In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No.

Appellant,

v.

NATIONSTAR MORTGAGE, LLC,

Appellee.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

Counsel for Appellant
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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Statutes

Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

Key:

The same conventions used for the Initial Brief are used here:

- Nationstar Mortgage, LLC is referred to as "the Servicer."
- [redacted] is referred to as "the Homeowner."
- The Uniform Commercial Code is abbreviated as "UCC."
- The record is "(R. __)" and the transcript of trial is "(T. __)."

SUMMARY OF THE REPLY ARGUMENT

The Servicer posits that it has standing to enforce the Note even though the real party in interest—the party who will ultimately receive the proceeds from any judgment in plaintiff's favor—is the owner of the Note, U.S. Bank. If anyone is a holder under Article 3 of the UCC, however, it is U.S. Bank, because the Servicer's possession of the Note is solely as an agent on behalf of its principal, a fact reflected in the words "designated holder." The UCC considers the principal to be in "possession" of the Note, and thus, the Article 3 holder.

Accordingly, the Servicer was required to join the real party in interest or, at a minimum, prove that it authorized the action to enforce the Note (which the Servicer admits that it did not do). Secondarily, to bring the separate equitable action of foreclosure, the Servicer was required to join, or obtain authority from, the mortgagee, the purported owner and holder, U.S. Bank.

Even if the Servicer were a holder, it would not be the mortgagee. Despite conclusory language in many Florida cases regarding a holder's standing to foreclose, no Florida case has directly addressed whether the mortgage follows the note to a holder rather than to the owner. This Court should hold that it follows to the owner because equity will not countenance an automatic transfer to an Article 3 holder who need not show that it has any right to possess the Note.

ARGUMENT

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

The Servicer concedes there was no evidence that the Note owner ratified the action brought by the Servicer—whether or not that owner was U.S. Bank.[1] The Bank counters solely with the proposition that it is the holder of the Note under Article 3 of the UCC even though it possessed the Note, and seeks to enforce it, solely on behalf of its principal. As a result, the appeal distills into two related questions:

- Whether an agent in possession of the Note on behalf of another entity can pretend to be enforcing the Note on its own behalf so as to evade the rule that requires joinder of the real party in interest (i.e. can a mere agent be an Article 3 holder?);
- Even if the Servicer qualified as an Article 3 holder, whether it can rely upon an equitable transfer of the mortgage when it is not the Note owner (i.e. does a mortgage follow the note to the true owner—the purchaser—of a note or to a holder?).

[1] Servicer's Answer Brief, p. 8.

A. An agent in possession of a negotiable instrument on behalf of its principal is not an Article 3 holder because its principal is the holder.

Despite acknowledging that it was (and is) a mere agent, the Servicer argues that it has standing as an Article 3 holder independent of any standing that might have been (but was not) conferred by its principal. It is telling that the Servicer's Answer Brief carefully walks a tightrope—never quite going so far as to claim that it is the real party in interest (since that would obviously conflict with its principal's status as the Note owner),[2] but arguing it nevertheless has its own standing to enforce the note. This distinct flavor of self-contradiction arises from a flaw in the initial premise: the fact that an agent enforcing the note on someone else's behalf cannot be an Article 3 holder.

First, as explained in the Initial Brief, to become an Article 3 holder, the transferor must transfer all the rights in the instrument to the transferee.[3] The Servicer responded that "[t]here was no restriction on the conveyance to its [predecessor servicer] Aurora [because it] had the right to collect payments and enforce the Note."[4] The Servicer has never disputed, however, that it could not do

[2] It bears repeating that, in its Reply, the Servicer claimed it had standing even if it was not a note holder because it "was acting on behalf of the real party in interest, to wit: the Note owner at the time the action commenced." (R. 323).

[3] Homeowner's Initial Brief, pp. 22-25.

[4] Servicer's Answer Brief, p. 11.

so on its own behalf—that the owner has always been the ultimate recipient of the payments and will ultimately receive the proceeds from this lawsuit should Plaintiff prevail. Indeed, this is evident from the definition of "servicer" itself[5]—a description to which the Plaintiff contentedly clung throughout the trial,[6] but which it now finds uncomfortably incompatible with its arguments.[7]

Second, aside from the fact that the Servicer is not a "transferee" of the Note as contemplated by Article 3, it is also not in "possession" of the Note under Article 3. This is because, when an agent is in the possession of an instrument on behalf of its principal, the UCC considers the principal to be the holder. The Comment to § 3-201 of the UCC explicitly acknowledges that possession may be effected constructively through an agent. § 673.2011, Fla. Stat. Ann. ("Negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent.) (emphasis added). *See also, Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1195 (E.D. Va. 1994) (the UCC "sensibly recognizes that a party has constructive possession of a negotiable instrument when it is held by the party's

[5] "Servicer: An organization that collects debt payments on behalf of a lender." Oxforddictionaries.com, 2014 Oxford University Press.

