

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION**

**INDYMAC FEDERAL BANK, FSB, SUCCESSOR
IN INTEREST TO INDYMAC BANK, F.S.B.,**

NO. 08-15815-CI-19

PLAINTIFF,

v.

ERICE D. DAVIS,

DEFENDANT.

**THE PLAINTIFF IN THIS CAUSE OF ACTION HAS NOT HAD THE CAPACITY OR
STANDING TO PROCEED WITH THIS CASE FOR MORE THAN ONE YEAR AND
THE PLAINTIFF'S CASE SHOULD ACCORDINGLY BE DISMISSED WITH
PREJUDICE**

COMES NOW, the Defendant ERICE D. DAVIS (hereinafter "Defendant") by and through the undersigned counsel, MATTHEW D. WEIDNER, and respectfully moves this Court to DISMISS WITH PREJUDICE the above entitled civil action, pursuant to Fla. R. Civ. P., 1.210(a); Fla. R. Civ. P. 1.210(a); Fla. R. Civ. P. 1.140(b)(6); Fla. R. Civ. P. 1.140(b)(6) and precedent case law, and in support thereof states:

FACTS

1. This is an action for foreclosure of residential real property owned by the Defendant.
2. The named Plaintiff in this case is "INDYMAC FEDERAL BANK, FSB, SUCCESSOR IN INTEREST TO INDYMAC BANK, F.S.B." (hereinafter "Plaintiff"). The only identification of the identity of the Plaintiff is in the caption of the complaint with no further identifying or descriptive information in the body of the complaint or elsewhere which provides any additional information about exactly who the Plaintiff is, what legal form or corporate identity it asserts or

the basis upon which the unspecified and improperly named entity claims the legal capacity or authority to proceed in the instant litigation.

3. The Plaintiff's complaint, filed on October 28, 2008 pled two counts: one for reestablishment of a lost promissory note and one for foreclosure of a mortgage.

4. Apparently because the Plaintiff lost the original of the promissory note at issue in this case, it was unable to attach even a copy of same to its complaint when filed.

5. Notwithstanding this deficiency, the Plaintiff filed the purported original note with this Court on or about January 23, 2009. The Plaintiff failed to amend its complaint as required by the Florida Rules of Civil Procedure to incorporate this new contract into its complaint and the Plaintiff failed to provide this note to Defendant. Rather than amending its complaint as required by the Florida Rules of Civil Procedure and a long established body of case law, the Plaintiff merely filed the note, along with a notice of dropping Count I of its complaint for reestablishment of the purportedly lost note also on January 23, 2009.

6. The Plaintiff asserted in paragraph eight (8) of its complaint that it "owns and holds the Note and Mortgage [in question]...[and therefore] is entitled to enforce the Note." Despite this generalized and unsupported statement, the fact that no note was attached at the time of filing and that no assignment of mortgage was recorded or attached to the complaint establish that as of the date of filing the complaint, the Plaintiff neither held nor owned either the note or mortgage at issue in this case.

7. Next, even if the Plaintiff had attached documents or evidence which supported its ownership or standing at the time of filing the complaint, the Plaintiff failed to plead its capacity or authority, either in its own name or in any representative capacity, to sue in the complaint before this court. Specifically, the four corners of the record are devoid of any pleading or notice

to this court regarding a series of transactions which took place between the entities named in the caption and several other entities and third parties between July 11, 2008 and continuing through the date of the trial's pre-trial conference. The existence of these very public transactions involving entities which are named parties to this transaction (Indymac Bank, FSB and Indymac **Federal** Bank, FSB or who have been identified in this transaction (OneWest Bank) present legitimate questions about this improperly-named Plaintiff's ability to proceed with this case.

8. It should be noted for the record that Defendant has consistently and repeated raised the issue of Plaintiff's failure to assert capacity, standing and authority to proceed as the real party in interest in these proceedings.

9. Firstly, the Defendant filed his Motion to Dismiss on or about May 28, 2009 which argued that the Plaintiff's failure to properly identify itself in the body of its complaint was fatal to any argument that it adequately pled its capacity.

10. Secondly, the Defendant also filed an Answer on or about May 28, 2009. In his Answer, the Defendant specifically demanded strict proof from the Plaintiff that it was in fact the owner and holder of the subject note and mortgage.

