In the District Court of Appeal
Fifth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

BAYVIEW LOAN SERVICING, LLC, et al.,

Appellees.

ON APPEAL FROM THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

Counsel for Appellants
1015 N. State Road 7, Suite C
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

TABLE OF AUTHORITIES
(continued)

Statutes

Rules

TABLE OF AUTHORITIES
(continued)

Other Authorities

Key to abbreviations:

The conventions used in the Initial Brief will be continued here:

- The appellants and defendants below, [redacted] and [redacted] will be referred to as "the Homeowners."
- Bayview Loan Servicing, LLC. will be "Bayview" or "the Bank."
- SunTrust Bank will be "SunTrust."
- Mortgage Electronic Registration Systems, Inc. will be "MERS."
- The Uniform Commercial Code will be "UCC."
- The Record on appeal will be "R. __."
- Transcript of Trial Before the Honorable Raul Zambrano, December 30, 2013 (R. 436) will be "T. __."

SUMMARY OF THE REPLY ARGUMENT

The judgment holder, Bayview, has conceded that it did not own the Note at the time of judgment and has made no argument that it was an Article 3 holder of the Note at that time. Instead, it claims that its status as a "servicer" is sufficient to grant it standing. A servicer, however, cannot be a real party in interest without joining its principal or proving that its principal had authorized the action. Nor can it rely on SunTrust's prior standing—assuming it ever had standing—or on claims made by the Bank's lawyers in the unverified motion to substitute the Plaintiff.

The Bank also concedes that the original Plaintiff, SunTrust, was not an owner or holder of the Note, but instead argues that it should be deemed to have standing under a theory never pled and never tried by consent—that it was a nonholder in possession. In arguing this, it avoids any discussion of the requirement under the UCC that the assignor, MERS, be a holder of the Note. The Bank also asks this Court to treat the fact that its witness was capable of reading aloud from the MERS assignment to SunTrust as evidence that would resolve the conflict on the face of that assignment. In reality, the Bank brought no evidence as to whether the transfer occurred before or after SunTrust filed the Complaint.

Lastly, the Homeowners preserved the objection to the Fla. R. Civ. P. 1.440 violation which was necessitated by a crucial, substantive change to the pleadings.

ARGUMENT

I. There was no evidence of the Bank's standing.

A. The evidence conclusively proved that Bayview was not the owner or holder of the note at the time of judgment.

1. Bayview has conceded it did not own the note at the time of trial.

The Bank appears to concede that the assignment of mortgage from SunTrust to Bayview attempted to transfer the mortgage without the note and was, therefore, insufficient to convey standing.[1] *See also Bristol v. Wells Fargo Bank, Nat. Ass'n*, 137 So. 3d 1130, 1133 (Fla. 4th DCA 2014) (an assignment of mortgage only transferring the mortgage does not convey standing to enforce a promissory note); *Pennington v. Ocwen Loan Servicing, LLC*, 1D13-3072, 2014 WL 5740990 (Fla. 1st DCA November 6, 2014) (as in this case, plaintiff bank's own witness admitted that mortgage assignment to bank failed to transfer note, which deprived bank of standing at the time of judgment). Indeed, the Bank expressly abandons the theory that its standing was based on ownership of the Note by arguing that "it is irrelevant whether Bayview owns the note."[2]

---

[1] Answer Brief, p. 20

[2] Answer Brief, p. 20. It also appears to have abandoned its argument at trial that the court made a factual determination that Bayview had standing when it granted the motion to substitute Bayview as the party plaintiff.

2. Without evidence that the owner authorized the action, the fact that Bayview was an agent (a "servicer") is insufficient to establish standing.

The only other basis that it ever pled for standing was that it was a holder of the Note.[3] On appeal, however, it argues that its standing was based upon being a servicer[4] (which would not make it an Article 3 holder even if the Note had been endorsed[5]). While a servicer can be a real party in interest, it is required to either join its principal in the lawsuit or prove that the principal had authorized its action. *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14, 17 (Fla. 4th DCA 2012) ("In securitization cases, a servicer may be considered a party in

[3] Complaint, ¶ 3 (R. 6).

