In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] ET AL.,

Appellants,

v.

WELLS FARGO BANK, N.A., AS TRUSTEE OF WAMU MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-PR4., ET AL,

Appellees.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules

Statutes

ISSUES PRESENTED

Under Florida law, a party who demonstrates a colorable entitlement to relief from judgment must be accorded an evidentiary hearing and the discovery necessary to prepare for that hearing. [redacted] and Edith [redacted] made specific allegations that a last-minute substitution of party plaintiff on the day of trial wrought a fraud upon the court. Were the [redacted] wrongly denied discovery to prove their allegations?

* * *

Under Florida law, a defaulted party is entitled to notice of an order setting an action for trial. After default was entered against her, Edith [redacted] was not notified of the court's order re-setting the trial date. Was Edith [redacted] entitled to notice of the order re-setting the trial date?

STATEMENT OF THE CASE AND FACTS

- **On the day of trial, the plaintiff moved to substitute the plaintiff based on a newly created assignment, which the court granted.**

This is a case in which a succession of three different banks has sought to foreclose upon a single condominium unit. [redacted] was the owner of the unit when he executed a promissory note to Washington Mutual, F.A. ("WAMU"). He and his wife, Edith [redacted] ("EDITH [redacted] and collectively, "the [redacted] both executed a mortgage to WAMU as the mortgagee. The property was subsequently transferred to the current owner, the [redacted] Patrick [redacted] Revocable Trust Agreement Dated October 31, 2003 ("[redacted] TRUST").

The original lender, WAMU, filed the initial complaint in February of 2008 against the [redacted] the trust, and unknown beneficiaries of the trust.[1] The Complaint alleged that WAMU was the "owner" (not "holder") of the promissory note that had been "lost or destroyed."[2]

Over a year later, plaintiff's counsel—ostensibly on behalf of WAMU—moved to substitute JPMorgan Chase, National Association ("JPMORGAN") as the party plaintiff on the grounds that WAMU had ceased to exist more than five

[1] Complaint, February 25, 2008 (A. 1).

[2] Complaint, ¶ 4 (A. 1)

months earlier. This motion was accompanied by an affidavit from a purported receiver stating that JPMORGAN had acquired WAMU's loans. While there was no indication on the motion that it was being submitted for *ex parte* consideration, the trial court granted the motion without a hearing.[3]

On the same day that it filed the motion to substitute party plaintiff, WAMU also filed documents it labeled as the "original note and mortgage."[4] The Certificate of Service on the Notice of Filing of the "originals" indicates that it was not served on EDITH [redacted] or the [redacted] TRUST. The documents received by the clerk of the court and scanned into the court's imaging system show that both the note and mortgage were missing every other page, including the signature pages on both. The physical copy of the court file is missing the Notice of Filing and the documents attached entirely.[5]

Despite having initially represented that the promissory note was lost or destroyed, neither WAMU nor JPMORGAN amended the Complaint to drop the lost note count or otherwise notify the parties that it would no longer be attempting to reestablish the lost note.

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[3] Order Substituting Party Plaintiff, March 10, 2009 (A. 57).

[4] Notice of Filing Original Note and Mortgage, docketed March 6, 2009 (A. 37).

[5] Appellants request that this Court take judicial notice of the Circuit Court file in this case pursuant to §90.202(6) Fla. Stat. (2011).

Over a year and half later—on the very day of trial—plaintiff's counsel (this time on behalf of JPMORGAN) moved to substitute the party plaintiff once again, this time with Wells Fargo Bank, N.A. ("WELLS FARGO") as Trustee of WAMU Mortgage Pass-Through Certificates, Series 2005-PR4.[6] The motion alleged that JPMORGAN had somehow assigned the subject nonperforming loan into a 2005 trust at some point after November of 2009[7]—and did so while the purported originals of the note and mortgage resided in the courthouse files.

