In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

J.P. MORGAN MORTGAGE ACQUISITION CORP.,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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KEY:

The following abbreviations are used in this Brief:

- "R." refers to the Record on Appeal.
- "Supp. R." refers to the Supplement to the Record filed with this Brief.
- "T. 11/17/11" refers to the transcript of the hearing held November 17, 2011.
- "T. 11/7/12" refers to the transcript of the hearing held November 7, 2012.
- "The BANK" refers to Plaintiff, J.P. Morgan Mortgage Acquisition Corp.
- "The refers to Defendants, and

STATEMENT OF THE CASE AND FACTS

I. Introduction

This appeal arises from the trial court's entry of summary final judgment against the in a mortgage foreclosure case initiated by the BANK on April 16, 2009.[1]

II. Appellants' Statement of the Facts

The BANK's Complaint alleged that Plaintiff, J.P. Morgan Mortgage Acquisition Corp., was the "legal and/or equitable owner and holder of the Note and Mortgage and has the right to enforce the loan documents."[2]

[1] R. 6-37.

The two-count Complaint sought foreclosure of a mortgage in Count I, and reestablishment of a lost note in Count II, which included the specific allegation that "Plaintiff is not in possession of the subject Promissory Note and Plaintiff cannot reasonably obtain possession of said Note because it is lost, stolen, or destroyed."[3]

The Mortgage attached to the Complaint identified "BankUnited, FSB" as Lender, with "MERS" identified as the nominee for Lender and Lender's successors and assigns.[4] There were two copies of a Note attached to the Complaint, which likewise identified BankUnited, FSB as Lender.[5]

The first page of the first copy of the Note attached to the Complaint was stamped "CERTIFIED TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL" at the top, and "ORIGINAL NOTE IN SECONDARY MARKETING" on the bottom.[6] This copy did not include any endorsements.

The second copy of the Note did not have these same stamped notations, but did appear to include an endorsement on the last page:

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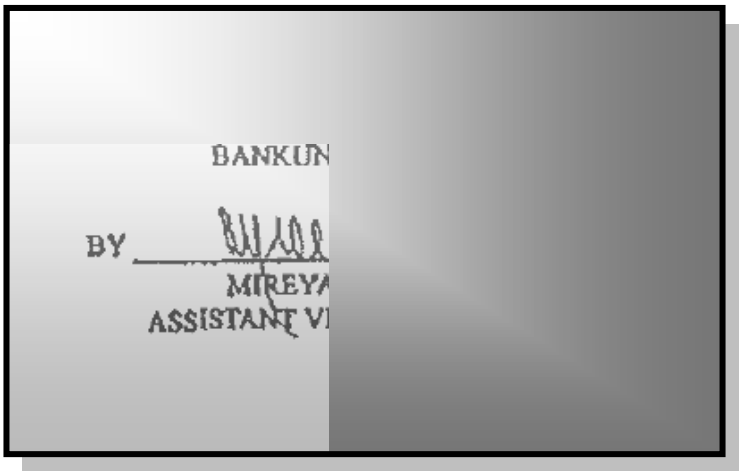
[2] R. 7.

[3] R. 8, 9.

[4] R. 11.

[5] R. 28, 33.

[6] R. 28.



The endorsement in blank was purportedly signed by a Mireya Foster, as Assistant Vice President.[7]

The [redacted] filed a Motion to Dismiss the Complaint,[8] arguing in pertinent part that:

- The BANK was not the real party in interest because it appeared from the face of the documents attached to the Complaint that the BANK was not the true owner of the claim sued upon and was not the real party in interest.[9]

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[7] R. 33, 37.

[8] Supp. R. 1-8. The Motion to Dismiss was dated and served on July 13, 2009, but for unknown reasons is not included on the Clerk's docket or the Index to the Record on Appeal. It is undisputed, however, that the Motion was presented to the trial court for consideration, resulting in the Order Denying Defendant's Motion to Dismiss Complaint docketed on or about March 17, 2011, found at R. 189-190. The BANK also incorporated this Motion to Dismiss as Exhibit A to its Motion to Strike Affirmative Defenses, found at R. 246.

