

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

CASE NO. [REDACTED]

(Circuit Court Case No. [REDACTED])

[REDACTED]

Appellant,

v.

FLAGSTAR BANK, FSB, et al.,

Appellees.

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

REPLY BRIEF OF APPELLANT

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	i
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. The BANK Confesses Error.....	1
II. This Legal Issue is Reviewed <i>De Novo</i>	1
III. The BANK is Estopped from Arguing against Attorneys' Fees Based on a Contract it Sued Upon which Provides for Attorneys' Fees.....	2
IV. The BANK Argues Matters Beyond the Scope of Appeal.	3
CONCLUSION.....	6
CERTIFICATE OF SERVICE.....	7
CERTIFICATE OF COMPLIANCE WITH FONT STANDARD.....	8

TABLE OF AUTHORITIES

	Page
Cases	
<i>Eagleman, M.D. v. Korzeniowski</i> , 924 So. 2d 855 (Fla. 4th DCA 2006).....	6
<i>Federated Mut. Implement & Hardware Ins. Co. v. Griffin</i> , 237 So. 2d 38 (Fla. 1st DCA 1970).....	2
<i>First Union Nat. Bank v. Turney</i> , 839 So. 2d 774 (Fla. 1st DCA 2003).....	2
<i>Green v. Sun Harbor Homeowners' Ass'n, Inc.</i> , 730 So. 2d 1261 (Fla. 1998).....	1
<i>Hewitt, Coleman & Assocs. v. Lymas</i> , 460 So. 2d 467 (Fla. 4th DCA 1984).....	5
<i>Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.</i> , 971 So. 2d 955 (Fla. 5th DCA 2007).....	1
<i>Ross v. Hacker</i> , 284 So. 2d 399 (Fla. 3d DCA 1973).....	2, 3
<i>Save on Cleaners of Pembroke II Inc. v. Verde Pines City Ctr. Plaza LLC</i> , 14 So. 3d 295 (Fla. 4th DCA 2009).....	1
Rules	
Fla. R. App. P. 9.110(b)	4

ARGUMENT

I. The BANK Confesses Error.

The first sentence in the BANK's Answer Brief concedes the only issue in this case: "Appellant did not waive her right to claim attorney's fees."¹ *See Green v. Sun Harbor Homeowners' Ass'n, Inc.*, 730 So. 2d 1261, 1263 (Fla. 1998) (when a case is dismissed before the filing of an answer, the defendant may raise a claim for attorneys' fees and costs by separate motion filed within thirty days following dismissal). *Green* is indistinguishable from this case. Accordingly, since it is agreed that [REDACTED] properly raised a claim for attorneys' fees and costs, the order denying entitlement to attorneys' fees should be reversed.

II. This Legal Issue is Reviewed *De Novo*.

The only issue in this case is whether [REDACTED] properly raised her right to attorneys' fees, which the Answer Brief concedes. Even if disputed, such issues not involving the amount of fees to be awarded are reviewed *de novo*. *Save on Cleaners of Pembroke II Inc. v. Verde Pines City Ctr. Plaza LLC*, 14 So. 3d 295, 297 (Fla. 4th DCA 2009). Further, when entitlement to fees is based on the interpretation of a contract, as a pure matter of law, the appellate court undertakes a *de novo* review. *See Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007).

¹ Answer Brief, p. 4.

The BANK nevertheless argues that the standard of review is abuse of discretion and cites *First Union Nat. Bank v. Turney*, 839 So. 2d 774, 776 (Fla. 1st DCA 2003). The *Turney* case, however, supports [REDACTED] position because the *Turney* court applied the *de novo* standard and only reviewed the award amount under the abuse of discretion standard. *Id.* Since this appeal involves legal issues surrounding entitlement, it is reviewed *de novo*.

III. The BANK is Estopped from Arguing against Attorneys' Fees Based on a Contract it Sued Upon which Provides for Attorneys' Fees.

The mortgage and note the BANK sued on provide for attorneys' fees. The BANK now argues that [REDACTED] should not be entitled to such fees for successfully defending the lawsuit because it would be inequitable. The BANK cites *Ross v. Hacker*, 284 So. 2d 399 (Fla. 3d DCA 1973) and *Federated Mut. Implement & Hardware Ins. Co. v. Griffin*, 237 So. 2d 38 (Fla. 1st DCA 1970) for support.

Ross, the BANK's own case, actually supports [REDACTED] entitlement to fees in this case. In *Ross*, the plaintiff sued on a contract which provided for attorneys' fees. *Id.* After the defendant successfully defended the suit, the plaintiff argued that the attorneys' fees provision did not exist because the contract was previously cancelled. *Id.* The court held that the plaintiff was estopped from maintaining

such a position in an action which it sought specific performance of a contract providing attorneys' fees. *Id.*

The situation here is virtually identical. The BANK brought suit on a mortgage and note that provided for attorneys' fees. [REDACTED] successfully defended the lawsuit, and now the BANK, exactly like the plaintiff in *Ross*, is arguing against attorneys' fees provided for in the contract it sued upon. Applying the holding in *Ross*, the BANK is estopped from maintaining such a position.

