In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

NATIONSTAR MORTGAGE, LLC,

Appellee.

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

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

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STATEMENT OF THE CASE AND FACTS

This is a foreclosure case in which Nationstar Mortgage, LLC ("the Servicer") seeks to take the home of [redacted] ("the Homeowner") to collect on a debt allegedly owed to U.S. Bank as Trustee for Lehman Mortgage Trust Pass-Through Certificates, Series 2006-2.

I. The Pleadings.

The operative pleading for the Plaintiff is the First Amended Complaint for Foreclosure,[1] which was deemed filed as of July 11, 2012.[2] That pleading alleged that the Servicer—at that time, Aurora Loan Services LLC—was bringing the action as an agent on behalf of the owner of the promissory note and mortgage:

> Plaintiff is the servicing agent for the owner of the note and mortgage, is the designated holder of the note and is authorized to prosecute this action on behalf of the owner.[3]

The Homeowner moved to dismiss the complaint on the grounds (among other things) that; 1) according to the attachments to the Amended Complaint,

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[1] First Amended Complaint for Foreclosure, dated April 29, 2011 (R.252).

[2] Order Granting Plaintiff's Motion for Leave to Amend Complaint and Permit First Amended Complaint Previously Filed to Constitute Operative Pleading dated July 11, 2012 (R. 281).

[3] First Amended Complaint, ¶ 2 (R. 252).

Aurora was not the real party in interest; and 2) the Plaintiff had failed to join indispensable parties—the note owner and the mortgagee.[4]

The motion pointed out that, while Fla. R. Civ. P. 1.210(a) permits an agent to bring an action on behalf of the real party in interest in the agent's own name, it must join the real party in interest because the agency relationship did not meet one of six enumerated exceptions in Rule 1.210(a). The court denied the motion.[5]

The Homeowner answered the Amended Complaint denying the allegation that the Servicer was a "designated holder" authorized to bring the action.[6] In addition, among the affirmative defenses were the legal arguments that the Servicer lacked standing and had failed to join an indispensable party—the owner of the note.[7]

At this point, a new servicer, Nationstar Mortgage, LLC, was substituted in as the party plaintiff.[8] Although the Motion to Substitute Party Plaintiff asserted

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[4] Defendant, [redacted] Motion to Dismiss First Amended Complaint, filed October 10, 2012 (R. 287).

[5] Order Denying Defendants' Motion to Dismiss First Amended Complaint, dated November 15, 2012 (R. 304).

[6] Defendant, [redacted] Answer to First Amended Complaint and Affirmative Defenses filed December 10, 2012 ("Answer"), ¶ 2 (R. 312).

[7] Answer, Fourth Affirmative Defense (R. 317).

[8] Motion to Substitute Party Plaintiff, filed November 19, 2012 (R. 305); Order Granting Motion to Substitute Party Plaintiff, dated December 12, 2012 (R. 321).

that Nationstar had become both the loan servicer and the note holder, it did not amend Aurora's pleadings to allege a different basis for its standing.

The Servicer then filed a reply to the affirmative defenses—still using the name Aurora—arguing that it had standing whether or not the note was a negotiable instrument because it was pursuing the action as an agent:

> A loan servicer can pursue a foreclosure action in its own name on behalf of the real party in interest even if it was not the holder. Here, Aurora was the loan servicer and was acting on behalf of the real party in interest, to wit: the Note owner at the time the action commenced.[9]

In response to the Homeowner's point that the owner of the note was an indispensable party, the Servicer argued that, because Florida's real party in interest rule is permissive, it could sue in its own name as an agent:

> Aurora was the loan servicer for the subject loan and was authorized to prosecute this action in its own name, on behalf of the owner of the loan.[10]

II. Discovery Reveals the Identity of the Unjoined Real Party in Interest.

In Answers to Interrogatories, the Servicer revealed that the entity with both legal and equitable title to the promissory note and mortgage is U.S. Bank, N.A. in trust for Lehman Mortgage Trust Mortgage Pass-Through Certificates, Series

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[9] Plaintiff's Reply to Defendant's Answer and Affirmative Defenses, filed December 20, 2012 ("Reply"), ¶ 4 (R. 323).

[10] Reply ¶ 7 (R. 324).

2006-2.[11] It is U.S. Bank that is registered on the MERS System note ownership tracking records as the current "investor."[12] It is U.S. Bank that will keep the judgment proceeds if Aurora prevails in this case.[13] And it is U.S. Bank that ultimately sets the parameters of the Servicer's settlement authority, if any.[14]

In response to requests for production, the Servicer represented that it did not purchase the subject Note and Mortgage.[15] And in support of its objection to producing records that would show when the note was acquired by Plaintiff's servicer, it stated "Plaintiff is the servicer."[16]

III. The Trial—the Servicer Introduced No Evidence That It Was Authorized to Bring this Action.

At trial, the Servicer called a single witness to prove all the elements of its case. That witness, Elizabeth Santoro, admitted that the Servicer was not the

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[11] Plaintiff's Notice of Serving Answers to Defendant's Mortgage Loan Ownership Interrogatories, served March 16, 2012, ¶¶ 2, 3 (Supp. R. 274).

[12] *Id*. at ¶ 5.

[13] *Id*. at ¶ 7.

[14] *Id*. at ¶ 8; *see also*, Deposition of Elizabeth Santoro, August 8, 2013, p. 60-65 (R. 717-722).