[9] *Id*. at 2-3.

- The BANK failed to join the mortgagee, MERS, as an indispensible party.[10]
- The BANK failed to attach copies of all of the instruments, including an assignment, in the alleged chain of title between itself and the original mortgagee.[11]
- The BANK did not have a cause of action for foreclosure of the Mortgage when it filed suit because the recorded Assignment of Mortgage to the BANK transferred ownership of the Mortgage on April 20, 2009, four days *after* the filing of the Complaint.[12]
- The BANK was not registered to do business in Florida and had not obtained a certificate of authority to access the Florida courts.[13]

About six months after filing suit, while the Motion to Dismiss was pending, the BANK served a Notice of Filing Original Note and Mortgage.[14]

In early 2010, the case was stayed by the filing of a Suggestion of Bankruptcy.[15] By March, 2011, the case was back before the trial court, which

[10] Supp. R. 3.

[11] *Id*.

[12] Supp. R. 4-5.

[13] Supp. R. 5-6.

[14] R. 97-120.

[15] R. 181.

entered its Order Denying Defendant's Motion to Dismiss Complaint on March 17, 2011.[16]

In July, 2011, the [redacted] filed their Answer and Affirmative Defenses,[17] reserving all evidentiary rights with respect to the copies of the Note and Mortgage, and specifically denying the allegation that the BANK held the Note.[18] The [redacted] also denied the validity of the signature on the purported endorsement by BankUnited, FSB.[19]

The [redacted] asserted nine affirmative defenses:

- First Affirmative Defense denied the authenticity of any document presented as the original promissory Note, and further denied the authenticity of any signatures, including any endorsement on the Note or assignment of the Mortgage.[20]
- Second Affirmative Defense disputed the BANK's status as the true owner of the claim sued upon or real party in interest, noting that the Complaint did not attach any documents that would establish a transfer of an interest in the Mortgage to the BANK.[21]

[16] R. 189-190.

[17] R. 198-212.

[18] R. 199.

[19] *Id*.

[20] R. 202.

[21] R. 202-203.

- Third Affirmative Defense noted the failure to join the named mortgagee, MERS, as an indispensible party.[22]
- Fourth Affirmative Defense asserted the BANK's failure to attach any instruments in the chain of title between it and the original mortgagee, noting that no Assignment of Mortgage was attached to the Complaint.[23]
- Fifth Affirmative Defense argued that because an Assignment of Mortgage did not exist until *after* the Complaint was filed, the BANK did not have a cause of action on the Mortgage when it filed suit.[24]
- Sixth Affirmative Defense argued that the BANK was barred from maintaining an action in Florida courts for failure to register with, or obtain a certificate of authority from, the Florida Department of State.[25]
- Seventh Affirmative Defense maintained that the BANK was not the holder of the Note because the Note was non-negotiable, referencing the various Florida statutes defining a negotiable instrument, and further detailing why the Note in this case failed to fit those definitions.[26]
- Eighth Affirmative Defense denied that the BANK performed all conditions precedent to filing suit, and specifically denied that the BANK sent the required notices under paragraph 22 of the Mortgage.[27]

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[22] R. 203-204.

[23] R. 204.

[24] R. 205.

[25] R. 205-206.

[26] R. 206-207.

[27] R. 208.

- Ninth Affirmative Defense asserted "unclean hands" on the part of the BANK, alleging that it failed to do its "due diligence" in ascertaining the true status of the Note before filing the Complaint. This affirmative defense also alleged facts which challenged the Assignment of the Mortgage as a fabrication and fraud.[28]

Nearly two years after filing the purported original Note, and after the [redacted] served their Answer and Affirmative Defenses, the BANK served a unilateral notice of dropping Count II (i.e., for reestablishment of a lost note) from the Complaint.[29]

The BANK then moved to strike the [redacted] affirmative defenses,[30] which was heard November 17, 2011.[31] The [redacted] had served a Memorandum in Opposition to the Motion to Strike on November 16, 2011, but the Memorandum was not docketed until November 18, 2011, one day after the hearing.[32]

The Judge at the hearing, Judge Alan Schwartz, abruptly ended the hearing before [redacted] counsel could complete his argument. He struck all nine of

[28] R. 208-210.

