In the District Court of Appeal
Fourth District of Florida

CASE NO.
(Circuit Court Case No. CACE)

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and

Appellants,

v.

COUNTRYWIDE HOME LOANS, INC and SEQUOIA GARDENS CONDOMINIUM ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellants
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

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Notes:

- References to pages in the Record on Appeal will be indicated as **(R. __)**.
- References to pages in the Supplement to the Record on Appeal will be indicated as **(Supp. R. __)**. The Supplement contains those filings which were mistakenly excluded by the Clerk in creating the Index to the Record on Appeal. The directions to the Clerk had requested that all discovery and notices of hearings be included in the record:

> Defendants/Appellants, [redacted] and [redacted] direct the clerk to include the following items in the original record described in rule 9.200(a)(l) Fla.R.App.P.:
>
> 1. Summonses. praecipes, subpoenas, returns, notices of hearing or of taking deposition, depositions, other discovery, and physical evidence.[1]

By separate Motion, Appellees are requesting that the record on appeal be supplemented with these documents which were in the trial court file.

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[1]Directions to Clerk **(R. 281)**.

STATEMENT OF THE CASE AND FACTS

A. Introduction.

The underlying action is one for foreclosure in which the Plaintiff/Appellee, COUNTRYWIDE HOME LOANS, INC. (the "BANK"), seeks to take the property of the Defendants/Appellants, [redacted] and [redacted] (collectively, the "OWNERS") in satisfaction of an unpaid loan.

B. The BANK files its Complaint without attaching a copy of the promissory note, but with a mortgage indicating that entities other than the BANK were the original lender and mortgagee.

The BANK filed a "Complaint to Foreclose Mortgage, and Reestablish Note and Mortgage and Reformation of Mortgage" in November of 2008.[2] The Complaint alleged that the "Promissory Note was executed and delivered in favor of the Plaintiff, or Plaintiff's Assignor."[3] No promissory note was attached to the Complaint, but the attached mortgage stated that the promissory note had been executed in favor of an entity different from the Plaintiff: Countrywide Bank, N.A.[4]

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[2] Complaint to Foreclose Mortgage, and Reestablish Note and Mortgage and Reformation of Mortgage, filed November 6, 2008 ("Complaint") **(R. 1)**.

[3] Complaint, ¶ 2 **(R. 1)**.

[4] Mortgage attached to Complaint **(R. 6)**.

The attached mortgage also granted the mortgage lien in favor of yet a different entity, Mortgage Electronic Registration Systems, Inc. ("MERS"), a Delaware corporation[5] located in Reston, Virginia.[6] The Complaint was also accompanied by an "Assignment of Mortgage" from MERS to the Plaintiff BANK. The mortgage assignment was executed by an alleged "1st Vice President" of MERS in Collin County, Texas (the same County where the BANK's Assistant Vice President executed the Affidavit of Indebtedness[7]) nine days before the Complaint was filed.[8]

The Complaint alleged (and the mortgage assignment states) that the mortgage assignment transferred to the BANK, not only the mortgage, but the promissory note itself,[9] thus making MERS "Plaintiff's assignor." In addition to asserting that it was the assignee of the note and mortgage, the BANK alleged that

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[5] Mortgage attached to Complaint **(R. 6)**.

[6] *See*, MERS Response to Subpoena Duces Tecum dated February 20, 2009, Exhibit B to the OWNERS' Notice of Reliance Pursuant to Rule 1.510(c) Fla.R.Civ.P., dated November 3, 2009 **(R. 248)**.

[7] *See*, Jurat, to Affidavit of Indebtedness, Notice of Filing, dated February 4, 2009 **(R. 159)**.

[8] Assignment attached to Complaint **(R. 30)**.

[9] Complaint, ¶ 3 **(R. 2)**; Assignment attached to Complaint **(R. 30)**.

it was "the present owner and constructive holder of the Promissory Note and Mortgage."[10]

C. The OWNERS contest the BANK's claim to own and hold the note and mortgage.

The OWNERS moved to dismiss the Complaint on the grounds that it did not state a cause of action.[11] Citing to *Fladell v. Palm Beach County Canvassing Board*, 772 So. 2d 1240 (Fla. 2000), the OWNERS argued that the attachments negated the BANK's allegations that it was the present owner and "constructive" holder of the note and mortgage.[12] The OWNERS also argued that Rule 1.130(a) Fla.R.Civ.P. required dismissal because the BANK did not attach a copy of the promissory note to the Complaint.[13]

A week later, the OWNERS propounded two sets of interrogatories and a request for production aimed at determining the true owner of the promissory note and mortgage.[14] The OWNERS also served a subpoena on MERS for a printout

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[10] Complaint, ¶ 2 **(R. 1)**.

[11] Defendants, [redacted] and [redacted] Motion to Dismiss Complaint, dated December 10, 2008 ("Motion to Dismiss") **(R. 35)**.

[12] Motion to Dismiss, pp. 1-3 **(R. 35-37)**.

[13] Motion to Dismiss, pp. 3-4 **(R. 37-38)**.

[14] Mortgage Loan Ownership Interrogatories and Notice of Service, dated December 17, 2008 **(Supp. R. 1)**; Note Authenticity/Ownership Interrogatories and Notice of Service, dated December 17, 2008 **(Supp. R. 3)**; Defendants, [redacted]

regarding the subject loan from its database that tracks transfers of note ownership.[15]

Rather than timely respond to the OWNERS' discovery, the BANK unilaterally noticed a five-minute, motion-calendar hearing[16] on a simultaneously served Motion for Summary Judgment. The summary judgment motion asserted that the BANK "owns and holds the Note and Mortgage."[17] The supporting affidavit, the Affidavit of Indebtedness, also stated that the BANK "is the owner and holder of the Note and Mortgage…"[18] The Affidavit of Indebtedness, did not mention the mortgage assignment or identify any document as the true and correct copy of the mortgage assignment.[19]

The following day, the BANK filed what it alleged to be the original note, the original mortgage, and assignment of mortgage[20] and served a Notice of

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and Request for Production Regarding MERS Tracking, dated December 17, 2008 **(Supp. R. 5)**.

[15] Defendant's Notice of Production from Non-Party, dated December 22, 2008 **(Supp. R. 8)**.

[16] Notice of Hearing for Summary Final Judgment and Awarding of Attorney's Fees, dated February 2, 2009 **(Supp. R. 13)**.

[17] Plaintiff's Motion for Summary Final Judgment Including a Hearing to Tax Attorneys' Fees and Costs, dated February 2, 2009 **(R. 7)**.

[18] Affidavit of Indebtedness, executed December 2008 **(R. 157)**.

[19] *Id.*

[20] Notice of Filing, dated February 3, 2009 **(R. 40)**.

Dropping Count II (the lost note count).[21] The alleged original note was (as had been suggested by the mortgage) made payable to Countrywide Bank, N.A.—an entity that is neither Plaintiff nor Plaintiff's assignor (MERS). While the note was endorsed by the original lender to Plaintiff, it was also endorsed by Plaintiff in blank.[22]

D. The trial court denies the OWNERS' motion to strike a summary judgment affidavit in which the testimony is based upon unattached documents that are neither sworn nor certified.

