In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RASC 2007KS3,

Appellees.

ON APPEAL FROM THE 19TH JUDICIAL
CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules

Treatises

ARGUMENT

The Answer Brief of Appellee U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR RASC 2007KS3 ("the BANK") is more instructive for what it does not say, than for what it says. What it does not say is that the affidavits with which it stripped [redacted] ("[redacted] of her home complied with substantive or procedural law. While it claims that it later filed a "corrected affidavit" that was "properly verified,"[1] the BANK never explains how such after-acquired "evidence" could cleanse its ill-gotten judgment when it was never considered by the court. Indeed, the BANK purposefully prevented the trial court from considering the new affidavit by leaving its Motion to Ratify pending for more than a year, only to withdraw it at a hearing finally set by [redacted]

Nor does the BANK trouble itself to even attempt to persuade this Court that the amount of the judgment is correct—or even substantially correct—despite the contradiction with its own pleadings. It does not seek to enlighten this Court as to what was meant by the admission of its own counsel that there had been a modification to the terms of the loan not mentioned in the pleadings.[2] It does not

[1] Answer Brief, pp. 1, 2.

[2] *See*, Initial Brief p. 13, citing to Hearing Before the Honorable Cynthia L. Cox, October 25, 2011, p. 11 (A. 346).

address how its attorneys' ethical obligation to have the court reconsider any judgment based on faulty affidavits was met in this case.[3]

Instead, the BANK's argument is a simple mantra reminiscent of the famed words bellowed by the "great and powerful" Wizard of Oz: "Pay no attention to the man behind the curtain."[4] Here, the BANK entreats this Court to pay no attention to the fact that the judgment is patently incorrect and fraudulently obtained, instead arguing that [redacted] missed the deadline to complain about these things. Indeed, she foolishly relied on the BANK to: 1) submit proper, truthful affidavits in the first instance; and 2) correct any falsities that were later uncovered. The BANK and its attorneys did neither.

And contrary to the BANK's implication, this Court's hands are not tied in reaching its constitutionally mandated goal here (as in every case): justice.

I. The Trial Court Was Required to Hold an Evidentiary Hearing to Reconsider the Judgment Based Upon the Bank's Timely Admission that Its Evidence Was Faulty.

As this Court recognized in *Jaffer v. Chase Home Finance LLC*, 92 So.3d 240, 242 (Fla. 4th DCA 2012), a bank's admission to the court that the person

[3] Supplemental Memo Exhibit E at 7 (A. 380) (Florida Bar Staff Opinion dated January 7, 2011).

[4] THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

signing the affidavit in support of summary judgment "may" not have personally reviewed the loan file required the trial court to set aside the judgment and make a determination as to whether the summary judgment affidavit complied with Rule 1.510(e).

Incredibly, the BANK's Answer Brief makes no attempt to distinguish or even mention *Jaffer*. Instead, the BANK deals with the issue by arguing, without citation to the record, that the investigation of Stephan and his countless faulty affidavits "is unrelated to the instant action."[5] The evidence before the trial court belies this statement. The BANK's Notice stated that counsel drafted the affidavit for Stephan, while the Stephan deposition transcript submitted to the Court confirmed that Stephan did not personally review records before signing affidavits.[6] The trial court had before it specific evidence of a sweeping

[5] Answer Brief at 2.

[6] Stephan Deposition at 12:1-13:4 (A. 169-70) (neither Stephan nor his team takes any action to verify that documents prepared for his signature by the attorney is correct). Stephan signed the specific documents at issue in *GMAC v. Neu* during the same time period he signed the affidavits in this case. *Id.* at Exhibit A (assignment of mortgage dated March 5, 2009) (A. 232); Exhibit F (Affidavit of Lost Original Document dated May 21, 2009) (A. 254).

investigation of Stephan's practices,[7] and had a duty to further inquire into the validity of the evidence upon which judgment relied.

