In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HSI ASSET SECURITIZATION CORPORATION TRUST 2006 OPT4, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OPT4, et al.

Appellees.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Key:

The Appellants, [redacted] and [redacted] will be collectively refered to as the "[redacted]

The Appellee, DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HSI ASSET SECURITIZATION CORPORATION TRUST 2006 OPT4, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OPT4, et al., will be referred to as the "BANK."

ARGUMENT

I. The Record More Than Adequately Preserved the Claim of Reversible Error.

A. No transcript of the hearing is needed to determine that the summary judgment evidence was inadequate and untimely.

Faced with a summary judgment that relied on evidence that was both late-filed and insufficient, the BANK incorrectly argues that the lack of a transcript precludes this Court from providing any relief to the [redacted][1] But the logic upon which the BANK relies—that "this Court cannot determine whether the lower court's decision was supported by evidence adduced at that hearing which is not otherwise apparent"[2]—is nonsensical in the summary judgment context. *See Shahar v. Green Tree Servicing, LLC*, No. 4D11-1111, ___ So. 3d ___, 2013 WL 811612 at *4 (Fla. 4th DCA March 6, 2013)(rejecting a similar argument raised by the same law firm because "hearing transcripts ordinarily are not necessary for appellate review of a summary judgment").

If, in fact, the trial court relied on "evidence adduced at that hearing" in granting summary judgment, that in and of itself would be reversible error. *Orange Lake Country Club, Inc. v. Levin*, 645 So. 2d 60, 62 (Fla. 5th DCA 1994)

[1] Answer Brief, pp. 7-8.

[2] Answer Brief, p. 8.

("[o]ral testimony is inappropriate at a hearing on a motion for summary judgment"). This is because summary judgment evidence must be specifically identified in the motion and served twenty days before the hearing. Rule 1.510, Fla. R. Civ. P.; *Servedio v. U.S. Nat. Bank Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010) (reversing summary judgment of foreclosure where docket indicated "original" note was filed after entry of judgment and was not filed and served at least twenty days prior to the summary judgment hearing).

B. Failure to provide timely evidence is not harmless.

Moreover, the BANK's failure to file and serve its summary judgment evidence in a timely matter is not simply harmless error. As a matter of due process, the "procedural strictures [of Rule 1.510] are designed to protect the constitutional right of the litigant to a trial…[and] are not merely procedural niceties nor technicalities." *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997). Because the failure to follow Rule 1.510 deprived the [redacted] of fundamental due process rights, the judgment must be reversed.

C. The error was further preserved by the Motion for Rehearing.

Finally, to the extent the BANK suggests that the trial court was unaware of the untimeliness of the BANK's affidavit, the [redacted] undeniably brought this to the court's attention in their timely Motion for Rehearing filed pursuant to Rule

1.530, Fla. R. Civ. P.[3] "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985).

Here, the [redacted] timely Notice of Appeal provided this Court with jurisdiction to "review any ruling or matter occurring before the filing" of that notice, including the issues raised in the Motion for Rehearing. *See* Rule 9.110(h), Fla. R. App. P. The very purpose of a Rule 1.530 motion is to "provide[] the trial court an opportunity to correct any error it has committed if it becomes convinced it has erred." *Brander v. Stoddard*, 78 So. 3d 101, 103 (Fla. 4th DCA 2012), *citing Wynocker v. Wynocker*, 500 So.2d 555, 557 (Fla. 2d DCA 1986). The broad grounds for a Rule 1.530 motion "include the contention that the final order conflicts with the governing law and is otherwise simply wrong on the merits." *Balmoral Condo. Ass'n v. Grimaldi*, 38 Fla. L. Weekly D174, ___ So. 3d ____, 2013 WL 238203 at *2 (Fla. 3d DCA Jan. 23, 2013).

Indeed, the trial court is permitted to reopen the record and take new evidence in considering a Rule 1.530 motion. If new evidence is permissible during this narrow rehearing window, then certainly argument that is "new"—from

[3] R. 187-197.

the perspective of the record[4]—preserves an issue for appeal. Here, the trial court abused its discretion in denying the Motion for Rehearing in the face of strong legal arguments demonstrating that its decision did not meet the stringent evidentiary or legal standards for summarily adjudicating the case without trial.[5] *Brander*, 78 So. 3d at 102 (reversing because court abused discretion by not granting rehearing); *Fernandes v. Boisvert*, 659 So. 2d 412, 413 (Fla. 2d DCA 1995)(trial court abused its discretion "in refusing to rescue [the appellant] from the apparent incompetence of her lawyer"[6] by granting a 1.530 rehearing).

