2009 WL 5855292 (Fla.App. 4 Dist.) (Appellate Brief)
District Court of Appeal of Florida, Fourth District.

COPPERHEAD, LLC, Aranda Ventures, Ltd., et al., Defendants/Appellants,
v.
SEACOAST NATIONAL BANK, Plaintiff/Appellee.

No. 4D09-753.
December 23, 2009.

On Appeal from a Final Order of the Circuit Court of Martin County, Florida, Case No.: 07-1804-CA

Appellants' Initial Brief

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*1 STATEMENT OF THE CASE AND FACTS

1. ***Nature of the Case*.**

This is an appeal from a final judgment rendered by the trial Court on February 13, 2009 and a simultaneous denial of the renewed motion for involuntary dismissal. R-855-870.

2. ***The Course of the Proceedings*.**

This case began with a complaint filed by Seacoast National Bank ("Seacoast") against all defendants, including the borrower Copperhead, LLC ("Copperhead") and the guarantors Aranda Ventures, Ltd., EH Building Group II SW Division, LLC and EH Building Group II, LLC ("guarantors").[1] The gist of the complaint was to enforce a promissory note and guarantees.[2] R-1-204 Attached to the complaint were the various loan documents which formed the basis of the suit.

More specifically, there was an A&D note in the principal amount of $ 21,217,495.00 dated January 10, 2007 in favor of Seacoast. (ExhibitB-1 to *2 the complaint). On the same date, there was a $ 10,000,000.00 construction note in favor of Seacoast. (Exhibit B-2 to the complaint).

Copperhead was seeking $80 million in financing in order to complete the project. (T-90/13-25, 91/1-4, 373/15-23). Seacoast represented that it would obtain any additional financing over and above what Seacoast itself would provide. (T-374/17-20, 377/6-23, 411/6-10). Subsequently, in conjunction with Seacoast's promises to syndicate the loan needs of the borrower, new notes were presented in April 18, 2007. T-146/18-20. An A & D phase I note in favor of Seacoast in the principal amount of $ 10,608,747.50 and a similarly titled note in favor of Orion Bank ("Orion") in the same principal amount. (Exhibits 2-B to the complaint). There was no **allonge** or similar document attached to the complaint. Orion is not and never has been a party to this action. The only **allonge** presented at trial was for the original January note for $ 21,217,495.00. No **allonge** for the "Orion" note was ever presented. (T-324/5-16). Moreover, the **allonge** presented as evidence was executed by Seacoast only.

Copperhead defended the action and asserted affirmative defenses. R-239-248. The gist of these were complaints about Seacoast's own breaches and improper actions relating to its improperly declaring that a default of the loan existed.

The trial court conducted a trial on September 2 and 4, 2008, and December 15-17, 2008 and rendered a final judgment against all defendants on February 13, 2009.

3. ***Disposition in the Lower Tribunal*.**

On February 13, 2009, the trial court entered its final judgment. On February 13, 2009, the trial court entered its order denying the renewed motion for involuntary dismissal.

*3 A notice of appeal was timely filed and this appeal ensued.

SUMMARY OF ARGUMENT

The trial court should have found that the **allonge** to the note was never properly affixed to the note. As such, the note "assigned" to Orion was unenforceable. Moreover, the only "evidence" of proper affixation was so tainted that sanctions should have been imposed against Seacoast.

The overwhelming evidence supported the theory that Seacoast manufactured events of default in order to proceed with its enforcement action. Its refusal to even show its appraisal of the property in question and the trial court's permission to deceive the parties on this issue was error. The evidence showed clearly that there was never any default and any findings to the contrary improperly ignore the testimony of both parties to this action.

The bank did not perform the most elementary actions required by its own loan documents as conditions precedent to enforce the note. Seacoast failed to give proper notice or any notice (depending upon which default is the topic) or any opportunity to cure any such allegations of defaults. Pursuant to the loan documents, these actions were required by Seacoast to be performed prior to any enforcement. Its failure to so perform should have resulted in a ruling denying any relief to Seacoast.

Finally, based upon Seacoast's own admissions, there was no default upon which any enforcement could have been declared.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ENFORCING NOTES THAT WERE NOT PROPERLY ENDORSED OR TRANSFERRED

It is axiomatic that a promissory note is a negotiable instrument F. S. Section 673.1041 (a). Negotiation is defined as a transfer of possession of the *4 instrument by a person other than the issuer to a third party who becomes the holder of the instrument by virtue of the transfer. F.S. Section 673.2011(1). For somewhat obvious reasons concerning the certainty of the transaction and protection of all parties, including the debtor of having to face potential multiple exposure on the same instrument, there are specific requirement to effect a legally proper and enforceable negotiation of such an instrument.