[15] Plaintiff's Objections to Defendant's Request for Production Regarding Entitlement to Enforce Loan Documents Response to Requests for Production, dated July 9, 2013, Request No. 9 (R. 465).

[16] *Id*. at Request No. 11 (R. 465).

owner of the loan, claiming instead, that U.S. Bank owned the loan.[17] However, the trial court cut short the Homeowner's cross-examination of Santoro as to what evidence existed to show that the subject loan had been incorporated into U.S. Bank's trust.[18] The Servicer argued that it was proceeding as the holder of a note endorsed in blank, and therefore, whether or not its principal was actually the note owner (and thus capable of authorizing the Servicer to bring this action) was irrelevant.[19]

At the close of trial, there had been no physical or testimonial evidence that the Servicer was an agent of U.S. Bank for the purpose of bringing the action, (as the Servicer had pled) or that U.S. Bank was, in fact, the owner of the note.

The trial court entered judgment for the Servicer from which this appeal was taken.[20]

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[17] Transcript of Non-Jury Trial Before the Honorable Susan Lubitz, September 3, 2013 ("T. __"), p. 115 (Supp. R. 131).

[18] T. 116-118 (Supp. R. 132- 134).

[19] *Id*.

[20] Final Judgment of Foreclosure, dated September 3, 2013 (R. 832); Notice of Appeal, dated September 5, 2013 (R. 840).

SUMMARY OF THE ARGUMENT

The trial court erred in denying the motion to dismiss the complaint for failure to join the indispensable, real party in interest, the note owner, U.S. Bank. The note owner is an indispensable party because it owns the reified right to payment, the cause of action itself. And under Fla. R. Civ. P. 1.210(a), the Servicer was required to join U.S. Bank because, with a handful of exceptions not applicable here, an agent cannot bring an action on behalf of the real party in interest without joining that party in the lawsuit.

The case law, while meandering at times, concludes as this Court concluded more recently: a servicer has standing to commence legal action on behalf of a trustee of a securitized trust "as long as the trustee joins or ratifies its action." While the ratification option is found only in the federal version of the rule, the trustee, U.S. Bank, did neither.

Nor could the Servicer proceed as a note holder, because any transfer of the note from U.S. Bank while still retaining all the rights to payment on the note was not a "negotiation." Article 3 of the Uniform Commercial Code ("UCC") applies only to complete, irrevocable transfers of all the rights in the instrument.

The trial court also erred in entering judgment for the Servicer where the record is devoid of any evidence that U.S. Bank, authorized or ratified the action.

STANDARD OF REVIEW

The standard of review of a trial court's denial of a motion to dismiss is *de novo*. *Landmark Am. Ins. Co. v. Studio Imports, Ltd., Inc.*, 76 So. 3d 963, 964 (Fla. 4th DCA 2011). Additionally, the standard of review for issues involving the construction of a procedural rule is *de novo*. *Schaeffler v. Deych*, 38 So. 3d 796, 799 (Fla. 4th DCA 2010); *Metcalfe v. Lee*, 952 So. 2d 624, 626 (Fla. 4th DCA 2007).

The sufficiency of the evidence at a non-jury trial is an issue of law reviewed *de novo*. *Norman v. Padgett*, 125 So. 3d 977, 978 (Fla. 4th DCA 2013); *see also Reed v. Honoshofsky*, 76 So. 3d 948, 951 (Fla. 4th DCA 2011) (Where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is *de novo*.)

ARGUMENT

I. The Owner of the Note Must Be Joined as a Party.

A. Fla. R. Civ. P. 1.210(a) compels joinder of the real party in interest unless a specific exception applies.

This Court said it best in *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14, 17 (Fla. 4th DCA 2012):

> In securitization cases, a servicer may be considered a party in interest to commence legal action **as long as the trustee joins or ratifies its action**.

(emphasis original) Here, the Servicer neither joined the trustee, U.S. Bank, nor submitted any evidence that it ratified the action. Accordingly, it was not a real party in interest.

The analysis in *Elston/Leetsdale*, and this case, begins with Fla. R. Civ. P. 1.210(a) which states that "[e]very action may be prosecuted in the name of the real party in interest…" Under this rule, a real party in interest may sue in its own name. And because the rule is "permissive," a nominal party, such as an agent, may bring suit in its own name for the benefit of the real party in interest. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1185 (Fla. 3d DCA 1985).

Here, the Servicer brought the case in its own name for the use of the real party in interest, U.S. Bank. According to the Servicer's operative pleading:

> Plaintiff is the servicing agent for the owner of the note and mortgage, is the designated holder of the note and is authorized to prosecute this action on behalf of the owner.[21]

But the ability of an agent to prosecute an action in its own name is not without conditions. The rule itself lists certain categories of relationships between a real party in interest and a nominal, representative plaintiff that do not require the plaintiff to join the real party in interest:

> Every action may be prosecuted in the name of the real party in interest, <u>but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.</u>

Fla. R. Civ. P. 1.210(a) (emphasis added).