This allegation of a post-default transfer was supported by a single document, an assignment of mortgage from WAMU to WELLS FARGO as trustee. The assignment was prepared by the same attorneys who have been arguing on behalf of the "plaintiff" in its various incarnations throughout this foreclosure action. The assignment lists both WAMU and WELLS FARGO as "residing or located at" 7757 Bayberry Road, Jacksonville, FL 32256. The assignment was executed by someone in Duval County holding herself out as a "Foreclosure Officer" of JPMORGAN, and who provided "self" as identification to the notary. The trial court granted the motion substituting the BANK as the

[6] Second Motion To Substitute Party Plaintiff, dated October 1, 2010 (A. 77).

[7] *Id*. at ¶¶ 3-4.

plaintiff,[8] and after completing the trial, entered a judgment of foreclosure in the BANK's favor.[9]

The judgment is silent as to whether there was any evidence, much less a finding, that the lost note was reestablished. In addition to enumerating the amounts due and owing under the promissory note, the judgment awarded attorneys' fees.[10] According to the judgment, the amount of attorneys' fees was determined "based upon the affidavits presented and upon inquiry of counsel for the plaintiff."[11]

- **The notice of the trial setting was not served on EDITH**

For the majority of the proceedings below, the were unrepresented by counsel. a World War II veteran who requires special transportation to and from the courthouse,[12] filed an Answer to the Complaint *pro se*,[13] and represented himself at the trial.

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[8] Second Order Substituting Party Plaintiff, October 1, 2010 (A. 75).

[9] Final Judgment of Mortgage Foreclosure, October 1, 2010 (A. 81).

[10] *Id.*

[11] *Id.*

[12] Defendants, Individually and as Trustee of The Patrick Revocable Trust Agreement Dated October 31, 2003, and Edith Motion to Vacate Final Judgment, November 24, 2010 (A. 86).

[13] Answer, March 14, 2008 (A. 32).

Having made no appearance in the case, EDITH was defaulted by the clerk,[14] but not until after the first *ex parte* substitution of party plaintiff.[15] Upon receipt of a notice that the case was ready for trial filed by the co-defendant, Rosewood Condominium Association, Inc. ("the CONDO ASSN."), the trial court entered a trial order setting calendar call on May 7, 2010.[16] Although the Order indicates that it was not served on either of the or the trust, the clerk docketed two letters returned as undeliverable in which the trial order had apparently been sent to and EDITH at the property address (9923 Three Lakes Circle in Boca Raton). Notably, the trial court itself had earlier ordered that all papers required to be served on be sent to his last known address at 14751 Summersong Lane in Delray Beach.[17]

The bank then moved for a continuance of trial stating that the parties were working on a settlement and that the "Defendant" was not noticed on the trial

[14] Default, March 19, 2009 (A.59).

[15] Order Substituting Party Plaintiff, March 10, 2009 (A. 57).

[16] Order Setting Non-Jury Trial and Directing Pretrial and Mediation Procedures, dated February 11, 2010 (A. 60).

[17] Order on Motion to Withdraw as Counsel, dated February 26, 2009 (A. 34).

order.[18] This motion was served only on [redacted] and the CONDO ASSN. The court granted the motion based on the "parties being in agreement" and notified all parties that "calendar call" had been rolled to July 9, 2010.[19] The court served EDITH [redacted] at the property address—the same address from which the court's original trial order had been returned as undeliverable.

Why the trial did not occur during the trial period of the July 9th calendar call is not discernible from the record. The next document in the docket is a "Notice of Non-Jury Trial" which declared that the trial was to take place September 24, 2010. This trial setting was not by order and was not served by the court. Instead, it was a simple notice served by the CONDO ASSN.[20]

Four days before this new trial date, however, the court rescheduled the trial yet again, this time for October 1, 2010.[21] According the Order itself, EDITH [redacted] was not served with notice of this trial re-setting. She did not appear on that date.

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[18] Motion for Continuance of Trial, dated April 21, 2010 (A. 65).

[19] Order on Motion to Withdraw as Counsel, February 26, 2009 (A. 34).