The OWNERS then moved to compel responses to their discovery still outstanding from the BANK.[23] Additionally, the OWNERS moved to strike the BANK's Affidavit of Indebtedness on the grounds that the affiant did not attach "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit…" as required by Rule 1.510(e) Fla.R.Civ.P.[24] The OWNERS also requested production of the documents upon which Affidavit of Indebtedness had

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[21] Notice of Dropping Count II, February 3, 2009 **(R. 78)**.

[22] Monthly Adjustable Rate PayOption Note attached to Notice of Filing, dated February 3, 2009 ("Promissory Note") **(R. 46)**.

[23] Motion to Compel Discovery, dated February 27, 2009 **(R. 117)**.

[24] Defendants, [redacted] and [redacted] Motion to Strike Affidavit, dated February 23, 2009 **(R. 113)**.

been based.[25] Once again, the BANK missed the discovery deadline, which resulted in an *ex parte* order compelling the BANK to produce the documentation.[26] The BANK then produced the documentation that had been "reviewed by the Affiant in the preparation and execution of the Affidavit of Indebtedness filed by Plaintiff."[27]

The OWNERS' Motion to Strike the affidavit was heard along with their Motion to Dismiss and Motion to Compel. Although the hearing was not attended by the BANK's counsel,[28] the Court denied the Motion to Strike on the grounds that the only necessary documentation was the mortgage which was attached to the Complaint:

> MR. IMMEL: [OWNERS' counsel] …It says that sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached or served therewith. They haven't attached anything. So, there's no way to verify the numbers.
>
> THE COURT: And their argument was that they say it's as stated within the mortgage which they have attached to the original

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[25] Defendant's Requests for Production Regarding Indebtedness, dated May 26, 2009 **(Supp. R. 16)**.

[26] Order on Defendants' *Ex Parte* Motion to Compel, dated August 12, 2009 **(R. 172)**.

[27] Plaintiff's, Response To Defendant's Request For Production, dated August 14, 2009 **(Supp. R. 20)**, Response No. 2; Plaintiff's Supplemental Response to Defendant's Request for Production, dated September 3, 2009, Response No. 1 **(Supp. R. 27)**.

[28] Transcript of Hearing on September 16, 2009 ("Hrg. 1."), p. 2 **(R. 180)**.

> complaint. Correct? And you just disagree with what they say is permissible.
>
> MR. IMMEL: I mean--
>
> THE COURT: Correct? I mean, is that your argument?
>
> MR. IMMEL: --there are things like different fees that would not be in the mortgage. They're obviously not---
>
> THE COURT: Okay. Motion to strike is overruled.[29]

The trial court also denied the OWNERS' Motion to Dismiss.[30] The OWNERS filed an Answer with five affirmative defenses.[31] Besides disputing that the BANK was the owner of the subject loan, the affirmative defenses denied the authenticity of any original documents supplied by the BANK and the reasonableness of the requested attorneys' fees.[32]

Lastly, the Court granted the OWNERS' Motion to Compel, requiring the BANK to produce records within its control and to respond to interrogatories without objections within ten days.[33] The BANK supplied supplemental responses (which still included objections) on September 28th and 29th, approximately nine

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[29] Hrg. 1., pp. 7-8 **(R. 185-186)**.

[30] Order on Motion to Dismiss, dated September 16, 2009 **(R. 174)**.

[31] Defendants, [redacted] and [redacted] Answer to Complaint and Affirmative Defenses, dated October 6, 2009 **(R. 202)**.

[32] *Id*.

[33] Order on Motion to Dismiss, dated September 16, 2009 **(R. 175)**.

months after they had first been propounded and just over five weeks before the summary judgment hearing.[34]

The interrogatories were answered and executed by a Brent Robinson, whose relationship to the Plaintiff BANK was unclear.[35] Not only did he aver that he worked for a "BAC Home Loans, L.P. f/k/a Countrywide Home Loans, L.P." (whereas the Plaintiff here is COUNTRYWIDE HOME LOANS, INC.), he never identified his official position with that company, even though the interrogatories had asked him to do so.[36] Aside from passing references in documents produced several weeks earlier, these responses—over nine months after the interrogatories were propounded—were the first mention of Mr. Robinson's involvement in the case.

The OWNERS asked the BANK for Mr. Robinson's deposition, as well as the depositions of:

- **Keri Selman**, Assistant Vice President of Plaintiff and affiant who executed the BANK's Affidavit of Indebtedness;

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[34] Notice of Service of Supplemental Answers to Note Authenticity/Ownership Interrogatories, dated September 28, 2009 **(Supp. R. 30);** Notice of Service of Supplemental Answers to Mortgage Loan Ownership Interrogatories, dated September 29, 2009 **(Supp. R. 35)**.

[35] *Id*.

[36] *See e.g.*, Verified Supplemental Answers to Note Authenticity/Ownership Interrogatories, dated September 28, 2009, Interrogatory No. 1 **(Supp. R. 32)**.

- **Brian Hogan**, the affiant who executed the BANK's Expert Affidavit of Attorney's Fees; and
- **Beth Norrow**, the affiant who executed the BANK's Affidavit of Attorney's Fees.[37]

Approximately four weeks after receiving the BANK's supplemental discovery responses, the OWNERS propounded two sets of requests for admission asking the BANK to admit, among other things, that the promissory note is owned by Fannie Mae.[38]

E. The BANK represents it cannot produce MERS records, which the OWNERS's expert cites as evidence that the BANK is not the OWNER.

The BANK also supplemented its discovery responses to the MERS note-tracking requests for production, saying that the documents are "solely in the custody and control of [MERS]"[39] and that the BANK "is not currently in possession, custody or control" of these documents.

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[37] *See*, Notice of Reliance, ¶ 9 **(R. 242)**; Notice of Filing Email from Plaintiff Counsel to Defense Counsel dated October 22, 2009 offering deposition dates **(R. 302)**.

[38] Defendants, [redacted] and [redacted] Requests for Admission, dated October 29, 2009 **(Supp. R. 49)**; Defendants, [redacted] and [redacted] Requests for Admission Regarding Mortgage Loan Ownership, dated October 30, 2009**(Supp. R. 52)**.

[39] Plaintiff's Supplemental Response to Defendant's Request for Production, dated September 28, 2009 **(Supp. R. 41)**.

The OWNERS' filed an affidavit of a MERS expert which stated that "[i]f Plaintiff is unable to view and produce the complete MERS records, it could be because Plaintiff is not the current owner or current servicer of the loan."[40]

F. The BANK files two more summary judgment motions claiming to be the owner of the note and mortgage.

Earlier, the BANK had filed a second Motion for Summary Judgment (in June) again claiming that it "is the owner and holder of the promissory note and mortgage…"[41] The BANK also filed a third Motion for Summary Judgment (in September) claiming yet again that it "is the owner and holder of the promissory note and mortgage…"[42]

G. The BANK files two affidavits of attorneys' fees and an expert affidavit which did not support the reasonableness of the majority of the requested fees.

