Supreme Court of Florida

CASE NO.:
On Discretionary Review From
The Fourth District Court of Appeal
)
(Circuit Court Case No.)

Petitioner,

v.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-0C8, MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2006-0C8, et al.,

Respondents.

PETITIONER'S REPLY BRIEF ON THE MERITS

Respectfully submitted,

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ARGUMENT

A. The judicial system has the inherent authority—and obligation—to protect its own integrity.

[redacted] will not rehash here the various ways in which the lower courts have interpreted the interplay between Rules 1.540 and 1.420 of the Florida Rules of Civil Procedure. The counterpoints to BNY Mellon's arguments are already contained within [redacted] Initial Brief on the Merits and the eloquent exposition of Judge Farmer, adoped by Judge Polen's dissent below.

It bears emphasis that BNY Mellon's position is entirely dependent upon these lower court views as to whether "affirmative relief" is required to vacate a voluntary dismissal and what constitutes "affirmative relief." BNY Mellon appears to have forgotten that this notion of an "affirmative relief" limitation is merely a lower court interpretation of procedural rules adopted by this Court and that those opinions obviously have no binding authority here.

The opinions of the District Courts would be relevant to this Court's review to the extent that they might have articulated a public policy that this Court might find persuasive. But BNY Mellon has studiously avoided a discussion of policy, presumably because there could be no rational basis for elevating an individual party's privilege to dismiss its case over the judicial system's inherent power—

even obligation—to police abuses of that system. Nowhere does BNY Mellon tell this Court why failed attempts to defraud should be immunized. Given that this Court is the ultimate authority to promulgate and interpret the Rules of Civil Procedure, it was incumbent on BNY Mellon to explain how it would benefit Florida to allow litigants to attempt fraud upon the court with impunity. It did not do so.

1. BNY Mellon's request for prospective application of this Court's ruling concedes the depth of the problem.

BNY Mellon argues that allowing trial courts to address fraud hidden behind a voluntary dismissal "opens a wide door" and is a "sea change" for which the industry would need advance warning by way of a prospective application. By advancing this argument, BNY Mellon appears to concede what previously would be unthinkable—that the financial industry has routinely used voluntary dismissals to conceal fraud and that the number of such cases is so staggering, attacks on their finality would bring the overburdened court system to a halt. The argument also exposes a tangible contempt for the judicial process to ask this Court to choose "efficiency" over the court system's mandate to deliver truth and justice.

But in reality, BNY Mellon's "floodgates" argument is baseless. The vast majority of foreclosure cases are not voluntarily dismissed, but rather, proceed

quickly—many would say too quickly—to summary judgment. To the extent that these judgments were obtained fraudulently, they are already subject to Rule 1.540 attacks, and are, in fact, being attacked every day in the trial courts. *See e.g*. *Freemon v. Deutsche Bank Trust Co. Americas*, 46 So. 3d 1202 (Fla. 4th DCA 2010).

Since cases that have gone to judgment do not involve any limitation upon voluntary dismissals, and because the fraud would have, in any event, achieved its ends, the Court's ruling here would have no effect on those cases. Nor would "bare allegations of fraud" suffice to attack judgments or dismissals since fraud must be alleged with specificity—as it was in this case. Even specific allegations must then be tested in the crucible of the evidentiary hearing, before dismissals may be vacated.

2. Whether BNY Mellon participated in the attempted fraud is forever beyond the record in this case.

Mortgage Bankers' assertion that the law firm, and not BNY Mellon, committed fraud is sheer speculation. The very point of this appeal is that the trial court denied the opportunity to present evidence to prove the allegations at a hearing to which he had demonstrated a colorable entitlement. That hearing would have resolved the factual issues necessary to the consideration of a dismissal with

prejudice.[1] *See Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) (recognizing that a trial court may consider dismissal as a sanction after a hearing to prove the relevant factors, one of which is the client's personal involvement in the misconduct).

3. Analogy to the federal rules supports [redacted] position.

BNY Mellon tells this Court that the right to voluntarily dismiss in the federal court is absolute and "unfettered."[2] In reality, the federal equivalent of Florida's Rule 1.540 can be used to strike voluntary dismissals. *See* Fed. R. Civ. P. 60(b); *Warfield v. Alliedsignal TBS Holdings, Inc.*, 267 F.3d 538, 542-43 (6th Cir. 2001); *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989); *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987).

Indeed, the United States Supreme Court case cited by BNY Mellon suggests that the federal courts may sanction improper conduct after a case is voluntarily dismissed without first vacating the judgment of dismissal. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). In that case, the Supreme Court held that a voluntary dismissal did not divest the court of jurisdiction to impose the Rule 11 sanctions. It affirmed the Circuit court's observation that such sanctions must be available notwithstanding a "party's effort to cut its losses and run out of

[1] There can be no evidentiary hearing here because the parties settled the case.

