In the District Court of Appeal
Fifth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] DATED OCTOBER 22, 2008,

Appellants,

v.

BANK OF AMERICA, N.A. AS SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP, ET AL.,

Appellees.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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OBJECTION TO APPELLEE'S STATEMENT OF FACTS

Bank of America, N.A. ("the Servicer") asserts in its Statement of Facts that "[a]t the time of filing its Complaint, Appellee was the servicer of the loan and holder of the Note and Mortgage…" It also states that "Federal National Mortgage Association is the owner of the note and authorized Appellee, Bank of America, N.A., to institute an action for foreclosure."[1] For these statements of "fact," the Servicer cites to the Complaint and Amended Complaint. They are, therefore, arguments masquerading as fact—mere allegations that were denied in the Answer. That there was no summary judgment evidence of these allegations is one of the central points on appeal.

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

ARGUMENT

I. The Servicer Provided Nary a Scrap of Summary Judgment Evidence That It Was the Holder of the Note When It Filed the Complaint.

The appellants did not waive standing because they were never defaulted.

The Servicer seeks to convince this Court that the Appellants[2] ("the Owners") waived standing because they had not yet responded to its Amended Complaint by the time of Summary Judgment.[3] The Servicer, however, 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 Servicer. By choosing to proceed to summary judgment without an answer or default, the Servicer set for itself the near-impossibly-high standard of disproving every possible defense that the Owners could have raised.

Ironically, the Servicer speaks of "equity aid[ing] the vigilant, not those who slumber on their rights" and emphatically declares that "**429 days**" passed between the expiration of the time period for answering the Amended Complaint and the

[2] [redacted] and [redacted] in Their Individual Capacity and as Co-Trustees of the John [redacted] Trust Dated October 22, 2008.

[3] Answer Brief, pp. 3-5.

entry of judgment.[4] Yet, it is the Servicer who did nothing to default the Owners during those 429 days—even though they re-defaulted another defendant.

And it cannot be assumed that a motion for default would not have changed the complexion of the pleadings at summary judgment. If the Servicer had served a motion to default the Owners, they may well have awakened to this apparent lapse in their pleadings and availed themselves of the opportunity to file an answer before default was entered. *Pinnacle Corp. of Cent. Florida, Inc. v. R.L. Jernigan Sandblasting & Painting, Inc.*, 718 So. 2d 1265 (Fla. 2d DCA 1998) (trial court erred in entering written order of default where defendant filed an answer after trial court announced its decision to enter default).

Alternatively, a motion for default may have spurred the Owners into presenting timely and convincing reasons why the record does not accurately reflect the status of the pleadings or why they should be permitted to respond belatedly. In doing so, the Owners may also have raised the myriad of affirmative defenses available to them.

Thus, the motion for default is a due process requirement; it gives a litigant actual notice of a point of no return in the litigation—a last opportunity to act. *Yellow Jacket Marina, Inc. v. Paletti*, 670 So. 2d 170, 171 (Fla. 1st DCA 1996)

[4] (emphasis original) Answer Brief , pp. 5, 17.

(referring to notice of the motion required by Fla. R. Civ. P. 1.500(b) as a "due process requirement"). In fact, the entry of default without notice of the motion "warrants the setting aside of the default without consideration of whether or not a meritorious defense was presented or whether excusable neglect was established." *Id*. It is an even greater violation of due process to treat an absent litigant as having conceded the case by default, when no actual order of default was entered and the opposing party provided no notice of a motion for default…because it never actually moved for one.

In the end, the Servicer is asking this Court to treat this case as if the Servicer had done something it did not do—default the Owners. The Servicer has not cited a single case for the notion that it may pick and choose which procedural due process requirements it will be permitted to skip. The Servicer does cite, however, to *Phadael v. Deutsche Bank Trust Co. Americas*, 83 So. 3d 893 (Fla. 4th DCA 2012) to support its waiver argument,[5] but does not advise this Court that a default had been entered against the defendant in that case.

Accordingly, the Servicer's argument that the Owners' failure to answer waived the defense that the Servicer lacked standing puts the cart before the horse.

[5] Answer Brief, p. 5.

Waiver cannot be determined until an answer to the Amended Complaint is filed or the entry of a default precludes such an answer.

There was no evidence that the Servicer was the "holder" of the Note or the agent of Fannie Mae at the time the case was filed.