[20] Notice of Non-Jury Trial, August 16, 2010 (A. 73).

[21] Order Re-Setting Non-Jury Trial, September 20, 2010 (A. 74).

- **The moved to vacate the judgment alleging fraud and lack of service of the trial notice.**

After the trial, the retained counsel who filed a Motion to Vacate Final Judgment.[22] The Motion to Vacate pointed out that EDITH (and technically, the TRUST) had never been served with the notice rescheduling trial. It also made specific allegations of fraud. The asserted that the Plaintiff had continually concealed the true owner of the note throughout the litigation, because the loan could not have been transferred into a trust after November of 2009, when the name of the trust indicates that it was "closed" to new assets in 2005.[23]

The Motion to Vacate also asked for an opportunity to conduct discovery on "whether the BANK has knowingly misled the Court for over two and half

[22] Defendants, Individually and as Trustee of The Patrick Revocable Trust Agreement Dated October 31, 2003, and Edith Motion to Vacate Final Judgment, dated November 24, 2010 (A. 86).

[23] The motion also asserted that, based on the information available then, the Plaintiff's trust did not exist. Although WELLS FARGO never specifically denied this assertion on the record, the are not pursuing this allegation on appeal.

years."[24] It requested additional discovery on "how an assignment dated in 2010 could possibly purport to transfer a note and mortgage into a trust dated 2005."[25]

- **The court denied the [redacted] discovery in support of their motion to vacate.**

The parties agreed to an order which cancelled the sale and reserved ruling on the Motion to Vacate until it could be decided at a specially set hearing.[26] The [redacted] then propounded discovery to further develop the evidence to support their allegations, including Requests for Admission,[27] Requests for Production[28] and Interrogatories.[29] WELLS FARGO moved to strike the discovery on the grounds that discovery was improper before the judgment was actually vacated.[30] The [redacted] responded that it is black letter law that a court is required to

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[24] *Id*., at 7.

[25] *Id*.

[26] Agreed Order on Motion to Vacate Final Judgment, dated January 10, 2011 (A. 96).

[27] Defendant, [redacted] First Requests for Admission, July 19, 2011 (A. 98).

[28] Defendant, [redacted] Edith [redacted] And [redacted] as Trustee of the [redacted] Patrick [redacted] Revocable Trust Agreement Dated October 31, 2003's, Request for Production, served July 19, 2011 (A. 101).

[29] Interrogatories And Notice of Service, served July 19, 2011 (A. 104).

[30] Plaintiff's Motion To Strike Defendant [redacted] First Request For Admission, Interrogatories And Request For Production, dated August 17, 2011 (A. 112).

permit discovery relevant to a motion to vacate prior to an evidentiary hearing on that motion.[31]

At the hearing on its motion to strike, WELLS FARGO argued that the [redacted] were not entitled to conduct discovery until there had been a finding of colorable entitlement.[32] The court agreed and struck the discovery.[33] Two days later, WELLS FARGO obtained a court order specially setting an evidentiary hearing on the motion to vacate.[34] At that hearing, the [redacted] reiterated that they were entitled to discovery before an evidentiary hearing on the motion to

[31] Defendant, [redacted] Individually and as Trustee of the [redacted] Patrick [redacted] Revocable Trust Agreement Dated October 31, 2003 and Edith [redacted] Memorandum in Opposition to Plaintiff's Motion to Strike Defendant's Discovery, dated August 24, 2011 (A. 116).

[32] Transcript of Hearing Before the Honorable Diana Lewis, October 5, 2011, pp. 3-4 (A. 121).

[33] *Id*. at 4-5 (A. 121); Order on Plaintiff's Motion to Strike Defendant [redacted] First Request for Admission, Interrogatories and Request for Production, dated October 5, 2011 (A. 129).

[34] Order Specially Setting Hearing on Defendants Motion to Vacate Final Judgment, dated October 7, 2011 (A. 132).

vacate.[35] Without taking any evidence, the trial court denied the motion to vacate.[36] The [redacted] timely appealed.