The Servicer's agency relationship with its principal—the real party in interest—is not one of these six enumerated categories. The Servicer is not: 1) a personal representative; 2) an administrator; 3) a guardian; 4) a trustee of an express trust; 5) a party to a third party beneficiary contract; or 6) someone expressly authorized by statute to sue on U.S. Bank's behalf. That the rule expressly lists the types of representatives that may sue in their own name without joining the real party in interest implies the exclusion of other agency relationships. *See Biddle v. State Beverage Dept.*, 187 So. 2d 65, 67 (Fla. 4th DCA 1966)

[21] First Amended Complaint, ¶ 2 (R. 252).

(applying '[e]xpressio unius est exclusio alterius'—the mention of one thing implies the exclusion of another). Accordingly, under the plain language of Rule 1.210(a), the Servicer was required to join U.S. Bank as a party.

This comports with, and provides the basis for, this Court's holding in *Elston/Leetsdale* that required joinder of the trustee as one of two options for complying with the real party in interest rule. It also comports with the policy of the "liberal joinder provision of Rule 1.210(a)." *Highland Ins. Co. v. Walker Mem'l Sanitarium & Benev. Ass'n*, 225 So. 2d 572, 574-75 (Fla. 2d DCA 1969).

The requirement of Rule 1.210(a) to join the real party in interest is particularly applicable here where U.S. Bank was an indispensable party. Throughout the litigation, the Servicer took the position that U.S. Bank, the trustee of a securitized trust, was the owner of the Promissory Note upon which the suit was brought and the holder of all legal and equitable title in the Note.[22] Although the judgment is in the Servicer's name, it is U.S. Bank that is entitled to all the proceeds from that judgment.[23]

The Servicer, therefore, had no interest in this action, other than to perform whatever duties it may have had as U.S. Bank's agent. U.S. Bank had, and

[22] Plaintiff's Notice of Serving Answers to Defendant's Mortgage Loan Ownership Interrogatories, served March 16, 2012, ¶¶ 2, 3 (Supp. R. 274).

[23] *Id*. at ¶ 7.

continues to have, a complete, undivided interest in the cause of action. As such, it was a necessary and indispensable party. *Aronovitz v. Stein Properties*, 322 So. 2d 74, 75 (Fla. 3d DCA 1975) (trial court erred in denying a motion to dismiss for failure to join individual partners as indispensable parties to a complaint seeking enforcement of a contract because "each partner had an interest in the deposit receipt contract sued on…"); *DeToro v. Dervan Investments Ltd. Corp.*, 483 So. 2d 717, 721 (Fla. 4th DCA 1985) ("Each partner is deemed to have an interest in the chose in action and thus is an indispensable party to the suit."); *see Standard Lumber Co. v. Florida Indus. Co.*, 141 So. 729, 733 (Fla. 1932) ("it is proper to join together as parties plaintiff in such a suit, all of those who are together the owners of the entire interest in the cause of action brought before the court for adjudication."); *Blue Dolphin Fiberglass Pools of Florida, Inc. v. Swim Indus. Corp.*, 597 So. 2d 808 (Fla. 2d DCA 1992) ("A person whose rights and interests are to be affected by a decree and whose actions with reference to the subject matter of litigation are to be controlled by a decree is a necessary party to the action and the trial court cannot proceed without that person.").

B. Joinder of the Trustee enhances the efficient and complete determination of the cause.

The rule requiring the joinder of indispensable parties has a practical foundation—it is intended to increase the efficiency of the court's adjudication of the controversy. *See State, Dept. of Health & Rehabilitative Services v. State*, 472 So. 2d 790, 792 (Fla. 1st DCA 1985) ("An indispensable party is generally defined as one whose interest is such that a complete and efficient determination of the cause may not be had absent joinder." [emphasis added]); *Kephart v. Pickens*, 271 So.2d 163 (Fla. 4th DCA 1973) (same); *Highland Ins. Co. v. Walker Mem'l Sanitarium & Benev. Ass'n*, 225 So. 2d at 574-75 (liberal joinder rule reflects a fundamental goal of modern procedural jurisprudence to "secure a method of providing an efficient an[d] expeditious adjudication of the rights of persons possessing adverse interests in a controversy.")

Joining the owner of the note increases the efficiency of foreclosure litigation in several ways. First, it insures that the party with the authority and incentive to settle is engaged in the litigation such that the cases can be resolved amicably. Indeed, mediation cannot be accomplished within the rules without the participation of the real party in interest. Here, for example, the Servicer admitted that its settlement authority was confined to "the parameters of its agreements with

[U.S. Bank]."[24] Thus, the Servicer did not have "full authority to settle without further consultation" as required by the mediation procedures of Fla. R. Civ. P. 1.720.

The limited settlement authority of servicers managing the foreclosure litigation certainly played a role in the spectacular failure of the Florida Supreme Court's foreclosure mediation program.[25] *See W. Waste Indus., Inc. of Florida v. Achord*, 632 So. 2d 680, 682 n. 1 (Fla. 5th DCA 1994) (as Rule 1.720 is designed, "failure to appear with full authority is equivalent to the failure to appear at all."); *Segui v. Margrill*, 844 So. 2d 820, 821 (Fla. 5th DCA 2003) ("a party's actual presence at mediation is often critical to its success).

Second, joining the trustee of a trust that allegedly owns the note simplifies the discovery of information related to the trust—such as whether it has standing and when it acquired standing. The trustee would be amenable to standard requests for production and interrogatories without the need for the lengthy, bureaucratic obstacle course that must be completed to serve out-of-state

[24] Plaintiff's Notice of Serving Answers to Defendant's Mortgage Loan Ownership Interrogatories, served March 16, 2012, ¶ 7 (Supp. R. 275).

