In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

THE BANK OF NEW YORK MELLON AS TRUSTEE FOR THE CERTIFICATE HOLDERS, CWALT, INC., ALTERNATIVE LOAN TRUST 2006-OA19, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA19,

Appellee.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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SUMMARY OF THE REPLY ARGUMENT

The Bank[1] sought to evade the main thrust of Homeowners' argument by ignoring all the cases that hold that attachments control over (and negate) contrary allegations in the text of a Complaint. Instead, it engaged in a detailed discussion of a case in which this Court actually affirmed the decision to vacate a default based on the failure to attach a document that would confer standing. Consistent with that opinion in *WM Specialty Mortg, LLC* v. *Salomon,* 874 So. 2d 680 (Fla. 4th DCA 2004), this Court should reverse the decision not to vacate the default.

Failure to state a claim is not waived by default and a plaintiff who lacks standing on the face of the complaint (including its attachments) has failed to state a cause of action. And because the determination of whether the Complaint stated a cause of action is a legal one that is reviewed *de novo,* the transcript of an evidentiary hearing (on a different aspect of the motion to vacate that was not appealed) is unnecessary surplusage.

The Homeowners should have been allowed to respond to allegations which did not exist until what was claimed to be an endorsed version of the note was revealed on the day of trial.

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[1] The conventions of the Initial Brief are used here. [redacted] and the decedent, Tricia [redacted] will be referred to as the "the [redacted] or "the Homeowners." The appellee, the Bank of New York Mellon will be referred to as "the Bank."

STANDARD OF REVIEW

The Bank casts its entire argument about the judge's refusal to vacate the default as if the standard of review were abuse of discretion, without countering, or even acknowledging, the Homeowners' point, that the decision here was strictly a legal issue—which would make the standard of review *de novo*.[2] Instead, the Bank cites this Court to cases regarding the review of a decision on a Rule 1.540(b) motion,[3] which is not involved here.

[2] Homeowners' Initial Brief, pp. 8-9.

[3] Bank's Answer Brief, p. 6.

ARGUMENT

I. The Trial Court Erred in Refusing to Vacate the Default on the Grounds that the Complaint Did Not State a Cause of Action.

The Bank ignores longstanding precedent that attachments that conflict with the text of the complaint destroy its viability.

Conspicuous by its absence is any response to the Homeowners' primary argument (and the many cases cited in support of the argument) that the unendorsed Note negated the cause of action asserted.[4] Instead, the Bank repeatedly stated that it had claimed to be the Note holder in the text of the Complaint,[5] perhaps hoping that this Court would forget that those words were effectively erased from the Complaint by the unendorsed Note.

Instead of addressing this controlling precedent, the Bank devotes significant discussion to one case which actually supports the Homeowners' position: *WM Specialty Mortg, LLC* v. *Salomon*, 874 So. 2d 680 (Fla. 4th DCA 2004).[6] In *WM*

[4] Initial Brief, pp. 11-12, citing *Fladell v. Palm Beach County Canvassing Board*, 772 So. 2d 1240 (Fla. 2000); *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185, 187 (Fla. 4th DCA 1983); *Safeco Ins. Co. of America v. Ware*, 401 So. 2d 1129 (Fla. 4th DCA 1981); *In re Estate of Vickery*, 564 So. 2d 555 (Fla. 4th DCA 1990); *Patriotcom v. Vega*, 821 So. 2d 1261 (Fla. 4th DCA 2002); *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 938 (Fla. 2d DCA 2010); *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885, 886 (Fla. 4th DCA 1990)—none of which were discussed in the Answer Brief.

[5] Answer Brief, pp. 4, 8, 10, 16.