[4] Answer Brief, p. 20.

[5] Under Article 3 of the Uniform Commercial Code ("UCC") a servicer which is acting solely as an agent is not a "holder" of the Note. This is because, when an agent is in the possession of an instrument on behalf of its principal, the UCC considers the principal to be the holder. The Comment to § 3-201 of the UCC explicitly acknowledges that possession may be effected constructively through an agent. § 673.2011, Fla. Stat. Ann. ("Negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent.) (emphasis added). *See also, Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (the UCC "sensibly recognizes that a party has constructive possession of a negotiable instrument when it is held by the party's agent…or when the party otherwise can obtain the instrument on demand" [internal citations omitted]); *In re Phillips*, 491 B.R. 255, 263 (Bankr. D. Nev. 2013) ("Thus, a person is a "holder" of a negotiable instrument when it is in the physical possession of his or her agent;" *quoting*, Lary Lawrence, *Lawrence's Anderson on the Uniform Commercial Code § 1–201:265* (3d ed. 2012)).

interest to commence legal action **as long as the trustee joins or ratifies its action."** [emphasis original]). Here, the Bank did neither.

Notably, the Bank cites one federal case which simply held that a servicer has standing to file a bankruptcy claim when it proved, not only that it was authorized to assert the claim of its principal, but was obligated to do so. *Greer v. O'Dell*, 305 F.3d 1297, 1303 (11th Cir. 2002). The Bank also cites one Florida case in which the plaintiff was identified as a servicer, but the issue of its standing is not discussed in the opinion.[6]

3. Bayview was required to establish that it had standing in its own right as of the time of judgment.

Next, the Bank suggests that merely being substituted for a party that had standing is alone sufficient to establish Bayview's standing. First, Bayview was substituted for SunTrust which did not have standing. Second, nothing in the single case cited by the Bank suggests that a substitute plaintiff need not establish its own standing.[7] Fla. R. Civ. P. 1.260(c) gives the court the option of allowing a plaintiff which has transferred its interest to continue the case in its own name. *See C.A. Leasing Serv. Corp. v. Zorn's (Howard) Equip. Serv., Inc.*, 565 So. 2d 744,

[6] *Walker v. Midland Mortg. Co.*, 935 So. 2d 519 (Fla. 3d DCA 2006) cited at Answer Brief, p. 20.

[7] *Lewis v. J.P. Morgan Chase Bank*, 138 So. 3d 1212 (Fla. 4th DCA 2014) cited at Answer Brief, p. 20.

746 (Fla. 5th DCA 1990) ("Clearly, unless the court orders substitution of parties, an action may be maintained by the original party to the action." [emphasis added]). It does not give the transferor or the purported transferee the option of pretending the original plaintiff never divested itself of its interest in the action. *See Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 554 (Fla. 5th DCA 2012) (disapproving of bank's prosecution of case in its own name by either concealing a transfer or backdating an assignment).

Stated differently, because a foreclosure plaintiff must show standing as of the time judgment is entered as well as at the time of filing (*Beaumont*, at 555), the original plaintiff (SunTrust) cannot pretend at trial that that it still has rights that it transferred away without committing a fraud on the court. Thus, even if the court opted to have SunTrust continue the action, SunTrust would have had to prove up the transfer and its authorization to represent the real owner of the interest.

4. What Bayview's lawyers say is not evidence.

Lastly, the Bank claims that "the record suggests an equitable transfer of the note from SunTrust Bank to Bayview" because its lawyers—in the Motion for Substitution of Parties—claimed that SunTrust had such an intent.[8] What attorneys say, however, is not evidence. *Cemex Const. Materials v. Ross*, 102 So. 3d 701,

[8] Answer Brief, p. 21.