[35] Transcript of Hearing Before the Honorable Diana Lewis, November 21, 2011, pp. 7-8 (A. 136)

[36] *Id*. at 9; Order on Defendants' Motion to Vacate Final Judgment, November 21, 2011 (A. 134).

SUMMARY OF THE ARGUMENT

The [redacted] alleged a colorable entitlement to relief from judgment on the grounds that the last-minute substitution of the party plaintiff was based upon false allegations. This deceit was accomplished by way of a self-serving, manufactured assignment purporting to transfer the loan into a trust which had long been closed to any new assets. The trial court erroneously denied the [redacted] any discovery to support their allegations prior to holding an evidentiary hearing.

Additionally, EDITH [redacted] due process rights were violated when she was not notified of the re-setting of the trial. Even as a defaulted defendant, EDITH [redacted] was entitled to attend trial and contest unliquidated damages, such as the reasonableness of attorneys' fees. Moreover, the bank waited to move to substitute WELLS FARGO as the party plaintiff until the day of trial, and the court granted the motion in EDITH [redacted] absence. She was never defaulted to this new claim of a transfer to WELLS FARGO—a claim she asserts to be an unmitigated falsehood. Nor was she defaulted to any new allegation that the note was not lost or destroyed. She therefore deserves a new trial on all issues so that she can contest the plaintiff's standing and seek to prevent foreclosure based on plaintiff's unclean hands.

STANDARD OF REVIEW

A trial court's ruling on a motion to vacate a judgment is normally reviewed under the abuse of discretion standard. *Rosso v. Golden Surf Towers Condo. Ass'n*, 711 So. 2d 1298, 1300 (Fla. 4th DCA 1998). However, the issue under review is whether the trial court erred in failing to grant an evidentiary hearing and related discovery on the Rule 1.540(b) motion. Such a motion should not be summarily denied without an evidentiary hearing. *Schleger* v. *Stebelsky*, 957 So. 2d 71, 73 (Fla. 4th DCA 2007). Denial of a Rule 1.540(b) motion without an evidentiary hearing is, as a matter of law, an abuse of discretion unless the motion fails to allege a "colorable entitlement" to relief. *See id*.; *Stella v. Stella*, 418 So. 2d 1029 (Fla. 4th DCA 1982); *Robinson v. Weiland*, 936 So. 2d 777 (Fla. 5th DCA 2006) (evidentiary hearing requirement applies when fraud is asserted as a grounds for relief under Rule 1.540); *Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986) (holding that the trial court erred because "where the moving party's allegations raise a colorable entitlement to rule 1.540(b)(3) relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.").

Moreover, when there is "no factual dispute upon which the trial court based its determination to vacate the default final judgment"—meaning that the court based its decision on a pure question of law—the standard of review is *de novo*. *Mourning v. Ballast Nedam Const., Inc.*, 964 So. 2d 889, 892 (Fla. 4th DCA 2007). In the instant case, there was no dispute that the order re-setting the trial indicates that it was not served on EDITH [37] The trial court necessarily based its decision solely on a question of law; namely, whether a defaulted party must be served notice of a trial. This decision must be reviewed *de novo*.

[37] Order Re-Setting Non-Jury Trial, September 20, 2010 (A. 74).

ARGUMENT

I. The Lower Court Erred in Denying Discovery Related to the Motion to Vacate Prior to the Evidentiary Hearing.

The discovery propounded by the [redacted] was directed to uncovering evidence to support the allegations of fraud, the failure to serve EDITH [redacted] with a trial notice and the missing signature page (among other missing pages) on the promissory note.[38]

"If the allegations in the moving party's motion for relief from judgment 'raise a colorable entitlement to rule 1.540(b)(3)'s relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.'" *Dynasty Exp. Corp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA 1996), *citing Southern Bell Tel. & Tel. Co. v. Welden*, 483 So. 2d 487, 489 (Fla. 1st DCA 1986). Nearly every District Court of Appeal has approved granting discovery prior to a Motion to Vacate under Fla. R. Civ. P. 1.540(b)(3). *See e.g. Seal v. Brown*, 801 So. 2d 993, 994-5 (Fla. 1st DCA 2001); *Estate of Wills v. Gaffney*, 677 So. 2d 949, 951 (Fla. 2d DCA 1996); *Pelekis v. Florida Keys Boys Club*, 302 So.