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

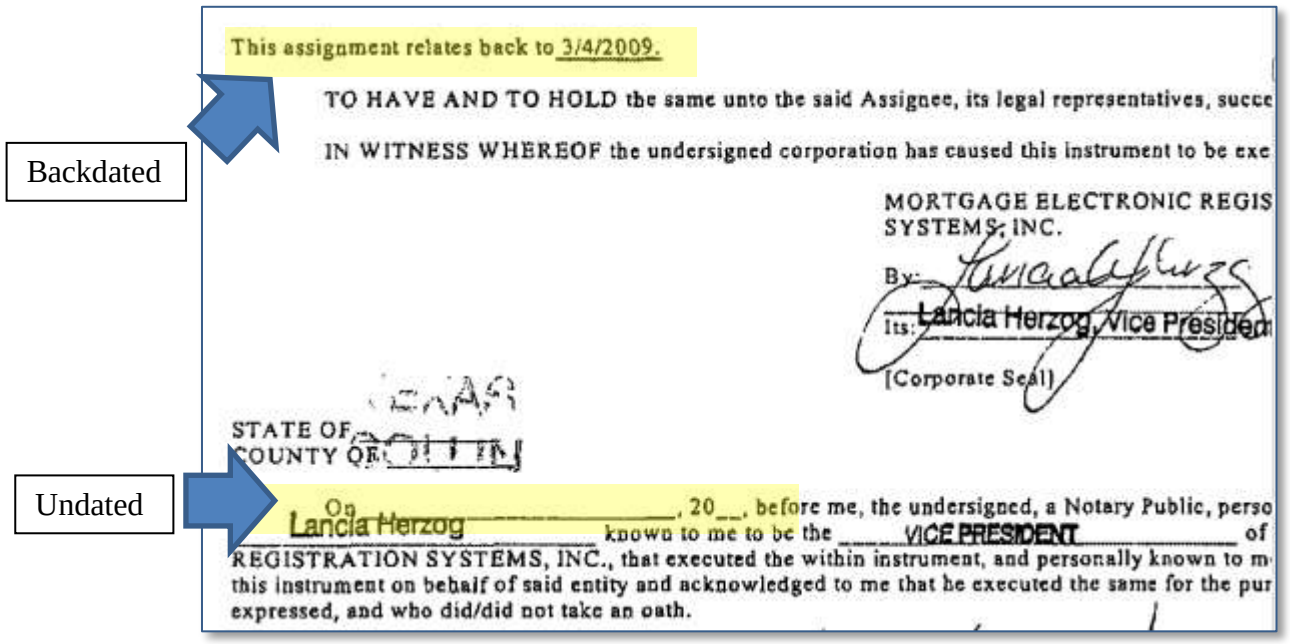
Specialty, this Court found that a foreclosure complaint filed by a stranger to the original transaction, but which was unaccompanied by an assignment of mortgage, was not defective because mortgages can transfer equitably without a written assignment (it "follows the note"). *Id*. at 682. The assignment that belatedly appeared in that case indicated that a transfer had occurred before the case was filed, but was itself executed after the action was commenced. This Court held that "[a]n evidentiary hearing would have been the appropriate forum to resolve the conflict which was apparent on the face of the assignment, i.e., whether WM Specialty acquired interest in the mortgage prior to the filing of the complaint." *Id*. at 683.

Here, the Homeowners challenged the transfer of the Note, not the Mortgage, so there can be no inference of an equitable transfer. The undated endorsement on the version of the Note produced on the day of trial—unlike the assignment—suggested nothing as to when it may have come into the Bank's hands.

Despite these differences, *WM Specialty* actually compels reversal here because the order being reviewed in that case contained two rulings: it first granted a motion to vacate a default and then dismissed the action. *Id*. at 681. While this Court reversed the dismissal of the bank's case, it upheld the trial court's order

vacating the default against the defendant on the very grounds argued here. *Id.* at 683.

Additionally, the assignment upon which the Bank seeks to rely on appeal[7] (despite having abandoned any assignment theory at trial) was remarkably similar to that in *WM Specialty*. Like the one there, the assignment here contains a conflict on its face. Not only is the signature undated, the body of the document attempts to make it effective even before it was actually prepared:[8]



[7] Answer Brief, p. 10.

[8] R. 47.

That date to which it "relates back" was exactly fifteen days before the Complaint was filed.[9] Again, *WM Specialty* instructs that the default should be vacated when there is a conflict on the face of the assignment and that the parties be given their day in court.

Failure to state a claim is not waived by a default

The Bank argues that the Homeowners waived the argument that the Bank lacked standing, because they were defaulted.[10] This, of course, puts the cart before the horse, because the issue here is whether the Homeowners were properly defaulted to begin with when the Complaint did not state a cause of action. There can be no doubt that a default does not waive the failure to state a cause of action. Such defaults can be vacated for at least a year after judgment is entered. *See Condo. Ass'n of La Mer Estates, Inc. v. Bank of New York Mellon Corp.*, 137 So. 3d 396 (Fla. 4th DCA 2014).

It is also beyond question that a plaintiff who lacks standing on the face of the complaint (or on the face of its attachments) has failed to state a cause of action. *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885, 886 (Fla. 4th DCA 1990); *Wells Fargo Bank, N.A. v. Bohatka*, 112 So. 3d 596, 600 (Fla. 1st DCA 2013)

[9] *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 951 (Fla. 4th DCA 2011) regarding practice of backdating assignments in foreclosure cases.

[10] Answer Brief, p. 11.