The BANK filed an Affidavit of Attorney's Fees (for $5,572.50),[43] and later, an Affidavit of Additional Attorney's Fees (requesting fees for an additional 7.1

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[40] Affidavit Rose Dinglasan, dated November 3, 2009, ¶ 16 **(R. 271)**.

[41] Motion for Summary Judgment, dated June 17, 2009 **(R. 162)**.

[42] Motion for Summary Judgment, dated September 30, 2009 **(R. 189)**.

[43] Plaintiff's Affidavit of Attorney's Fees, executed September 30, 2009, by Beth Norrow ("Aff. Atty Fees No. 1") **(R. 194)**.

hours, but which now totaled the entire fee bill at only $4,462.50).[44] The BANK also filed an expert affidavit in support of its fees.[45] The expert affidavit stated that "7.1 hours at $125.00 per hour equals a total reasonable fee of $887.00." The BANK presented no expert testimony in the affidavit or elsewhere that the claimed fees of either $5,572.50 or $4,462.50 was reasonable, that a flat fee of $910 was reasonable, or that the hours and hourly rate charged for paralegal services was reasonable.

Additionally, the Affidavit of Attorney's Fees seeks reimbursement for two hours ($250) of the affiant, Beth Norrow's, time in attending the Motion to Dismiss hearing (September 16, 2009)[46]—at which no attorney representing the BANK argued or even appeared. (An attorney employed by a firm who had never filed a Notice of Appearance for the BANK had signed in before the hearing, but was not actually present during the argument.[47])

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[44] Plaintiff's Affidavit of Additional Attorney's Fees, executed October 15, 2009, by Beth Norrow ("Aff. Atty Fees No. 2") **(R. 216)**.

[45] Plaintiff's Affidavit of Attorney's Fees, executed October 16, 2009 by Brian Hogan ("Expert Aff. Atty Fees") **(R. 221)**.

[46] Aff. Atty Fees No. 1., attached Transactions Listing entry for September 16, 2009 **(R. 201)**.

[47] Hrg. 1, p. 2 **(R. 180)**.

H. The OWNERS counter the BANK's allegations of note-ownership with affidavits, including one from the MERS expert.

The affidavit of the MERS expert retained by the OWNERS stated that she had reviewed the records produced by MERS and that "the printouts contain information ordinarily relied upon by the mortgage banking industry in the normal course of business to determine the current ownership interests in a particular loan." The expert also testified that the MERS records indicate that the owner of the subject loan is the Federal National Mortgage Association ("Fannie Mae"), not the Plaintiff BANK:

> 13. The MERS® System printouts, indicate that the "Investor" at the time of the printout is Federal National Mortgage Association, commonly known as Fannie Mae. Based upon my experience and expertise, it is my opinion that "Investor" in this context means the owner of the promissory note related to the mortgage with the Mortgage Identification Number ("MIN") of 1001337-0001639726-0.
>
> 14. Based upon my experience and expertise and the information in the MERS® System printouts, it is my expert opinion that the owner of the promissory note related to the mortgage with MIN 1001337-0001639726-0 is Federal National Mortgage Association and that Countrywide Financial Corporation is the servicer. It is my expert opinion that the Plaintiff, COUNTRYWIDE HOME LOANS, INC., has no ownership in the promissory note related to mortgage with MIN 1001337-0001639726-0.[48]

[48] Affidavit Rose Dinglasan, dated November 3, 2009, ¶¶ 13, 14 **(R. 246)**.

The OWNER, [redacted] also executed an affidavit a saying that, according to the Fannie Mae website, Fannie Mae owns the subject loan.[49]

I. The OWNERS counter the BANK's claim that the proffered note is an original document with an expert's affidavit.

The OWNERS also filed an affidavit of a Certified Forensic Document Examiner who opined that, as a general proposition, a high-quality color copy of a document would be extremely difficult to distinguish from the original by the naked eye, even if the signature is in blue ink.[50]

J. The OWNERS serve a Rule 1.510(c) Notice of Reliance listing ten reasons summary judgment should be denied.

In opposition to the BANK's motion for summary judgment, the OWNERS filed a Notice of Reliance under Rule 1.510(c) Fla.R.Civ.P.[51] Attached to the Notice were the two, above-mentioned expert affidavits and the affidavit of OWNER, [redacted][52] The Notice of Reliance also pointed out that the BANK had failed to carry its burden of disproving any of the five affirmative

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[49] Exhibit C to the Notice of Reliance **(R. 253)**.

[50] Affidavit of Rita M. Lord, dated November 17, 2008 ¶ 5 **(R. 256)**.

[51] Notice of Reliance Pursuant to Rule 1.510(c) Fla.R.Civ.P., dated November 3, 2009 **(R. 240)**.

[52] Exhibits A, C and D to the Notice of Reliance **(R. 244, 253, 256)**.

defenses raised by the OWNERS.[53] It also mentioned that the BANK's motion to strike those affirmative defenses had never been heard or determined.[54] The Notice mentioned written discovery that was still outstanding, as well as the four depositions that the OWNERS had requested.

Lastly, the Notice of Reliance asserted the OWNERS' objection to the use of the unauthenticated Assignment of Mortgage as summary judgment evidence because it is not self-authenticating and is not itself a sworn document.[55]

K. The trial court grants summary judgment.

Over the OWNERS' objection, the BANK once again noticed its summary judgment hearing on motion calendar certifying that all "the issues may be heard and resolved by the court within five (5) minutes."[56] At the hearing, the OWNERS objected to (among other things) the trial court hearing argument from Dinna Kawass, the only other attorney present at the hearing. Ms. Kawass is not employed by the BANK's counsel (Butler & Hosch, P.A.) and had never filed a

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[53] Notice of Reliance, ¶ 7 **(R. 241)**.

[54] Notice of Reliance, ¶ 8 **(R. 241)**.

[55] Notice of Reliance, ¶ 10 **(R. 242)**.

[56] Plaintiff's Notice of Hearing, dated October 13, 2009 **(Supp. R. 44)**.

notice of appearance in the case. Ms. Kawass verbally represented that she was "co-counsel on behalf of the firm" to which the court responded "That's fine."[57]

The OWNERS then presented argument that the affidavit of the MERS expert demonstrated that Fannie Mae is the owner of the loan. The court responded "That's between them and Fannie Mae. That's not between your client."[58] The court also stated that, the BANK's assertions that they are the holder of the note and that "they got it" is sufficient for summary judgment.[59]

While Ms. Kawass acknowledged that discovery was not complete (and that the OWNERS had requested depositions), she argued that this discovery only related to standing, which was not material to the court's summary judgment decision.[60] The court granted the motion for summary judgment finding that "appropriate affidavits are in the file as far as the note."[61] This ruling came just over four weeks after the OWNERS filed their Answer and Affirmative defenses. This had been achieved without a single appearance in court by an attorney of record for the BANK.

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[57] Transcript of Hearing before the Honorable Patti Henning on November 5, 2009 ("MSJ Hrg."), p. 5 **(R. 289)**.

[58] MSJ Hrg., p. 6 **(R. 290)**.

[59] *Id.*

[60] MSJ Hrg., p. 10-11 **(R. 294-295)**.

