In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE IN TRUST FOR THE BENEFIT OF THE CERTIFICATEHOLDERS FOR ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2003-AR3, et al.

Appellees.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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Key:

- The "[redacted] = Defendants [redacted] and [redacted]
- The "BANK" or "DEUTSCHE BANK" = DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE IN TRUST FOR THE BENEFIT OF THE CERTIFICATE HOLDERS FOR ASSET-BACKED PASSTHROUGH CERTIFICATES, SERIES 2003-AR3

ARGUMENT

I. Summary of the Argument

After fifty dense pages and 158 case citations, the BANK's entire argument boils down to this: The [redacted] didn't answer the complaint—even when given a deadline by an order [albeit one that was never properly served on them]. Therefore, as punishment for not doing something they were obligated to do, this Court should pretend that the BANK did something that the BANK was obligated to do: obtain a default.

Merely stating the BANK's argument refutes it. The BANK did not obtain a default and a court of law cannot intentionally overlook a key procedural due process safeguard merely because it would be more convenient for the BANK. By choosing to proceed to summary judgment without an answer or default, the BANK set for itself the near-impossibly-high standard of disproving every possible defense that the [redacted] could have raised. This would be so even if the [redacted] had intentionally refused to answer. Yet, the record suggests it was not intentional, making the BANK's request for special consideration all the more abhorrent.

One of the potential defenses that the BANK needed to conclusively disprove was apparent from the face of the BANK's own pleadings. By attaching

an unendorsed copy of the Note to a complaint which claimed that the Note had been lost, the BANK itself adduced all the evidence that was necessary to dispute that it was a "holder" (or even a nonholder in possession) at the time it filed suit. Because the BANK did not even attempt to refute this defense (among others), summary judgment was improper.

The BANK also contends that the [redacted] points concerning due process defects—the lack of notice of hearings and orders—were waived. While the BANK's failure to provide proper notice primarily serves to explain how the [redacted] could arrive at this juncture without an answer, to the extent it also serves as a second reason for reversal, it is completely independent of the first. In other words, even if a lack of notice could be waived, such waiver would not change the fact that the BANK did not disprove even the most obvious defenses. In any event, due process defects such as the absence of a required notice are not waivable because they constitute fundamental error.

II. Because the [redacted] Were Never Defaulted, the BANK Was Required to Disprove all Possible Defenses.

A plaintiff who moves for summary judgment prior to an answer being filed faces an extraordinary burden: the movant "has the burden of conclusively establishing that no answer which the defendants might properly serve could present a genuine issue of material fact." *Valhalla, Inc. v. Carbo*, 487 So. 2d 1125, 1126 (Fla. 4th DCA 1986). This is true even where, as in *Valhalla*, the defendant files an answer after the motion for summary judgment has been filed. The moving plaintiff must anticipate every possible defense, and prove that it is either legally or factually insufficient. *See, e.g., Gutterman-Musicant-Kreitzman, Inc. v. I.G. Realty Co.*, 426 So. 2d 1216, 1217 (Fla. 4th DCA 1983) ("When plaintiffs moved for a summary judgment before an answer was filed, they had the burden of conclusively establishing that no answer which the defendants might properly serve could present a genuine issue of material fact"); *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 937-38 (Fla. 2d DCA 2010) (Plaintiff must establish that "the defendant could not raise any genuine issues of material fact if the defendant were permitted to answer the complaint.").

Incredibly, the BANK appeals to "equity" in seeking to sweep away these procedural safeguards,[1] and asks this Court to defy decades of decisional law requiring movants to meet this heavy burden. There is no definition of equity that would include entry of judgment without notice and opportunity to be heard. But in any event, "[c]ourts of equity have no power to overrule established law." *Orr v. Trask*, 464 So. 2d 131, 135 (Fla. 1985), *citing Flagler v. Flagler*, 94 So. 2d 592, 594 (Fla. 1957) ("This court has no authority to change the law simply because the law seems to us to be inadequate in some particular case.").

No matter how late an answer is, the rules for entry of summary judgment are the same. The summary judgment procedure is "not a substitute for a trial," *Ham v. Heintzelman's Ford, Inc*., 256 So. 2d 264, 267 (Fla. 4th DCA 1971), and a non-movant can only be deprived of the right to a trial if the facts "are so crystallized that nothing remains but questions of law." *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). Indeed, the *Lehew* case cited by the BANK confirms that it is error to enter summary judgment without disproving the possible answer, even if the defendant/appellant has not timely answered. *Lehew v. Larsen*, 124 So. 2d 872, 874 (Fla. 1st DCA 1960). In *Lehew*, the trial court entered summary judgment on plaintiff's behalf while defendant's motion to dismiss was pending.

[1] Answer Brief, pp. 27-28.

The appellate court reversed, noting that the trial court should not have granted summary judgment without first allowing defendant to answer, even as the court criticized the defendant for dilatory litigation tactics. The lesson of *Lehew* is simple: due process is paramount.

Moreover, in this case, the record offers a good reason for the Answer being late: The [redacted] attorneys were never served with a copy of either the notice of hearing on their motion to dismiss, or the order that resulted from that hearing.[2] The [redacted] attorneys were never informed that an answer was due.