Thus, if an instrument is payable to a specifically identified debtor, negotiation requires transfer of possession of the instrument *and* proper **indorsement** by the holder. F.S. Section 673.2011 (2). Further, and this is a critical issue to the appellants, the **indorsement** must be written by or on behalf of the holder and a paper must be affixed to the instrument. F.S. Section 673.2041 (3).

Based upon these basic principles, Florida courts have gone to state that only a proper holder of the note may be the real party in interest in an action on a note. F.E. Booker v. Sarasota, Inc., 707 So. 2d 886, 889 (Fla. 1st DCA 1998). In Booker, plaintiff sued alleging defendant's execution and delivery of a note based upon a purported assignment of the note to plaintiff. To support its claim, plaintiff attached a photocopy of the note to the complaint along with an **allonge** to support the claim that the note was **endorsed** by the prior holder. [3]

On summary judgment, defendant argued that plaintiff did not prove that it was the holder of the note for various deficiencies in the allonge. In reversing the trial court's grating summary judgment in plaintiff's favor, Booker held that a trial court is not at liberty to simply assume that the plaintiff *5 held the note and that a photocopy of the allonge was not proper evidence to support the conclusion of the holder. Moreover, the court noted that an allonge must be firmly affixed to the negotiable instrument itself as to become a part thereof.

Accordingly, Booker reversed the trial court's summary judgment since plaintiff failed to establish its status as the legal owner and holder of the note based upon an assignment.

Similarly, there are many cases wherein courts have held that instruments payable to a named payee or order can only be negotiated by indorsement and deliver by the named payee. Parker v. Dudley, 527 So. 2d 240,242 (Fla. 5th DCA 1988). In fact, without a proper indorsement, there is no negotiation of the instrument. F.S. Section 673.2011, 673.2031, 673.2041, Margiewicz v. Terco Props. of Miami Beach, Inc., 441 So. 2d 1124, 1125 (Fla. 3d DCA 1983), Second Nat. Bank of N. Miami v. G.M.T. Props., Inc. 364 So. 2d 59 (Fla. 3rd DCA 1978) (upholding trial court's finding that bank was not holder in due course where bank took mortgage on assignment without an indorsement of the note).

In this case, the issues are even more alarming. Seacoast claims that it assigned one of the notes to Orion, a non-party to this action. Yet, the evidence was overwhelming that the allonge which evidenced this assignment was never attached or affixed to the note. T-l30/22-25, 131, 132/1-5, 136/22-25, 137/1-2, 323/2-6. Indeed, as the trial exhibits make clear, Seacoast's arguments on this are sanctionably suspicious. Seacoast claimed that they put two hole punches through the documents to affix them. Yet, counsel for defendants below reviewed the original documents at trial and they were not attached. Moreover, defendants introduced 7 copies of the allonge and they were all crystal clear on the top. There was no explanation given nor could there be to explain how a *6 document which had two holes punched in them would not have some indicia of those holes on any copy.

Moreover, no one from Orion testified at trial. Indeed, the evidence at trial suggested that Orion had not even considered their note in default! T-357/9-14, 24-25, 358/1-3, 17-25, 359/1, 17-21, 361/1-4, 365/2-16.

In sum, despite tainted evidence that the allonge was affixed, despite Orion's absence at trial or even as a party, despite Orion's statements suggesting that the loan was still active, the trial court erroneously found that both notes were in default and due and owing.

Further, the only allonge was of the January note for $ 21,217,495.00. This note was NOT the note for which Seacoast sought relief below. Rather, the trial proceeded on the two April notes each in the amount of $10,608,747.50. T-337/21-25, 338/1-2. These were new notes. T-146/18-20. There was never any allonge for either of these notes nor any testimony from Orion regarding its note. Additionally, the only allonge was executed by Seacoast alone, yet Orion never declared a default of its note nor sought any relief below on "its" note. The very fear of potential multiple exposure for the same note is glaringly possible in this type of situation. T-344/11-19. In fact, Orion sent notices after the alleged default announced by Seacoast that indicated that the loan was still active. T-357/9-14, 24-25, 358/1-3, 17-25, 359/1, 17-21, 361/1-4, 365/2-16. Further, Orion retained its authority to enforce its own note. 547/9-13.

In sum, Seacoast " endorsed" its 21 million dollar note to itself. Subsequently, two new notes of 10 million dollars each (rounding off for ease of argument) were created, one to Seacoast and one to Orion. The Orion note was never endorsed to Seacoast and mere was no allonge for that note. Indeed, there is no dispute about these points.

*7 Seacoast's representative testified as such:

Question: Sir, that **allonge** that you're looking at does not refer to a 10.6 million dollar note in favor of Orion Bank; does it?

Answer: No, it does not.

Question: Okay. Does the other **allonge** refer to the 10.6 million dollar note in favor of Orion Bank?

Answer: No.

