

**In the District Court of Appeal
Fourth District of Florida**

CASE NO. [REDACTED]
(Circuit Court Case No. [REDACTED])

[REDACTED] and [REDACTED]
Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION,

Appellee.

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 Appellant
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
ISSUES PRESENTED.....	1
STATEMENT OF THE CASE AND FACTS	2
I. The Plaintiff files a Complaint with attachments that conflict with the allegations.....	2
II. U.S. Bank moves for summary judgment.	3
SUMMARY OF THE ARGUMENT	5
STANDARD OF REVIEW	6
ARGUMENT	7
A. At the time of filing, U.S. Bank had no standing to sue because the special endorsement was payable to First Magnus or Washington Mutual Bank and the mortgage shows MERS was the mortgagee.	7
B. The documents on which U.S. Bank based its standing—the assignments—were not executed or effective until after the filing of the lawsuit.....	9
CONCLUSION	11
CERTIFICATE OF SERVICE	12
SERVICE LIST.....	12
CERTIFICATE OF COMPLIANCE WITH FONT STANDARD.....	13

TABLE OF AUTHORITIES

	Page
Cases	
<i>BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques</i> , 28 So. 3d 936 (Fla. 2d DCA 2010)	7, 9, 10
<i>Carvell v. Kinsey</i> , 87 So. 2d 577 (Fla. 1956).....	9
<i>Cessna Aircraft Co. v. Avion Techs., Inc.</i> , 990 So. 2d 532 (Fla. 3d DCA 2008)	9
<i>Fernandez v. Fernandez</i> , 648 So. 712 (Fla. 1995).....	9
<i>Fladell v. Palm Beach County Canvassing Bd.</i> , 772 So. 2d 1240 (Fla. 2000).....	9
<i>Holl v. Talcott</i> , 191 So. 2d 40 (Fla. 1966).....	6
<i>Jeff-Ray Corp. v. Jacobson</i> , 566 So. 2d 885 (Fla. 4th DCA 1990)	7, 10, 11
<i>Palm Beach Pain Management, Inc. v. Carroll</i> , 7 So. 3d 1144 (Fla. 4th DCA 2009)	6
<i>Reeves v. North Broward Hosp. Dist.</i> , 821 So. 2d 319 (Fla. 4th DCA 2002)	6
<i>Riggs v. Aurora Loan Servs., LLC</i> , 36 So. 3d 932 (Fla. 4th DCA 2010)	7, 8
<i>Verizzo v. Bank of New York</i> , 28 So. 3d 976 (Fla. 2d DCA 2010)	7
<i>Volusia County v. Aberdeen at Ormond Beach, L.P.</i> , 760 So. 2d 126 (Fla 2002).....	6
Statutes	
§ 673.2051(1), Fla. Stat. (2009).....	7, 8
Rules	
Fla. R. Civ. P. 1.130(b)	9
Fla. R. Civ. P. 1.510(c)	6

ISSUES PRESENTED

Issue #1

To prevail in a foreclosure action, the plaintiff must present evidence that it owns and holds the note and mortgage. A specially endorsed instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. The note attached to the summary judgment affidavit is payable to First Magnus. The note attached to U.S. Bank's notice of filing is endorsed to Washington Mutual Bank. Did U.S. Bank have standing to enforce either of these versions of the note?

Issue #2

Under Florida law, a plaintiff must have a cause of action at the time of filing a lawsuit. The mortgage lists MERS as the mortgagee and First Magnus as the lender. There is no evidence of any transfers prior to the lawsuit. Was U.S. Bank the mortgagee at the time the law suit was filed?

STATEMENT OF THE CASE AND FACTS

I. The Plaintiff files a Complaint with attachments that conflict with the allegations.

On March 5, 2009, U.S. Bank National Association brought suit to foreclose on the property of [REDACTED] and [REDACTED].¹ The Complaint alleged that a promissory note and mortgage were executed and that “[p]laintiff is the legal and/or equitable owner and holder of the Note and Mortgage and has the right to enforce the loan documents.”² No copy of a note was attached to the Complaint.³ The attached copy of the mortgage listed Mortgage Electronic Registration Systems, Inc. (“MERS”) as the mortgagee and First Magnus Financial Corporation as the lender.⁴

[REDACTED] answered the Complaint and denied that U.S. Bank is the owner and holder of the note and mortgage.⁵ [REDACTED] raised several affirmative defenses. Her second affirmative defense claimed U.S. Bank failed to state a cause of action, lacked standing to bring this suit, and neither owned nor held the note

¹ Complaint, filed March 5, 2009. (R. 1-26).

² Complaint, ¶¶ 4, 6 (R. 1-26).

³ Complaint (R. 1-26).

⁴ Mortgage attached to Complaint (R. 1-26).