[2] Respondent's Brief, pp. 8-9.

court using [the voluntary dismissal rule] as an emergency exit." *Id.* at 390. The Court noted that the voluntary dismissal rule does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers. *Id*. at 397-98. This Court should similarly hold that the right of one free dismissal does not secure the right to commit fraud on the court.[3]

4. The judicial branch cannot abdicate policing of the court system to the other branches of the government.

Finally, BNY Mellon suggests that this Court should rely on the enforcement of criminal statutes to curb fraud on the court. But the judicial branch cannot be dependent upon the vagaries of other governmental branches and political entities to prosecute criminal cases or otherwise concern themselves with the integrity of the courts system. The independence of the judiciary, coupled with a freedom from manipulation by litigants, is necessary to preserve the public's trust in the system.

[3] BNY Mellon suggests that §57.105 Fla. Stat., the Florida equivalent of Rule 11, should be sufficient à la *Hartmarx* to discourage fraud without attacking the sanctity of the voluntary dismissal. (Respondent's Answer Brief, p. 9). This ignores the safe harbor provision, which became a feature of Rule 11 after *Hartmarx*. Dismissal is effectively a withdrawal of the frivolous argument, such that sanctions would be unavailable. *See Hockley by Hockley v. Shan Enterprises Ltd. P'ship*, 19 F. Supp. 2d 235, 239-41 (D.N.J. 1998).

B. The banking and insurance amici offer no objective evidence that punishing fraud will foment a financial apocalypse.

On the heels of the nationwide robosigning scandal, the Fourth District's acknowledgment that "many, many mortgage foreclosures appear tainted with suspect documents,"[4] and this Court's own efforts to curtail rampant false allegations by banks in foreclosure cases,[5] the Mortgage Bankers[6] and Title Companies[7] have the temerity to call for less scrutiny of the instruments filed by banks, rather than more.

The briefs of these organizations are overflowing with dire warnings that an opinion from this Court against BNY Mellon could have "serious economic consequences…in real estate markets"[8] and could cause "lending practices in Florida…[to] come to a grinding halt."[9] But they cite no empirical studies, statistical data, or even the reasoned opinion of a single independent expert to

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[4] *v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011).

[5] *In re Amendments to the Florida Rules of Civil Procedure*, 44 So. 3d 555, 556 (Fla. 2010), as modified on denial of reh'g (June 3, 2010).

[6] The Mortgage Bankers Association and the Florida Bankers Association, collectively "Mortgage Bankers."

[7] The Florida Land Title Association and American Land Title Association ("ALTA"), collectively "Title Companies."

[8] Amicus Brief of the Title Companies, pp. 7.

[9] Amicus Brief of the Mortgage Bankers, p. 4.

support these calamitous predictions. [redacted] submits that these unsupported statements are simply a thinly-veiled attempt at fear mongering,[10] a tactic that is even more distasteful in light of the contradictory positions they have publicly espoused.

For example, the Title Companies urge the Court to choose finality over honesty in the courtroom to avoid serious economic consequences to the housing market and the "uncertainty [that will] impair resolution of the housing logjam."[11] Yet, one of those two organizations, the American Land Title Association ("ALTA") told its own members that the "Foreclosure Documentation Crisis Won't Cause [a] 'Nightmare Scenario.'"[12] In that article, ALTA quotes an analyst as saying that it was "highly unlikely" that title defects due to the bank's "faulty paperwork" would not be cured before re-conveyance to an innocent third party because the title industry is extremely good at "detecting and correcting such errors."[13] In response to a New York Times Article, ALTA stated, "Nightmare

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[10] It is assumed here that the Mortgage Bankers' suggestion that its members would stop lending in Florida is not to be interpreted as a threat.

[11] Amicus Brief of the Title Companies, pp. 7-8.

[12] TitleNews, Official Publication of the American Land Title Association, November 2010, p. 25, available at: http://www.alta.org/publications/titlenews/10/Volume89_Issue11.pdf.

[13] *Id*. at 26.

scenarios that people will lose their homes [bought through foreclosure] are the equivalent of shouting fire in a crowded theater. These wild speculations only breed fear and prolong recovery."[14]

Similarly, while Mortgage Bankers now argue that the Court should look to the Florida Bar and criminal statutes to protect the integrity of the court system,[15] it previously told this very Court that the courts' "authority to sanction lawyers and lenders asserting improper foreclosure claims…is explicit in Florida law and implicit in the courts' inherent power to sanction bad faith litigation."[16]

The idea that fraudulent bank documentation may result in "nice young families" being "put out on the street," rather than institutional investment giants losing rental properties is tenuous enough.[17] But to the extent that court proceedings sullied by fraud and perjury may visit a hardship on any innocent

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[14] *Id*. at 8.