[38] Defendant, [redacted] First Requests for Admission, July 19, 2011 (A. 98); Defendant, [redacted] Edith [redacted] and [redacted] as Trustee of the [redacted] Patrick [redacted] Revocable Trust Agreement Dated October 31, 2003's, Request for Production, served July 19, 2011 (A. 101); Interrogatories and Notice of Service, served July 19, 2011 (A. 104).

2d 447 (Fla. 3d DCA 1974) (reversing the trial court's decision not to allow a deposition and a request for production prior to a hearing on a Motion to Vacate based upon fraud allegations).

The allegations which established the [redacted] entitlement to an evidentiary hearing and related discovery were that: 1) EDITH [redacted] was not served with the final notice of trial; and 2) the eleventh-hour substitution of the WELLS FARGO was fraudulent. On this latter issue, the [redacted] specifically alleged that the date contained in the name of the trust now claimed to be the "owner" of the loan is closely associated with the "closing date" of the trust—the date which determines what assets constitute the corpus of the trust. The [redacted] alleged that the trust, therefore, could not be the owner of the loan, at least not by way of a self-serving assignment (prepared by foreclosing counsel) purporting to transfer the loan into the trust years after it had closed.

Indeed, if the trust was, in fact, the owner of the loan, it had to have taken possession of the note long before the assignment and long before this case was filed. The [redacted] therefore, are suggesting that WELLS FARGO's newly minted claim to own the loan is false and the assignment prepared by foreclosing counsel is fraudulent. An alternative explanation of the facts alleged is that the WELLS FARGO trust owned the loan when the lawsuit was initiated and

WAMU's claim to ownership in complaint was false. In this latter scenario, the assignment was falsified to conceal the fact that the party that initiated this lawsuit never had standing. In either event, the [redacted] allegation is that the banks or their counsel have misled the court throughout the case as to the identity of the real party in interest.

Although never pled, it bears mentioning that WELLS FARGO could not have become the holder of the note, because the alleged original was in the courthouse file at the time of the purported transfer. Additionally, the record is devoid of any evidence of an endorsement executed by the original lender, WAMU.

Accordingly, the [redacted] allegations—which WELLS FARGO never denied on the record—specifically enumerated the essential facts that fit squarely into the language of Rule 1.540(b) as "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Fla. R. Civ. P. 1.540(b)(3). If these allegations of intentional misrepresentation concerning the ownership of the loan and falsification of transfers are proven true, the [redacted] may be entitled to defeat foreclosure on the grounds that the plaintiff lacks standing or has forfeited its right to foreclose due to unclean hands. *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So. 2d 786 (Fla. 4th DCA

1995); *see Quality Roof Services, Inc. v. Intervest Nat. Bank*, 21 So. 3d 883, 885 (Fla. 4th DCA 2009) ("Unclean hands may be asserted by a defendant who claims that the plaintiff acted toward a third party with unclean hands with respect to the matter in litigation.")

The allegations, therefore demonstrated a "colorable entitlement" to relief under Rule 1.540(b) which triggered the requirement for an evidentiary hearing, as well as any relevant discovery regarding the allegations. Having been denied discovery, the evidentiary hearing devolved into a hollow pretense of the due process to which the [redacted] were entitled. In fact, no actual evidence was taken at the hearing and the court made no findings of fact.