[25] In Re: Managed Mediation Program for Residential Mortgage Foreclosure Cases, Administrative Order No. AOSC11-44, Florida Supreme Court (discontinuing managed mediation program) available at:

http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/12-19-2011_Order_Managed_Mediation.pdf

subpoenas. It also resolves common evidentiary problems at trial, such as that nearly always encountered by an employee of the servicer attempting to authenticate documents that are actually records of the trustee. *See Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973) (commenting that the purpose of the federal version of the rule is to "enable a defendant to present defenses he has against the real party in interest, to protect the defendant against a subsequent action by the party actually entitled to relief, and to ensure that the judgment will have proper res judicata effect.")

Third, joining the trustee of a securitized trust would eliminate the practice of transferring the bid to the real owner of the legal and equitable interest in the loan after judgment.[26] The judgment can be in the name of the real party in interest—just as it should be when the agent is merely a nominal plaintiff pursuing the interests of another.

In the end, in modern foreclosure cases, the judicial system is laboring at the behest of absent real parties in interest—"ghost" litigants. *See* § 702.015(3), Fla. Stat. (newly enacted to require foreclosure plaintiffs who have been delegated the authority to file suit to identify, with specificity, the document that grants the plaintiff the authority to act on behalf of the person entitled to enforce the note);

[26] *See*, Final Judgment of Foreclosure dated September 3, 2013, ¶ 9 (R. 845) allowing Plaintiff to assign its bid.

Municipality of Anchorage v. Baugh Const. & Eng'g Co., 722 P.2d 919, 924 (Alaska 1986) (Alaska's corresponding procedural rule reflects a policy against the use of sham plaintiffs; where a person's claim is directly litigated before the courts of the state, there is no reason that person should not be made a named party).

This industry-wide practice of shielding the true parties from the jurisdiction of this court through the use of agents not only unduly complicates the foreclosure process but destroys the transparency of the legal proceedings so essential to equitable and just resolutions. *See Nat'l Title Ins. Co. v. Oscar E. Dooly Associates, Inc.*, 377 So. 2d 730, 731 (Fla. 3d DCA 1979) (judgment reversed for failure to join indispensable party defined as "one who has not only an interest in the subject matter of the controversy, but an interest of such a nature that a final decree cannot be rendered between other parties to the suit, or cannot be rendered without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."[emphasis added]).

C. The exception for suits by parties to third-party beneficiary contracts does not permit a suit by an agent without joining the principal.

One of the specifically enumerated exceptions to the joinder requirement of Rule 1.210(a) is for "a party with whom or in whose name a contract has been made for the benefit of another." In accordance with former common law practice,

this rule provides that, although the third-party beneficiary is the real party in interest, the named contracting party may still bring suit on that contract in its own name. *Corat Intern., Inc. v. Taylor*, 462 So. 2d 1186, 1187 (Fla. 3d DCA 1985); *Stanley Fine Furniture, Inc. v. N. River Ins. Co.*, 411 So. 2d 210, 211 (Fla. 3d DCA 1982) (recognizing that the federal counterpart to Rule 1.210(a) codified this common law right); *see also Coxhead v. Winsted Hardware Mfg. Co.*, 4 F.R.D. 448, 450 (D. Conn. 1945) (federal counterpart to Rule 1.210(a) permits party to a third-party beneficiary contract to sue without joining the beneficial owner of the right).

The path taken by Florida's jurisprudence to this conclusion has not been without deviation. In *Durrant v. Dayton*, 396 So. 2d 1225 (Fla. 4th DCA 1981), this Court (in an opinion authored by Associate Judge Alan Schwartz) held that a trustee who assigned a land purchase contract to an attorney-in-fact for the trust was not an indispensable party to the suit. There, the trustee and assignor, Gonzalez, had been joined with the attorney-in-fact and assignee, Durrant, as an additional party-plaintiff to avoid dismissal for failure to join an indispensable party. When Gonzalez refused to appear for his deposition, the judge dismissed the action with prejudice as to both plaintiffs.

After quoting Fla. R. Civ. P. 1.210(a), this Court reversed the dismissal upon finding that Gonzalez was not an indispensable party under that rule:

> It is very clear that the rule means just what it says and that a nominal contracting party like Durrant is permitted, at his option, to bring an action in his own name, without joining the real party in interest.

Durrant v. Dayton, 396 So. 2d at 1226 (emphasis added). Durrant, however, was not a party to the contract being sued upon—the purchase of realty. So his standing could not be conferred as a nominal party to a third-party beneficiary contract. The decision was, nevertheless, correct because Durrant was an assignee of that contract, and therefore, was himself a real party in interest. *Corat Intern., Inc. v. Taylor*, 462 So. 2d at 1188 (post-suit assignment changed plaintiff's capacity to that of an assignee, making it a real party in interest); *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1184 (Fla. 3d DCA 1985) (subrogee is a real party in interest who may sue in its own name); *Holyoke Mut. Ins. Co. in Salem v. Concrete Equip., Inc.*, 394 So. 2d 193, 195 (Fla. 3d DCA 1981) (subrogee of cause of action had the right, as the real party in interest, to prosecute the action in its name).