This Court should not rely on *Best v. Educ. Affiliates, Inc*., 82 So. 3d 143, 146 (Fla. 4th DCA 2012) to find otherwise. In *Best*, the court concluded that the error had not been preserved for appeal for a number of reasons, one of which was that the issue had not been raised until the motion for rehearing. First, this case is distinguishable from *Best* because the error is evident in the record even without

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[4] The BANK argues (Answer Brief, p. 3) that the timeliness issue was not raised earlier, but the record does not show either way whether the issue was raised at the summary judgment hearing. All that is certain is that the issue was clearly raised before the trial court in the Rule 1.530 motion.

[5] R. 211 (Order Denying Rule 1.530 Motion for Rehearing). Although the trial court stated that the motion was "DENIED on its merits," the written ruling appears to deny the motion due to the alleged failure to provide the trial judge with a courtesy copy of the Motion for Rehearing. *See* R. 211-212.

[6] Notably, the [redacted] retained new counsel for the motion for rehearing. R. 198-200 (Notice of Appearance made after final judgment of foreclosure).

the need for a Rule 1.530 motion. Here, the post-judgment motion gave the trial court one last chance to correct error already apparent in the record. It would turn the policy behind preservation of error on its head to construe such a motion as somehow waiving the error.

Second, the *Best* decision should not be applied here because it is built upon a faulty line of cases that contradict the proper rule of preservation: that an issue is preserved if raised before the trial court, even if on a motion for rehearing. Without analysis, *Best* cites *Trinchitella v. D.R.F., Inc.*, 584 So.2d 35 (Fla. 4th DCA 1991) for its waiver proposition, which in turn cites *School Board of Pinellas County v. Pinellas County Commission*, 404 So.2d 1178 (Fla. 2d DCA 1981), again without analysis.

But *School Board of Pinellas County* relies on two cases that simply do not stand for the proposition that an issue raised cannot be raised before the trial court for the first time on a Rule 1.530 motion. The first case, *Lipe v. City of Miami*, 141 So. 2d 738, 743 (Fla. 1962) merely states the long-standing rule that "[m]atters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by [the Supreme] court on appeal." *Id.* There is no mention of the appellant having raised the issue on rehearing before the trial court.

The second case, *Buchanan v. Gulf Life Ins. Co.*, 286 So. 2d 223, 224 (Fla. 1st DCA 1973), considered the substance of the issues raised for the first time before the trial court on a motion for rehearing. And although the court ultimately declared them "a day late and a dollar short," it did so because it proposed theories of recovery that were not only new, but contradicted the allegations of the complaint.

The proper standard, as articulated by the Florida Supreme Court in *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985), *Lipe v. City of Miami*, 141 So. 2d 738, 743 (Fla. 1962), and countless other cases, is that an issue is preserved for appellate review if first presented to the trial court. The district courts of appeal have repeatedly recognized this basic tenet of appellate review and found an issue preserved when raised for the first time on a Rule 1.530 motion. *See, e.g*, *Brander v. Stoddard*, 78 So. 3d 101, 103 (Fla. 4th DCA 2012)(setting out proper standard for reviewing for denial of Rule 1.530 motion); *Simmons v. Simmons*, 979 So. 2d 1063, 1064 (Fla. 1st DCA 2008) (issue must be presented to trial court at least in a motion for rehearing to be preserved); *AC Holdings 2006, Inc. v. McCarty*, 985 So. 2d 1123, 1126 (Fla. 3d DCA 2008)(same). This Court is bound by Supreme Court precedent and should likewise find the issues preserved here.

The BANK, at page 9 of the Answer Brief, also incorrectly relies upon case law explaining that a party cannot raise an issue for the first time on an appellate motion for rehearing. *See, e.g., Sherwood v. State,* 111 So. 2d 96, 97 (Fla. 3d DCA 1959)(denying appellate motion for rehearing for failing to raise issue in merits briefs). But the appellate rule for rehearing serves a different purpose than the trial court motion for rehearing, and cases interpreting the appellate rule are inapposite. *Fitchner v. Lifesouth Cmty. Blood Centers, Inc*., 88 So. 3d 269, 278 (Fla. 1st DCA 2012) (reversing based on argument raised in a Rule 1.530 motion and explaining that "the standard to be applied in trial courts is much broader than the one that applies on appeal").

II. The Answer Properly Placed Standing at Issue, and the BANK Failed to Meet Its Heavy Burden to Prove Its Standing and the Authenticity of the Notes.

A. Once properly denied, the BANK bears the burden of proving standing at every stage of the case.

The BANK attempts to excuse its failure to disprove all defenses by arguing that the [redacted] failed to preserve the issue of "standing at inception."[7] The thrust of the argument appears to be that a four-paragraph affirmative defense challenging "standing" (and detailing the conflict on the face of the allonges) is

[7] Answer Brief, p. 10.

somehow insufficient to require the BANK to prove it had standing when it filed the case. The moment prior to filing, however, is merely a point at which standing is measured. *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011) (a party must have standing both at time of filing and at time of judgment). Adding the words "at inception" to "standing," does not make it a separate issue that must be separately challenged in an affirmative defense.