[29] R. 225-226.

[30] R. 233-335.

[31] R. 336-337.

[32] R. 339-348.

affirmative defenses as "insufficient."[33] Without elaborating as to whether they were stricken as factually or legally insufficient, the Order on the Motion to Strike simply states that "Defendants' Affirmative Defenses are hereby stricken without prejudice," and granted the thirty days in which to file amended Affirmative Defenses.[34]

The moved for reconsideration, based on the clear impression that the trial court had not considered their Memorandum in Opposition prior to the hearing, and once again refuted each of the arguments advanced by the BANK in the Motion to Strike.[35] The also asked for clarification as to whether

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[33] Supp. R. 9-15; T. 11/7/11, pages 3-6.

[34] R. 338. While the initial striking of the affirmative defenses is not a presented here as a grounds for reversal, it is the position that the ruling was clearly erroneous. *See Bay Colony Office Bldg. Joint Venture v. Wachovia Mortg. Co.*, 342 So. 2d 1005 (Fla. 4th DCA 1977); *see also Costa Bella Development Corp. v. Costa Development Corp.*, 445 So. 2d 1090 (Fla. 3 DCA 1984); *Van Valkenberg v. Chris Craft Industries, Inc.*, 252 So. 2d 280 (Fla. 4th DCA 1971). In the unlikely event that the BANK's Answer Brief is based upon the striking of the only two affirmative defenses that were not amended, it should be on notice that the intend to argue that the order was itself error, which will be more fully addressed, if necessary, in the Reply. Additionally, because Judge Alan Schwartz's ruling may become relevant to the appeal and because he continues to participate in this Court's appellate decisions, the would object to his doing so in this case.

[35] Supp. R. 16-26. The Motion for Reconsideration/Clarification is included in this Supplemental Record pursuant to the Clerk's notation in its Index to Record on

every defense was stricken and, if so, whether they were stricken as legally or factually insufficient.[36] The trial court denied the Motion for Reconsideration and declined to clarify its ruling striking all of the defenses.[37]

The served their Answer and Amended Affirmative Defenses,[38] amending the defenses to include more detailed factual allegations, as follows:

- Specifically identified the challenged signatures on the Note and Mortgage.[39]
- Detailed the significant differences between the two Notes attached to the Complaint (one copy certified to be a "true and correct copy of the original," but without any endorsement, and another copy without any certification, but including an endorsement).[40]
- Elaborated on the bifurcation of the Note and Mortgage, and the absence of the mortgagee, MERS, as a party to the foreclosure action, and further

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Appeal that the Motion could not be located within the Clerk's office. *See* Index to Record on Appeal (notation after November 23, 2011).

[36] Supp. R. 23-24.

[37] Supp. R. 34. The trial court's Order denying the Motion for Reconsideration/Clarification is dated January 9, 2012, but is not included in the Clerk's Index to Record on Appeal.

[38] R. 353-371.

[39] R. 357.

[40] R. 358.

raised an issue of fact as to the true identity of the investor for the subject Note.[41]

- Denied receipt of any notices of default required by the Note and Mortgage.[42]
- Provided an additional example of the BANK's unclean hands (i.e., submission of two copies of the purported original Note, with different stamps and markings).[43]

The remaining affirmative defenses were pled again in an abundance of caution to preserve them for appellate review.[44]

Without moving to strike the amended Affirmative Defenses, the BANK filed its Motion for Summary Judgment about eight months later.[45] In response to the Motion for Summary Judgment, the [redacted] served a Request for Production Regarding Indebtedness seeking, among other things, the documents reviewed or relied upon by Plaintiff's Affiant. In addition, Defendants sought the deposition of Plaintiff's Affiant.[46]

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[41] R. 359.

[42] R. 365.

[43] R. 367.

[44] R. 360-365.

[45] R. 372-488.

[46] R. 489-492; 494-497; 502-513.