[61] MSJ Hrg., p. 11 **(R. 295)**.

The court then signed a Summary Final Judgment, the form of which had never been reviewed by the OWNERS' counsel. The Final Judgment included the reformed legal description as alleged in the Complaint, even though the BANK had made no mention of the count for reformation in any of its three motions for summary judgment or at the summary judgment hearing. The BANK had submitted no affidavit or other evidence to support the change to the legal description.

And although no evidentiary hearing had been held on the reasonableness of attorneys fees (an issue which had been specifically raised by affirmative defense), and although no expert had testified that 37.3 hours was reasonable,[62] the Judgment included $5,372.50 in Attorney Fees.[63]

The Judgment also included $14,120.08 of interest,[64] an increase of over $8,000 from that stated in the Affidavit of Indebtedness.[65] The difference was apparently calculated from a per diem rate that is not mentioned in the affidavit.[66]

The OWNERS filed a timely notice of appeal.[67]

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[62] Expert Aff. Atty Fees **(R. 221)**.

[63] Summary Final Judgment for Foreclosure, ¶ 5 **(R. 263)**.

[64] *Id*.

[65] Affidavit of Indebtedness, ¶ 6 **(R. 158)**.

[66] Summary Final Judgment for Foreclosure, ¶ 5 **(R. 263)**; Affidavit of Indebtedness, ¶ 6 **(R. 158)**.

STANDARD OF REVIEW

The standard of review of an order granting Summary Judgment is *de novo*. *Reeves v. North Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. 4th DCA 2002); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2002). In order to determine the propriety of a summary judgment, the Court must resolve whether there are any "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The "burden of proving the absence of a genuine issue of material fact is upon the moving party." *Palm Beach Pain Management, Inc. v. Carroll*, 7 So. 3d 1144, 1145 (Fla. 4th DCA 2009) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). The Court must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party, the OWNERS, and if the slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See, id.*

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[67] Notice of Appeal, dated November 20, 2009 **(R. 273)**.

SUMMARY OF THE ARGUMENT

This case presents a veritable catalogue of all the reasons a summary judgment should not be granted:

- The OWNERS demonstrated the existence of genuine issues of fact as to the BANK's standing to bring this case. The OWNERS submitted two uncontradicted affidavits, one of an expert, showing that Fannie Mae, not the BANK, was the owner of the promissory note. Also, the BANK did not identify an iota of admissible evidence that the note and mortgage was, as claimed, assigned to the BANK by MERS.

- The BANK's summary judgment motion was unsupported by evidence because its only affidavit on the merits was hearsay; the affiant was not a custodian for the BANK and did not swear or certify that any of the documentation to which the affidavit referred was a true and correct copy.

- The BANK did not disprove the OWNERS' affirmative defenses, which, among other things, challenged the BANK's standing, the authenticity of its documentation, and the reasonableness of its attorneys' fees.

- Relevant discovery was still pending. It took over nine months and two court orders for the BANK to divulge—only weeks before summary judgment—information in response to the OWNERS' initial written discovery. Yet, the

BANK insisted that all follow-up discovery (including four depositions) take place in the few weeks that remained before its summary judgment hearing, which it had scheduled on motion calendar over the OWNERS' objection.

- The judgment signed by the court included rulings on issues which are nowhere to be found in the motion for summary judgment, such as, a reformation of the mortgage and interest on the loan.

The trial court, therefore, erred in granting summary judgment and its order should be reversed.

Additionally, the Motion to Dismiss should have been granted because the attached mortgage, which states that the original lender was Countrywide Bank, N.A., conflicts with the allegations that the original lender was the BANK or its assignor, MERS. Upon locating the promissory note (allegedly in its own possession), the BANK was required to amend the Complaint to dispose of its lost note count and to attach a copy of the claimed "original" note—which still conflicted with, and therefore nullified, the allegations of the Complaint.

This foreclosure action, far from the equitable proceeding it was intended to be, showcases the ills of a bank-driven rush to judgment in which close judicial scrutiny of the BANK's "evidence" is lacking. The summary judgment should be reversed and the case remanded for dismissal without prejudice to amend.

ARGUMENT

A. The Trial Court Erred in Granting Summary Judgment.

1. A genuine issue of fact remained as to who owns the promissory note and mortgage.

a) Two affidavits—one from an expert—created an issue of fact as to whether the BANK is the owner of the promissory note.

The OWNERS submitted two affidavits proving that Fannie Mae, not the Plaintiff BANK owns the promissory note. One was executed by a MERS expert who stated under oath that the documents produced by MERS established that Fannie Mae was the owner and that "Plaintiff, COUNTRYWIDE HOME LOANS, INC., has no ownership in the promissory note related to [the subject] mortgage."[68]

The other affidavit was executed by the OWNER, [redacted] It states that, according to the Fannie Mae website, Fannie Mae owns the subject loan.[69] The BANK never disputed that the MERS records and the Fannie Mae website both indicated that it was not the owner of the promissory note.

The BANK must plead and prove ownership of the promissory note to foreclose upon the associated mortgage. *Your Const. Ctr., Inc. v. Gross*, 316 So. 2d 596, 597 (Fla. 4th DCA 1975) (plaintiff must "necessarily allege he is the owner and holder of the note and mortgage…[and]…should defendants have any

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[68] Affidavit Rose Dinglasan, dated November 3, 2009, ¶¶ 13, 14 **(R. 246)**.

[69] Exhibit C to the Notice of Reliance **(R. 253)**.

allegation to the contrary they may join issue on it, and obtain adjudication as to the ownership.") The OWNER's evidence that Fannie Mae is the owner of the note, therefore, created a genuine issue of fact which precluded summary judgment.

b) The BANK adduced no evidence in support of its allegation that it owned the note and mortgage through an assignment from MERS.

Moreover, the BANK did not put forward any evidence in support of its allegation that it became the owner of the note and mortgage through an assignment from MERS. First, there was no "summary judgment evidence" of the alleged assignment because such evidence must be admissible (Rule 1.510(c) Fla.R.Civ.P.) and the OWNERS had specifically objected to its admissibility, both in their Notice of Reliance[70] and in their Second Affirmative Defense which denied the authenticity of any signature on the assignment of mortgage.[71]

The Assignment of Mortgage is not a self-authenticating document. The person who executed it did not swear to any of the factual matters stated in it.[72] The only affidavit submitted by the BANK (other than those concerning attorneys' fees) was the Affidavit of Indebtedness. That Affidavit did not specifically

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[70] Notice of Reliance, ¶ 10 **(R. 242)**.

[71] Defendants, [redacted] and [redacted] Answer to Complaint and Affirmative Defenses, p. 4 **(R. 205)**.