In the case of *Stanley Fine Furniture, Inc. v. N. River Ins. Co.*, 411 So. 2d 210 (Fla. 3d DCA 1982), the Third District correctly held that Rule 1.210(a) permitted a party to an insurance contract to sue in its own name for the benefit of

others who actually owned the insured property that had been destroyed. The court mistakenly said, however, that it could do so as "the real party in interest," rather than saying that it was an exception to Rule 1.210(a)—i.e. that it could bring suit despite not being the real party in interest.

Three years later, in *Kumar*, the Third District cited *Durrant* and *Holyoke* as holding that "a nominal party, such as an agent, may bring suit in its own name for the benefit of the real party in interest." *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d at 1185. Despite the broad language that would seemingly imply that any agent can bring suit in its own name, the opinion did not address whether the principal must be joined. More importantly, the shipping contract being sued upon in *Kumar* was a third-party beneficiary contract benefitting the intended recipient of the goods. Under the rule, therefore, Kumar would not have been required to join the real party in interest.

Finally, in *Corat Intern., Inc. v. Taylor*, 462 So. 2d 1186, 1187 (Fla. 3d DCA 1985)—an opinion in which the author of *Durrant* concurred—the Third District cited *Durrant* as supporting the statement that a party to a third-party beneficiary contract can sue in its own name (even though Durrant was not such a party). And despite repeating the imprecise language of *Stanley Fine Furniture* (that a nominal party to an insurance contract is a "real party in interest"), the *Corat* court

expressly found that it is the intended third-party beneficiary of a contract, not the nominal party to that contract, that is the real party in interest. The contracting party nevertheless had standing under the third-party beneficiary exception to Rule 1.210(a). *Id*. at 1188.

The line of cases between *Durrant* and *Corat*, therefore distills into two principles that are apparent from a plain, commonsense reading of the rule: 1) a real party in interest by way of subrogation or assignment may sue on a contract even if it was not originally a party to that contract (it stands in the shoes of the original party); and 2) a named party to a third-party beneficiary contract may sue on that contract in its own name on behalf of the real party in interest (the benefited party) without joining that party. Here, the Servicer is not a party to the contract—the promissory note—upon which it sued. Nor is it an assignee or subrogee of the promissory note. Thus, it has no standing as the real party in interest. Nor may it rely upon the exception in Rule 1.210(a) to sue in its own name without joining the real party in interest.

D. The ratification requirement is not an alternative to joinder.

An offshoot of this same line of cases is the creation of an alternative to the real party in interest rule—that an agent may bring a case in its own name on a cause of action belonging to its principal so long as the principal ratifies the

agent's prosecution of the claim. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d at 1185 (affidavits unequivocally show that principal ratified and endorsed agent's action in bringing suit on principal's behalf); *Juega ex rel. Estate of Davidson v. Davidson*, 8 So. 3d 488, 490 (Fla. 3d DCA 2009) (standing established by affidavit indistinguishable from the affidavit of the principal in *Kumar*).[27]

The issue in these cases, however, is whether the agent had standing (regardless of whether it was the real party in interest), not whether the agent must also join its principal as a party plaintiff to the lawsuit when the agent is not the real party in interest. Additionally, these cases may be harmonized with the rules by treating the authorization affidavit as an assignment. *See E. Investments, LLC v. Cyberfile, Inc.*, 947 So. 2d 630, 632 (Fla. 3d DCA 2007) (citing to *Kumar* for the conclusion that the plaintiff's lack of standing could be remedied by an assignment from the signatory of the contract).

This Court's holding in *Elston/Leetsdale*—that the trustee's ratification is an option to joining the trustee as a party—was based upon a quotation from a federal

[27] In its original opinion, the court in *Juega*, the court affirmed the dismissal for lack of standing saying that "[b]y its express wording, Rule 1.210(a) enumerates six categories of persons who may bring an action for the benefit of another without joining the real party in interest." (Addendum 2). On rehearing, the court reversed on the basis of *Kumar* and the "ratification" affidavit. Here, because there was no affidavit of ratification, the result should be consistent with the first *Juega* opinion.

case, *CWCapital Asset Mgmt., LLC v. Chicago Properties, LLC*, 610 F.3d 497 (7th Cir. 2010). That case turned on the federal counterpart to Fla. R. Civ. P. 1.210(a) which contains the ratification option not found in Florida's version:

> ***(3) Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest

Fed. R. Civ. P. 17(a)(3). In sharp contrast, the word "ratify" does not appear in Florida's procedural rules.

Accordingly, to hold that an agent who does not fit within the six enumerated categories may bring an action without joining the principal—with or without ratification—is to render the words of the rule meaningless. *See Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) (when interpreting statutes and rules, the court must choose that which renders their provisions meaningful and avoid those that make certain words superfluous).

And while the concept of ratification (or proof of authority of an agent) may be a judicial gloss upon the real party in interest rule, it has no application in this case, because U.S. Bank never ratified the Servicer's action in bringing the suit.

E. The Servicer's claim that it is a "designated holder" of the note does not provide standing.

Despite the resemblance—no doubt intentional—to the jargon of the UCC, the term "designated holder" is nowhere to be found there. A "designated holder" is not among those persons that Article 3 of the UCC lists as entitled to enforce the note. § 673.3011, Fla. Stat.