The [redacted] also served a Motion for Summary Judgment, which focused on the BANK's lack of standing at the time the Complaint was filed, and its failure to perform all conditions precedent prior to filing suit (i.e., failure to prove that it provided notice to the [redacted] in the time and form required by paragraph 22 of the Mortgage).[47]

Shortly thereafter, the BANK served an Emergency Motion for Protective Order to prevent the depositions of four individuals noticed by the [redacted] for deposition.[48] The BANK also responded with Objections to the Requests for Production served by the [redacted][49]

The Motions for Summary Judgment and the Motion for Protective Order were all scheduled for hearing on November 7, 2012. By Order dated November 7, 2012, the trial court granted the BANK's Motion for Protective Order and denied the [redacted] Motion for Summary Judgment.[50] The trial court entered a Final Judgment of Foreclosure in favor of the BANK that same date.[51]

This appeal follows.

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[47] R. 514-561.

[48] R. 567-590.

[49] R. 593-602; 619-630.

[50] R. 644.

[51] R. 656.

SUMMARY OF THE ARGUMENT

The trial court's entry of summary judgment in favor of the BANK was error, based on the genuine issues of material fact unresolved in the record while discovery was still pending. These unresolved issues of fact included whether the BANK had standing to foreclose when it filed suit.

The trial court's protective order prohibiting crucial discovery, including depositions and requests for production regarding the very documents and affidavit testimony upon which the BANK's summary judgment motion was based, was also clear error. The trial court's error in this regard further precluded entry of summary judgment in favor of the BANK.

The summary judgment in favor of the BANK should be reversed.

STANDARD OF REVIEW

This Court reviews a trial court's entry of summary judgment *de novo*, and views the evidence in the light most favorable to the non-moving party. *Mechaia Investments, LLC v. Romano*, 56 So. 3d 107, 108 (Fla. 3d DCA 2011); *see also Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000) ("If the 'slightest doubt' exists, then summary judgment must be reversed.").

> The burden of the movant for summary judgment is not simply to show that the facts support its own theory of the case, but rather to demonstrate that the facts show that the party moved against cannot prevail. The moving party has the burden of conclusively showing the absence of genuine issues of material fact. If the existence of such issues or the possibility of their existence is reflected in the record, or the record raises even the slightest doubt in this respect the judgment must be reversed.

Florida E. Coast Ry. Co. v. Metro. Dade Cnty., 438 So. 2d 978, 980 (Fla. 3d DCA 1983) (internal citations omitted).

Whether the BANK had standing to maintain this foreclosure action is also reviewed *de novo*. *Dixon v. Express Equity Lending Group, LLLP*, 2013 WL 2420417 (Fla. 4th DCA June 5, 2013).

ARGUMENT

I. The Trial Court Erred in Granting Summary Judgment Because There Remained Genuine Issues of Material Fact as to the BANK's Standing

A. The BANK's standing when it filed the case was never conclusively established.

A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose at the inception of the case. *McLean v. JP Morgan Chase Bank, N.A.*, 79 So. 3d 170 (Fla. 4th DCA 2011). The [redacted] asserted throughout this case that the BANK lacked standing when it filed suit to foreclose. That issue alone should have prevented entry of summary judgment in favor of the BANK.

The [redacted] Answer specifically denied that the BANK was the "legal and/or equitable owner and holder of the Note and Mortgage and has the right to enforce the documents," thus shifting the burden to the BANK to establish that it owned and held the Note at the inception of the case in order to obtain summary judgment. *See Lindsey v. Wells Fargo Bank, N.A.*, 2013 WL 692825, n. 1 (Fla. 1st DCA February 27, 2013) (because defendant's answer denied the allegation in the complaint that the plaintiff owns and holds the note, plaintiff had the burden to establish that it was the owner and holder of the note in order to obtain summary judgment); *see also Cutler v. U.S. Bank National Association*, 109 So. 3d 224 (Fla.

2d DCA 2012) (where defendant's motion to dismiss argued that plaintiff U.S. Bank lacked standing because it did not hold the note when it initiated the foreclosure suit, the allegation was sufficient to bring the issue to the attention of the trial court, and "accordingly, a genuine issue of material fact remained as to whether U.S. Bank was the proper holder of the note at the time it initiated the foreclosure action.").

