In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No. CACE

Appellant,

v.

DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE FORMERLY KNOWN AS BANKERS TRUST COMPANY,

Appellee.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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Key:

The Appellant and Defendant below, [redacted] will be referred to as "the Homeowner." The Appellee and Plaintiff below, Deutsche Bank Trust Company Americas will be referred to as "the Bank."

ARGUMENT

I. A Challenge to a Plaintiff's Standing is a Legally Cognizable Defense. [Conceded by the Bank]

The Bank's Answer Brief did not dispute that a plaintiff's lack of standing at the time it files a case is a legally cognizable defense. Thus, the Bank has conceded reversible error on the first point on appeal—that the trial court erred when it ruled (after the first portion of the summary judgment hearing) that the Homeowner's affirmative defense of standing was "legally insufficient."[1] The lower court did not rule that the Bank had disproven the defense or that the defense was factually insufficient, but rather, specifically and expressly held that it was legally insufficient.

This Court need not reach the second point of error—that the Bank failed to disprove this defense—because the court's ruling was conclusive on the issue of standing at the inception of the case, obviating any further measures to preserve the ruling for appeal. It therefore moots the Bank's argument that, because there is no transcript of the summary judgment hearing, the issue of standing at inception was not preserved.[2] Even if such a transcript existed, no one would expect it to show

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[1] Order On Plaintiff's Motion for Summary Final Judgment Including Taxation of Attorney's Fees and Costs, dated October 24, 2012 (R. 461); Initial Brief, p. 13.

[2] Answer Brief, p. 6, 11-12. The Bank cites to *Zarate v. Deutsche Bank Nat. Trust Co. as Tr.*, 81 So. 3d 556, 557 (Fla. 3d DCA 2012) and *Rose v. Clements*, 973 So.

the Homeowner's counsel proffering argument or evidence on standing during the second portion of the hearing after being explicitly warned by the trial court in a written order that the court "will hear no further argument" on the issue. And because the court expressly forbade additional argument, it is not, as the Bank claims, "reasonable to conclude that the trial court [thereafter] allowed [redacted] to develop evidence of his standing defense."[3]

It also moots the Bank's argument that the absence of a transcript somehow waives the defect apparent on the face of its summary judgment affidavit—the failure to disclose the specific basis for the affiant's alleged "personal knowledge" about the attached documents.[4]

2d 529, 530 (Fla. 1st DCA 2007) in which the appellate courts did not know what defenses, if any, the non-movant had raised to the case or to summary judgment (Answer Brief, p. 12). Here, the trial court's express rejection of the standing defense as legally insufficient—not to mention the existence of the affirmative defense in the answer—makes it clear that the trial court was fully apprised of the Homeowner's position.

[3] Answer Brief, p. 9.

[4] Answer Brief, p. 25. In any event, the trial court was apprised of the Homeowner's position by his Motion to Strike Plaintiff's Affidavit of Indebtedness (R.393), which the Bank admits was noticed to be heard at the same time as its summary judgment hearing (Answer Brief, p. 6). While the Bank claims that this error was not preserved without an order specifically denying the motion to strike (Answer Brief, p. 22, n. 12), it was impliedly denied because summary judgment could not be entered without the affidavit.

II. The Record Is Replete with Evidence, and Inferences from Evidence, That Create a Genuine Issue of Fact as to the Bank's Standing.

Although the Court need not reach this second point of error, it provides a second reason for reversing the decision below.

The Bank concedes on appeal that it was not the holder of the original note when the case was filed.

Aside from its tacit concession that lack of standing at inception is a legally sufficient defense, the Bank makes an express and dispositive concession that it did not possess the note when it filed the claim:

> [redacted] claims this testimony establishes that the Bank "regained possession" of the original note after this suit was filed. IB at 20. Of course the Bank located the original note after this suit was filed -- that is why the Bank withdrew its claim to reestablish the lost note.[5]

This admission—which comports with its original allegation that there was a complete "loss of possession"[6]—means that the Bank was not a holder of the note at that time. § 671.201 (21)(a), Fla. Stat. ("Holder" means the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession); *See*, Uniform Commercial Code Comment to § 3-201 ("nobody can be a holder without possessing the instrument" [§ 673.2011, Fla.