[15] Amicus Brief of the Mortgage Bankers, p. 14.

[16] Comments of the Florida Bankers Association ("FBA"), in Re: Amendments to Rules of Civil Procedure and Forms for Use with Rules of Civil Procedure, p. 2. (authored by Akerman, Senterfitt—the same firm representing BNY Mellon in this case).

[17] *See* "Government Set to Sell Foreclosures in Bulk," Diana Olick, CNBC, January 9, 2012, (http://www.cnbc.com/id/45925851).

party, the problem should be met with a clarion call to end such deceit, not to bless tainted judgments by making them unassailable.

And contrary to their assertions, a ruling in favor will not have a chilling effect on litigation or dissuade litigants from asserting valid claims.[18] It will only dissuade litigants from knowingly asserting invalid claims.

There can be no question but that the perspectives offered by the banking and title insurance amici are merely the self-interested financial concerns of their members. Those concerns cannot be placed before the concerns of the Florida citizenry about the proper functioning of its courts.

C. This Court should emphatically reject the notion that assignments, even fraudulent ones, are irrelevant.

1. BNY Mellon is not the holder of the promissory note.

The amici's invitation to jettison assignments of mortgage as necessary proof that the plaintiff bank is the mortgagee rests on a single erroneous premise that even BNY Mellon was not willing to assert—that BNY Mellon is the "holder" of the promissory note in this case.

Initially, BNY Mellon claimed the note was lost and no copy of a note was attached to its pleading. Its amended complaint attached a copy of a note and an

[18] Amicus Brief of the Mortgage Bankers, pp. 4, 15.

allonge endorsed, not to BNY Mellon, but to a stranger to this litigation: Countrywide Bank.[19] A note (even an original, had one been filed) restrictively endorsed to Countrywide Bank would not make BNY Mellon the holder. Therefore, the assignment was not only relevant, but essential to BNY Mellon's case as the only document that supported its claim of ownership. This would perhaps account for the fact that BNY Mellon attached the assignment to the Complaint as a document upon which its action was based.[20]

2. There can be no blanket rule that assignments are irrelevant.

Starting from the faulty premise that BNY Mellon was a holder, the amici invite this Court to announce that assignments of mortgage, even fraudulent ones, are irrelevant in a foreclosure action when a bank's attorney claims to have possession of the original note endorsed in blank. While at least one District was initially tempted to adopt this position—one which is typically advocated by the banks—it is now generally recognized that assignments are relevant, if not indispensable, to establishing <u>when</u> the plaintiff acquired the note, and thus

[19] Allonge attached to Amended Complaint (Appendix to Answer Brief of the Bank of New York Mellon filed in the Fourth District Court of Appeal, p. 67).

[20] Even if BNY Mellon were incorrect about the need for an assignment, the Petitioner submits that any attempt to deceive the Court on a fact a party thought would help its case could never be deemed immaterial or *de minimus*.

acquired standing. *Compare Harvey v. Deutsche Bank Nat. Trust Co*., 69 So. 3d 300, 304 (Fla. 4th DCA 2011) *with McLean v. JP Morgan Chase Bank Nat'l Ass'n*, No. 4D10-3429, 2012 WL 385532 (Fla. 4th DCA 2012), reh'g granted (Feb. 8, 2012) *and Beaumont v. Bank of New York Mellon*, Case No. 5D10-3471 (Fla. 5th DCA February 17, 2012).

Because endorsements are very often undated and because the plaintiff must prove that it had standing at the inception of the case, *Marianna & B.R. Co. v. Maund*, 56 So. 670, 672 (Fla. 1911), the assignment will be determinative of, or at least evidence that would support or contradict, plaintiff's claim of standing. *See Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990); *WM Specialty Mortg., LLC v. Salomon*, 874 So. 2d 680 (Fla. 4th DCA 2004); *but see Deutsche Bank Nat. Trust Co. v. Lippi*, 37 Fla. L. Weekly D201 (Fla. 5th DCA 2012).[21]

Moreover, there is no shortage of other reasons why there can be no blanket ruling that assignments of mortgage are irrelevant in foreclosure actions. First, as in this case, the bank itself will sometimes choose to rely upon the assignment for its standing to foreclose. *Taylor v. Deutsche Bank Nat'l Trust Co.*, 44 So. 3d 618

[21] To the extent that *Deutsche Bank Nat. Trust Co. v. Lippi*, 2012 WL 162023 (Fla. 5th DCA 2012) may suggest that an amended complaint which attaches a note endorsed in blank and an assignment dated after the lawsuit was filed states a cause of action for foreclosure, it should be disapproved.