[72] *See*, jurat on Assignment of Mortgage **(R. 30)**.

mention the Assignment nor lay any evidentiary foundation for admitting the Assignment attached to the Complaint (such as the authenticity of either the document or the signature of the purported MERS vice-president).[73] *The BAC Funding Consortium Inc. v. Jean-Jacques*, --- So.3d ---- (Fla. 2d DCA February 2010) (unauthenticated assignment did not constitute admissible summary judgment evidence establishing bank's standing to foreclose). Even the Complaint did not allege that the attached Assignment was a true and correct copy of an actual instrument duly executed by MERS.[74]

Second, even if the Assignment were genuine and admissible, at best it would have demonstrated a transfer of the mortgage from MERS (the original mortgagee) to the BANK. But because MERS was not the payee on the note[75] (despite the Complaint's allegation to the contrary) and because there was no evidence that MERS was ever the owner or even holder of the note, it never had any ownership right in the note to assign to the BANK. *See State St. Bank & Trust Co. v. Lord*, 851 So. 2d 790, 792 (Fla. 4th DCA 2003) (assignee could not enforce instruments where assignor had no power of enforcement to assign).

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[73] Affidavit of Indebtedness **(R. 157)**.

[74] Complaint, ¶ 3 **(R. 2)**.

[75] Promissory Note, ¶ 1 **(R. 42)**.

Moreover, the notion that MERS had somehow become the noteholder conflicts with the endorsements on the note which show that the original lender endorsed it directly to the BANK—and that the BANK then endorsed the note in blank.[76] The BANK's conversion of a note already in its possession to a bearer instrument suggests that the BANK did not keep the note, but transferred it to another entity. It is implausible that this other entity would have been MERS, which then assigned it back to the BANK (particularly when that assignment was executed in the county where the BANK does business, not where MERS is located[77]). It is far more plausible—and consistent with the OWNERS' evidence—that the loan passed through the hands of the BANK on its way to being securitized into a trust owned by Fannie Mae.

In *Verizzo v. Bank of New York*, --- So.3d ---- (Fla. 2d DCA 2010), the court reversed a summary judgment where, as here, a MERS assignment purported to assign both the note and mortgage to the plaintiff. The court's ruling was based, in part, on the fact that the original note, mortgage, and assignment were not served to the defendant twenty days before the summary judgment hearing. But the court

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[76] Promissory Note **(R. 46)**.

[77] *See*, Mortgage attached to Complaint **(R. 6)**; MERS Response to Subpoena Duces Tecum dated February 20, 2009, Exhibit B to the OWNERS' Notice of Reliance Pursuant to Rule 1.510(c) Fla.R.Civ.P., dated November 3, 2009 **(R. 248)**.

also found that there existed a genuine issue of material fact as to the plaintiff's standing to foreclose because nothing in the record reflected an assignment or endorsement of the note to plaintiff or MERS.

While the endorsement chain in *Verizzo* did not reach the plaintiff, here the endorsement chain appears to extend beyond the Plaintiff. Again, because the BANK itself endorsed what it claims to be its own note in blank, there is a powerful inference that it transferred the note to another entity—an inference sufficient to defeat summary judgment. All inferences of fact from the proofs must be drawn in favor of the party opposing the motion for summary judgment, the OWNERS. *Jack Drury & Associates, Inc. v. City of Fort Lauderdale*, 203 So. 2d 361, 363 (Fla. 4th DCA 1967).

c) Possession of a bearer instrument alleged to be the original note is insufficient for the taking of real property.

At the hearing on the BANK's motion for summary judgment, non-record counsel (Ms. Kawass) put forward only one argument in support of the BANK's standing: that it was in possession of the original promissory note.[78] Ms. Kawass even implied that the Court had already decided the issue when it denied the OWNER's motion to dismiss.[79]

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[78] MSJ Hrg., pp. 3, 10 **(R. 287, 294)**.

[79] *Id*.

Of course, it is axiomatic that the standard for ruling on a motion to dismiss (where plaintiff's allegations are accepted as true) is far different than that for ruling upon a motion for summary judgment (where plaintiff must prove the contested allegations). *See Barbado v. Green & Murphy*, 758 So. 2d 1173 (Fla. 4th DCA 2000). Even if the standards were the same, the trial court's denial of the motion to dismiss was also patently erroneous (*see*, section B of argument, below).

But what of Plaintiff's argument that it can foreclose because it is in possession of the note—a negotiable, bearer instrument—regardless of how it came into possession? First, , a mere "possessor" of the note is not necessarily the "holder" of a note. The erroneous notion that possession, even wrongful possession, of a bearer instrument alone confers an unassailable right of enforcement is a misconception arising from an "authorization anomaly" in the Uniform Commercial Code, sometimes expressed apothegmatically as: "[even] a thief is 'entitled' to enforce a bearer instrument…" Khan, Ali, *A Theoretical Analysis of Payment Systems* (September 22, 2008), South Carolina Law Review, Vol. 60, No. 2, 2008 (questioning whether any court will "accept such a daring theory" that a thief is *entitled* to enforce an instrument because it is an "obvious abuse of the term 'entitlement'" *id*. at 2, n. 22); *see also*, *Antonacci v. Denner*, 149

So. 2d 52 (Fla. 3d DCA 1963) (defense of theft available against "holder not in due course").

In reality, the status of "owner and holder," such as would confer a right of enforcement, and mere "possession" are quite different things, as can be readily seen by observing that the mailman, the BANK's counsel, and the Clerk of the Court are all in possession of the note at some point, but none are considered "owners" or "holders" capable of filing suit to collect the debt on their own behalf. *See*, §§ 673.2011 and 673.2031, Fla.Stat. (2009) (one becomes a "holder" through a "transfer," which is defined as a delivery of the instrument with the intent of "giving the person receiving delivery the right to enforce the instrument"); *In re Hwang*, 396 B.R. 757, 766 (Bankr.C.D.Cal.2008) ("If a loan has been securitized, the real party in interest is the trustee of the securitization trust, not the servicing agent … [a rule that] does not turn on who has possession of the note.")

Second, even if the BANK could enforce the note as a person in possession (even wrongful possession), this case is not an action to enforce a note, but to foreclose a mortgage—an equitable action requiring clean hands. "A foreclosure action is an equitable proceeding which may be denied if the holder of the note comes to the court with unclean hands or the foreclosure would be

unconscionable." *Knight Energy Services, Inc. v. Amoco Oil Co*., 660 So. 2d 786, 789 (Fla. 4th DCA 1995).

To enforce the lien against real property, one must be the lienholder—i.e. the "mortgagee." And while a mortgage may "follow the note" to its new owner, equitable principles would prevent it from following the note to an entity that came into possession wrongfully. Thus, a plaintiff in a foreclosure action must meet a higher standard to be the real party in interest—a showing of ownership of both the note and mortgage, rather than just possession of an original note. To adapt the above-mentioned adage to a foreclosure action: *a thief may be able to enforce a note, but he cannot take your home.*

This higher real-party-in-interest showing is consistent with the language of Form 1.944 Fla.R.Civ.P., adopted with the Rules of Civil Procedure and deemed by the Florida Supreme Court to be legally "sufficient" for mortgage foreclosure complaints. The form language calls for the plaintiff to plead and prove that it "owns and holds the note and mortgage" (not merely that it has possession of a bearer instrument). It is also consistent with the deep-rooted public policy of promoting and defending home ownership that has found expression in the Florida Constitution's homestead protections. Florida Constitution, Article X, Section 4; *see Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997) ("As a matter of public policy, the

purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home…").