The [redacted] raised this standing issue before the trial court in any number of ways. As argued by the [redacted] in various filings, the BANK represented in a bankruptcy filing (through its servicer, EMC Mortgage Corporation) that both the subject Note and Mortgage were transferred to the BANK on April 20, 2009.[52] Given the fact that this foreclosure action was filed on April 16, 2009, four days earlier, there was clearly an issue of material fact as to the BANK's standing at the time the complaint was filed. *See Marianna & B.R. Co. v. Maund*, 62 Fla. 538 (Fla. 1911) ("plaintiff cannot supply the want of a valid claim at the commencement of the action by the acquisition or accrual of one during the pendency of the action."); *Stegemann v. Emery*, 146 So. 650 (Fla. 1933) ("suit may not be maintained upon an after-acquired right."); *McLean v. JP*

[52] R. 520-521. *See* EMC Mortgage Corporation's Motion for Relief from the Automatic Stay (¶ 6); *see also* Assignment of Mortgage, attached as Exhibit A to Motion to Dismiss at Supp R. 1-8.

Morgan Chase Bank, N.A., 79 So. 3d 170 (Fla. 4th DCA 2011) ("While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor of the plaintiff, this does not alter the rule that a party's standing is determined at the time the lawsuit was filed."). *See also*, *Saver v. JP Morgan Chase Bank*, 2013 WL 1979824 (Fla. 4th DCA May 15, 2013) (summary judgment reversed where issues of material fact remained regarding plaintiff's standing when it filed suit); *Gonzalez v. Deutsche Bank National Trust Company*, 95 So. 3d 251, 252 (Fla. 2d DCA 2012) (same).

Second, it is undisputed that the operative Assignment of Mortgage was dated after the Complaint was filed. Even if the BANK were to argue that the Assignment merely memorialized an earlier transfer (that was somehow never mentioned in the Assignment), an evidentiary hearing would be required to resolve what would then be a conflict on the face of the Assignment. *See WM Specialty Mortgage LLC v. Salomon*, 874 So. 2d 680 (Fla. 4th DCA 2004) ("An evidentiary hearing would have been the appropriate forum to resolve the conflict which was apparent on the face of the assignment …"); *Vidal v. Liquidation Properties Inc.*, 104 So. 3d 1274 (Fla. 4th DCA 2013) ("the trial court erred in ruling there was no issue of material fact regarding standing, as the record does not reflect as a matter of law that Liquidation had standing on the date the complaint was filed");

compare Stone v. BankUnited, 2013 WL 1845584 (Fla. 2d DCA May 3, 2013) (final judgment of foreclosure affirmed after evidentiary hearing adduced competent substantial evidence that bank owned the note and mortgage and thus had standing to foreclose). By definition, the need for an evidentiary hearing means that summary judgment was inappropriate.

Moreover, these cases that hold that an evidentiary hearing is triggered whenever an assignment attached to the complaint conflicts with itself or with the allegations in the body of the complaint are applicable here in another way. Specifically, the same rule must apply to the dueling Notes attached as exhibits to the Complaint in this case. Because the Notes conflict with themselves on the issue of standing, an evidentiary hearing is automatically required to resolve the conflict. Once again, summary judgment is inappropriate where the evidence must be weighed by a trier of fact.

The BANK sought to draft its way around what is apparently recognized as a legal stumbling block by having its summary judgment affiant proclaim that the "Plaintiff held the Note prior to the date the Complaint was filed…"[53] This bald self-serving statement, however, cannot overcome the contrary evidence in the record for purposes of summary judgment. It merely demonstrates that there exists

[53] R. 390.

conflicting evidence on the issue—a conflict that cannot be resolved at summary judgment. Moreover, if the BANK seeks to rely on this statement, it only underscores the fact that the [redacted] were wrongly denied the opportunity to cross-[redacted] this witness's assertion (which is the second point of error in this appeal).