It is noteworthy that WELLS FARGO argued at the earlier hearing on its motion to strike the [redacted] discovery that a non-evidentiary hearing must first be held to determine whether there was colorable entitlement to an evidentiary hearing and related discovery.[39] Despite having prevailed on the argument that there must be two hearings, WELLS FARGO had the court issue a notice two days later for a single evidentiary hearing on the motion to vacate.[40] This sort of

[39] Transcript of Hearing Before the Honorable Diana Lewis, October 5, 2011, pp. 3-4 (A. 121)

[40] Order Specially Setting Hearing on Defendants Motion to Vacate Final Judgment, dated October 7, 2011 (A. 132)

procedural gamesmanship, which results in a denial of due process, should not be countenanced by the Court.

Accordingly, the trial court erred in denying the [redacted] discovery in support of the motion to vacate.

II. A Defaulted Party Must Be Served the Order Setting an Action for Trial.

The facts disclosed above outline a litany of failed and improper attempts to schedule trial without notice to the *pro se* defendants, including one apparent attempt by the CONDO ASSN. to set the trial without a court order. In the final analysis, however, the record is clear that EDITH [redacted] was not served with the order re-setting the trial date for October 1, 2011—the actual date of trial.

Although default had been entered against her, EDITH [redacted] was still entitled to notice of the trial so that she could have the opportunity to present defenses against any new claims and object to any arguments regarding unliquidated damages. Because she was denied this opportunity, EDITH [redacted] procedural due process rights were violated, and the final judgment should be vacated.

When default is entered against a party in a suit, that party's participation in the proceedings is not finished. The court must serve all parties, including those against which a default has been entered, with any orders setting an action for trial in which the damages are not liquidated. Rules 1.440(c) and 1.080(h)(1) Fla. R. Civ. P. "A defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages." *Bowman v. Kingsland Development, Inc.*, 432 So. 2d 660, 663 (Fla. 4th DCA 1983). EDITH was not given this opportunity, even though some of the damages demanded by the BANK in this case were not liquidated.

A. The demand for reasonable attorneys' fees is an unliquidated damages claim that triggers the requirement that EDITH be served with the trial notice.

Damages are unliquidated "if the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment." *Bowman v. Kingsland Development, Inc.*, 432 So. 2d at 663. Because requests for attorney's fees necessarily involve some kind of testimony regarding the time and effort expended in the case, "every claim of damages for the reasonable value of services is a claim for unliquidated damages." *Id.*; *Watson v. Internet Billing Co., Ltd.*, 882 So. 2d 533, 534 (Fla. 4th DCA 2004) ("[A]ttorneys fees are not

liquidated where only a "reasonable" sum may be recovered."); *Roggemann v. Boston Safe Deposit & Trust Co.*, 670 So. 2d 1073, 1075 (Fla. 4th DCA 1996) ("A 'reasonable attorney's fee' is an unliquidated item of damages because testimony must be taken to ascertain facts upon which a judge or jury can base a value judgment."); *Asian Imports, Inc. v. Pepe*, 633 So. 2d 551, 553 (Fla. 1st DCA 1994) ("Florida courts have held that an item of damages for "reasonable attorney's fees" is not liquidated damages.").

The BANK's Complaint includes a claim for reasonable attorneys' fees.[41] Therefore, a claim for unliquidated damages was a part of the original allegations made against EDITH The final judgment makes a finding of the number of hours that were "reasonably" expended by counsel for Plaintiff and the hourly rate that was "appropriate." These findings were "based upon the affidavits presented and upon inquiry of counsel for the plaintiff."[42] Because EDITH was not given notice of the trial, she was denied the opportunity to object to the reasonableness of these unliquidated damages and the procedure by which they were ascertained.

[41] Complaint (A. 1); Mortgage, ¶19 (A. 19).

[42] Final Judgment of Mortgage Foreclosure (A. 81).