Apparently invented by financial institutions suing in Florida (the cases outside of Florida do not mention the expression), the phrase seems, by design, to imply some sort of real party in interest status as a holder of a negotiable instrument while at the same time allowing the holder of the equitable and legal title to retain all of its rights. This, of course, runs counter to the entire scheme of the UCC which contemplates a transfer of the entire bundle of rights in an instrument before one can become a "holder." §§ 673.2011 and 673.2031(4), Fla. Stat.

While, "holder" is defined in § 671.201, Fla. Stat. as a person in possession of a negotiable instrument that is payable either to bearer or to that person, that general definition is "[s]ubject to definitions contained in other chapters of this code which apply to particular chapters or parts thereof." One such definition that modifies "holder" is in § 673.2011, Fla. Stat. That section specifies that a person may only become a "holder" by means of a "negotiation" which requires a

"transfer." Section 673.2031, Fla. Stat., in turn, defines "transfer" as a delivery of the instrument by a person "for the purpose of giving to the person receiving delivery the right to enforce the instrument." It goes on to say that "negotiation"—the only way one becomes a "holder"—does not occur when the "transferor purports to transfer less than the entire instrument." Instead the transferee obtains no rights under Article 3 and has only the rights of a partial assignee. The Comment to the corresponding UCC section makes clear that conveyance of "less than the entire amount of the instrument is not effective for negotiation." Uniform Commercial Code Comment to §3-203 (§ 673.2031, Fla. Stat. Ann.).

Thus, Article 3 does not permit an owner or holder of a note (Entity A) to transfer the note to another (Entity B) while retaining some right to payment on the note. *See Lipkowitz & Plaut v. Affrunti*, 407 N.Y.S.2d 1010, 1013 (N.Y. Sup. Ct. 1978) (under New York's version of the UCC,[28] transferor's failure to irrevocably divest himself of the ultimate right to all the proceeds of the notes made purported negotiation only a partial assignment).

[28] The provision relied upon, N.Y. U.C.C. Law § 3-202(3) (McKinney), adopted the corresponding provision from an earlier version of UCC, the restatement of which ultimately became Florida's version, §673.2031(4), Fla. Stat. *See*, Uniform Commercial Code Comment to §3-203, ¶ 5 (explaining that subsection 3-203(d) restates former § 3-202(3) [§ 673.2031, Fla. Stat. Ann.]).

It follows then that Entity A cannot "transfer" a note to Entity B to enforce the instrument on behalf of Entity A, because doing so would mean, not only has Entity A retained some interest in payment on the note, it has retained all such interest. Any attempt at such a transfer with a reservation of rights would not be a "negotiation," but rather a partial assignment, at best. Most importantly, Entity B (here, the Servicer) never becomes a "holder" because no negotiation has occurred.

Accordingly, Article 3 of the UCC cannot be pressed into service as a substitute for an agency agreement or power of attorney (or a "ratification"[29]). It is strictly designed for complete, irrevocable transfers of the entire interest in negotiable instruments. This is why agents of the owner who may at some juncture have possession of the note—such as the mailman and the clerk of the court—cannot claim to be holders. Even an attorney, who is given possession of the note for the specific purpose of enforcing it, is not a holder under the UCC because he or she is doing so on someone else's behalf. The same must be said of a servicer.

The term "designated holder," therefore, is an oxymoron—it is impossible for anyone to become an Article 3 holder by designation, only by negotiation. Thus, U.S. Bank cannot "designate" the Servicer as a "holder" for the purpose of

[29] It is especially inappropriate for ratification, because "transfers" need not be voluntary. §673.2011, Fla. Stat. Mere possession of a negotiable instrument does not mean that the previous holder voluntarily surrendered the instrument or authorized the current holder's lawsuit.

enforcing the note on U.S. Bank's behalf.[30] Either the Servicer is a holder entitled to enforce the note on its own behalf, or it is not a holder.

Once again, this comports with this Court's holding in *Elston/Leetsdale* that "a servicer may be considered a party in interest to commence legal action **as long as the trustee joins or ratifies its action**." 87 So. 3d at 17 (emphasis original).

F. The trial court erred in refusing to join U.S. Bank as a party.

The Homeowner moved to dismiss the First Amended Complaint on the grounds, among others, that the Servicer failed to join indispensable parties—the note owner and the mortgagee, MERS.[31] The court denied the motion.[32] For the

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[30] The word "designate" means to officially choose someone or something to do or be something, and in some contexts, "chosen for a particular job but not officially doing that job yet." "Designate." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 17 May 2014. <http://www.merriam-webster.com/dictionary/designate>. To be "designated" therefore requires that someone or something do the choosing—the designating. In the context of the Servicer's allegation, the designator can only be the note owner, U.S. Bank:

> Plaintiff is the servicing agent for the owner of the note and mortgage, is the designated holder of the note and is authorized to prosecute this action on behalf of the owner

First Amended Complaint for Foreclosure, dated April 29, 2011 (R.252).

[31] Defendant, [redacted] Motion to Dismiss First Amended Complaint, filed October 10, 2012, p. 4 (R. 290).

[32] Order Denying Defendants' Motion to Dismiss First Amended Complaint, filed November 16, 2012 (R. 304).

reasons above, the trial court erred in failing to dismiss the action to require that the Servicer join U.S. Bank as a party.