11. Thirdly, and in conjunction with his Answer, the Defendant filed Affirmative Defenses on or about May 28, 2009. The Defendant's Third Affirmative Defense specifically pleads that the Plaintiff's failure to plead its capacity is fatal to its claim.

12. Fourthly, on or about May 10, 2010 the Defendant propounded discovery to the Plaintiff which would help to resolve the issue of the Plaintiff's capacity and/or the ownership of the note and mortgage at issue in this case.

13. Finally, during this court's pre-trial conference on June 6, 2010, (transcript attached) Defendant repeatedly raised the issue of capacity and standing of this Plaintiff.

14. Despite these attempts to resolve the issue of capacity, the Plaintiff has failed to respond to the Defendant's allegations, either in the form of a Response to the Motion to Dismiss, a Response to the specific denials in the complaint, a Response to the Third Affirmative Defense, or through submitting a response to the requested discovery.

15. It should be specifically noted for the record that the issues relating to capacity and the entity status of the Plaintiff named in this case have been actively litigated by the law firm who appears in this case for at a significant amount of time prior to the date of this motion. Rather than respond to Defendant's Affirmative Defenses or Discovery, Plaintiff's only response was to file a Motion for Extension of Time to respond to Defendant's discovery asserting that it needed additional time to research, investigate and gather the documentation requested by Defendant. Defendant asserts, on information and belief, that such information has already been collected by Plaintiff in connection with other cases in which these issues have been actively litigated and that the information sought by Defendants is readily accessible by both the Plaintiff and their counsel of record in this case.

16. In support of its assertion that the issues related to capacity are well known and the information accessible by the parties to this case, Defendant first points to the deposition of Erica A. Johnson-Seck, attached hereto and incorporated as Exhibit "A". It should be noted that the affiant in this case has entered an affidavit in this case, but this deposition establishes that the witness in this case and the law firm representing the Plaintiff in both cases, were aware that the Plaintiff Indymac Bank, FSB was on notice that it no longer had authority or capacity to function under that name as of July 11, 2008. While the exact circumstances of the Plaintiff's inability to operate under its former name will be more clearly stated below, it should be noted that the Plaintiff's current law firm was also its counsel when the Johnson Seck deposition was taken in

February 2009 and was therefore on notice that capacity issues were central in complaints filed by the client or clients that appear in this case.

17. Moreover, in at least one other case, the Plaintiff's law firm filed a Notice of Removal of a claim by the Plaintiff into federal court on behalf of the Federal Deposit Insurance Corporation (hereinafter "FDIC") on or about January 20, 2010. A copy of this Notice is attached hereto and incorporated as Exhibit "B". While the FDIC's relationship with the Plaintiff will be explained in more detail below, this Notice provides further evidence that the Plaintiff and its law firm have been on notice that its capacity is an issue for more than one year from the date of this motion. More importantly, the Notice of Removal shows that the issue of Plaintiff's nebulous capacity has been used to its advantage in the very recent past in other cases.

18. As if this was not enough, the Plaintiff indicated during the pretrial conference on June 10, 2010 that it will file in this case, a motion to substitute party Plaintiff which the Defendant's undersigned counsel has yet to receive. Counsel for Plaintiff also asserted that it was in the process recording an assignment of mortgage in this case. Despite repeated requests that counsel identify who they intend to substitute or who will take assignment of the mortgage, this information has not been provided to Defendant as of the date of filing this Motion. Also in this pre-trial conference, counsel for the Plaintiff expressly represented that "[s]ubsequent to the filing of this lawsuit, Judge, **the loan was sold**. So we have prepared a motion to substitute party plaintiff and will submit to the court as soon as the new assignment is finally executed." *See Transcript of June 10, 2010 Pre-trial Hearing*, page 15 lines 3-7. Counsel also asserts, "We are filing a motion to substitute" and "we're just waiting for the assignment to be recorded" (page 30 lines 1011)

19. Therefore, by counsel's express statements and the evidence of record in this file, the named Plaintiff in this case lacks both the capacity to sue and the standing to sue on the underlying note in this case or to foreclose on the mortgage at issue.