Had she been present to voice an objection, the trial court would have been precluded from determining reasonableness based upon affidavits and statements of counsel. First, upon such an objection, EDITH was entitled to have the BANK prove the reasonableness of fees by way of admissible evidence, not affidavits. *Geraci v. Kozloski*, 377 So. 2d 811, 812 (Fla. 4th DCA 1979) ("[T]he determination of an attorney[']s fee for the mortgagee based upon affidavits over objection of the mortgagor is improper."). Second, such admissible evidence would not include statements of counsel. *Faircloth v. Bliss*, 917 So. 2d 1005, 1006 (Fla. 4th DCA 2006) (unsworn statements by attorneys are not evidence). And finally, such evidence must include expert testimony as to reasonableness. *Mullane v. Lorenz*, 372 So. 2d 168, 168 (Fla. 4th DCA 1979) (the awarding of fees without expert testimony is improper).

B. Service of trial orders on defaulted parties is a mandatory procedure meant to guarantee due process.

The requirement that an order setting trial be served on a defaulted party (along with the requirement that the final judgment be served) is the last line of defense to ensure a litigant's constitutionally guaranteed right of due process. In the event that service of process is defective or does not confer genuine notice of the proceedings (such as may be the case with substituted service or service by

publication), service of the order setting trial provides a safety net of actual notice. *See Parrish v. Dougherty*, 505 So. 2d 646, 648 (Fla. 1st 1987) (Rule 1.440 acts as a "safeguard…to procedural due process."). Because of this, compliance with Rule 1.440 is mandatory. *Genuine Parts Co. v. Parsons*, 917 So. 2d 419, 421 (Fla. 4th DCA 2006); *Bennett v. Continental Chemicals, Inc.*, 492 So. 2d 724, 727 (Fla. 1st DCA 1986).

Accordingly, at a minimum, the fee award must be reversed on the grounds that EDITH was not noticed for trial.

C. EDITH Defaulted Only to the Allegations of the Original Complaint.

1. EDITH default did not admit facts contrary to the allegation that the note was lost or destroyed.

In addition to the attorneys' fee award, EDITH contests the plaintiff's standing to foreclose her interest in the property. "[E]ven a party in default does not admit that the plaintiff in a foreclosure action possesses the original promissory note." *Venture Holdings & Acquis. Group, LLC v. A.I.M. Funding Group, LLC*, 75 So. 3d 773, 776 (Fla. 4th DCA 2011). A plaintiff must prove its right to enforce the note as of the time judgment is entered, even if the defendant had waived the right to challenge the bank's standing as of the date suit

was filed. *Beaumont v. Bank of New York Mellon*, 5D10-3471, 2012 WL 511288 (Fla. 5th DCA Feb. 17, 2012).

Here, while there is no record of what occurred at trial, the record indisputably shows that the case went to trial on pleadings that claimed that the note was lost or destroyed. And the note that was presented as the "original" (if any) was incomplete. WELLS FARGO was bound by these pleadings. *Hart Properties, Inc. v. Slack*, 159 So. 2d 236, 238 (Fla. 1963).

Moreover, EDITH default admitted only the facts pled by WAMU in the original Complaint, i.e. that the note was lost or destroyed and needed to be reestablished. *Days Inns Acquisition Corp. v. Hutchinson*, 707 So. 2d 747, 749 (Fla. 4th DCA 1997) (a defaulting party admits only the well-pleaded factual allegations of the complaint). The rationale for this rule is grounded in due process considerations:

> When process is served upon a defendant, he is thus brought into court to answer only the case made by preceding pleadings. Adjudication of any other claim would be outside the issues and beyond the jurisdiction of the court. Hence, if a defendant upon whom process has been served decides to confess the complaint by failure to plead, he has the right to assume that only the claim thus confessed will be decided. If a different claim is decided, there is a lack of due process of law.

Colburn v. Highland Realty Co., 153 So. 2d 731, 735-36 (Fla. 2d DCA 1963)

Although WELLS FARGO was required to reestablish the note at trial by proving all the elements of Section 673.3091 Fla. Stat. (2011),[43] the judgment makes no findings regarding those elements and makes no declaration that the note is reestablished.