The BANK brought this information to the court's attention in 2010, well within the one year time limit noted for relieving a party from judgment pursuant to Rule 1.540(b)(3), and based upon a citation to that rule.[8] Although [redacted] does not concede that the court could grant the BANK the relief requested in its Motion to Ratify—clearly, summary judgment based upon new evidence can only be granted by following the procedures required to afford due process as outlined in Rule 1.510, Fla. R. Civ. P.—the Motion to Ratify did timely put the court on notice that the court had an obligation to perform an evidentiary hearing to determine whether the judgment should be set aside for "fraud…misrepresentation, or other misconduct."

The issue, then, is whether the BANK is judicially estopped (and its attorneys ethically prohibited) from withdrawing a pending Rule 1.540(b)(3) motion that admits of a defect in the evidence, particularly when [redacted] motion had already joined in questioning the validity of Stephan affidavit. Does the trial

[7] See Initial Brief at 2-13 and record evidence cited therein.

[8] See Notice (A.141) and Motion to Ratify Final Summary Judgment of Mortgage Foreclosure *Nunc Pro Tunc* and to Reschedule Judicial Sale (A. 144) at ¶¶ 8-9 (citing Rule 1.540(b)(3) as basis for motion).

court have the discretion—as the BANK suggests—to leave a judgment standing (without further investigation) when all parties concerned agree that it was likely defective and it manifestly conflicts with the pleadings?

The BANK argues extensively that there are no provisions for tolling the one year time period for Rule 1.540(b)(3) motions.[9] While [redacted] does not argue specifically for a "tolling" of the period, in what may be a case of first impression, [redacted] posits that the BANK's Rule 1.540(b)(3) motion did hold the final judgment in limbo until it could be determined. The trial court did not have the authority to execute upon the judgment while the motion was pending—even without [redacted] motion—and thus, erred in rescheduling the sale.

The one year deadline in Rule 1.540 is intended to give finality to judgments. Here, the finality and operation of the judgment had been suspended. Its decree had not been executed (the home had not gone to sale) and its propriety had already been questioned by the BANK. The termination of judicial labor at the trial level had been delayed. *See Pruitt v. Brock*, 437 So. 2d 768, 772 (Fla. 1st DCA 1983) (timely Rule 1.530 motion tolled time for Rule 1.540 motion because additional judicial labor was still required or permitted and because cases should be determined on their merits).

[9] Answer Brief, pp. 6-7.

And to the extent that the one year deadline was intended to insure that evidence which undermines the judgment is not stale—that the judgment creditor would have access to countervailing information that would support the judgment—it is especially significant that [redacted] motion was made on the same grounds as the BANK's motion. The BANK, therefore, was on notice of the problem with the judgment, and in fact, had already attempted to take corrective action. Accordingly, not only was the judicial labor unfinished, it was never complete with respect to the specific issue at hand—the propriety of Stephan's affidavit.

Thus, [redacted] motion, and her proffer of additional evidence reinforcing the very fraud that was initially and timely raised by the BANK, should have been considered timely. But this Court need not decide the case on that basis. It may simply rule that a trial court can neither ignore a timely filed motion that attacks the validity of a judgment nor allow a party to withdraw it once another party has joined in alleging the same defect in the judgment.

Moreover, the evidence submitted was sufficiently particular to warrant an evidentiary hearing, contrary to BANK's argument.[10] In *Jaffer*, the court found that the bank's admission that the affidavit "may" have been improperly verified,

[10] Answer Brief, pp. 9-10.

without more, required the trial court to reconsider the judgment. Here, [redacted] provided more than the BANK's admission. She also provided the affiant's own sworn testimony that he never reviewed underlying files and had no personal knowledge of the facts in the affidavits he signed during the period of time in which he signed the affidavits in this case.[11]

Moreover, [redacted] detailed defects in the pleadings and proof that questioned the entire foundation of the judgment. For example, the fact that the affidavits claimed a principal amount due and owing that exceeded the amount stated on the face of the Note.[12] Because [redacted] provided ample evidence of both the affiant's misconduct and larger issues with the underlying judgment, the trial court should have vacated the judgment and held an evidentiary hearing.