[6] T. 65, 115-117; Plaintiff's Exhibit 15 (Exh. R. 36).

[7] Servicer's Answer Brief, p. 3 (decrying the "Servicer" label as a diversionary tactic).

agent…or when the party otherwise can obtain the instrument on demand" [internal citations omitted]); *In re Phillips*, 491 B.R. 255, 263 (Bankr. D. Nev. 2013) ("Thus, a person is a "holder" of a negotiable instrument when it is in the physical possession of his or her agent.")[8]

In fact, the use of an agent to possess the instrument on behalf of the holder is such a common banking practice that it was officially authorized by the 1998 amendments to Article 9 of the UCC[9] (which brought mortgage loans within its purview for the specific purpose of facilitating securitization[10]). The drafters' Comment 3 to § 9-313 explicitly equated possession by an agent with actual

---

[8] *Quoting*, Lary Lawrence, *Lawrence's Anderson on the Uniform Commercial Code § 1–201:265* (3d ed. 2012).

[9] These changes were enacted in Florida in 2001, effective 2002, §§679.1011-.709 Fla. Stat.; s*ee* §679.3131(3) Fla. Stat. regarding requirements for use of an agent to possess the collateral.

[10] Dale Whitman, *Transfers of Mortgage Notes under New Article 9*, *available at:* http://dirt.umkc.edu/files/newart9i.htm. (apparent purpose of change was to insulate issuers of mortgage-backed securities from attacks by bankruptcy trustees "without the bother of taking physical possession of the notes in question, a process that they often consider irksome"); Steven Schwarcz, *The Impact of Securitization of Revised UCC Article 9*, 74 Chicago-Kent L. Rev. 947 (1999); H. Bruce Bernstein, *Commercial Finance Association: Summary of the Uniform Commercial Code Revised Article 9, available at:* https://www.cfa.com/eweb/DynamicPage.aspx?Site=cfa&WebKey=9d83ef78-8268-4aae-95e1-7f4085764e46 (revised Article 9 facilitated mortgage-backed securitization); David Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 Fla. Bar J. 11, 12 (November 2011) (revisions to Article 9 addressed the needs of banks in the securitization chain by treating mortgages as personal property that could be transferred without regard to the real estate records).

possession by the principal. § 679.3131, Fla. Stat. Ann. ("if the collateral is in possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession").

This (again) explains why mailmen and attorneys can "hold" the instrument without becoming Article 3 holders—the true holder remains in constructive possession of the note. Here, if anyone is an Article 3 holder, it is the owner, U.S. Bank, not the Servicer, because it is U.S. Bank who has always been in possession of the Note through its agent, the Servicer.

And assuming that the Servicer proved, or could have proved, that U.S. Bank was the owner and holder of the Note, it is notable that proof of authority (or ratification) of the action by U.S. Bank could very well have made the Servicer a "nonholder in possession of the instrument who has the rights of a holder," § 673.3011(2), Fla. Stat. This harmonizes (and reinforces) this Court's holding in *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA 2012), which requires, at a minimum, that a servicer show that the note owner had ratified the foreclosure.

B. The use of the term "designated holder" reflects that the Servicer's possession is limited by the will of the holder/owner.

The Servicer does not dispute that the term "designated" has a specific dictionary meaning ("to officially choose someone" for a job) and even admits that it modifies the word "holder."[11] But it invents its own self-serving definition—that the word merely indicates that the Servicer did not steal the Note.[12] Given that the Servicer agrees with the Homeowner that even a person "in wrongful possession of the instrument" can enforce it,[13] this purported meaning would make the word superfluous.

Because the term "designated holder" is sandwiched between two agency allegations, the more natural reading is that "holder" has its ordinary, non-UCC meaning: "a person who possesses or uses property"[14] Thus, in context, the Servicer is simply saying that it is in possession of the instrument solely on the owner's behalf.[15]

---

[11] Servicer's Answer Brief, p. 10.

