 96).

eliminated, his ability to prepare.[20] WELLS FARGO argued—not that the discovery had been waived—but that it had been stricken.[21]

The [redacted] objections were sufficient to preserve the discovery issue. They were entitled to discovery prior to the evidentiary hearing on their motion to vacate. Conceivably, the trial court could first determine by way of a separate non-evidentiary hearing whether the [redacted] had met the "colorable entitlement" threshold before allowing them to embark on discovery (which was WELLS FARGO's original argument). But that was not done here.

V. WELLS FARGO's Argument That Its Misrepresentations Were Discoverable at the Time of Judgment Must Be Rejected.

WELLS FARGO retorts that the [redacted] Rule 1.540 motion fails to present any evidence that was not discoverable at the time of judgment[22]—i.e. that the [redacted] should have discovered the alleged fraud and raised it as an issue prior to the expiration of the appeal period. This, however, is the standard under Rule 1.540(b)(2) (newly discovered evidence), not Rule 1.540(b)(3) (fraud). *Schlapper v. Maurer*, 687 So. 2d 982, 984 (Fla. 5th DCA 1997) (judgment set aside for fraud even where greater diligence may have discovered the concealed

[20] Hearing Before the Honorable Diana Lewis, November 21, 2011, pp. 7-8 (A. 142-143).

[21] *Id*. at 8.

[22] Answer Brief, p. 32.

evidence—adverse party entitled to rely on statements of opposing counsel); *see also Maresca v. Olivo*, 819 So. 2d 855, 857 (Fla. 5th DCA 2002) (opposing party's failure to apprise the court of the true state of affairs is a misrepresentation warranting relief from judgment). To hold otherwise is to reward concealment and duplicity.

CONCLUSION

As to the ROONEYS, this Court should reverse the trial court's denial of the motion to vacate and remand with directions to permit the ROONEYS to conduct discovery prior to an evidentiary hearing.

As to EDITH ROONEY this Court should vacate the final judgment entirely and remand the matter for further proceedings.

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
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

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 Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this August 9, 2012 to all parties on the attached service list. This brief also complies with Administrative Order No. 2011-1 and an electronic copy has been emailed to the court at efiling@flcourts.org.

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Robert R. Edwards, Esq.
THE LAW OFFICES OF
MARSHALL C. WATSON, P.A.
1800 NW 49th Street, Suite 120
Fort Lauderdale, FL 33309
Plaintiff/Appellee's counsel

Thomas H. Loffredo, Esq.
Shayna A. Freyman Esq.
Jeffrey T. Kuntz, Esq.
GRAY ROBINSON P.A.
401 E. Las Olas Boulevard, Suite 1850
Fort Lauderdale, FL 333001
Co-Counsel for Appellee

Drew Melville, Esq.
ROSEWOOD CONDOMINIUM
ASSOCIATION, INC.
One Park Place, Suite 300
621 NW 53rd Street
Boca Raton, FL 33487
Counsel for Rosewood Condominium Association, Inc.