Question: So which one of those **allonges** that doesn't refer to the 10.6 million dollar note was attached to the 10.6 million dollar note before trial and to this **allonge** here with the 21 million dollar note?

....

Question: Do you have any written evidence with you here today showing that Orion Bank is owed 50 percent of the ten of the indebtedness, the 16.8 million dollar indebtedness?

Answer: No.

T-543/13-25, 544/13-17.

To make the issue of this **allonge** even more peculiar, the very integrity of the "affixing" was at issue. In the early part of the trial, defendants' counsel reviewed the original documents and determined that the **allonge** was never affixed to any note or instrument. T-132. Indeed, counsel later advises the trial court that the affixing appears to have been done by clipping them together at the trial but never affixing them. T-323/2-6.

Mr. Holland, Seacoast's representative admitted that the Orion note (Plaintiff's exhibit 19) had no **endorsement** from Orion which empowered Seacoast to enforce its rights herein. T-541/9-19. When asked about the affixing, the following testimony took place:

*8 Question: Okay, Sir, is there an **allonge** permanently affixed to that original promissory note, whereby Orion Bank is negotiating that promissory note in favor of Seacoast National Bank?

Answer: The **allonge** was removed ..... Well, they were clipped together in the file, and we took them apart for trial.

T-543/20-25, 544/1-2.

A discussion ensued relating to the lack of any staple marks and the witness explained that there would be holes as they would be clipped with an Echo clip which would make holes. T-542/3-13.

Yet, it became crystal clear after introducing 7 copies of the **allonge** and note (defendants' exhibit 6) that there were no hole marks in any of the copies, no rings, no circles, nothing, just plain clean white paper. The only reasonable conclusion is that Seacoast became aware of its own deficiency in maintaining these critical documents as a result of being at the early stages of the trial. In its haste to correct these deficiencies, Seacoast "affixed" the documents during the trial! Even the trial court appears to have reached that conclusion.

The Court: But yet the evidence and the documents attached seem to dispute, contradict whether or not holes were ever punched in it, and that holes were punched later on to support the testimony given previously. T-83/6/10 found in App-3. Despite this acknowledgment, the trial court gave no relief to appellants, and permitted the bank to benefit from its own misdeeds.

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WHEREFORE, this Court should reverse the final judgment and remand this case to the trial court with instructions to enter a final judgment in favor of defendants/appellants and against plaintiff/appellee.

*9 II.

THE TRIAL COURT ERRED IN REJECTING THE AFFIRMATIVE DEFENSES RELATING TO SEACOAST'S IMPROPER ACTIONS

The entire "story" consists of Seacoast making promises to lend money, further promising to syndicate the loans as it knew the borrower was seeking and needed additional funding, and then, doing nothing other than protecting its own risks and interests to the detriment of the borrower.

The story begins with Copperhead seeking 80 million dollars in financing. Seacoast agreed to partially lend and to seek additional financing from others to satisfy the borrowing needs. Despite its promise, the only "additional" lender obtained was Orion. However, in the ultimate self serving fashion, Seacoast promptly paid itself the Orion money as opposed to providing the funds for the borrower! The Orion loan never benefitted the borrower at all, rather it reduced Seacoast's exposure in the deal. Given Seacoast's promises to obtain additional financing, Seacoast's taking all the "additional" money for itself was self serving and a breach of its fiduciary duties and agreements with Copperhead. Moreover, to the extent that there was any payment default, an issue of much doubt, any such default was created by Seacoast's own failure to obtain the additional financing.

Each and every claimed default was shown to be either no default at all or as a result of Seacoast's own actions or inactions. As yet another example, the claimed default on value was supposed to be supported by an appraisal. Yet, Seacoast never made the appraisal available to defendants, not even at trial!

WHEREFORE, this Court should reverse the trial court's final judgment and remand this case to the trial court with instructions to enter a final judgment in favor of defendants and against plaintiff.

*10 III.

THE TRIAL COURT ERRED IN ALLOWING SEACOAST TO ENFORCE ITS PROMISSORY NOTE WHILE IGNORING ITS FAILURE TO PERFORM CONDITIONS PRECEDENT TO ITS ENFORCEMENT

In addition to Seacoast's blatant self dealing, their own actions created the illusion of a default. As one example, the loan documents provide that Seacoast will fund an interest reserve. In essence, during the term of that particular phase of the loan, Seacoast "pays" the interest with its own loan money. There is no dispute that this was part of Seacoast's obligations.

In order to get around their clear obligation under the loan agreements, Seacoast forced the borrower to execute a loan modification agreement. This agreement did nothing other than to take all the borrower's rights away from it under the existing loan agreement. There was no consideration for this agreement, yet the trial court rejected this argument as not having been formally pled in the answer.

As a result of this unilateral modification, Seacoast used it as a pretext to declare a default the very next month! The "default" was Seacoast's own failure to pay its own interest reserve.