In any event, where, as here, the Answer denies the plaintiff's claim that it "is the current owner of or has the right to enforce the Note and Mortgage,"[8] the burden is on the BANK to prove this fact as part of its *prima facie* case, not on the defendant to disprove it. *Lizio v. McCullom*, 36 So. 3d 927, 929 (Fla. 4th DCA 2010) ("Where the defendant denies that the party seeking foreclosure has an ownership interest in the mortgage, the issue of ownership becomes an issue the plaintiff must prove."); *see also Lindsey v. Wells Fargo Bank, N.A.*, No. 1D12-2406, 2013 WL 692825 at n. 1 (Fla. 1st DCA Feb. 27, 2013) (rejecting waiver

[8] R. 2 at ¶ 6 (Complaint); R. 61 at ¶ 6 (Amended Answer) ("the material allegations are expressly, directly, and explicitly denied and strict proof is demanded thereon."); R. 64 ¶ 5 (Second Affirmative Defense arguing the BANK did not have possession of the Note). The [redacted] do not concede that the BANK filed the "original" note as contended in the Answer Brief at p. 2.

argument because issue of ownership of the loan is part of the Plaintiff's *prima facie* case).

The BANK mischaracterizes the [redacted] argument about the endorsements as one merely about the timing of their first appearance in the case. It attacks this straw man by repeatedly stressing that the copy of the Note attached to the Complaint already included the challenged endorsements. In reality, the [redacted] point—which was secondary to its challenge to the authority and authenticity of the endorsements themselves—was that undated copies of documents do not establish when a transfer of the original occurred. Even if the endorsements are genuine, the BANK still did not become the "holder" until a physical transfer of possession of the actual bearer instrument (as opposed to a copy) took place.

The BANK itself recognized this deficiency below when it decided to provide another affidavit addressing standing—but the affidavit was four times more tardy than the proverbial "day late and a dollar short." And in any event, the Late Affidavit did not bridge the evidentiary gap, because it does not address the

challenge to the authority of the alleged endorser, nor does it even state that it "was" in possession of the note at the time the complaint was filed.[9]

B. The law required the BANK to prove the person who signed the allonges had the authority to do so.

1. Self-authentication of commercial paper is limited to signatures.

In their Initial Brief, the showed that their affirmative defense had sufficiently challenged the authority by which the endorsements were made,[10] and that the BANK made no attempt to provide evidence to disprove that defense as required.[11] *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009) (plaintiff must refute all affirmative defenses to obtain summary judgment). The also pointed out that the BANK could not rely upon a presumption of authenticity. *Ederer v. Fisher*, 183 So. 2d 39, 41 (Fla. 2d DCA 1965) (plaintiff must prove validity of endorsements); § 90.902(8), Fla. Stat. (2012) (self-authentication of commercial paper limited to that provided in the UCC); § 673.3081, Fla. Stat. Ann. (2012) (the "proof of signatures" provision of the UCC).

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[9] R. 129 (late affidavit) at ¶ 6.

[10] R. 63-64 (Affirmative Defense denying the authority of the signatures on the allonges).

[11] R. 128-129 (Affidavit in Response to Affirmative Defenses).

The BANK responds that nothing in the language of the evidence code (§ 90.902(8)) "limits self-authentication to signatures only."[12] Apparently, the BANK would have this Court overlook the most critical phrase in that statute which limits such self-authentication "to the extent provided in the Uniform Commercial Code"; § 90.902(8), Fla. Stat. (2012).[13] The only applicable UCC provision identified by the BANK is § 673.3081, the text of which—and even the title—speaks only about the authentication of signatures.

2. Under the UCC, once authenticity is challenged in the pleadings, the burden of establishing validity is on the party claiming validity.

Here, the BANK has not disputed that the [redacted] pleadings specifically denied the authenticity of, and authority to make, the endorsements. Therefore, under the UCC (§ 673.3081), the [redacted] cannot be deemed to have admitted the authenticity of the endorsements—a fact the BANK does not appear to dispute—and the burden shifts back to the BANK to prove up the endorsements. The only issue is whether a rebuttable presumption of validity should arise and whether it is rebutted by the contradiction apparent on the face of the allonges. § 673.3081, Fla. Stat. Ann. (2012).

[12] Answer Brief, p. 8.

[13] Answer Brief, pp. 12-13.

3. The rebuttable presumption arises only when the signature is that of the party whose liability is sought under the instrument.