G. The trial court also erred in refusing to join the mortgagee, MERS, as a party.

There is no evidence of any transfer of the mortgage from MERS to either the Servicer or to U.S. Bank. The Servicer will argue that proof of its status as mortgagee was not needed because "the mortgage follows the note."

This aphorism is inapplicable here for two reasons. First, as shown above, the Servicer was neither a holder nor an owner of the Note—it was merely an agent of the owner and holder. It does not follow mere possession of the Note, or else the mailman, the attorneys, and the court itself would become mortgagees. So, if the Mortgage followed the Note, U.S. Bank is the mortgagee.

Second, even if the Servicer were a holder, mortgages follow the ownership of the note, not holdership. This is because the concept of the "mortgage follows the note" is merely shorthand for the legal fiction that there is an "equitable transfer" of the mortgage to the new, rightful owner of the note. *Johns v. Gillian*, 184 So. 140, 143-144 (Fla. 1938) (where there is no written assignment of the mortgage, the plaintiff "would be entitled to foreclose in equity upon proof of his purchase of the debt." (emphasis added)).

Because the evidentiary shortcut of a mortgage following a note is dependent upon the court's finding of an equitable transfer, it, like foreclosure itself, arises from the powers of the court's equitable jurisdiction. Therefore, it cannot apply to mere holders who are given the legal right to enforce a note even if they have taken possession of it under inequitable circumstances. (For example, it is often said that "even a thief can enforce a note.")[33]

The UCC itself compels this inevitable conclusion because the common-law concept that the lien faithfully tags along after the note is found in Article 9,[34] not Article 3. Notably, while possession is a means of perfection under Article 9, enforcement of the security interest requires proof that the buyer gave value to purchase the mortgage loan from a seller entitled to sell it—i.e. ownership.[35]

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[33] The Fifth District, in *Wells Fargo Bank, N.A. v. Morcom*, 125 So. 3d 320 (Fla. 5th DCA 2013), opined that a bank may foreclose simply by showing it is a UCC holder. To the extent that the holding implies that standing to foreclose has become subsumed within, and no different than, standing to obtain a money judgment on the note, the decision overturns years of binding authority dating back to the 1800s that foreclosure is an equitable remedy. Because a court in equity may not countenance a thief taking a home—particularly in the face of a strong public policy protecting homeownership, this Court should simply reject the *Morcom* decision as wrongly decided. Foreclosure is still a separate, distinct action from enforcement of the note.

[34] §§ 9-203(g) and 9-308(e) UCC; §§ 679.2031(7) and 679.3081(5), Fla. Stat.

[35] § 9-203(b) UCC; § 679.2031(2), Fla. Stat.

Because MERS was still the mortgagee, the trial court erred in denying the Homeowner's motion to dismiss and in granting judgment in favor of the Servicer.

II. There Was No Evidence That U.S. Bank Owned the Loan or Ratified the Servicer's Filing of this Action.

Despite pleading that it was bringing this action in a representative capacity, the Servicer presented no evidence that it was an agent for that purpose. At trial, the Servicer's only witness confirmed that the Servicer was not the owner of the loan.[36] And although the Servicer's authority could only spring from the true owner of the loan, the trial court prohibited any questioning as to whether the loan was actually part of U.S. Bank's trust.[37]

Even if there had been admissible evidence that U.S. Bank owned the loan, there was no evidence that it authorized or ratified this action. Therefore, it failed to adduce evidence of its standing as succinctly and clearly described by this Court in *Elston/Leetsdale.*

Instead, it argued that it had established standing as the holder of a note endorsed in blank.[38] The Servicer, however, never pled that as a basis for its standing, having alleged that its standing arose from its capacity as an agent. The

[36] T. 115.

[37] T. 116-118.

[38] T. 116, 118.

Servicer was bound by those pleadings. The admission that its standing arose from its representative capacity—in both the First Amended Complaint and the Reply to Affirmative Defenses—is accepted as a fact without the necessity of supporting evidence from the Homeowner. *Hart Properties, Inc. v. Slack*, 159 So. 2d 236, 238 (Fla. 1963) (plaintiff bound by allegation that he was a licensee).

Nor did the Servicer ask to amend its pleadings to conform to the evidence. As shown above, any amendment at trial to allege that it was a "holder" would not conform to the evidence—and would not be legally sound—because the evidence established that the plaintiff was a mere servicer and was not enforcing the Note on its own behalf.[39] Additionally, it would have been an abuse of discretion to allow the Servicer to change its entire theory of standing mid-trial. It would severely prejudice the Homeowner who had conducted his discovery under the Servicer's original theory.

Accordingly, without admissible evidence that U.S. Bank owned the loan and without any evidence that U.S. Bank authorized or ratified the action, there

[39] Given the new pleading requirements of § 702.015(3), Fla. Stat. requiring disclosure of a plaintiff's representative status and identification of any document granting authority to act on behalf of the person entitled to enforce the note, it is doubtful that the Servicer could lawfully amend to say it is a holder in its own right.

was no evidence to support the judge's verdict and judgment in favor of the Servicer.[40]

[40] "When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection thereto in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment." Fla. R. Civ. P. 1.530(e); *Norman v. Padgett*, 125 So. 3d 977, 978 (Fla. 4th DCA 2013).

CONCLUSION

The Court should reverse the judgment in favor of the Servicer and remand for entry of judgment in favor of the Homeowner.