[5] Answer Brief, p. 26 (emphasis added).

[6] Complaint to Foreclose Mortgage and to Enforce Lost Loan Documents, Count II, ¶ 19, 22 (R. 3).

Stat. Ann.]) And while it is possible that the Bank "located" the Note by discovering that it was in its own possession all along, it has never offered that explanation, much less, submitted any evidence of it.[7]

The Homeowner did not rely on "paper issues," but upon admissions in the Bank's pleadings and inferences from the Bank's documentary evidence.

The Bank repeatedly argues that the Homeowner's position relies on "paper issues" in the Bank's own filings.[8] But its argument hinges upon a basic misunderstanding of the term "paper issues" which refers to mere allegations of the non-movant. *See Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264, 269 (Fla. 4th DCA 1971) (reliance on documentary evidence, such as a certificate of title, was not a "paper issue"). The Homeowners did not rely on allegations in their own pleadings, but upon those in the Bank's pleadings—which are admissions.[9]

[7] The import of this admission is that the Bank's lost note count was not a false or mistaken allegation. It concedes that the loss of possession was a fact that is sufficiently truthful to argue to this Court. While the Bank seeks to distance itself from the original Complaint by pointing out that the principal of the law firm it first retained has been disbarred (Answer Brief, p. 30, n. 15), its current counsel is now continuing the first attorney's representation that the Bank actually lost possession of the Note.

[8] Answer Brief, pp. 8, 10, 14.

[9] *See*, cases cited in Initial Brief, at pp. 23-24 holding that admissions in pleadings are accepted as facts without the necessity of supporting evidence.

The Bank's pleadings, by necessity, included the later filed versions of the Note because the Complaint (and Amended Complaint) did not state a cause of action without them. *Safeco Ins. Co. of Am. v. Ware*, 401 So. 2d 1129, 1130 (Fla. 4th DCA 1981) (a complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof is attached). Shoring up its defective pleadings was the Bank's very purpose for filing the Notes.

Moreover, the attachments (or what must be deemed as attachments) trump any allegations in the text of a pleading. *Duke v. HSBC Mortg. Services, LLC*, 79 So. 3d 778, 780 (Fla. 4th DCA 2011) ("When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint."). The Bank's argument, therefore that it never "admitted" in its pleadings that it did not hold the note when it initiated the action[10] is without merit. Leaving aside the lost note count which concedes a lack of possession, if the first-filed copy of the Note (which was not endorsed to the Bank) is treated as an attachment to the Amended Complaint, it nullifies the textual allegation that the Bank was a holder of the Note. It is also another admission—upon which the Homeowner was entitled to rely—that the Bank did not hold a properly endorsed Note when it filed the action.

[10] Answer Brief, p. 27.

If that were not enough, the Bank's own affiant, Laura Cauper, swore that the allegations in the original Complaint were true (with the exception, of course, that the Bank was now in possession of the Note).[11] Additionally, the Homeowner argued in his Initial Brief that the Bank admitted that the Note was not properly endorsed when its attorney signed the Notice of Filing Copy of Promissory Note as an officer of the court.[12] The Bank did not respond to either of these points that were raised in the Initial Brief.

The inferences that the Note was endorsed after the case was filed are not stacked, but rather, are independent, parallel inferences.

Although the Bank argues that the Homeowner is impermissibly stacking one inference upon another, it never clearly describes what inference is dependent upon any other inference.[13] Independent, parallel inferences do not violate the rule against the stacking of inferences. *See Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1279 (Fla. 2003).

Here, two different versions of the Note appeared over the course of the litigation. The first endorsement did not appear until a year after the case was

[11] Initial Brief, p. 7; R. 182.