**THE COMMERCIAL TRANSACTIONS INVOLVING THE PLAINTIFF, CERTAIN
PREDECESSORS AND CERTAIN SUCCESSORS**

20. Although the Plaintiff has failed to advise this court, a complex series of transactions have taken place between July 11, 2008 and March 19, 2009 that directly impact the issue of capacity, standing and other issues directly related to this case.

21. To begin, the Plaintiff was initially known as INDYMAC BANK, F.S.B. (hereinafter "Failed Thrift"). In fact, the subject note and mortgage that is at issue in this case was initially originated by INDYMAC BANK, the Failed Thrift.

22. Pursuant to paragraph two (2) of the Notice of Removal referred to in paragraph fourteen (14) above, "[o]n July 11, 2008 [the Failed Thrift] was closed by the Office of Thrift Supervision (hereinafter "OTS")." A copy of OTS Order Number 2008-24, dated July 11, 2008 and attached hereto and incorporated as Exhibit "C", explains that this was done because

- (a) [the Failed Thrift was] likely to be unable to pay its obligations or meet its depositors' demands in the normal course of business because it [did] not have sufficient liquid assets to fund expected withdrawals;
- (b) [the Failed Thrift was] in an unsafe and unsound condition to transact business due to its lack of capital and its illiquid condition;
- (c) [the Failed Thrift was] undercapitalized as defined in section 38(b) of the FDIC, and has no reasonable prospect of becoming adequately capitalized as defined in section 38(b) of the FDIA.

23. Accordingly, and as evidenced by the OTS' July 11, 2008 notice, the OTS transferred the Failed Thrift's assets and liabilities (including perhaps the note and mortgage at issue in this case) into FDIC conservatorship under a new thrift which was named INDYMAC FEDERAL

BANK, FSB (hereinafter “New Thrift”), the entity identified as successor in interest and the Plaintiff in this case.

24. On March 18, 2008 the New Thrift, under conservatorship of the FDIC, entered into a Master Purchase Agreement with IMB HOLDCO LLC (hereinafter “HoldCo”) and ONEWEST BANK GROUP, LLC (hereinafter “Intermediate HoldCo”). A copy of the Master Purchase Agreement is attached hereto and incorporated as Exhibit “D”.

25. According to the Recitals contained on the opening page of the Master Purchase Agreement, Holdco desired to purchase certain specified assets and assume certain liabilities of the New Thrift. Intermediate HoldCo was identified as a “newly formed direct wholly owned subsidiary of HoldCo” which would “form a new federally chartered, FDIC insured, stock form savings association or savings bank known as OneWest Bank, FSB (hereinafter “OneWest”).

26. Finally, the Master Purchase Agreement details that “the FDIC shall be appointed receiver of [the New Thrift].” This is bolstered by OTS Order Number 2009-17, dated March 19, 2009 and attached hereto and incorporated as Exhibit “E”, which reads provides that: “(1) the FDIC [is replaced as] conservator for the [the New Thrift]; and (2) the FDIC [is appointed as] receiver for [the New Thrift].”

27. Therefore, as of March 18, 2009 the FDIC had been transferred out of its role as conservator of the New Thrift into the role of receiver and that either HoldCo or Intermediate HoldCo or OneWest (or all) desired to purchase the New Thrift’s assets out of receivership from the FDIC.

28. This is in fact what happened the following day. On March 19, 2009 the FDIC, apparently acting now as receiver for the New Thrift, entered into a Loan Sale Agreement with

OneWest. A copy of the Loan Sale Agreement is attached hereto and incorporated as Exhibit “F”.

29. The sale of the assets of the New Thrift to OneWest is also evidenced by a Notice issued by the FDIC in the Federal Register, Vol. 74, No. 221, dated Wednesday, November 18, 2009 and attached hereto and incorporated as Exhibit “G”. This notice reads that “[o]n March 19, 2009, [the New Thrift] was placed in receivership and substantially all of its assets were sold.” However, this notice fails to specify whether the assets were sold to HoldCo, Intermediate HoldCo, or OneWest.