[12] Servicer's Answer Brief, p. 10

[13] Servicer's Answer Brief, p. 10.

[14] Black's Law Dictionary, 9th Ed., for the iPhone/iPad/iPod touch. Version: 2.1.2(B13195).

[15] That the Homeowner predicted the Servicer's argument here and raised the affirmative defense that the note was not negotiable does not alter the fact that the Servicer alleged, proved, and still admits it was an agent for the ultimate beneficiary of this lawsuit.

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

Unable to claim that the note owner is not the real party in interest, the Servicer falls back to the argument that it need not join the owner because Rule 1.210(a) is "permissive." Because the Rule states that "a real party in interest may sue in its own name" (emphasis added), the Servicer urges the Court to read the Rule out of existence—to find that "may" means that anyone can bring an action, without regard to whether they are a real party in interest and without joining the real party in interest.[16] One is left to wonder: "why have the Rule at all?"

But Florida law has already explained that the permissive language of Rule 1.210(a) means that an agent of a real party in interest can bring suit in its own name for the benefit of its principal. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178 (Fla. 3d DCA 1985). At a minimum, this has always required that the "agent" show either: 1) that it is a nominal party or third party beneficiary to a contract being sued upon; or 2) that the principal ratified the action. Here, the Servicer readily admits that it did neither.[17]

Also conspicuously absent is any explanation by the Servicer as to why Rule 1.210(a) would list five categories of persons who may bring an action in their own

[16] Servicer's Answer Brief, p. 5.

[17] Servicer's Answer Brief, p. 8.

name without joining the real party in interest, if, as the Servicer claims, anyone may do so.

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

Even if the Servicer could be considered an Article 3 holder, it points to no Florida case that expressly addresses the issue of whether a "mortgage follows the note" to its owner or to its holder. Even the errant case, *Wells Fargo Bank, N.A. v. Morcom*, 125 So. 3d 320, 322 (Fla. 5th DCA 2013) declared only that a holder could foreclose without being the owner. And while the *Morcom* court reflexively repeats the mantra that a holder can foreclose "regardless of any recorded assignments," the specific point that a mortgage cannot equitably transfer to a mere holder was apparently never raised and never decided.

Ironically, in its haste to bury the proof-of-purchase prerequisite for an equitable transfer, the Servicer jettisons one of the banking industry's most beloved cases, *Johns v. Gillian*, 184 So. 140 (1938), undoubtedly the most often cited opinion for the mortgage-follows-the-note rule. In fact, *Gillian* is the centerpiece—the very support pillar—of the principal case that the Servicer does

cite for the rule, *WM Specialty Mortg., LLC v. Salomon*, 874 So. 2d 680 (Fla. 4th DCA 2004).[18]

Yet, the Servicer attempts to banish *Gillian* from the pantheon of important Florida mortgagee cases with the same non-sequitur espoused in *Morcom*—that enactment of the UCC (regarding negotiable instruments) somehow trumped prior cases regarding transfers of mortgages (which are not negotiable instruments).[19] There is nothing in Article 3 that mentions mortgages, much less the equitable transfer of mortgages.[20] In fact, the Permanent Editorial Board for the UCC declares that the real property law of each state—not the UCC—controls enforcement of a mortgage:

> Whatever steps are required in order to enforce a mortgage in the absence of a recordable assignment are the province of real property law.[21]

---

[18] Servicer's Answer Brief, p. 12.

[19] Servicer's Answer Brief, p. 12.

[20] As mentioned in the Homeowner's Initial Brief, Article 9 does adopt the mortgage-follows-the-note concept, but also requires proof of purchase—a point that the Servicer appears to tacitly concede.

[21] Report of the Permanent Editorial Board for the Uniform Commercial Code, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes, p. 8 (American Law Institute and the National Conference of Commissioners on Uniform State Laws, 2011)[hereinafter PEB Report], p. 12, n. 43. *See also*, PEB Report, p. 14, n. 50, *available at:* http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report

Moreover, it is black letter law that the UCC does not displace common law unless there is an actual conflict with its provisions. § 671.103, Fla. Stat.; *Burtman v. Technical Chemicals & Products, Inc.*, 724 So. 2d 672, 676 (Fla. 4th DCA 1999) ("Unless displaced by the particular provisions of this code, the principles of law and equity ... shall supplement its provisions."). Thus, *Gillian* (and many other pre-UCC cases) are alive and well—this Court said as much when it heavily relied upon *Gillian* for its opinion in *WM Specialty*. Accordingly, the *Gillian* requirement that a foreclosing plaintiff prove purchase of the loan (i.e. ownership) to avail itself of the mortgage-follows-the-note shortcut is also alive and well.[22]