Further, the loan agreement is a 100 page plus document. In this extremely detailed and complicated document, one would find that the vast majority of the provisions are drafted in a way to protect Seacoast's interests. There is a small fraction of provisions which "protect" the borrower. These *11 consist of the provisions which require notice and an opportunity to cure and the bank's agreement to fund the interest reserve.

In this case, Seacoast ignored and/or unilaterally changed all of these minimal obligations.

With respect to the interest reserve, Seacoast relies upon paragraph 5 of plaintiffs trial exhibit 27 for its position that it no longer has to fund the interest payments. However, that paragraph deals with acquisition and development funds, not interest. Indeed, on this issue, Seacoast admitted, that even under their best scenario, their obligation to pay the interest out of the reserve would have ended upon execution of the collateral assignment of amended and restated purchase and sale agreement, dated November 15, 2007. Thus, even under their best case scenario, the first breach was Seacoast's as of November 1, 2007.

Moreover, the collateral assignment was a unilateral document which provided absolutely no consideration towards the defendants. All the document appears to do is to take away the already extremely limited rights of the borrower and reiterate the obligations already quantified.

By virtue of executing that document, the borrower received no benefit and no consideration and as such, it was error to enforce that document.

The inequity of this relationship is exemplified by the bank's complete ignoring of the notice provisions and the opportunity to cure. The following testimony by Mr. Holland was instructive.

Question: An event of default requires giving of notice, the lapse of time or both, where required?

Answer: Correct

....

*12 Question: An event of default may require notice and an opportunity to cure, correct?

Answer: Correct,

T-413/25, 414/1-2, 8-10. Similar testimony is given in various places. T-418/14-25, 419/1-22, 420/3-25, 421/1-25, pgs. 422-424. Seacoast stipulated that there was no notice given of the alleged violation of the loan to value provisions under the loan documents. T-431/2-7. Mr. Holland went on to admit (again) that notice was required.

Question: Mr. Holland, if a borrower is alleged to have committed a breach of a covenant or agreement in the loan documents, are they not entitled to advanced written notice under Section 11.1D on Page 77 of Plaintiffs Exhibit 2, to a notice that specifies the nature of the default?

Answer: Yes.

Question: Okay. If a borrower is alleged to breach a covenant or agreement in the loan agreement, aren't they entitled, under Section 11.1.D on Page 77 of Plaintiff's Exhibit 2, to 30 days' opportunity to cure that alleged default?

Answer: Yes.

T-443/15-25, 444/1.

Yet again, Seacoast admitted that it did not give notice or an opportunity to cure. T-526/7-17.

It is axiomatic that conditions precedent must take place prior to enforcing a contractual obligations. State Street Bank vs. Badra, 765 So. 2d 251 (Fla. 4th DCA 2000). Hume vs. GL Miller Bond, 118 So. 3 (Fla. 1928) (wherein the Court ruled that where a condition is inserted into a contract, it is presumed to be there for a reason and that the reason is not to leave the rights of the parties as they would have been without the condition.)

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*13 This would seem particularly true in a case such as this where the loan itself was not even matured as of the day of trial, let alone the purported date of the alleged default! T-415/16-22.

WHEREFORE, Appellants request that this Court reverse the final judgment and remand to the trial court to dismiss the complaint herein for Seacoast's failure to follow the conditions precedent to the note.

CONCLUSION

For the foregoing reasons, appellants request that this Court reverse the final judgment and/or order denying renewed motion for involuntary dismissal and either remand this matter to the trial court with instructions to enter a final judgment in favor of defendants below or dismiss the case based upon the failure to comply with conditions precedent.

Footnotes

1 Michael Aranda was an original defendant below. As a result of his filing for bankruptcy protection, (R-781-791) this action did not proceed against him below; accordingly, this appeal does not address this individual.

2 References to the record on appeal will be referred to as R-. References to the trial transcript will be referred to as T-. References to the appendix to this appeal will be referred to as App-. The trial transcripts for September 2 and 4, 2008 are part of the record on appeal, but will still be referred to as trial transcript page numbers. The trial transcript for December 15-17, 2008 will be presented as follows. Undersigned ordered the entire trial transcript for those days multiple months ago. Upon "receipt" of same, the parties engaged in settlement discussions and these transcripts were placed in the files. It is only upon doing the final stages of this brief that undersigned noticed that these transcripts were only excerpts. Accordingly, these excerpts are attached hereto as an Appendix. The remainder of the trial transcript (which is limited to about one half of a trial day) will be supplemented upon receipt.

3 Florida's Uniform Commercial Code never identifies an **allonge** by name, but the Booker court explained that an **allonge** is an example of the piece of paper that the UCC requires to be affixed to a negotiable instrument on which to write **endorsements** when the instrument itself has no room for such **endorsement**.

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