In its Answer Brief, the Servicer abandons its theory that it was an authorized agent of Fannie Mae bringing this lawsuit on behalf its principal.[6] Instead, it asserts that it filed the action on its own behalf as the holder of the Note—that the agency allegations were merely for "clarity and transparency."[7] While it claims that "[a]t the time this action commenced, BOA was servicer and holder [of] the Note and Mortgage," the "evidence" that it cites is its own allegations in the Complaint[8]—allegations that the Owners denied.[9] The Servicer also claims that it proved that it was the holder when the case was filed because, years later, it filed the Note endorsed in blank.[10] In the face of a plethora of decisions that undated endorsements appearing after the case is initiated do not

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[6] Answer Brief, p. 11-12 ("As stated above, BOA does not assert standing via an agency theory.")

[7] Answer Brief, p. 12.

[8] Answer Brief, pp. 12, 14.

[9] Answer to Complaint, dated March 26, 2010 (R. 69).

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

prove standing at that critical juncture,[11] the Servicer does not explain how it has proven that it was a holder prior to filing.

Despite having abandoned the argument, the Servicer nevertheless continues to peddle its agency theory by asserting—without citation to the record—that "Fannie Mae authorized BOA to bring this action."[12] It also makes the bald assertion that "[t]he joinder of Fannie Mae was unnecessary" without citing a case or explaining why Fla. R. Civ. P. 1.210 or the Florida Supreme Court decision cited by the Owners[13] would not compel the opposite conclusion.

The Assignment does not confer the Servicer with standing.

With the same ambivalence that it displays towards its agency theory, the Servicer cannot settle on whether it is a Note holder or an assignee—first arguing that it "has never waivered on its position that it is entitled to enforce the Note as its holder,"[14] and then claiming that its "position as the real party in interest was

[11] Answer Brief, pp. 10-11.

[12] Answer Brief, p. 12.

[13] Initial Brief, pp. 14-15.

[14] Answer Brief, p. 13.

well established at the inception of this case by virtue of the Assignment of Mortgage."[15]

When arguing that it is an assignee, the Servicer points to language in the Assignment that purports to transfer the mortgage "together with the note" from Mortgage Electronic Registration Systems Incorporated ("MERS") to the Servicer. The operative pleading, the Verified Amended Complaint, however, makes no mention of the Servicer having standing as an assignee of the mortgage.[16]

More importantly, the Servicer's purported status as an assignee was never mentioned in the motion for summary judgment or the supporting affidavits.[17] A motion for summary judgment must "state with particularity the grounds upon which it is based and the substantial matters of law to be argued...." Fla. R. Civ. P. 1.510(c); *Gee v. U.S. Bank Nat. Ass'n*, 72 So. 3d 211, 214 (Fla. 5th DCA 2011).

Even if the two summary judgment affiants in this case had mentioned the Assignment, they did not attach sworn or certified copies of the Assignment as required by Fla. R. Civ. P. 1.510(e). *See Zoda v. Hedden*, 596 So.2d 1225, 1226 (Fla. 2d DCA 1992) (unauthenticated documents referred to in, but not attached to,

[15] Answer Brief, p. 9.

[16] R. 165-168.

[17] Motion for Summary Final Judgment of Foreclosure, dated September 1, 2010.

the affidavit constituted incompetent hearsay not sufficient to support summary judgment); *CSX Transp. Inc. v. Pasco County*, 660 So. 2d 757 (Fla. 2d DCA 1995); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988); *Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971) ; *Starkey v. Miami Aviation Corp.*, 214 So. 2d 738 (Fla. 3rd DCA 1968). Accordingly, the Assignment was not summary judgment evidence that the trial court could consider—a fact raised in the Initial Brief,[18] but not addressed in the Servicer's response.

Nor does the Servicer respond to the Owners' point that there was no evidence that MERS ever had any rights in the Note to assign or that the entity that held such rights, the Note owner (Fannie Mae), had authorized MERS to assign the Note.[19]

And, in any event, as pointed out in the Owners' Brief, an assignment would not imbue the Servicer with the status of "holder," especially where the Note owner retains its rights to collect on the debt.[20] The Servicer responds only that "a promissory note is almost unequivocally designated as a negotiable instrument

[18] Initial Brief, p. 13.

[19] Initial Brief, pp. 13-14.