(Fla. 5th DCA 2010) (finding that the assignment of mortgage transferred a note and mortgage to plaintiff).

Second, the argument that assignments are superfluous arises from a misapplication of the adage, "the mortgage follows the note." Contrary to the position of the financial industry, the rule that "the mortgage is but an incident of a debt" does not mean that the possessor of a note need not prove it is the mortgagee. The rule has always meant that a foreclosing plaintiff may prove an equitable transfer of the mortgage if a formal, written assignment is unavailable or invalid. *Johns v. Gillian*, 184 So. 140 (Fla. 1938); *see also WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680 (Fla. 4th DCA 2004) (requiring evidentiary hearing to determine if plaintiff acquired interest in the mortgage before the filing of the suit based on a postdated assignment that contained an effective date prior to filing.) *Johns* and its progeny cannot be read so broadly as to permit a finding of equitable ownership without any actual proof.

Importantly, mere presentment of a note (even if shown to be the original) is not in itself proof of an equitable transfer of the mortgage. This demonstration of possession may be sufficient to enforce the note, but carries no indicia of ownership or intent to transfer. The Uniform Commercial Code ("UCC") consecrated a preference in commercial transactions for simple possession of

endorsed instruments over proof of actual ownership—an exception in the law that was intended to foster free trade of commercial paper. Khan, Ali, *A Theoretical Analysis of Payment Systems*, 60 S.C. L. REV. 425, 447 Winter 2008. The concept that a noteholder, even one who is not legitimate, may nevertheless bring an action on the note is entrenched in commercial law and commonly summarized by the axiom "even a thief may enforce a note."

However, the policies underlying the taking of real property intended to secure such a note are not solely market driven. Dispossession of the homestead impinges upon deeply rooted and constitutionally protected concerns. Art. X, § 4, Fla. Const.; *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997). For this reason, the taking of one's home by foreclosure is an equitable remedy and equity would not allow a "thief" to use a stolen note to foreclose on a mortgage lien. *See Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So. 2d 786 (Fla. 4th DCA 1995); *Quality Roof Services, Inc. v. Intervest Nat. Bank*, 21 So. 3d 883 (Fla. 4th DCA 2009) ("Unclean hands may be asserted by a defendant who claims that the plaintiff acted toward a third party with unclean hands with respect to the matter in litigation.")

Equitable considerations would also prevent a foreclosure by a "finder" of a note or a plaintiff bank which, still hung-over from the days of rapid-fire paper

transfers and short-cut-prone securitizations, is just plain mistaken about its right to enforce a note in its possession. To place no higher standard of proof of a foreclosure plaintiff's standing than that required to obtain a money judgment on the note would eviscerate the distinction between legal and equitable causes of action and would elevate commercial expediency over public policies favoring home ownership and due process.

So, if "the mortgage follows the note" has any meaning in the context of today's routine banking practice of splitting ownership of the note (often reposed in a securitized trust) from the right to enforce it as its holder, it could only be that the equitable right to enforce the lien follows the ownership of the note, not mere possession. That equitable right must be proven with evidence of a delivery with the intent to transfer ownership of both the note and the lien.

CONCLUSION

The certified question should be answered in the affirmative.[22] Of course, a trial court has authority, inherently and under Rule 1.540, to hold an evidentiary hearing for the purpose of protecting the integrity of the judicial system. This Court should send a clear signal to litigants that presenting perjury and false evidence will not be tolerated in the State of Florida.

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[22] Because there is an issue as to whether the avoidance of punishment for fraud is itself "affirmative relief," this Court should reformulate the certified question to: DOES A TRIAL COURT HAVE JURISDICTION AND AUTHORITY UNDER RULE 1.540(b), Fla. R. Civ. P., OR UNDER ITS INHERENT AUTHORITY TO GRANT RELIEF FROM A VOLUNTARY DISMISSAL WHERE THE MOTION ALLEGES A FRAUD ON THE COURT IN THE PROCEEDINGS BUT NO AFFIRMATIVE RELIEF ON BEHALF OF THE PLAINTIFF HAS BEEN OBTAINED ASIDE FROM THE AVOIDANCE OF SANCTIONS?

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically at e-file@flcourts.org and served to all parties on the attached service list via electronic mail this February 20, 2012, and will be served by U.S. Mail on February 21, 2012 to all parties on the attached service list.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Answer Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New [redacted] 14 Point.

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