The BANK has not disputed that *Ederer v. Fisher* states that there is no presumption of authenticity for a challenged endorsement signature. Indeed, the BANK chose not to address *Ederer* at all in its Brief. Instead, the BANK asks this Court to interpret § 673.3081 to provide a presumption that would be in derogation of the *Ederer* rule.[14]

To reach that result, this Court would have to conclude that § 673.3081 displaces the common law rule stated in *Ederer* due to an actual conflict. § 671.103, Fla. Stat. (1997); *Burtman v. Technical Chemicals & Products, Inc.*, 724 So. 2d 672, 676 (Fla. 4th DCA 1999) ("Unless displaced by the particular provisions of this code, the principles of law and equity ... shall supplement its provisions."). To find actual conflict, the Court would have to interpret § 673.3081 in a way that clashes with the overall statutory scheme of the UCC and the Official Comment to § 673.3081[15]—both of which suggest it applies only to

[14] Answer Brief, p. 14.

[15] This Court regularly relies upon the Official Comments when interpreting UCC provisions. *See, e.g., Southwest Florida Prod. Credit Ass'n v. Schirow*, 388 So. 2d 338, 339 (Fla. 4th DCA 1980) (relying on official comment to UCC in interpreting a UCC provision); *Oppenheim v. Jules Jergensen Corp.*, 385 So. 2d 1078, 1079

the signature of the party liable under the instrument (the "maker"), not an endorser.

First, Section 3-308, codified as § 673.3081, Fla. Stat., is found in Part III of the chapter on negotiable instruments, entitled "Enforcement of Instruments," and not in Part II, entitled "Negotiation, Transfer, and Indorsement." Compare Ch. 673, Part II *with* Ch. 673, Part III. Thus, § 673.3081 is purposely found in the Part of the UCC focused on the enforcement of the original instrument against the maker, not on negotiation of the instrument.

Second, the Official Commentary to § 673.3081 explains the rationale for the presumption is that "any evidence [of a forgery] is within the control of, or more accessible to, the defendant." § 673.3081, Fla. Stat. Ann. (2012).[16] This rationale makes no sense if it applied to the signatures of endorsers where it is the "plaintiff" or BANK that controls the evidence, not the "defendant" maker.

(Fla. 4th DCA 1980) (finding that the "official comments to the [UCC] make clear" the court's interpretation of the statute).

[16] The UCC Comment states but one other rationale: that "in ordinary experience forged or unauthorized signatures are very uncommon." This rationale is also inapplicable in modern foreclosure cases. *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) ("many, many mortgage foreclosures appear tainted with suspect documents"); *In re Amends. to the Fla. Rules of Civ. Pro.*, 44 So.3d 555, 556 (Fla. 2010) (enacting rule requiring verification of foreclosure complaints to address the problem of plaintiffs failing to properly investigate their claims).

Interpreting § 673.3081 so that it comports with the drafters' intent also harmonizes the statute with clear, unambiguous common law. This Court should not adopt an interpretation that conflicts with *Ederer*—and for which the BANK has offered no rationale—just to provide the BANK a shortcut in this case.

III. The Interest Awarded in the Final Judgment Is Not Supported by the BANK's Summary Judgment Evidence.

A. The BANK does not deny that the interest calculation is incorrect.

The BANK all but admits that the interest calculation does, indeed, "def[y] simple arithmetic." *Spencer v. EMC Mortg. Corp*., 97 So. 3d 257, 259 (Fla. 3d DCA 2012). The error was timely raised by the timely motion for rehearing[17] and now requires that the judgment be reversed.

B. Attempting to affirm aspects of the judgment never argued—particularly in the presence of demonstrated error—is an impermissible "end run" around the law of the case doctrine.

Finally, the Court should definitively reject the BANK's suggestion that it merely fix the math and otherwise affirm. Where, as here, the summary judgment evidence contains statements that are demonstratively false or incorrect, the Court cannot assume that the other statements made in the affidavits are truthful and accurate. Nor should it require an appellant to raise every possible error (rather

[17] R. 192-193.

than focusing on that which most easily articulated or demonstrated) for fear that the Court will presume that the appellant consented to all other errors.

To do as the BANK suggests, is to bind the trial judge to its original ruling in all respects except that which was the subject of the appellate court's review and ruling. The effect is to impermissibly extend the "law of the case" doctrine to issues that were never argued before the appellate court. The trial court, however, must be given the freedom to reconsider any part of the ruling not decided by this Court. *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001) (law of the case "bars consideration only of those legal issues that were actually considered and decided in a former appeal").

CONCLUSION

For all of these reasons set forth in the Initial Brief and this Reply, the final judgment should be REVERSED.

Dated: March 11, 2013

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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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this March 11, 2013 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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