702 (Fla. 5th DCA 2012) ("unsworn representations by counsel about factual matters may not serve as the basis for a trial court's factual determination"); *see also Lazcar Int'l, Inc. v. Caraballo,* 957 So.2d 1191, 1192 (Fla. 3d DCA 2007) ("Unsworn argument of counsel is insufficient to satisfy the due diligence requirement of a motion to vacate a default final judgment."); *State v. Bauman,* 425 So.2d 32, 35 n. 3 (Fla. 4th DCA 1982) ("Facts are established by testimony, affidavits and stipulations. It is of no moment in establishing facts that attorneys are 'officers of the court' as we so often read when an unsworn representation is made."). The Bank neither verified nor swore to any of the information in the motion. Nor did the Homeowners stipulate to it.

Accordingly, there was no evidence that Bayview had standing at the time that the court entered judgment.

B. There was no evidence that SunTrust was the owner or holder of the note when it filed the case.

1. SunTrust was not the holder or owner of the Note.

On appeal, the Bank has conceded that SunTrust was neither an owner nor Article 3 holder of the Note.[9] The Bank urges this court to ignore the fact that the only basis for standing that it pled was as owner and holder, because its pleadings

[9] Answer Brief, p. 15. ("SunTrust Bank was a nonholder in possession of the note…"); p. 16 ("It is immaterial whether SunTrust Bank proved it was the owner or holder of the note.")

are "inconsequential."[10] It argues that the pleadings could have been conformed to the evidence, but offers no record citation as to where it requested this relief or where the trial court granted such relief. It provides no citation to the record showing that the Homeowners expressly or impliedly consented to the trial of the Bank's new theory of standing—that it was a "nonholder in possession." It cites no case for the proposition that an appellate court can reform its pleadings.

The Court should resoundingly reject the notion that it matters not what a party pleads—that trials are a free-for-all that have nothing to do with the pleadings and that ambush litigation should be adopted as a desirable feature of the adjudicative process.

2. SunTrust was not a "nonholder in possession of the instrument who has all the rights of a holder."

The Bank relies entirely on the argument that MERS could convey the right to foreclose to SunTrust (as a "nonholder in possession") even if MERS was not in possession of the Note and even if its principal was not in possession of the Note. The Bank does not attempt to dispute, or even address, the Uniform Commercial Code Comment to §3-203 UCC (§673.2031, Fla. Stat. Ann.) that states that one cannot become a nonholder in possession unless the transferor is a holder at the time of transfer. Instead, it relies entirely upon this court's decision *Taylor v.*

[10] Answer Brief, p. 16.

Deutsche Bank Nat. Trust Co., 44 So. 3d 618 (Fla. 5th DCA 2010) even though it did not decide the issue—it did not speak to the requirement that MERS be a holder.

Nor does the Bank address the language of the mortgage which, on its face, limits MERS' rights to the exercise of lien interests, which it cannot do without an concomitant interest in the Note.[11] Instead, it sweeps these written requirements away as an "unpersuasive[] attempt to parse the language in the mortgage…" and again argues that *Taylor* somehow decided this issue, even though it was never raised or discussed in that case.[12]

The Bank also cites to a federal trial judge who based his ruling on *Taylor*.[13] In that case, the court quotes the mortgage language from *Taylor* but omits the antecedent to the word "those":

> MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but if necessary to comply with law or custom,
>
> Borrower understands and agrees that … MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of

[11] Initial Brief, p. 22.

[12] Answer Brief, p. 17.

[13] *Lane v. Mortgage Elec. Registration Sys., Inc.*, 2014 WL 129071, at *1 (M.D. Fla. 2014), cited at Answer Brief, p. 18.

> Lender including, but not limited to, releasing and canceling this Security Instrument.