2. EDITH [redacted] did not default to the substituted plaintiff.

Here, EDITH [redacted] default could not have admitted that WELLS FARGO owned the promissory note, because that allegation was not made until the day of trial. Nor did she concede that JPMORGAN was an interim owner given that the substitution was *ex parte* before she was defaulted.

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[43] Section 673.3091 Fla. Stat. (Enforcement of lost, destroyed, or stolen instrument) requires the following findings:

> (a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
>
> (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
>
> (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> * * *
>
> …The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument.

a. The first substitution was ineffective as it was impermissibly obtained *ex parte*.

Because the substitution of JPMORGAN was accomplished *ex parte* before she was defaulted, EDITH was improperly denied an opportunity to contest the factual accuracy of JPMORGAN's claim. If a reason other than basic due process need be advanced to show that the *ex parte* ruling was improper, it should be noted that the substitution rule itself requires a hearing. Rule 1.260(c) Fla. R. Civ. P. (directing that service of motion be made in accordance with subdivision (a), which requires that the notice be accompanied by a notice of hearing).

Motions for substitution of party plaintiff—at least in the context of modern foreclosure cases—are not perfunctory, but involve factual determinations that may be denied and disproven. *Cf Bank of New York Trust Co., N.A. v. Rodgers*, 37 Fla. L. Weekly D181 (Fla. 3d DCA Jan. 18, 2012) (reversing involuntary dismissal for lack of standing, in part because defendant did not oppose or otherwise challenge order that substituted a party with standing). Having denied the a hearing (evidentiary or otherwise), the order substituting JPMORGAN should be deemed to have no effect in this case. *Cf Mazine v. M & I Bank*, 67 So. 3d 1129, 1132, n. 1 (Fla. 1st DCA 2011) (where plaintiff bank filed a

motion to substitute party plaintiff which was never ruled upon, the plaintiff to be substituted could not confer its status as holder on the original plaintiff).

b. The second substitution was also effectively *ex parte*.

The second substitution alleged that the loan had been transferred into a trust by JPMORGAN (acting on behalf of the now defunct WAMU), and therefore relied upon the first order of substitution which had been obtained *ex parte*.[44] Worse, because EDITH [redacted] was not given notice of the trial date, she was not present when the court granted the second motion, effectively making the second order of substitution *ex parte* as to her.

These substitutions were essentially amendments to the claim of ownership asserted in the Complaint. They added factual allegations—such as the assignment—that were not in the Complaint and to which EDITH [redacted] was never defaulted. Given the seriousness of the allegations that the transfer was falsified with a fabricated assignment, it cannot be said that these changes to the claims in the WAMU's Complaint were insubstantial.

If the substitutions are treated as amendments to the Complaint, then the pleadings were not closed at the time of trial. Moreover, these amendments would have to be served on EDITH [redacted] despite the default. *See Kitchens v.*

[44] Second Motion to Substitute Party Plaintiff, p. 1. (A. 77)

Kitchens, 162 So. 2d 539 (Fla. 3d DCA 1964) ("Even the most minimal standards of due process would require that notice be given to a party who had suffered a default or decree *pro confesso* where the complaint has been amended in a matter of substance after the entry of such default."); *Pinero v. Pinero*, 498 So. 2d 637, 638 (Fla. 3d DCA 1986) (allowing the plaintiff to proceed on an amended complaint seeking new relief after entry of a default on the original complaint constituted a denial of due process).

Accordingly, not only must the fee award must be reversed on the grounds that EDITH was not noticed for trial, but the entire judgment must be reversed to provide EDITH an opportunity to contest the plaintiff's standing, as well as any other facts not alleged in the original complaint.

CONCLUSION

As to the [redacted] this Court should reverse the trial court's denial of the motion to vacate and remand with directions to permit the [redacted] to conduct discovery prior to an evidentiary hearing.

As to EDITH [redacted] this Court should vacate the final judgment entirely and remand the matter for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this March 15, 2012 to all parties on the attached service list. This brief also complies with Administrative Order No. 2011-1 and an electronic copy has been emailed to the court at efiling@flcourts.org.

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