In the proceedings below, the BANK repeatedly focused on its after-the-fact possession of the Note as conclusive proof that it had standing to sue in accordance with *Riggs v. Aurora Loan Services*, 36 So. 3d at 932 (Fla. 4th DCA 2010). That case is distinguishable for at least two reasons. First, nothing in the opinion indicates that the issue of standing at inception was ever raised or considered. Second, as the court in that case specifically noted, "Nothing in the pleadings placed the authenticity of [the endorsement] at issue." *Id*. at 933.

Here, the [redacted] have raised the issue of standing at inception and have placed the authenticity of the endorsement at issue. The [redacted] Answer not only specifically denied that the BANK held the Note,[54] the Amended Affirmative Defenses challenged the validity, authority and authenticity of the signature on the

[54] R. 354.

endorsement.[55] Moreover, the BANK itself effectively undermined the legitimacy of the endorsement when it attached two different versions of the Note to the Complaint—one without an endorsement (the "true and correct" copy) and one with an endorsement. As noted in the amended Second Affirmative Defense, the BANK in effect "attached two different copies of the note which attempt to make the note enforceable by different entities."[56]

Yet a third reason that Riggs is inapplicable here is that the [redacted] challenged the negotiability of the Note itself. If the Note is determined not to be negotiable, then the self-authenticating shortcut of Article III of the Uniform Commercial Code ("UCC") is not available to the BANK. § 673.3081 Fla. Stat. More importantly, if the Note is not negotiable, then the BANK must prove that it owns the debt, not that it is merely a holder.[57]

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[55] R. 357. Signatures of the maker on a negotiable instrument are self-authenticating unless challenged in the pleadings. § 90.902(8) Fla. Stat.; §673.3081 Fla. Stat. The [redacted] posit that the statute cannot be extended to endorsement signatures because the maker ordinarily is not in a position to dispute the signatures of others at the pleadings statge—he or she must avail themselves of the right to conduct discovery first. Nevertheless, in an abundance of caution, the [redacted] challenged the endorsement signature in their affirmative defenses to ensure that the authentication short-cut would not be applied inappropriately.

[56] R. 358.

[57] That the BANK would use the same "owns and holds" language for both the note and the mortgage calls into question whether the BANK ever intended to

Because the authenticity of the original Note, the endorsement on the Note, and the signature of the endorsement on the Note were all disputed in the record, *Riggs* is exceedingly unhelpful here, and the BANK's standing was still an issue of fact. Thus, summary judgment in favor of the BANK was premature.

B. Judicial estoppel did not apply to bar the defenses raised by the

The BANK repeatedly argued below that the were judicially estopped from asserting any defenses, especially any challenge to the BANK's standing.[58] The BANK claimed that the were judicially estopped from raising these defenses because of a bankruptcy in which the listed the subject mortgage as a debt. The BANK asserted that the mere listing of EMC Mortgage Corporation in the bankruptcy served as a waiver of defenses. The trial

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claim that it was a holder of the note under Article III of the Uniform Commercial Code (§673.1011 et seq. Fla. Stat.), since a mortgage has never been a negotiable instrument. The phrase "owns and holds" is an ubiquitous legalism used in many contexts outside of negotiable instruments. Unlike the Article 3 "holder," the person who "owns and holds" an instrument is its owner. For example, when Form 1.934 Fla. R. Civ. P. (Promissory Note Complaint) was amended in 1980, the Florida Supreme Court added the same words found in the foreclosure form—"the Plaintiff owns and holds the note"—specifically "to show ownership of the note." Committee Note to Form 1.934 Fla. R. Civ. P. adopted by *The Florida Bar, In re Rules of Civil Procedure*, 391 So. 2d 165 (Fla. 1980).

[58] R. 379-382.

court was particularly engaged in this argument during the hearing on the Motions for Summary Judgment.[59]

This estoppel argument must fail. The elements of judicial estoppel were outlined by the Fourth District as follows:

> After *Blumberg* [*v. USAA Casualty Insurance Co.,* 790 So. 2d 1061 (Fla. 2001)], the general rule of judicial estoppel in Florida appears to be this:
>
> A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions, subject to the "special fairness and policy considerations" exception to the mutuality of parties requirement.

Grau v. Provident Life and Accident Insurance Company, 899 So. 2d 396 (Fla. 4th DCA 2005)(emphasis added).