The trial court erred, therefore, when it ignored the only evidence of note ownership before it—evidence that Fannie Mae owned the loan, not the Plaintiff – with the dismissive declaration: "That's between them and Fannie Mae. That's not between your client."[80]

d) The BANK failed to carry its burden of showing that the document it presented as the note was, in fact, the original.

Even if possession of the original note were, without more, sufficient to foreclose, the BANK presented no evidence that the document on file was the original note. At the outset, it must be emphasized that it is not the OWNERS' position that the homeowner, Ms. [redacted] had never signed the original note. It is the OWNERS' position that the document submitted as the original note is possibly a copy. This fundamental distinction was misunderstood by the trial court at the summary judgment hearing when the OWNERS argued that the original note had not been authenticated:

> THE COURT: Do you have affidavit of the person who signed it of your client saying that's not her signature?
>
> MR. ZACKS: I don't, Your Honor.

[80] MSJ Hrg., p. 6 **(R. 290)**.

THE COURT: Then move on to the next point.[81]

The original note is, of course, required to foreclose. *Pastore-Borroto Development, Inc. v. Marevista Apartments, M.B., Inc.*, 596 So. 2d 526 (Fla. 3d DCA 1992). And while the signatures on the note are said to be self-authenticating—unless their authenticity is specifically denied in the pleadings (§ 90.902(8) Fla. Stat. (2009) and § 673.3081(1) Fla. Stat. (2009))—this evidentiary shortcut is not available to establish that the proffered document itself is an original. Moreover, the UCC's self-authentication provision merely eliminates the need for extrinsic evidence as a condition precedent to admissibility of the note. Mere admission under this provision does not conclusively establish that the note is the genuine original. Rather, the authenticity of the note becomes a jury issue. *See U.S. v. Carriger*, 592 F.2d 312, 316 (6th Cir. 1979).

The OWNER's good faith basis for challenging the note's authenticity[82] was that the BANK had at first alleged that the original note and mortgage had been lost and that they had "disappeared under unknown circumstances."[83] Yet, without explanation for their reappearance, the BANK dropped its lost note count[84] and

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[81] MSJ Hrg., p. 7 **(R. 291)**.

[82] Answer, p. 4 **(R. 205)**.

[83] Complaint ¶18 **(R. 4)**.

[84] Notice of Dropping Count II, dated February 3, 2009.

filed documents purporting to be the original note and mortgage.[85] *See also*, Comments of the Florida Bankers Association filed in *In Re: Amendments to Rules of Civil Procedure and Forms for Use with Rules of Civil Procedure*, Case No: 09-1460 (Florida Supreme Court)[86] ("The reason 'many firms file lost note counts as a standard alternative pleading in the complaint' is because the physical document was deliberately eliminated to avoid confusion immediately upon its conversion to an electronic file." *Id*. at 4.) Additionally, the conflict between the BANK's claim that it owned the loan and the uncontradicted evidence that Fannie Mae owned the loan raised still further doubt as to the note's authenticity.

Lastly, the OWNERS filed the unrebutted affidavit of a forensic document examiner who, although not having examined the particular promissory note in this case, opined generally that it is virtually impossible to distinguish an original document from a quality color copy without the aid of a microscope.[87] Of course, the trial court may not weigh the evidence in determining a summary judgment, and thus, could not have made its own determination of whether the note was a copy or the original. But to the extent it might have been tempted to do so, the

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[85] Notice of Filing, dated February 3, 2009.

[86] Available at:

http://www.floridasupremecourt.org/pub_info/summaries/briefs/09/09-1460/Filed_09-30-2009_Comment_Bankers_Association.pdf.

[87] Notice of Reliance, Exhibit D **(R. 256)**.

undisputed evidence established that the determination requires expertise and a microscope.

The BANK put forward no evidence that the document was an original. The statement of its counsel in filing the document as the "original" does not rise to level of evidence. *Hewitt, Coleman & Associates v. Lymas*, 460 So. 2d 467 (Fla. 4th DCA 1984) (unsworn statements of fact by attorneys do not establish facts); *Leon Shaffer Golnick Adver., Inc. v. Cedar*, 423 So. 2d 1015, 1016 (Fla. 4th DCA 1982) (same). The same representation by Ms. Kawass, a non-record attorney, was even more deficient. *See Pasco County v. Quail Hollow Properties, Inc.*, 693 So. 2d 82, 84 (Fla. 2d DCA 1997) (notice of appearance grants attorney official recognition in the eyes of the court and "notice to all that he or she acts on the client's behalf and has authority to bind the client.").

2. The trial court erred in relying upon the BANK's Affidavit of Indebtedness to support summary judgment.

When the BANK filed its Affidavit of Indebtedness, the OWNERS moved to strike the affidavit on the grounds that it could not be used for summary judgment. Specifically, the OWNERS pointed out that Rule 1.510(e) Fla.R.Civ.P., provides that, for summary judgment affidavits, "[s]worn or certified copies of all

papers or parts thereof referred to in an affidavit shall be attached or served therewith."[88]

While claiming personal knowledge of the facts in the Affidavit, the affiant admitted that "the information hereinafter given is contained in the original books and records maintained in the office of the Plaintiff."[89] To use this affidavit for summary judgment, the BANK was required to attach sworn or certified copies of those portions of the referenced "books and records" that contained the relevant information. *Starkey v. Miami Aviation Corp*., 214 So. 2d 738 (Fla. 3d DCA 1968).

The OWNERS then propounded discovery requesting the very documents that should have been attached to the affidavit:

> All documents, records or computerized data files reviewed or relied upon by the Affiant in the preparation and execution of the Affidavit of Indebtedness filed by Plaintiff.[90]

The BANK produced documents in response to this request, thereby admitting what could be presumed by common sense: that the affiant did not retain debt figures down to the penny in her head, but instead simply parroted figures found in the BANK's "books and records." Despite the BANK's admission that

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[88] Defendants, [redacted] and [redacted] Motion to Strike Affidavit, dated February 23, 2009 **(R. 113)**.

[89] Affidavit of Indebtedness, ¶ 2 **(R. 157)**.

[90] Defendants' Request for Production Regarding Indebtedness, dated May 26, 2009 **(Supp. R. 16)**.

the affiant referred to and relied upon documentation which was not attached—much less "sworn or certified"—the BANK did not amend its affidavit or provide another.

Instead, the BANK filed a memorandum in which it argued that, because the sworn information arose under the terms of the note and mortgage, and because those two documents were already on file with the court, it did not need to attach anything to the affidavit.[91] As support for this proposition, the BANK cited this Court's decision in *Bifulco v State Farm Ins. Corp*., 693 So. 2d 707 (Fla. 4th DCA 1997). The BANK represented that *Bifulco* held that copies of a note and mortgage need not be attached to the affidavit "because copies of those documents 'ATTACHED TO THE COMPLAINT were true and correct copies.'"[92] In reality, *Bifulco* held just the opposite. There, this Court reversed a summary judgment because documents attached to an affidavit were not sworn or certified:

> Merely attaching documents which are not "sworn to or certified" to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla.R.Civ.P. 1.510(e). Moreover, rule 1.510(e) by its very language [footnote omitted] excludes from consideration on a motion for summary judgment, any document that is not one of the enumerated documents or is not a certified attachment to a proper affidavit.