The Servicer also argues that the mortgage follows the note, by "operation of law" without regard to whether the automated transfer would be equitable.[23] The Servicer cites to a single case *U.S. Bank Nat. Ass'n v. Knight*, 90 So. 3d 824 (Fla. 4th DCA 2012) in which this Court found that the bank had properly alleged standing when it claimed to be as both the holder and the owner of the note. *Id.* at

---

_111411.pdf (even Article 9 does not address all the conditions that must be satisfied for enforcement of a mortgage).

[22] Notably, negotiable instruments and the "holders" of such instruments are concepts that had existed for centuries in the English common law, and eventually that of Florida, long before the enactment of the UCC. See *White v. Camp*, 1 Fla. 94, 109 (1846). The Court in *Gillian* was certainly aware of such law and could have made an exception for holders.

[23] Servicer's Answer Brief, p. 13.

826. On the assumption that the bank would prove that allegation, this Court agreed that the mortgage "equitably follow[ed] the note." *Id*. *Knight* does not, therefore, stand for the proposition that a mere holder can foreclose without proof that it is the mortgagee (or is authorized by the mortgagee). Nor do any other cases where this issue was never raised and expressly decided by the appellate court.[24]

In the end, the Servicer simply asks this Court to blindly follow *Morcom*, without even attempting to explain away the logical and legal shortcomings of the decision pointed out by the Homeowner.

E. Joinder of the trustee enhances the efficient and complete determination of the cause.

The Servicer characterizes the Homeowner's argument as expanding this Court's holding in *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14 (Fla. 4th DCA 2012). In reality, it is the Servicer who is attempting to hammer a factual situation that is identical to *Elston/Leetsdale* into a shape intended to resemble Article 3 by using terms (such as "designated holder") and concepts (such as a partial "transfer" to an agent) not found in the UCC.

[24] Such as those cited in Servicer's Answer Brief, p. 9: *Am. Home Mortg. Servicing, Inc. v. Bednarek*, 132 So. 3d 1222 (Fla. 2d DCA 2014); *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010); and *Philogene v. ABN Amro Mortg. Group Inc.*, 948 So. 2d 45 (Fla. 4th DCA 2006).

In a footnote, the Servicer disagrees with the Homeowner's point that requiring the trust to be joined as party enhances efficiency by bringing a more knowledgeable entity—and the real beneficiary of the suit—to the proceedings. According to the Servicer, only a servicing agent "can bring before the court the direct material evidence which allows a case to be decided on the merits."[25] This assumes that the only matters of merit are those concerning loan payments and escrow expenses. The issue of standing can, and often does, involve matters within the particular knowledge of the trustee, for example: whether, and when, the loan was incorporated into the trust. *See e.g. Osorto v. Deutsche Bank Nat. Trust Co.*, 88 So. 3d 261 (Fla. 4th DCA 2012) (in a case brought in the name of the trustee of a securitized trust, summary judgment was premature due to outstanding discovery requests regarding the pooling and servicing agreement and repurchase and reassignment documents).

The Servicer did not dispute that it is the owner that sets the parameters of the Servicer's settlement authority and that it is a necessary party to any mediation.[26] Nor does it dispute that the absence of the trustee banks at mediation played a rule in the failure of the Florida Supreme Court's foreclosure mediation

[25] Servicer's Answer Brief, p. 7, n. 7.

[26] Homeowner's Initial Brief, pp. 12-13.

program.[27] Instead, it dismissively counters that the Homeowner should bring these "aspirational" considerations to the legislature.[28] These public policy considerations, however, were offered as the rationale underpinning the current joinder rule which exists to foster efficiency.[29] They are reasons why the current rule should be enforced, not a request for a different rule.

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

The Servicer concedes there was no evidence that the Note owner ratified the action brought by the Servicer.[30]

[27] Homeowner's Initial Brief, p. 13.

[28] Servicer's Answer Brief, pp. 7-8.

[29] Homeowner's Initial Brief, p. 12.

[30] Servicer's Answer Brief, p. 8.

CONCLUSION

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

Dated: September 4, 2014

ICE APPELLATE
Counsel for Appellant
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 Appellant
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 September 4, 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 September 4, 2014.

ICE APPELLATE
Counsel for Appellant
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