Here, the [redacted] have not taken a completely inconsistent claim or clearly conflicting position in the foreclosure action. In the bankruptcy, they listed claims against them, and included EMC Mortgage Corporation. That listing of a claim against them did not constitute a waiver of defenses in a subsequent foreclosure action. As counsel explained during the hearing on the Motions for Summary Judgment, the [redacted] bankruptcy filings simply listed all parties

[59] Supp. R. 35-59; T. 11/7/12, pages 43-46.

who had a claim against them. That listing of a claim did not admit the validity of the claim, or the [redacted] liability, and it certainly did not waive a standing defense in an action for foreclosure initiated by a different plaintiff.[60]

Under *Blumberg* and *Grau*, judicial estoppel cannot apply. As previously noted, the parties are not the same in both actions. The BANK relied on the bankruptcy court's Order to argue that the [redacted] did not dispute that EMC Mortgage Corporation could bring this foreclosure action without defense.[61] The Order itself does not specify that the [redacted] waived any defenses. Moreover, while the Order states that EMC Mortgage Corporation may continue the foreclosure action, this case was never pursued in the name of EMC Mortgage Corporation.

There is also absolutely no evidence in the record that the BANK "was misled and changed its position in such a way that it would be unjust" to allow the [redacted] to take an alleged inconsistent position. *See Crawford Residences LLC v. Banco Popular North America*, 88 So. 3d 1017 (Fla. 2d DCA 2012) (foreclosing bank was not misled and did not change its position in reliance on defendant's

[60] Supp. R. 35-59; T. 11/7/12, pages 9-11.

[61] R. 374.

affidavit; "Banco maintained the same position throughout litigation: it sued because Crawford did not pay back the loan.").

Moreover, even if estoppel applied because of any particular position taken by the [redacted] in the bankruptcy case, the bankruptcy case only related to the debt on the promissory Note. During the hearing on the Motions for Summary Judgment, counsel for the [redacted] pointed out that the [redacted] bankruptcy discharge only affected the debt, not the mortgage lien. If the BANK's rights to foreclose could be determined by the bankruptcy court, it would resolve the dispute there. Instead, it remands the matter for a determination in the state court, precisely because the rights of these two parties are still to be litigated.[62]

In sum, despite the bankruptcy filings, the BANK still had to establish its right to enforce the Mortgage within the foreclosure action, and the [redacted] affirmative defenses contested the BANK's right to do so.

[62] T. 11/7/12, pages 16-17 ("Why would the [bankruptcy] Court then allow the plaintiff to go back to the trial court, file their foreclosure proceeding, and have to continue litigating it? That's because there's nothing that's been waived here, your Honor.").

II. Summary Judgment Was Precluded Because the [redacted] Were Prevented From Obtaining Documents or Deposing the Individuals Who Signed the Affidavits in Support of the BANK's Motion for Summary Judgment.

At the time of the hearing on the Motions for Summary Judgment, the [redacted] had requested documents and were attempting to depose at least two witnesses whose testimony was relevant to the summary judgment issues. Deonjanea Samuel signed the Affidavit of Amounts Due and Owing," which was attached to the BANK's Motion for Summary Judgment as Exhibit A.[63] She signed as Vice President of a complete stranger to this litigation—JP Morgan Chase Bank, N.A.—and specifically represented that she executed the Affidavit on behalf of "J.P. Morgan Chase Bank, National Association ('Chase')." She further stated that she had access to the business records of "Chase," and that "Chase is the servicer of the loan and is authorized to act on behalf of the holder of the Note. Plaintiff held the Note prior to the date the Complaint was filed on 4/16/2009." The Affidavit never references the identity of the "holder of the Note."

The [redacted] also sought to depose Addie Pike, who signed an Affidavit in Support of Plaintiff's Motion for Final Summary Judgment. She also signed her Affidavit "on behalf of JP Morgan Chase Bank, National Association

[63] R. 388-391.