Moreover, the trial court was clearly troubled by this issue, stating on the record "I'm not happy that the note says 231 and the judgment says 249."[13] The trial judge, erroneously, appears to have felt her hands were tied by the one year time limit set out in Rule 1.540(b)(1)-(3). The trial court's interpretation and application of the rules of procedure must be reviewed *de novo*. *Barco v. School*

[11] Stephan Deposition at 9-10 (A. 166-67).

[12] See Initial Brief at 2-13 and record cites therein.

[13] Hearing Before the Honorable Cynthia L. Cox, October 25, 2011, p. 12 (A. 347).

Bd. of Pinellas County, 975 So. 2d 1116, 1121 (Fla. 2008). Applying this review, it is clear that the trial court had the discretion to set aside the judgment, based upon the BANK's timely "Motion to Ratify" made pursuant to Rule 1.540(b). It is also clear that the trial court did not have the discretion to refuse to reconsider the judgment, and instead had an obligation to inquire about the adequacy of the Stephan affidavit. *Jaffer v. Chase Home Finance LLC*, 92 So.3d 240 (Fla. 4th DCA 2012).

II. The Trial Court Should Have Vacated the Void Judgment Pursuant to Rule 1.540(b)(4), Because [redacted] Timely Argued That the Complaint Failed to State a Claim and the Plaintiff Lacked Standing.

When the underlying judgment is "void," the trial court has no discretion, but is obligated to vacate the judgment. *Phenion Dev. Group, Inc. v. Love*, 940 So. 2d 1179, 1181 (Fla. 5th DCA 2006); *Southeast Land Developers Inc. v. All Florida Site and Utilities Inc.*, 28 So. 3d 166, 168 (Fla. 1st DCA 2010) ("A default judgment is void and should be set aside when the complaint fails to state a cause of action."). Here, the underlying complaint (and resulting judgment) does not match the principal amount stated on the face of the Note attached to the Complaint, canceling out the allegations of the complaint and failing to state a claim. *Schweitzer v. Seaman*, 383 So. 2d 1175, 1178 (Fla. 4th DCA 1980)

(upholding dismissal of complaint with prejudice due to pleading inconsistency failing to state a claim). At best, the Note controls, and the Plaintiff could only be awarded a judgment for the principal amount stated on the Note. "The party seeking affirmative relief may not be granted relief that is not supported by the pleadings or by substantive law applicable to the pleadings." *Bd. of Regents v. Stinson-Head, Inc.*, 504 So. 2d 1374, 1375 (Fla. 4th DCA 1987), *citing* H. Trawick, Trawick's Florida Practice and Procedure § 25-4 (1986 ed.); *see also Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1233 (Fla. 1st DCA 1995) (damages can be awarded only to the extent supported by the well-pleaded allegations of the complaint).

As [redacted] argued to the trial court,[14] the Complaint's failure to state a claim and the court's entry of judgment for a principal amount greater than what the Note says [redacted] borrowed required that the default be set aside. *Becerra v. Equity Imports, Inc.*, 551 So. 2d 486, 488 (Fla. 3d DCA 1989) ("Failure to state a cause of action, unlike formal or technical deficiencies, is a fatal pleading deficiency not curable by a default judgment").

The BANK makes no attempt to distinguish or discuss the cases cited by [redacted] on this issue. Rather, the BANK's only response to this argument is its

[14] Motion at 7-8.

misguided conclusion that [redacted] waived these defenses.[15] But [redacted] did not waive her objections to the BANK's standing or its failure to state a claim in its complaint, because [redacted] raised those issues to the trial court prior to this appeal. The Florida Supreme Court in *Love v. Hannah*, 72 So. 2d 39 (Fla. 1954) confirmed that a defendant may raise a challenge to standing as late as post-trial, even if it is raised in an otherwise impermissible filing, because the test for waiver is whether the party "brought such fact to the [trial] Court's attention during the term."