(reversing because dismissal of complaint for lack of standing should not have been with prejudice, but expressly finding no fault in the dismissal of initial complaint "which facially created a contradiction between who the bank alleged was the owner of the note (the bank) and whom the attached note and mortgage identified as the owner…"). In short, when negated by the attached documents, standing is not admitted by default precisely because the allegation of standing is not "well pled." *Phadael v. Deutsche Bank Trust Co. Americas*, 83 So. 3d 893, 895 (Fla. 4th DCA 2012) ("When a default is entered, the defaulting party admits all well-pled factual allegations of the complaint.")[11]

The Bank's cases[12] do not hold otherwise because they address the waiver of the right to dispute properly articulated allegations of standing. They do not

[11] Notably, *Phadael* (also cited by the Bank at Answer Brief, p. 11) held only that the issue of standing cannot be raised for the first time in a post-judgment, Rule 1.540 motion. *Id*. at 895. By confining the holding to Rule 1.540 motions, the Court marginalized dicta in *Glynn v. First Union Nat. Bank*, 912 So. 2d 357 (Fla. 4th DCA 2005) to the effect that standing is waived if not raised by affirmative defense. In doing so, it harmonized *Glynn* with the Second District opinion in *Maynard v. Florida Bd. of Educ. ex rel. Univ. of S. Florida*, 998 So. 2d 1201 (Fla. 2d DCA 2009) which had concluded that standing could be raised by means other than an affirmative defense. The only requirement is that lack of standing be brought to the trial court's attention, as it was here, prior to appeal (or as refined by *Phadael*, prior to judgment).

[12] *Chem. Residential Mortg. v. Rector*, 742 So. 2d 300 (Fla. 1st DCA 1998); *Beaulieu v. JPMorgan Chase Bank, Nat. Ass'n*, 80 So. 3d 365 (Fla. 4th DCA 2012).

involve complaints defective on their face because their allegations are negated by the attachments.

A transcript of the October 23rd evidentiary hearing is unnecessary because it concerned an aspect of the motion to vacate which was not appealed.

The Bank's tertiary argument is that the Homeowners "failed to provide an adequate record for this Court…"[13] Citing to *Applegate* and its progeny, the Bank argues that this Court cannot address the legal issue raised by the Homeowners—whether they could be defaulted to a Complaint that does not state a cause of action—without reviewing a transcript of an evidentiary hearing on October 23, 2012.[14]

As mentioned by the Homeowners in their Initial Brief, however, the motion to vacate rested upon two grounds—one of which was not appealed:

> After retaining counsel, the Homeowners moved to vacate the default on two grounds: 1) excusable neglect (which is not being raised as an issue on this appeal); and 2) the Complaint upon which the default was granted failed to set forth a viable cause of action.[15]

By definition, whatever evidence was taken at the hearing on excusable neglect is irrelevant to whether the Complaint stated a cause of action. Because it

[13] Answer Brief, p. 12.

[14] Answer Brief, p. 13.

[15] Initial Brief, p. 3.

is a legal issue heard *de novo*, *Applegate* is inapplicable. *Ronbeck Const. Co., Inc. v. Savanna Club Corp.*, 592 So. 2d 344, 348 (Fla. 4th DCA 1992) (*Applegate* applies only where the trial court's decision turns on its resolution of contested facts, not when it determines pure legal questions.)

Additionally, to whatever extent the October 23rd denial of the motion also embraced the issue on appeal, the argument was raised again at trial and rejected for a second time.[16] Nevertheless, in an abundance of caution intended to insure that this appeal is determined on the merits, the Homeowners have moved to supplement the record with the transcript of the October 23rd hearing.

[16] *See*, Homeowners' Statement of Case and Facts and citations to trial transcript at Initial Brief, p. 5.

II. The Trial Court Erred in Allowing the Bank to Amend its Complaint on the Day of Trial Without Vacating the Default to Permit the Homeowners to Respond to the New Allegations.

In response to this second issue, the Bank argues only that it was proper to drop Count II—a proposition with which the Homeowners readily agreed in their Initial Brief.[17] The Bank did not address the argument—or any of the cited cases—that this (coupled with the unveiling of an alleged endorsement) presented an entirely new theory of the case which triggered the Homeowners' right to respond.

The Bank argues that Count I was always part of the Complaint, and therefore, dropping Count II did not materially change the essential allegations of that first count. The Bank concludes that this means it never hid its claim to be the holder of the Note.[18] The fallacy in this argument is that the Bank did hide the existence of an endorsed note. It is the appearance of this key document that, by breathing life into the Complaint (were it to attach a copy by way of an actual amendment), radically alters the theory of the case. Dropping Count II was merely a consequence of the Bank's admission that it possessed the Note all along.[19]

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[17] Answer Brief, pp. 14-15.

[18] Answer Brief, p. 15.

[19] Notably, proving under Count II that the note was not lost was never an alternative to proving that the Note was endorsed to the Bank. Paragraph 1 of the

The Homeowners were entitled to respond to this newly invigorated allegation and to contest whether—and when—the Bank actually became the holder of the Note.

Complaint, expressly adopted by reference into Count II (¶ 20), alleges that the Bank "is the holder of the Note and Mortgage which are the subject of this suit."[19] The Bank, therefore, was still required to prove it was a holder under its lost note theory. Because the attachment negated Paragraph 1, neither Count stated a cause of action until the operative part of the instrument (the endorsement) was attached.

CONCLUSION

The Homeowners request that the judgment be reversed and the default vacated such that they may respond to the Complaint.

Dated: August 22, 2014

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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 August 22, 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.

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