('JPMorgan')."[64] She too stated that she had access to and reviewed "JPMorgan's business records."[65] This Affidavit purportedly verified that notice of default was provided to the [redacted][66]

These Affidavits, not disclosed to the [redacted] until service of the BANK's Motion for Summary Judgment on September 10, 2012, directly relate to the issues raised by the [redacted] in their Affirmative Defenses (i.e., the standing of the BANK to seek foreclosure and whether the required notice of default was provided to the [redacted] These were the issues at the very heart of both summary judgment motions.

At the hearing on the Motion for Protective Order, the trial court (the Honorable Marvin Gillman) granted the Motion for Protective Order and directed that "no depositions will be taken."[67] This was clear error, as deposition testimony was necessary to confirm whether the affiants actually had the requisite personal knowledge of the facts outlined in the affidavits. *See e.g. Glarum v. LaSalle Bank, N.A.*, 83 So. 3d 780 (Fla. 4th DCA 2011) (in order for affidavit not to constitute

[64] R. 392.

[65] *Id*.

[66] R. 393.

[67] T. 11/7/12, page 38.

inadmissible hearsay, the proponent must demonstrate the following through a records custodian or other qualified person: (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record); *compare Weisenberg v. Deutsche Bank National Trust Co.*, 89 So. 3d 1111 (Fla. 4th DCA 2012) (deposition testimony of affiant demonstrated that she was familiar with the bank's record-keeping system and had knowledge of how date was uploaded into the system).

With regard to the unresolved document requests, counsel for the [redacted] specifically asked the trial court to note that the discovery was directed to the contents of the affidavits, and that the [redacted] could not have propounded those particular discovery requests prior to receipt of the BANK's affidavits.[68]

The trial court committed reversible error when it granted the protective order preventing discovery, and then entered summary judgment in favor of the BANK. Discovery was not complete, so the facts concerning the statements in the affidavits were still unresolved in the record. As this Court has stated:

Where discovery is not complete, the facts are not sufficiently

[68] *Id*., page 40.

> developed to enable the trial court to determine whether genuine issues of material facts exist. *See Singer v. Star*, 510 So.2d 637, 639 (Fla. 4th DCA 1987). Thus, where discovery is still pending, the entry of Summary Judgment is premature. *See Smith v. Smith*, 734 So.2d 1142, 1144 (Fla. 5th DCA 1999)("Parties to a lawsuit are entitled to discovery as provided in the Florida Rules of Civil Procedure including the taking of depositions, and it is reversible error to enter summary judgment when discovery is in progress and the deposition of a party is pending."); *Henderson v. Reyes*, 702 So.2d 616, 616 (Fla. 3d DCA 1997)(reversing the entry of Summary Judgment where depositions had not been completed and a request for the production of documents was outstanding.); *Collazo v. Hupert*, 693 So.2d 631, 631 (Fla. 3d DCA 1997) (holding that a trial court should not entertain a motion for summary judgment while discovery is still pending); *Spradley v. Stick*, 622 So.2d 610, 613 (Fla. 1st DCA 1993); *Singer v. Star*, 510 So.2d 637 (Fla. 4th DCA 1987).

Payne v. Cudjoe Gardens Property Owners Association Inc., 837 So. 2d 458, 461 (Fla. 3d DCA 2002).

With specific regard to summary judgment in the context of mortgage foreclosures, the Fourth District recently held that a trial court granted summary judgment prematurely where there were outstanding discovery requests. *See Osorto v. Deutsche Bank National Trust Company*, 88 So. 3d 261 (Fla. 4th DCA 2012). In that case, the court noted that outstanding and unresolved discovery requests directed to "original or best copies of records concerning the transfer or assignment of the loan" could potentially be material. "Where the information contained in outstanding discovery could create genuine issues of material fact,

summary judgment would not be proper." *Id*. at 263.

Because the outstanding discovery requests for documents and depositions of witnesses who signed affidavits were not only material, but absolutely critical to the determination of whether there remained any genuine issues of material fact, summary judgment was not proper.

CONCLUSION

Based on the foregoing discussion and analysis, the Final Summary Judgment in favor of the BANK should be reversed, and the case remanded for further proceedings.

Dated: July 19, 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(a)(2) and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this July 19, 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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