Similarly, the Second District recently applied the holding of *Love* to confirm that a party does not waive its challenge to standing even if it is raised for the first time in a motion to set aside the judgment. *Maynard v. Florida Bd. of Educ. ex rel. Univ. of S. Florida*, 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009); *but cf. Phadael v. Deutsche Bank Trust Co. Americas*, 83 So. 3d 893 (Fla. 4th DCA 2012). The cases upon which [redacted] relies—such as *Southeast Land Developers Inc. v. All Florida Site and Utilities Inc.*, 28 So. 3d 166, 168 (Fla. 1st DCA 2010)—are procedurally identical to the posture of this case. Here, as in *Southeast Land*, [redacted] is appealing from denial of a motion brought pursuant to Rule 1.540(b). And here, as in *Southeast Land*, the court must vacate the judgment because the complaint does not state a claim for the principal judgment awarded.

[15] Answer Brief, pp. 11-12.

The BANK also argues that the evidence is "incontrovertible" that it had standing to foreclose, but fails to even cite the evidence it relies upon to support this view.[16] *See Gladstone v. Smith*, 729 So. 2d 1002, 1004 (Fla. 4th DCA 1999)(failure to cite to record on appeal "can be fatal"). This is because the BANK's evidence of standing has, in fact, been controverted by [redacted] argued below that the Note was not timely made part of the Trust to which the BANK purports to be a trustee, and the endorsement on the Note was vague as to which entity is receiving the Note and in what capacity.[17] Even a seemingly minor discrepancy as to the identity of the holder of a note precludes judgment in the favor of a plaintiff who has not proven its holder status. *See, e.g.*, *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011)(bank failed to prove standing where Plaintiff was entity named "M&I Bank," entity listed on the note and mortgage was "M & I Marshall & Ilsley Bank," and there was no proof that they were the same entity or successors to the original entity).

Rather, the BANK relies upon cases that do not help it.[18] In support of [redacted] position, *McLean v. JP Morgan Chase Bank Nat. Ass'n*, 79 So. 3d 170, 173

[16] Answer Brief, p. 12.

[17] A.46.

[18] Answer Brief, p. 12.

(Fla. 4th DCA 2012) confirms that a "crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose" and "plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." *Id.* And unlike *McLean*, in this case it is far from clear that the endorsement on the note is in favor of the Plaintiff, and therefore summary judgment was inappropriate. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011); *see also Snyder v. Cheezem Dev. Corp.*, 373 So. 2d 719, 720 (Fla. 2d DCA 1979)("if the record raises even the *slightest doubt* that an issue might exist, summary judgment is improper)(emphasis added).

Isaac v. Deutsche Bank Nat. Trust Co., 74 So. 3d 495, 496 (Fla. 4th DCA 2011) is even less helpful to the BANK, because in that case, the note bore a blank endorsement. Here, by contrast, the endorsement is to a specific entity, but not the full name of the entity that is the Plaintiff.[19]

Because [redacted] did not waive the issues of standing and failure to state a claim, *In re Guardianship of Schiavo*, 792 So. 2d 551, 559 (Fla. 2d DCA 2001) did not require that the trial court deny the relief sought by [redacted] Rather, the trial court should have reversed the judgment and conducted further proceedings, in

[19] A.46.

keeping with due process, to determine whether the BANK was the proper entity to foreclose, and the proper amounts due and owing under the Note.

III. In the Alternative, the Safety Valve of Rule 1.540(b)(5) Must Be Applied Here, Where the Plaintiff Has Admitted its Judgment is Based Upon Faulty Evidence and the Federal Government Seriously Questioned the Propriety of Judgment.