Lane v. Mortgage Elec. Registration Sys., Inc., 2014 WL 129071, at *2. Thus, the court omitted the exact language upon which the Homeowners rely. In doing so, it aptly emphasizes that the provision is nonsensical without knowing what interests "those" refers to. Stated differently, it demonstrates that one cannot conclude that MERS was granted the power to transfer a right to foreclose—even when it is not an Article 3 holder—without ignoring those particular words.

The Homeowners also pointed out the that plain language of the mortgage requires MERS to be compelled by law, not merely permitted by law, to take action for the benefit of the note holder before it may do so (language also omitted by the judge in *Lane*).[14] The Bank answers that this requirement is satisfied because the law requires SunTrust to have standing to commence the action.[15] This, however, is a legal requirement for SunTrust, not MERS. SunTrust can satisfy its obligation to have standing in a multitude of ways that do not involve MERS.

[14] Initial Brief, p. 22.

[15] Answer Brief, p. 17.

3. Even if SunTrust acquired the right to enforce the Note by way of the assignment, there was no evidence that it acquired the right before filing the case.

The Bank claims that its witness Mr. Carlo "confirmed" the assignment's effective date.[16] However, all Mr. Carlo actually did was read a document already in evidence to the Court. He was not able to offer any actual information regarding the effective date:

> Q**:** Does it (Assignment of Mortgage) have an effective date of the transfer on it?
>
> Mr. Brotman: Objection, your honor. The document speaks for itself, lack of foundation, hearsay.
>
> The Court: Overruled, but he is just reading the document. I mean, I can read.
>
> Mr. Perez: I'm anticipating an argument from opposing counsel at mid trial based on the dates of this document. I'm just trying to make everything very clear for the Court at this point so I don't have to rehash it at mid trial.
>
> The Court: Overruled.
>
> The Witness: The date is - - the effective date is July 27, 2014.[17]

Despite overruling the objection, the trial judge himself recognized that the witness was merely reading from the document and not providing anything further

[16] Answer Brief, p. 6.

[17] T. 41-42.

than what could be simply gleaned from the document itself. This is further exemplified by the answers provided by the same witness on cross examination:

> Q: So you don't know if July 27 was a date chosen because that's when transfer occurred or if it was just chosen because that's prior to the complaint being filed, do you?
>
> A: I do not.[18]

Thus, Mr. Carlo was unable to offer anything by way of confirmation or supplementation to confirm when a transfer of interest even took place. The Bank, therefore, brought no evidence to clarify the ambiguity inherent in the assignment.

II. The trial court erred in trying the case before it was at issue.

A. The violation of Rule 1.440 was not "technical" and was not waived by the Homeowner.

The Bank further argues that a mere technical violation of Rule 1.440 should be disregarded by the Court if there is no prejudice. Prejudice is not a prerequisite to the following of 1.440 and the "[f]ailure to adhere strictly to the mandates of Rule 1.440 is reversible error." *Tucker v. Bank of New York Mellon*, 3D13-2258, 2014 WL 1491630 (Fla. 3d DCA 2014).

The Bank cites to *Bennett v. Ward*, 667 So. 2d 378, 380 (Fla. 1st DCA. 1995) for the proposition that prejudice to the parties should dictate whether the trial court must abide by Rule 1.440. However, the court in *Bennett* ruled that the

[18] T. 87.

lack of notice under Rule 1.440 had been waived—both at trial and on appeal. *Id*. at 380. In fact, the court concluded that "that those present agreed that no evidentiary hearing or trial was needed, not that fact finding should proceed despite defective notice." *Id*.

In the Bank's second case on the prejudice issue, *Alfonso v. Alfonso*, 823 So. 2d 261, 263 (Fla. 3rd DCA 2002), also turned on a waiver, finding that the appellant, who had been incarcerated at the time of a final hearing, had never requested an opportunity to appear in person or telephonically. *Id*. at 262. And although the court also found that the procedural irregularity caused no "prejudicial error," it was because the trial judge merely granted the relief (dissolution of a marriage) that the appellant had himself requested. Here, the trial did not grant the relief requested by the Homeowner—dismissal of the foreclosure action.