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[91] Plaintiff's Response in Opposition to Defendant's Motion to Strike, dated May 5, 2009, p. 2 **(R. 153)**.

[92] *Id*.

Id. at 709.

Notably, *Bifulco* went on to hold that the documents did not qualify for the business records exception to hearsay because, just as in this case, they were not authenticated by a custodian. *Id.* at 711. Here, the affiant does not claim to be a custodian of documents "in the office of Plaintiff." And although the affiant identifies herself as an "Assistant Vice President," she seemed to be unclear as to whether she is an officer of Plaintiff or an agent (or even whether she is male or female):

> Affiant by nature of his/her position with the Plaintiff or as its agent knows of his/her personal knowledge that the Plaintiff is the owner and holder of the Note and Mortgage…[93]

See also Thomasson v. Money Store/Florida, Inc., 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (summary judgment reversed where affidavit which demonstrated "no more than that the documents attached thereto appear in the files and records of [movant]" did not meet requirements of the business record hearsay exception).

The language which the BANK attributed to *Bifulco* was actually from *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719, 721 (Fla. 4th DCA 1978). In that case, this court did not hold that merely filing unsworn documents is sufficient to meet summary judgment evidentiary requirements. It held that failure

[93] Affidavit of Indebtedness, executed December 18, 2008 ¶ 2 **(R. 157)**.

to attach documents could be overlooked, as long as they were already on file and "the affidavit swore that the copies of [the documents on file] were true and correct copies." *Id*. In stark contrast, the affiant here did not swear that anything was a true and correct copy. Because the affidavit should not have been considered, the BANK's summary judgment was unsupported by any evidence whatsoever and should have been denied.

3. The BANK did not disprove the OWNERS' affirmative defenses.

"The party moving for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Stop & Shoppe Mart, Inc. v. Mehdi*, 854 So. 2d 784 (Fla. 5th DCA 2003). Here, the OWNERS raised five affirmative defenses, none of which were countered by evidence or shown to be insufficient as a matter of law. Two (contesting the ownership and authenticity of the note) were discussed above. Another, (that Plaintiff failed to join an indispensable party: the mortgagee, MERS) flows from the inadmissibility of the Assignment of Mortgage, also discussed above. In short, because the Assignment of Mortgage was inadmissible, MERS was, from the standpoint of the admissible evidence, still the mortgagee and a necessary party to a foreclosure action.

A fourth affirmative defense raised the equitable doctrine of unclean hands. While the OWNERS were not given an opportunity to fully develop this defense

through discovery, the disputed factual issues regarding ownership and authenticity of the note, if eventually determined against the BANK (if not themselves sufficient for dismissal for lack of standing), would support a dismissal for unclean hands.

The last affirmative defense (but appearing first in the list) was the OWNERS' objection to the reasonableness of attorneys' fees and costs. This Court held in a contested foreclosure action such as this, an award of fees cannot be based solely upon affidavit when the party who must pay those fees objects:

> In an adversary proceeding such as this the determination of an attorneys fee for the mortgagee based upon affidavits over objection of the mortgagor is improper. Evidence should be adduced so that the full range of cross examination will be afforded both parties.

Geraci v. Kozloski, 377 So. 2d 811, 812 (Fla. 4th DCA 1979). Even if the trial court could have awarded fees without an evidentiary hearing, it was error to award $4,685.50 more in attorneys fees than what the BANK's own expert's affidavit said was reasonable. *See Mullane v. Lorenz*, 372 So. 2d 168 (Fla. 4th DCA 1979) (error to award fees based only on the affidavit of the lawyer himself claiming the fees).

The evidentiary hearing to which the OWNERS were entitled would have permitted them to challenge the exorbitant time spent on some ill-defined tasks (such as the one-hour charge for "legal services rendered in connection with

foreclosure"[94]) as well as the two-hour charge for the attorney-fee affiant's appearance at a hearing which no one—much less the affiant—attended on behalf the BANK.[95]

4. Pending discovery precluded summary judgment.

"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." *UFF DAA, Inc. v. Towne Realty, Inc.*, 666 So. 2d 199, 200 (Fla. 5th DCA 1995). Summary judgment is premature where there has been insufficient time for discovery or where a party through no fault of his own, has not yet completed discovery. *Singer v. Star*, 510 So. 2d 637, 639 (Fla. 4th DCA 1987); *Epstein v. Guidance Corp., Inc.*, 736 So. 2d 137 (Fla. 4th DCA 1999).

a) The OWNERS had been diligent in seeking discovery.

Here, before the summary judgment hearing, the OWNERS had propounded requests for admissions[96] and had asked BANK's counsel for dates to depose four

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[94] Aff. Atty Fees No. 1., attached Transactions Listing entry for November 26, 2008 **(R. 197)**.

[95] Aff. Atty Fees No. 1., attached Transactions Listing entry for September 16, 2009; Hrg. 1, p. 2 **(R. 201)**.

witnesses.[97] One of the witnesses, Keri Selman, was the person who had executed the Affidavit of Indebtedness[98]—the single document upon which the entire motion for summary judgment rested and which was devoid of any sworn attachments. The other witnesses, were Brent Robinson (the interrogatory signor), Brian Hogan (the attorneys' fee expert), and Beth Norrow (the attorney fee affiant).

In response to the OWNERS' request, the BANK offered deposition dates for only three of the witnesses, and for Selman, offered only a telephone deposition because a broken foot prevented her from coming to the forum to testify.[99] If she was, in fact, an officer of the BANK, rather than an agent, the OWNERS were entitled to her deposition in person and in the forum county. *Plantation-Simon Inc. v. Bahloul*, 596 So. 2d 1159, 1162 (Fla. 4th DCA 1992). And while the BANK protested that the Selman Affidavit of Indebtedness had been on file since

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[96] Defendants, [redacted] and [redacted] Requests for Admission, dated October 29, 2009 **(Supp. R. 49);** Defendants, [redacted] and [redacted] Requests for Admission Regarding Mortgage Loan Ownership, dated October 30, 2009 **(Supp. R. 52)**.

[97] Notice of Reliance Pursuant to Rule 1.510(c) Fla.R.Civ.P., ¶ 9 **(R. 242);** Notice of Filing Email from Plaintiff Counsel to Defense Counsel dated October 22, 2009 offering deposition dates **(R. 302)**.

[98] Affidavit of Indebtedness, executed December 18, 2008 **(R. 157)**.

[99] Notice of Filing Email from Plaintiff Counsel to Defense Counsel dated October 22, 2009 offering deposition dates **(R. 302)**.

February 4, 2009,[100] the OWNERS had learned only on September 16, 2009 (about five weeks before their deposition request) that the Selman Affidavit would not be stricken for failure to attach any sworn documentation.

Aside from offering only a telephone deposition of Selman, the BANK also demanded that all three depositions (Selman, Robinson and Hogan) be shoehorned into the two weeks that remained prior to the summary judgment hearing.[101] Such short notice left insufficient time to prepare for the depositions, to make travel arrangements to attend, and afterwards, to transcribe the depositions for use at the summary judgment hearing.