At the very least, this case cried out for relief pursuant to Rule 1.540(b)(5). Rule 1.540(b)(5) grants a trial court broad discretion to "relieve a party…from a final judgment" when "it is no longer equitable that the judgment or decree should have prospective application." Fla. R. Civ. P. 1.540. As explained in *Cutler Ridge Corp. v. Green Springs, Inc.*, 249 So. 2d 91, 93 (Fla. 3d DCA 1971), the general purpose of Rule 1.540(b) "is to enable the court to grant relief against an unjust decree, and [Rule 1.540(b)] should be liberally construed to advance such remedy." *Id.* Appellate courts have not hesitated to hold that the trial court abused its discretion in refusing to grant relief pursuant to Rule 1.540(b)(5). *See, e.g.*, *Smith v. Frank Griffin Volkswagen Inc.*, 645 So. 2d 585, 588 (Fla. 1st DCA 1994); *Weitzman v. F.I.F. Consultants, Inc.*, 468 So. 2d 1085, 1086 (Fla. 3d DCA 1985)(reversing denial of Rule 1.540(b)(5) motion and requiring the trial court to cancel the judgment).

More generally, the rule provides a safety valve where "significant new evidence or substantial changes in circumstances arising after the entry of the judgment make it 'no longer equitable' for the trial court to enforce its earlier order." *In re Guardianship of Schiavo*, 792 So. 2d at 560.

Here, the Plaintiff was obligated to bring to the Court's attention the fact that its affiant, the now-infamous "Robo-Signer" Jeffrey Stephan, likely did not have personal knowledge of the facts to which he swore in support of summary judgment.[20] Even in the face of the BANK's extraordinary backpedaling by withdrawing its "Motion to Ratify" and trying to sweep its deficient evidence under the rug, the trial court should have granted relief under Rule 1.540(b)(5).

[redacted] learned, days before she supplemented her motion, that the Federal Government had announced a program to review the propriety of foreclosure judgments such as hers.[21] This significant new evidence included the Federal Government's conclusion that foreclosures by GMAC (and others) on primary residences between January 1, 2009 and December 31, 2010 (which brackets the

[20] Supplemental Memo Exhibit E at 7 (A. 380).

[21] Federal Government's announcement Independent Foreclosure Review Program. Supplemental Memorandum at 3-4 (A. 356-57).

judgment here) likely caused financial injury, and likely entitled the customer to "compensation or other remedy."[22]

Once again, the BANK ignores this strong new evidence undermining the judgment, instead arguing that the foreclosure judgment has no "prospective application" and so Rule 1.540(b)(5) should not apply.[23] The BANK cites no authority for this interpretation of "prospective application"—a clause whose meaning is unsettled. *Pozo v. Prada*, 563 So. 2d 726, 727 (Fla. 3d DCA 1990)(concurring opinion of J. Cope). But authority certainly exists to support use in this context. *See Weitzman v. F.I.F. Consultants, Inc.*, 468 So. 2d 1085, 1086 (Fla. 3d DCA 1985) (finding it no longer equitable that a money judgment would have prospective application where it allowing "it to stand would serve impermissibly both to reward a wrongdoer and to penalize the victim of his misconduct…").

CONCLUSION

For all of the foregoing reasons, the trial court's Order refusing to investigate the faulty judgment should be REVERSED and the underlying

[22] Supplemental Memorandum Exhibit D (A. 368).

[23] Answer Brief, p. 8.

judgment vacated. At a minimum, the Court should remand for an evidentiary hearing.

Dated: October 8, 2012

Respectfully submitted,

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

BY: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this October 8, 2012 to all parties on the attached service list.

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

BY: _____
THOMAS ERSKINE ICE
Florida Bar No. 0521655

SERVICE LIST

Travis Harvey, Esq.
FLORIDA DEFAULT LAW GROUP, P.L.
P.O. Box 25018
Tampa, FL 33622-5018
eservice@wolfelawfl.com
eservice2@wolfelawfl.com
Appellee's counsel

Barry B. Johnson, Esq.
O'KELLEY and SOROHAN ATTORNEYS AT LAW, LLC.
2290 Lucien Way, Ste. 205
Maitland, FL 32751
bjohnson@oslawllc.com
Plaintiff's Co Counsel

D. Brian O'Dell
Marc James Ayers
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North,
Birmingham, AL 35203-2104
bodell@babc.com; mayers@babc.com
Plaintiff's Co Counsel