[12] Initial Brief, p. 23.

[13] Answer Brief, pp. 15, 18.

filed, and the two others did not appear until nearly two years after that. Each occasion that the Bank filed a different version of the Note is a separate, parallel inference that new endorsements necessary for its standing had been added after the case was filed.

Moreover, the Bank proffered no evidence of any competing inference—much less a reasonable one—to be drawn from the slowly evolving allonge. *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.*, 928 So. 2d 1272, 1275 (Fla. 2d DCA 2006) (summary judgment reversed where movant failed to prove that its suggested competing inferences were reasonable inferences); *Gonzalez v. B & B Cash Grocery Stores, Inc.*, 692 So. 2d 297, 299 (Fla. 4th DCA 1997) (even if the summary judgment movant raised a reasonable inference contrary to that suggested by the non-movant, it merely presents a question of fact for the jury).

As the non-movant at summary judgment, the Homeowner was not required to provide inferences that would rise to level of proof of his affirmative defense. Instead—and despite the Bank's claim otherwise[14]—the Bank was required to disprove the affirmative defense with evidence that would eliminate the inference. *Alejandre v. Deutsche Bank Trust Co. Americas*, 44 So. 3d 1288, 1289 (Fla. 4th

[14] Answer Brief, p. 8.

DCA 2010) (in a foreclosure case, summary judgment for the bank reversed because "the plaintiff must either disprove [the affirmative] defenses by evidence or establish the legal insufficiency of the defenses." quoting *Bunner v. Florida Coast Bank of Coral Springs, N.A.*, 390 So. 2d 126 (Fla. 4th DCA 1980)); *Brady v. Zimmerman*, 246 So. 2d 637, 638-39 (Fla. 4th DCA 1971) (summary judgment precluded unless movant has shown that the non-movant's affirmative defense is a sham).

By claiming on appeal that the Homeowner stacked the inferences that the Note was endorsed after the case was filed, the Bank has conceded that there was indeed an inference to be drawn from its own filings in the Homeowner's favor.

The Bank's summary judgment affiant does not demonstrate his competence to testify.

The Homeowner pointed out that the Bank's affiant (Tim Justice) did not "detail the facts showing that he has personal knowledge" as required by Fla. R. Civ. P. 1.510(e).[15] The Bank's only response was to emphasize Mr. Justice's title as "an officer of PNC," arguing that the title alone is a fact that establishes his personal knowledge of the documents.[16]

[15] Initial Brief, p. 26.

[16] Answer Brief, pp. 4, 8, 21, 25, 28.

Mr. Justice, however, signed the affidavit as a "Mortgage Officer" and called himself a Default Litigation Coordinator.[17] The Certificate (allegedly containing excerpts of By Laws and Resolutions) attached to the affidavit shows that his title as an "officer" is a nominal one conferred for the limited purpose of giving him signing authority (or at least the mantle of such authority[18]). This differs from cases such as *Buzzi v. Quality Serv. Station, Inc.*, 921 So. 2d 14 (Fla. 3d DCA 2006)[19] where the very job (not just the title) held by the affiant requires personal knowledge of the matters to which he attested.

Here, the Certificate actually undermines Mr. Justice's claim of personal knowledge because it reveals that he is not an executive officer actually responsible for running the Bank or even a department. Nothing about being a person authorized to sign affidavits implies personal knowledge of PNC's recordkeeping policies and procedures. It especially does not qualify him to make

[17] R. 350-351.

[18] The Certificate (itself an unsworn, un-notarized hearsay statement) establishes only that Mr. Justice—like any "non-officer employee"—would be authorized to sign affidavits only if "designated in writing by the Chief Executive Officer, the President, any Senior Vice Chairman, Vice Chairman, Executive Vice President or Senior Vice President of the Corporation or Bank." (R. 353). No such written designation was provided.

[19] Cited by the Bank at Answer Brief, p. 25.

the legal conclusion that the Bank was the holder of the Note at the time the case was filed.