Griffin is inapplicable to this case. In *Griffin*, a plaintiff argued that her husband's death was not in the course of employment to avoid a policy exclusion in garnishment proceedings when the underlying judgment entered for the plaintiff was based on the theory that her husband's death was in the course of employment. *Id.* at 40-41. The court held that the plaintiff was estopped from arguing an inconsistent factual position in a later part of the same case. *Id.* Unlike the post-judgment posture in *Griffin*, this case was dismissed before [REDACTED] filed a pleading. Further, [REDACTED] position is consistent. [REDACTED] never denied the existence of the note and mortgage, only that the BANK had standing to sue.

IV. The BANK Argues Matters Beyond the Scope of Appeal.

Having admittedly led the lower court into error, the BANK now seeks to rehash matters that were not appealed and are beyond the scope of appeal.

Specifically, the Answer Brief focuses entirely on the BANK's dissatisfaction with the underlying dismissal of this case—a final order which the BANK never appealed and, as a result, is not preserved for review by this Court. Nor are such issues within the scope of review of the order denying entitlement to attorneys' fees. *See* Fla. R. App. P. 9.110(b) (notice of appeal must be filed within thirty days of rendition of the order to be reviewed).

Further, in rearguing the dismissal, the BANK goes beyond the record and confuses facts and allegations. The BANK starts by claiming there was an understanding about the dismissal: "Rather, it was understood by all the parties that the dismissal and re-filing would be done merely to eliminate any question"² as to the timing of the assignment and filing. There was never any understanding or agreement, nor does the record support such an assertion. The BANK goes on state the following with no support in the record:

1. [T]here was never a question [REDACTED] was subject to foreclosure for non-payment.³
2. [P]laintiff at all times had legal rights as the Lender under the first mortgage.⁴
3. [A]ppellant at all times was mortgagee under the second mortgage.⁵

² Answer Brief, p. 4.

³ Answer Brief, p. 4.

⁴ Answer Brief, p. 6.

4. The BANK also asserted mortgage rights under a Home Equity Line of Credit.⁶
5. “MERS never transferred its limited rights under the mortgage to any other entity.”⁷

Five of the six statements above do not cite any portion of the record. The BANK does cite a home equity line of credit which was attached to the amended complaint for the proposition that BANK asserted rights under the line of credit. The amended complaint, however, shows the BANK did not assert any rights under the home equity line and merely included it as a subordinate interest.⁸ The second mortgage is not the mortgage being sued upon and therefore, the BANK would not assert any rights under it.⁹

Similar assertions to those listed above are found in the BANK’s Statement of Facts which cite to attorney argument. The unsworn statements of attorneys do not establish facts. *Hewitt, Coleman & Assocs. v. Lymas*, 460 So. 2d 467 (Fla. 4th DCA 1984). Further, the attorney argument the BANK cites to argue against the dismissal was not made at the hearing on the dismissal but two months later at the

⁵ Answer Brief, p. 6.

⁶ Answer Brief, p. 7.

⁷ Answer Brief, p. 8.

⁸ Amended Complaint, ¶ 15 (A. 9).

⁹ Compare the book and page numbers of paragraph 15 of the Amended Complaint (BK 21551, PG 663) and Exhibit A to the Amended Complaint, (BK 21551, PG 0647) (A. 9, 12).

hearing on entitlement to attorneys' fees¹⁰ and thus not preserved for review. *See Eagleman, M.D. v. Korzeniowski*, 924 So. 2d 855, 859-60 (Fla. 4th DCA 2006) (court is unable to review issues not preserved for appellate review).

Accordingly, the Statement of Facts, Section II and Section III of the Answer Brief should be stricken as nonresponsive and beyond the scope of appeal.

CONCLUSION

The BANK confessed error by admitting that [REDACTED] properly raised the claim for attorneys' fees and costs by filing a motion raising the claim within thirty days of the judgment of dismissal. Accordingly, the lower court's ruling denying [REDACTED] an award of attorneys' fees and costs should be reversed and remanded to the lower court with directions to enter an order granting entitlement to attorneys' fees and costs in favor of [REDACTED] and against the BANK.

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellant
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Facsimile (866) 507-9888
mail@icelegal.com

By: 
ENRIQUE NIEVES
Florida Bar No. 41736

¹⁰ Transcript of the Hearing before the Honorable Jack H. Cook held on June 21, 2010 (A. 72-74).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing along with the appendix to the initial brief was served by U.S. Mail this January 3, 2011 to all parties on the attached service list.

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
mail@icelegal.com

By:



ENRIQUE NIEVES
Florida Bar No. 41736

SERVICE LIST

Julie R. Mandel, Esq.
GREENFIELD & COOMBER, P.A.
7000 West Palmetto Park Road
Suite 307
Boca Raton, FL 33433
Telephone: (561) 392-6391
Appellee's counsel

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.
c/o Electronic Data Systems
Corporation
3300 SW 34th Ave., Suite 101
Ocala, FL 33474

William T. Viergever, Esq.
SONNEBORN RUTTER COONEY &
KLINGENSMITH, P.A.
1545 Centrepark Drive North
West Palm Beach, FL 33401
Telephone: (561) 684-2000
Facsimile: (561) 684-2312
Appellee'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 Appellant
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone (561) 729-0530
Facsimile (866) 507-9888
mail@icelegal.com

By:



ENRIQUE NIEVES
Florida Bar No. 41736