The Bank also cites to *Labor Ready Se. Inc. v. Australian Warehouses Condo. Ass'n*, 962 So. 2d 1053 (Fla. 4th DCA 2007)—yet another case that was decided on the basis of a waiver (finding that "neither the owner nor the tenant filed an objection, sought additional discovery, or requested the court to reconsider or continue the …final hearing date [, a]ll parties fully participated in the hearing without objection [and] no one argued they were not ready for trial…" *Id*. at 1055). To the extent that the court, in *dicta*, commented that a technical violation of Rule

1.440 that does not prejudice a party's trial preparation is not grounds for reversal, it did so because the court found it important that the case had been at issue for more than three years before a "technical amendment" reopened the pleadings. *Id*. 1054-1055. The amendment here changed the party plaintiff, and contrary to the Bank's claim in its brief,[19] the amendment was a crucial, substantive change to its claim of standing—a hotly contested issue that was central to the trial and this appeal.

Similarly, the court in *Davis v. Hagin*, 330 So. 2d 42 (Fla. 1st DCA 1976) found that the appellant's objection to receiving less than thirty days' notice for trial was "tardy." *Id*. Here, the Homeowners objected immediately and continuously.

The Bank attempts to muddy the waters by characterizing the Homeowners' objection to the continuance as a waiver of the Rule 1.440 violation.[20] In reality, the Homeowners objected to the continuance <u>if it were coupled with a substitution of the Plaintiff</u>.[21] It is unmistakable that the Homeowners recognized that they suffered far greater prejudice in proceeding to trial in less than thirty days with a new Plaintiff (which had never been the subject of discovery), than they would by

[19] Answer Brief, p. 12.

[20] Answer Brief, p. 26-27.

[21] R. 678-679.

merely proceeding to trial immediately with the old Plaintiff (even though that too, was in contravention of Rule 1.440). Had the court chosen to proceed immediately to trial, an argument that the Homeowners waived the initial procedural defect might have been well-taken. But given that the trial court chose the more prejudicial option over the Homeowners' objection, it is disingenuous for the Bank to argue that the Homeowners somehow consented to the Rule 1.440 violation.

In summary, the Bank has cited no case for its proposition that strict compliance with Rule 1.440 is unnecessary that did not involve a waiver or a lack of due diligence in raising the issue. Nor did it cite a case involving a last minute change to the pleadings so fundamental and so sweeping as switching the very party bringing the claim.

B. The Homeowners had not answered the amended complaint.

The Bank argues that the Homeowners had no right to file an answer to a non-existent amended complaint.[22] However, this conveniently ignores the court order that allowed for that very thing.[23] The substitution of a party plaintiff was a *de facto* amendment to the pleadings that completely altered the standing issues to be proven in this matter. With or without the court order, the Homeowners were

[22] The Bank's Answer Brief, p. 12.

[23] Order on Plaintiff's Motion to Substitute Party Plaintiff, December 10, 2013. (R. 347-349).

entitled to amend their response (and conduct discovery) to address the change in the Plaintiff. The court granted the Homeowners the right to amend their pleading and that it exactly what was done.

CONCLUSION

This Court should reverse and remand for entry of judgment in favor of the Homeowners on the grounds that the Bank adduced no evidence that it had standing prior to filing its case or at the time of trial. If the Court should find such evidence, it should reverse for a new trial.

Dated: November 24, 2014

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
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 certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
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 AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this November 24, 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. I also certify that this brief has been electronically filed this November 24, 2014.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
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

Nancy M. Wallace
William P. Heller
Michael J. Larson
AKERMAN SENTERFIT
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
nancy.wallace@akerman.com
michael.larson@akerman.com
elisa.miller@akerman.com
michele.rowe@akerman.com
william.heller@akerman.com
lorraine.corsaro@akerman.com
Appellee's Counsel