Nor is it appropriate to ask this Court to draw an inference that Mr. Justice was a qualified witness from the absence of a transcript of his deposition in the record.[20] If there is any inference to be drawn, it must be drawn against the Bank as the summary judgment movant—who also did not file the transcript.

The assignments of mortgage were never identified as summary judgment evidence, never authenticated, and never relied upon by the affiant.

The Bank tries to distinguish *Feltus v. U.S. Bank Nat'l Ass'n*., 80 So. 3d 375 (Fla. 2d DCA 2012) on the grounds that here, unlike *Feltus*, the Bank alleged standing by way of assignments of mortgage attached to the Amended Complaint.[21] Yet, in the accompanying footnote it concedes that "the summary judgment papers do not mention the assignments," precisely because it sought instead to prove standing as a holder of the Note.[22] Having failed to identify or

[20] Answer Brief, pp. 6, 24.

[21] Answer Brief, pp. 28-29. The Bank also interjects in its Statement of Facts that "National City assigned the mortgage and note to the Bank" (Answer Brief, p. 1)—an allegation that is not summary judgment evidence.

[22] Answer Brief, p. 29, n. 13.

authenticate the assignments as summary judgment evidence, it cannot rely upon them now to prop up its misbegotten summary judgment.

Whether or not the endorsements are authentic is irrelevant because the issue on appeal is that there was no evidence of <u>when</u> the Note was endorsed.

The Bank misdirects this Court when it argues that the Homeowner must make an evidentiary showing to rebut the statutory presumption that the allonge and its endorsements are authentic.[23] The error in granting summary judgment was that there was no evidence of <u>when</u> the endorsements were first placed on the Note—a determinative issue whether the endorsements are authentic or not.

Accordingly, the Bank's extensive discussion of *Bennett v. Deutsche Bank Nat. Trust Co.*, 124 So. 3d 320 (Fla. 4th DCA 2013) and *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010)[24] is misplaced because, while the Homeowner does not concede that the endorsements are authentic, that is not the basis of his argument on appeal. There is no presumption under the UCC as to <u>when</u> an endorsement was made or that it was made prior to the filing of a complaint. There is no evidentiary "bubble" for the Homeowner to burst.[25]

[23] Answer Brief, p. 7.

[24] Answer Brief, pp. 17-19.

[25] The Bank's argument is, in any event, without merit because the signatures which are self-authenticating under the UCC are those of the maker, not those of

Similarly, the Bank's argument based on *Harvey v. Deutsche Bank Nat. Trust Co.*, 69 So. 3d 300 (Fla. 4th DCA 2011) raises a "straw man" irrelevant to this appeal. Specifically, the Bank calls attention to this Court's holding that Harvey "failed to present any evidence below to support her contention that the signatures [on the assignment] were fraudulent."[26] Again, while the endorsements here may well be fraudulent (and the rapidity with which the Bank jumps to deny an accusation that has never been made might raise some eyebrows), that was not the Homeowner's argument. The argument was simply that there was no evidence as to when the endorsements were made and that the slow, sequential revelation of the endorsements during the litigation raises at least an inference that they were made after the case was filed.

The Second District has not "signaled a potential departure" from the requirement that a plaintiff show standing at inception.

Twice, the Bank references the Second District case of *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308 (Fla. 2d DCA 2013) with the suggestion that the law is

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an endorser. (*see*, Comment to UCC § 3-308, at § 673.3081, Fla. Stat. Ann. stating that the presumption is based on the evidence of forgery normally being in control of the defendant). While this court applied the presumption to an endorsement in *Bennett* and *Riggs*, the point that the drafters of the UCC clearly did not intend that the term "signature" would include endorsements was either not raised or not addressed.