⁵ Answer and Affirmative Defenses (“Answer”) filed February 1, 2010 (R. 53-72).

and mortgage.⁶ She also raised standing in her third, twelfth, and fourteenth affirmative defenses.⁷ U.S. Bank filed a reply claiming it is the holder of the note.⁸

II. U.S. Bank moves for summary judgment.

U.S. Bank moved for summary judgment claiming it is the holder of a negotiable instrument.⁹ Attached to its motion and affidavit were copies of a note and two assignments of mortgage which post date the filing of the Complaint.¹⁰ The note was payable to First Magnus and contained no further endorsements.¹¹ The first assignment dated April 7, 2010, sought to transfer the mortgage from JPMorgan Chase Bank National Association to U.S. Bank, National Association. The second assignment dated April 21, 2010, sought to transfer the mortgage from MERS to JPMorgan Chase National Banking and purported to correct an earlier assignment.

The same day the motion was filed, U.S. Bank filed a note, mortgage, and an assignment its counsel claimed were originals.¹² The filing contained a note

⁶ Answer (R. 53-72).

⁷ Answer (R. 53-72).

⁸ Reply to Affirmative Defenses, filed February 10, 2010 (R. 73-74).

⁹ Plaintiff's Motion for Summary Judgment and Exhibits, served August 6, 2010 (A. 1).

¹⁰ Plaintiff's Motion for Summary Judgment and Exhibits (A. 12-20, 50-58).

¹¹ Plaintiff's Motion for Summary Judgment and Affidavits (A. 12-16, 50-54).

¹² Notice of Filing, filed August 9, 2010 (R. 82-111).

originally payable to First Magnus which was further endorsed to Washington Mutual Bank. The filing also contains an assignment of mortgage dated May 22, 2009, transferring the mortgage to U.S. Bank as Trustee for Washington Mutual Bank.

██████████ filed a memorandum in opposition to summary judgment and an affidavit arguing that U.S. Bank did not own or hold the note at the time the Complaint was filed.¹³ The trial court granted summary judgment for U.S. Bank.¹⁴

██████████ timely moved for rehearing which was denied by the court.¹⁵ ██████████ then filed a timely notice of appeal.

¹³ Memorandum in Opposition to Summary Judgment, served September 9, 2010 (R. 391-416); Affidavit of Defendant, filed September 10, 2010 (R. 114-391).

¹⁴ Final Judgment of Foreclosure, filed on September 14, 2010 (R. 466-70).

¹⁵ Defendant's Motion for Rehearing, served September 22, 2010 (R. 471-97); Order Denying Rehearing, filed on October 12, 2010 (R. 504).

SUMMARY OF THE ARGUMENT

To have standing to sue a plaintiff must have a cause of action at the commencement of the suit. In foreclosure cases, the party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action.

In this case, U.S. Bank produced a note payable to First Magnus and a note endorsed to Washington Mutual Bank. A specially endorsed instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. Here, U.S. Bank cannot be a holder of the note unless it is the named payee in the endorsement — which it is not.

Further, there is no allegation or evidence of an earlier transfer. The assignments produced by U.S. Bank postdate the filing of the Complaint and do not contain earlier effective dates. Therefore, as a matter of law, U.S. Bank did not have standing to sue when the Complaint was filed. This Court must reverse the final summary judgment with directions to dismiss this case.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2002); *Reeves v. North Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. 4th DCA 2002). The summary judgment standard is well-established. A movant is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that 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, [REDACTED] and if there is the slightest doubt or conflict in the evidence, then summary judgment must be reversed. *See id.*

ARGUMENT

A. At the time of filing, U.S. Bank had no standing to sue because the special endorsement was payable to First Magnus or Washington Mutual Bank and the mortgage shows MERS was the mortgagee.

To possess standing to sue a plaintiff must have a cause of action at the commencement of the suit. *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990). In foreclosure cases, the party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action. *Riggs v. Aurora Loan Servs., LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010); *see also Verizzo v. Bank of New York*, 28 So. 3d 976, 978 (Fla. 2d DCA 2010). If the note does not name the plaintiff as the payee, the note must bear an endorsement in favor of the plaintiff or a blank endorsement. § 673.2051(1), Fla. Stat. (2009); *see also Riggs*, 36 So. 3d at 933. Alternatively, the plaintiff must produce evidence of an assignment showing it acquired the right to sue prior to filing. *See BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 938 (Fla. 2d DCA 2010).

In this case, U.S. Bank produced two notes—neither of which is endorsed in blank. The note attached to the affidavit in support of summary judgment lists First Magnus as the payee.¹⁶ Therefore, absent further endorsement, U.S. Bank

¹⁶ Note attached to Complaint (R. 1-26).

could not state a cause of action or have standing to sue based on a note payable to First Magnus.

The note attached to the notice of filing is specially endorsed to Washington Mutual Bank.¹⁷ A special endorsement is an endorsement by a holder of an instrument that identifies a person to whom it makes the instrument payable. § 673.2051(1), Fla. Stat. (2009). When specially endorsed, an instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. *Id*; *see also Riggs, LLC*, 36 So. 3d at 933 (distinguishing a special endorsement which specifically identifies the person to whom it is made payable from a blank endorsement which is made payable to bearer and is negotiated by transfer alone).