[2] R. 90 (certificate of service on Notice of Hearing on Defendants' Motion to Dismiss); R. 99 (certificate of service on Order granting motion to dismiss).

III. The BANK Failed to Prove Its Standing to Foreclose.

The BANK made no effort to prove that it was the proper party to foreclose, and its failure to do so should have prevented entry of judgment. Mere possession of an endorsed note at the time of summary judgment is not enough. The foreclosing party must prove that it had standing to foreclose "at the inception of suit." *McLean v. JP Morgan Chase National Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012); *see also Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group*, LLC, 75 So. 3d 773, 776 (Fla. 4th DCA 2011) (the assignment or transfer that provides a party with the right to sue "must pre-date the filing of a foreclosure action.").

Here, as in *McLean*, the bank alleged a lost note count in its complaint, and attached an unendorsed copy of a note to which the plaintiff was not a party. *Id.* at 172.[3] Here, as in *McLean*, the bank obtained summary judgment by later filing the purported original note, now bearing an undated endorsement. *Id.*[4] The court in *McLean* made clear that, under these circumstances, the party can only prevail if it proves it was either a holder or a nonholder in possession <u>at the time the suit was filed</u>. *McLean*, 79 So.2d at 173.

[3] R. 25 ¶ 1.

[4] R. 152 (undated endorsements).

At least in *McLean*, the Bank had attempted to swear that it was the "holder and owner" of the note. In this case, the "Affidavit of Indebtedness" alleges only that the affiant is "familiar" with the note.[5] Accordingly, here, as in *McLean*, the BANK failed to submit any evidence that it held the Note at the time it filed suit. Rather, the BANK's admission in its pleading that it had lost the Note required the court to draw all inferences in the [redacted] favor and find that the BANK failed to prove it had standing when it brought the action. *See, e.g., Gonzalez v. Deutsche Bank Nat. Trust Co.*, 95 So. 3d 251, 253 (Fla. 2d DCA 2012) (reversing summary judgment because undated endorsement did not establish standing).

IV. The [redacted] Were Denied Due Process, Which is an Entirely Independent (and Unwaivable) Ground for Reversal.

Without proper notice and an opportunity to be heard, there is no due process. *Mondestin v. Duval Fed. Sav. & Loan Ass'n*, 500 So. 2d 580, 580 (Fla. 4th DCA 1986) (reversing summary judgment because record does not reflect service of notice on appellant's attorney). Here, the BANK consistently mailed its pleadings and notices to the [redacted] directly, even though they had counsel of record, in violation of the rules of procedure.[6] The one time the BANK

[5] R. 112-113.

[6] R. 90 (certificate of service on Notice of Hearing on Defendants' Motion to Dismiss); R. 99 (certificate of service on Order granting motion to dismiss); R.

attempted to serve counsel of record—with the notice of hearing for summary judgment—the address used had the wrong suite number.[7] Where a party knew or reasonably should have known that the notice was sent to an incorrect address, such notice was not reasonably calculated to give notice that comports with due process. *Delta Prop. Mgmt. v. Profile Investments, Inc.*, 87 So. 3d 765, 773 (Fla. 2012); *see also Baxter v. Baxter*, 684 So. 2d 886, 887 (Fla. 5th DCA 1996) (finding due process was violated because party was served at incorrect address).

Because the lack of due process here is an independent ground for reversal, a finding that the issue had been waived would not be determinative of the appeal. In any event, lack of due process is fundamental error that the appellate court can and should correct even if raised for the first time on appeal. "If a procedural defect is declared fundamental error, then the error can be considered on appeal

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110-11 (certificate of service on Motion for Summary Judgment). *See*, Initial Brief, pp. 15-20.

[7] *Compare*, R. 127 (notice of hearing certificate of service addressed to "2101 Vista Parkway, Suite 200") *with* R. 75 (Notice of Appearance providing court with address of "2101 Vista Parkway, Suite 124"). The [redacted] Initial Brief, through oversight, erroneously stated that: "When the SJ Motion was noticed for hearing, the BANK served that notice on the same faulty service list, which again did not include the [redacted] counsel of record." (Initial Brief, pp. 8-9) The statement should have said, and is hereby amended to say: "When the SJ Motion was noticed for hearing, the BANK served that notice with another faulty service list, this time including one of the [redacted] counsel of record, but at the wrong address."

even though no objection was raised in the lower court." *Jackson v. State*, 983 So. 2d 562, 575 (Fla. 2008). "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *Id*. Indeed, the very case cited by the BANK[8] recognizes that fundamental error need not be preserved. *See Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 326 (Fla. 1st DCA 2001) (noting the fundamental error exception to preservation rule); *see also Hooters of America, Inc. v. Carolina Wings, Inc*., 655 So.2d 1231, 1234–35 (Fla. 1st DCA 1995) (reversing default judgment for lack of due process where issue was raised for the first time on appeal).

[8] Answer Brief, p. 14.

CONCLUSION

The Court should decline the BANK's invitation to sweep away decades of case law providing constitutional due process safeguards. Instead, the Court should reverse the entry of summary judgment because the BANK utterly failed to refute the [redacted] clearly viable affirmative defenses, and the judgment was entered without due process of law.

Dated: October 22, 2012

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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 this October 22, 2012 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 October 22, 2012.

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