[20] Initial Brief, pp. 15-16.

pursuant to the Uniform Commercial Code."[21] While the Owners do not agree that anything entitled "promissory note" qualifies as a negotiable instrument, their argument assumed (*arguendo*) that Article 3 of the Uniform Commercial Code applied to Note in this case--i.e. that it was a negotiable instrument. It is Article 3 that states that assignees are not holders, because there is no "negotiation" as defined by the Code. § 673.2031(4) Fla. Stat. (UCC § 3-203); § 673.2011 Fla. Stat. (UCC § 3-201).

The Servicer concludes its argument about the Assignment by stating that, since it "demonstrated standing at the inception of the case via the Assignment of Mortgage, the inadvertent and erroneous attachment of an incorrect copy of the Note without indorsements is not fatal."[22] It is telling that it is on appeal that the Servicer injects, for the first time, the notion that the Note attached to the original Complaint was an "incorrect copy" mistakenly provided the trial court. There was no evidence that the Servicer accidentally attached the wrong copy, because there is no evidence that the Servicer was ever in possession of the "right" copy (an endorsed version) before it filed suit. This self-serving and unsupported characterization of its actions as "inadvertent"—though casually tossed at the

[21] Answer Brief, pp. 12-13.

[22] Answer Brief, p. 9.

reader—is the very crux of this appeal. It is the absence of any proof of a mistake that allows the inference that the Bank did not have the endorsed Note in its possession when it filed suit, which is why the judgment must be reversed.

II. Because the Owners Never Answered the Amended Complaint, the Servicer Was Required to Disprove Every Possible Defense and Affirmative Defense.

The Servicer concedes the general rule that, when moving for summary judgment prior to the filing of an answer, a party must disprove all possible defenses. Although the Servicer suggests that the rule does not apply when the time period for answering has expired,[23] it does not direct this Court to a case that so holds.

And while the Servicer cited *Dominko v. Wells Fargo Bank, N.A.*, 102 So. 3d 696 (Fla. 4th DCA 2012) in its Standard of Review, it did not advise this Court that its holding is directly contrary to its later argument about tardy answers. In *Dominko*, as in this case, the defendant never answered the complaint and the plaintiff did not move for a default. The appellate court, however, ruled that "[t]he plaintiff must essentially anticipate the content of the defendant's answer and establish that the record would have no genuine issue of material fact even if the

[23] Answer Brief, p. 16.

answer were already on file." *Id*. at 698, *quoting*, *Goncharuk v. HSBC Mortg. Services, Inc*., 62 So. 3d 680, 682 (Fla. 2d DCA 2011).

The Servicer also did not mention *Woodrum v. Wells Fargo Mortg. Bank, N.A.*, 73 So. 3d 873 (Fla. 4th DCA 2011) where the defendants failed to answer and the bank failed to move for a default. Once again, the court required the bank to refute all defenses, noting specifically that "a party may plead or defend at any time before default is entered. Fla R. Civ. P. 1.500(c)." *Id*.

In *McColman v. Deutsche Bank Nat. Trust Co.*, 112 So. 3d 668 (Fla. 4th DCA 2013), the appellate court affirmed summary judgment where no default had been entered, but unlike this case, the defendant had, at least, moved for default. The court distinguished *Dominko* and *Woodrum* on the grounds that the defendants in *McColman* did not comply with an order requiring them to answer the complaint (*Id*. at 670) —a factor not present here. Unlike this case, the motion for default and the order requiring an answer in *McColman* provided the procedural safeguard to insure that the absence of an answer was not accidental.

Nor does the Servicer address this Court's case of *Kaplan v. Morse*, 870 So. 2d 934 (Fla. 5th DCA 2004), cited by the Owners in their Initial Brief.[24] In that case, the defendant did not answer an amended complaint for six years. *Id*. at 938

[24] Initial Brief, p. 20.

(dissent). The dissenting opinion reveals that the defendant had argued that, because the plaintiffs had not obtained a default, they "were obliged at summary judgment to negate the existence of any issue as to any pleading he might have filed." *Id*. The majority, whose opinion did not treat the defendant's failure to answer as a waiver of any arguments against summary judgment, necessarily agreed with the defendant's position.

Accordingly, to prevail at summary judgment, it was incumbent upon the Servicer to disprove any defense that the Owners could have raised, including that of standing at the time that the case was filed. Because the Servicer failed to do so, the trial court erred in granting summary judgment.

CONCLUSION

Accordingly, the trial court erred in entering summary judgment against the Owners. The judgment should be reversed and remanded for further proceedings.

Dated: March 4, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel 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 AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this March 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 March 4, 2014.

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