At the summary judgment hearing, the BANK again protested that the OWNERS had only recently asked for the outstanding discovery[102] implying that the OWNERS had interposed discovery at the last minute for the sole purpose of delaying summary judgment. The trial court, too, expressed concern that the depositions had not yet been set in a case filed approximately a year before the hearing.[103]

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[100] *Id*.

[101] Notice of Filing Email from Plaintiff Counsel to Defense Counsel dated October 22, 2009 offering deposition dates **(R. 302)**.

[102] MSJ Hrg., p. 11 **(R. 295)**.

[103] MSJ Hrg., p. 9 **(R. 293)**.

Actually, the OWNERS had diligently pursued their discovery, propounding interrogatories and a request for production a week after moving to dismiss the case.[104] It was the BANK who had taken over nine months to substantially (but still not completely) respond to the first wave of paper discovery, and not before the OWNERS were forced to obtain two court orders compelling the responses.[105] Leaving aside that it is customary to complete paper discovery before embarking on depositions, these long-awaited responses from the BANK—only weeks before the summary judgment hearing—disclosed for the first time that Mr. Robinson's was a relevant witness. Another requested deponent, Brian Hogan, the expert on the reasonableness of attorneys' fees was first revealed less than three weeks before summary judgment.[106]

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[104] Mortgage Loan Ownership Interrogatories and Notice of Service, dated December 17, 2008 **(Supp. R. 1)**; Note Authenticity/Ownership Interrogatories and Notice of Service, dated December 17, 2008 **(Supp. R. 3)**; Defendants, [redacted] and [redacted] Request for Production Regarding MERS Tracking, dated December 17, 2008 **(Supp. R. 5)**.

[105] Order on Motion to Compel, entitled Order on Motion to Dismiss, dated September 16, 2009 **(R. 174)**; Order on Defendants' *Ex Parte* Motion to Compel; dated August 12, 2009 **(R. 172)**.

[106] Affidavit of Brian Hogan, executed October 16, 2009 **(R. 221)**.

b) The pending discovery was relevant.

The BANK also argued that the depositions were relevant only to its standing to bring the action, and therefore, were irrelevant to the summary judgment.[107] This blanket characterization was patently incorrect with respect to the requested depositions of the attorneys' fees affiants (Brian Hogan and Beth Norrow) and the indebtedness affiant (Keri Selman). And while Mr. Robinson would certainly have addressed standing issues in his deposition, depending on his position and relationship with the BANK, he may have been able to provide testimony to other relevant issues, as well.

In any event, standing was still a material issue deserving of discovery because, as discussed above, mere possession note is not equivalent to ownership. Nor does mere possession, without ownership, equate to lienholder. Also as discussed above, the BANK's possession of the original note, as opposed to a copy, had not been determined merely because its attorney filed a document she self-servingly described as the original.

Accordingly, the trial court erred in granting summary judgment while the OWNERS' discovery was pending. *Fleet Fin. & Mortg., Inc. v. Carey*, 707 So. 2d

[107] MSJ Hrg., p. 11 **(R. 295)**.

949 (Fla. 4th DCA 1998) (summary judgment reversed where court advised at hearing that party had agreed to be deposed on a date after the hearing).

5. The Summary Final Judgment contains a reformed legal description and loan interest for which no evidence had been submitted.

An additional reason that the summary judgment should be reversed is that it contains a legal description that tracks that of the count to reform the mortgage in the BANK's Complaint. The BANK's motion for summary judgment never mentioned reformation of the mortgage, nor did the BANK's attorney at the hearing. The BANK submitted no evidence to support its contested allegation that the legal description on the mortgage was incorrect, or that the legal description it proposed was correct.

Similarly, the Judgment included $14,120.08 of interest,[108] an increase of over $8,000 from that stated in the Affidavit of Indebtedness.[109] How this difference was calculated is not mentioned in the judgment or in the BANK's affidavit.[110]

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[108] *Id*.

[109] Affidavit of Indebtedness, ¶ 6 **(R. 158)**.

[110] Summary Final Judgment for Foreclosure, ¶ 5 **(R. 263)**; Affidavit of Indebtedness, ¶ 6 **(R. 158)**.

B. The Motion to Dismiss Should Have Been Granted Because the BANK Failed to Amend After Locating the Promissory Note.

The BANK did not attach a copy of the promissory note to the Complaint and instead represented to the court that the note had been lost.[111] The BANK later claimed to have found the note in its own possession,[112] but did not amend its Complaint. The BANK was required to amend its Complaint for two reasons. First, once it found the note, it was required to amend the Complaint to attach a copy. *Safeco Ins. Co. of Am. v. Ware*, 401 So. 2d 1129, 1131 (Fla. 4th DCA 1981). No mere procedural technicality, the amendment is crucial to the course of the proceedings because the BANK is bound by its pleadings and any admissions in the pleadings are accepted as established facts. *U. S. v. Century Fed. Sav. & Loan Ass'n of Ormond Beach*, 418 So. 2d 1195, 1197 (Fla. 4th DCA 1982). And because the lender on the note is Countrywide Bank, N.A.—not Plaintiff or its assignor, MERS—the note conflicts with the allegations of the Complaint. Once attached, the conflict between the note and the allegations would require dismissal. *See Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000); *Buck v. Kent Sec. of Broward, Inc.*, 638 So. 2d 1004 (Fla. 4th DCA 1994).

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[111] Complaint, dated November 5, 2008 **(R. 1)**.

[112] Notice of Service of Supplemental Answers to Note Authenticity/Ownership Interrogatories, dated September 28, 2009, Answer to Interrogatory No. 2 **(Supp. R. 32)**.

Second, the BANK was required to amend because it is impermissible to simply file a Notice of Dropping Count II[113] (the lost note count) to dispose of one of its three claims. *Deseret Ranches of Florida, Inc. v. Bowman*, 340 So. 2d 1232, 1233 (Fla. 4th DCA 1976) (voluntary dismissal of less than all counts "impossible" and therefore a nullity; proper method is amendment of the pleading under Fla.R.Civ.P. 1.190). Accordingly, at the time of summary judgment, the BANK was still bound to its pleading that the original note was lost.

The trial court, therefore, erred in denying the OWNERS' motion to dismiss.

[113] Notice of Dropping Count II, February 3, 2009 **(R. 78)**.

CONCLUSION

The summary judgment in this case should be reversed and the case remanded for the entry of an order dismissing the case without prejudice to amend.

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellants
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: _____
THOMAS E. 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 April 16, 2010 to all parties on the attached service list.

ICE LEGAL, P.A.
Counsel for Appellants
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: _____
THOMAS E. ICE
Florida Bar No. 0521655

SERVICE LIST

Beth Norrow, Esq.
BUTLER & HOSCH, P.A.
3185 S Conway Rd Ste E
Orlando, Florida 32812-7315

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Answer 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
1975 Sansburys Way, Suite 104
West Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: 
THOMAS E. ICE
Florida Bar No. 0521655