Dated: May 21, 2014

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this May 21, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this May 21, 2014.

ICE APPELLATE
Counsel for Appellants
1015 N. State Road 7, Suite C
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Designated Email for Service:
service@icelegal.com
service1@icelegal.com
service2@icelegal.com

By: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Steven Ellison, Esq.
BROAD AND CASSEL
One North Clematis Street, Suite 500
West Palm Beach, FL 33401
sellison@broadandcassel.com
tpellegrino@broadandcassel.com
tbidwell@broadandcassel.com
Appellee's Counsel

ADDENDUM

Original opinion before rehearing of *Juega ex rel. Estate of Davidson v. Davidson*

(discussed at p. 20, n. 27 of this Brief)

ADDENDUM

Luis Juega, Administrator, on behalf of the Estate of Simon Davidson, Deceased, Appellant,
v.
Stanley S. Davidson, Individually and as Trustee of the Stanley S. Davidson Trust, Appellees.
No. 3D05-2785.
District Court of Appeal of Florida, Third District.
Opinion filed February 14, 2007.

An Appeal from the Circuit Court for Miami-Dade County, Gill S. Freeman, Judge, Lower Tribunal No. 94-12239 CA 15.

William L. Richey; Ferrell Law and H. Eugene Lindsey, for appellant. Arthur W. Tifford, for appellees.

Before COPE, C.J., and GREEN and LAGOA, JJ.

LAGOA, Judge.

Luis Juega, as administrator for the estate of Simon Davidson, appeals an order dismissing him from this lawsuit for lack of standing. We affirm.

I. FACTUAL HISTORY

Simon Davidson died testate in 1991, leaving behind a son, Allan Davidson, and a brother, Stanley Davidson. Prior to Simon Davidson's death, the Nozomi Corporation, of which Simon Davidson was the director, executed a loan and promissory note to Stanley Davidson in the amount of $5 million.1 Following Simon Davidson's death, Stanley Davidson closed several accounts held by Simon Davidson, appropriating the assets for himself. Estate proceedings commenced in Spain, and Luis Juega ("Juega") was appointed as estate administrator.

In 1994, Nozomi filed suit in Miami-Dade County ("the Nozomi litigation"), seeking repayment of the note and foreclosure on property securing the note. In 1995, Juega, as estate administrator, joined Nozomi's lawsuit, and asserted additional claims on behalf of the estate and its beneficiaries for conversion and civil theft.

In 2003, the Spanish court entered an order closing Simon Davidson's estate and finding Allan Davidson to be his father's sole heir. Juega's notice to the court regarding estate assets failed to list the Nozomi lawsuit as an estate asset, but did mention the lawsuit's existence under the category "other remarks." When the estate was closed, Juega was discharged from his administrative responsibilities.

Subsequent to the estate's closing and his discharge as the estate administrator, Juega filed a Fourth Amended complaint in the Nozomi litigation. Stanley Davidson moved to dismiss on the ground, among others, that Juega lacked standing to pursue the litigation because as the estate was closed he no longer was the estate administrator under Florida Rule of Civil Procedure 1.210(a), Florida's real party in interest rule. The trial court denied the motion in its entirety.

Stanley Davidson moved for reconsideration solely as to Juega, continuing to argue Juega's lack of standing. Juega then moved to substitute Allan Davidson as the real party in interest. In support of the motion, Allan Davidson filed an affidavit attesting that Juega was pursuing the litigation for his benefit and ratified all actions taken by Juega since the inception of the lawsuit. At a hearing on the reconsideration motion, Juega withdrew his motion to substitute parties, and relied solely on the argument that he could pursue the litigation in Allan Davidson's name as his agent. The trial court dismissed Juega from the lawsuit and this appeal ensued.

ADDENDUM

II. STANDARD OF REVIEW

We review de novo a party's dismissal for lack of standing. See Payne v. City of Miami, 927 So. 2d 904, 906 (Fla. 3d DCA 2005). Our review is confined to the complaint's four corners, with all reasonable inferences drawn in favor of the dismissed party. Id.

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III. ANALYSIS

Florida Rule of Civil Procedure 1.210(a) states, in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.

By its express wording, Rule 1.210(a) enumerates six categories of persons who may bring an action for the benefit of another without joining the real party in interest. However, the real party in interest may prosecute in his own name as well even if one of those six categories of persons is available. See Estate of Morales v. Iasis Healthcare Corp., 901 So. 2d 965, 966 (Fla. 2d DCA 2005) ("[i]n cases involving claims made by . . . an estate, there are two parties: the estate and the personal representative"). Here, Juega ceased to be the estate administrator and the Estate ceased to be the real party in interest in 2003.

Because Juega ceased to act in his representative capacity in 2003, he did not have standing in 2004 to raise claims on behalf of the estate. Moreover, in 2004, the real party in interest was no longer the estate but Allan Davidson. As such, the Fourth Amended Complaint was not prosecuted in the name of the real party in interest, Allan Davidson. The proper procedure under these circumstances would have been to move to substitute Allan Davidson for Juega. For reasons not

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made clear on this record, Juega, however, chose to abandon his motion for substitution. Accordingly, we affirm the trial court's order.

Affirmed.

Not final until disposition of timely filed motion for rehearing.

Notes:

1. The circumstances regarding the loan are disputed on this record, but have no bearing on the outcome of this appeal.