[26] Answer Brief, p. 20.

changing or unclear as to whether standing at inception is required for a foreclosure plaintiff.[27] In reality, the court in *Focht* unanimously (albeit begrudgingly) applied the unambiguous and controlling precedent that a plaintiff's lack of standing when the case is filed cannot be cured by acquiring standing later. *Id*. at 311. The Second District's certified question beseeched the Florida Supreme Court to change the rule just for lenders "in light of the ongoing foreclosure crisis in this State." *Id*. That certified question was never presented to the Supreme Court.

The Bank's cases do not hold that the filing of unendorsed notes is irrelevant to the issue of standing at inception.

The Bank cites this Court to cases for the proposition that the filing of unendorsed notes is irrelevant to the issue of standing at inception, even though those cases never broach the subject. For example, despite the Bank's description of *Miller v. Kondaur Capital Corp.*, 91 So. 3d 218 (Fla. 4th DCA 2012)[28] as a summary judgment case, that case actually held that standing may not be raised for the first time in a post-judgment motion. *Id.* at 218-219. Similarly, *Deutsche Bank Nat. Trust Co. v. Taperi*, 89 So. 3d 996 (Fla. 4th DCA 2012) did not rule that summary judgment for the bank was proper, but that, by filing a different mortgage

[27] Answer Brief, pp. 13, 29.

[28] Answer Brief, p. 16.

than that attached to the amended complaint, the bank had created an issue of fact preventing summary judgment for the borrower. The case did not involve an endorsement on a note or standing at inception. And *Deutsche Bank Nat. Trust Co. v. Lippi*, 78 So. 3d 81 (Fla. 5th DCA 2012) reversed a dismissal of the bank's complaint as a sanction. While the court found that, by the time it had amended its complaint twice, the bank had sufficiently alleged standing to withstand a motion to dismiss, it did not speak to what evidence would be necessary to establish at summary judgment that it had standing before it filed suit.

The Bank also cites a number of cases for the proposition that simply producing an endorsed note at summary judgment is sufficient to establish standing.[29] None of these cases, however, addressed the issue of standing at inception.

The Bank also cites to *Hall v. REO Asset Acquisitions, LLC*, 84 So. 3d 388 (Fla. 4th DCA 2012)[30] in which this Court followed its holding in *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So.3d 170 (Fla. 4th DCA 2012) to deny

[29] Answer Brief, pp. 15-16, 22; *Lizio v. McCullom*, 36 So. 3d 927 (Fla. 4th DCA 2010); *Wells Fargo Bank, N.A. v. Morcom*, 125 So. 3d 320 (Fla. 5th DCA 2013); *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010); *Duke v. HSBC Mortg. Services, LLC*, 79 So. 3d 778, 780 (Fla. 4th DCA 2011); *Deutsche Bank Nat. Trust Co. v. Clarke*, 87 So. 3d 58 (Fla. 4th DCA 2012); *Isaac v. Deutsche Bank Nat. Trust Co.*, 74 So. 3d 495 (Fla. 4th DCA 2011).

[30] Answer Brief, p. 22-23.

summary judgment. The Bank points to the Court's comment in *Hall* that the affiant never swore that the note was owned by the plaintiff on the day the complaint was filed—which the Bank contends distinguishes it from the Justice affidavit. But this Court was not suggesting that any witness, no matter how unqualified, may utter this legal conclusion—especially in the face of contrary inferences in the record—and thereby obtain summary judgment.

Mr. Justice does not attest to when the endorsements were placed on the allonge. The sum total of his testimony on the timing issue is to simply point to the endorsements as if to say that they speak for themselves. But they do not speak as to the date they were created. And if his legal conclusion were based on some other, unmentioned record, no sworn or certified copy was attached as required.

In the end, the Bank never addressed the simple issue at the core of this appeal. It never explained why this Court should ignore the fact that the necessary endorsements slowly and individually dribbled into the Court file.

CONCLUSION

This Court should reverse the summary judgment and remand for further proceedings on the ground that a plaintiff's standing when the case is filed is a legally cognizable defense.

Dated: May 16, 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 May 16, 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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