Here, U.S. Bank cannot be the holder of the promissory note unless it is the named payee in the endorsement — which it is not. Therefore, the chain of title for the note ends at First Magnus or Washington Mutual Bank. The endorsement is evidence that U.S. Bank does *not* hold the subject promissory note. At the very least, the endorsements to an entity other than U.S. Bank created an issue of fact that precluded summary judgment.

¹⁷ Notice of Filing, filed August 9, 2010 (R. 82-111).

B. The documents on which U.S. Bank based its standing—the assignments—were not executed or effective until after the filing of the lawsuit.

The Complaint here was filed on March 5, 2009.¹⁸ The mortgage attached to the Complaint lists MERS as the mortgagee as nominee for First Magnus.¹⁹ Exhibits attached to a pleading become a part of the pleading for all purposes. *See* Fla. R. Civ. P. 1.130(b). When exhibits are attached to a complaint, the contents of the exhibit control over the allegations of the complaint. *See Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000); *BAC Funding*, 28 So. 3d at 938. Further, a party is bound by its own pleadings and there does not have to be testimony from either party concerning facts admitted by the pleadings. *Fernandez v. Fernandez*, 648 So. 712, 713 (Fla. 1995) *citing Carvell v. Kinsey*, 87 So. 2d 577 (Fla. 1956); *Cessna Aircraft Co. v. Avion Techs., Inc.*, 990 So. 2d 532, 536-37 (Fla. 3d DCA 2008). Therefore, based on the pleadings and admissions MERS was the mortgagee at the time the case was filed.

To prove its standing as mortgagee, however, U.S. Bank relied on several assignments which were all executed after the case was filed and do not have

¹⁸ *See* Complaint (R. 1-26).

¹⁹ Mortgage attached to Complaint (R. 1-26).

previous effective dates.²⁰ The first assignment (which U.S. Bank claimed was incorrect) was executed on May 22, 2009.²¹ The second assignment was executed on April 7, 2010 and the last one on April 22, 2010—all after this case was filed.²² Therefore, U.S. Bank could not prove standing on the date the Complaint was filed based on assignments that did not exist, and were not effective, until *after the lawsuit was filed*.

This Court has already decided this issue. In *Jeff-Ray*, a lender attempted to foreclose with an assignment dated four months after the lawsuit was filed. 566 So. 2d at 885. The Fourth District held that the “complaint could not have stated a cause of action at the time it was filed based on a document that did not exist until some four months later.” *Id.* at 886. As a result, the court reversed final summary judgment and found that the complaint should have been dismissed. *Id.*; see *BAC Funding*, 28 So. 3d at 938-39.

Like the plaintiff in *Jeff Ray Corp.*, U.S. Bank in this case sought to state a cause of action based on an assignment that did not exist, and was not effective, at the time the Complaint was filed. Nor can U.S. Bank fall back on the often used excuse for failing to provide proper assignments—that the “mortgage follows the

²⁰ Even if the assignments had predated the filing of the lawsuit, the assignments were never authenticated as *true and correct copies* or *originals*. The same is true for all other exhibits attached to the affidavits.

²¹ Notice of Filing, filed August 9, 2010 (R. 82-111).

²² Plaintiff’s Motion for Summary Judgment and Affidavit (A. 17-20, 55-58).

note”—because here, the record evidence establishes that the note never reached the plaintiff by way of endorsement and transfer. Indeed, the only “evidence” that the note was ever conveyed to U.S. Bank are the self-serving assignments prepared by its own foreclosure attorneys after the suit was filed.

Accordingly, the Complaint could not have stated a cause of action at the time it was filed and this case should be dismissed.

CONCLUSION

To be entitled to summary judgment U.S. Bank was required to show that there was no genuine issue of fact that it was the noteholder and mortgagee at the time the case was filed. The record shows the opposite. Therefore, the judgment must be reversed with directions to dismiss this case under *Jeff-Ray Corp.*

Dated November 14, 2011

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Rd. 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

By:

ENRIQUE NIEVES III
Florida Bar No. 41736

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing along with the appendix thereto was served by U.S. Mail and by email in accordance with Administrative Order No. 2011-1 this November 14, 2011 on all parties on the attached service list.

ICE LEGAL, P.A.

Counsel for Appellants
1015 N. State Rd. 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

By:

ENRIQUE NIEVES III
Florida Bar No. 41736

SERVICE LIST

Jeffrey T. Kuntz, Esq.
GRAY ROBINSON, P.A.
401 East Las Olas Boulevard
Suite 1850
Fort Lauderdale, FL 33301
(954) 761-8111
Facsimile (954) 761-8112
Appellee's counsel

Cherri-Ann Gianell, Esq.
LAW OFFICES OF MARSHALL C.
WATSON, P.A.
1800 N.W. 49th Street, Suite 120
Fort Lauderdale, FL 33309
(954) 453-0365
Plaintiff's counsel

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

ICE LEGAL, P.A.

Counsel for Appellants

1015 N. State Rd. 7, Suite D

Royal Palm Beach, FL 33411

Telephone: (561) 729-0530

Facsimile: (866) 507-9888

By:

ENRIQUE NIEVES III

Florida Bar No. 41736