30. Nevertheless, Section 2.01 of the Loan Sale Agreement between the New Thrift and OneWest reveals, provides that “[the New Thrift] hereby sells, transfers, conveys, assigns and delivers to [OneWest], and [OneWest] hereby purchases, accepts and assumes from [the New Thrift]...all of [the New Thrift’s] rights, title, and interests in, to an under the [the loans].”

31. Therefore, by the express language of Section 2.01, loans such as the Defendant’s were transferred from the New Thrift to OneWest.

32. Moreover, Section 5.05 of the Loan Sale Agreement, entitled “Loans in Litigation” specifically address the disposition of cases involving loans such as the Defendant’s in this case, which were subject to litigation at the time the Loan Sale Agreement was executed. That agreement provides that:

OneWest shall, within thirty-five days of the closing date, “notify the clerk of the court or other appropriate official and shall counsel of record that ownership of Loan was transferred from [the New Thrift] to OneWest.” Additionally, OneWest was also required, within thirty-five (35) days after the closing date, to “have its attorney filed appropriate pleadings and other documents and instruments with the court.

33. Despite the express terms of that contract, no pleadings, documents or instruments were filed by OneWest or any party in the instant case within thirty-five (35) days of the closing of the

Loan Sale Agreement nor was this court or the defendant even notified that OneWest or any other party had perfected any ownership interest in the documents which are the subject of this instant litigation.

34. Next, the loan which is the subject of this litigation is, on information and belief, registered on the Mortgage Electronic Registration System. According to the subject loan ownership registry report attached hereto and incorporated as Exhibit "H", OneWest is now merely the servicer of the subject note and mortgage. The ownership registry asserts that the true owner of the subject note and mortgage is DEUTSCHE BANK NATIONAL TRUST COMPANY (hereinafter "Deutsche Bank").

35. The fundamental point sought to be illustrated by all these facts is that there are at least a half dozen additional entities or parties that may have an interest in this loan and these proceedings but the Plaintiff has failed to advise the court of these entities and parties. As a threshold matter, because the Plaintiff has failed to in any way to plead how it has capacity to maintain these proceedings, it has failed entirely to any of the other various entities listed above. Without such a proper averment, the Plaintiff simply lacks capacity.

LEGAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION

I. Plaintiff's Complaint Should be Dismissed because Plaintiff Lacks Capacity to Sue and because it is not the Real Party in Interest

a. Legal Standards

36. Fla. R. Civ. Pro. 1.120(a) provides that

[i]t is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, **except to the extent required to show the jurisdiction of the court.** (emphasis added) The initial pleading served on behalf of a minor party shall specifically aver the age of the minor party. **When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a**

party to sue or be sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge. *Emphasis added.*

37. Furthermore, the Comment to the Rule (2004 Version), states that “if a party involved in a suit in **other than his individual capacity**, the capacity in which he is a party **should be indicated in the caption and the pleadings.**” *Bold emphasis added.*

38. “Capacity to sue” is an absence of legal disability which would deprive a party of the right to come into court. 59 Am.Jur.2d *Parties* § 31 (1971).

39. This is in contrast to "standing" which requires an entity have sufficient interest in the outcome of litigation to warrant the court's consideration of its position. Keehn v. Joseph C. Mackey and Co., 420 So.2d 398 (Fla. 4th DCA 1982).

40. The issue of capacity to sue may be raised by motion to dismiss where the defect appears on the face of the complaint. *See Hershel California Fruit Products Co. v. Hunt Foods*, 119 F. Supp. 603 (1975), quoting Coburn v. Coleman 75 F. Supp. 107 (1974); Klebanow v. New York Produce Exchange, 344 F.2d 294 (2nd Cir. 1965).

41. The failure to adequately plead capacity has been grounds for dismissals of lawsuits in Florida state courts. *See e.g. Asociacion de Perjudicados v. Citibank*, 770 So.2d 1267 (Fla. 3d DCA 2000) (dismissing case for lack of capacity as distinguished from lack of standing).

42. Moreover, it is important for the Court to take notice that judicial circuits across this State have been DISMISSING WITH PREJUDICE foreclosure complaints where the Plaintiff has been unforthcoming with the Court about the true owner and holder of the subject note and mortgage.

43. Specifically, in M&T Bank v. Lisa D. Smith, Case No. CA09-0418-55 (7th.Jud.Cir./Hon. J. Michael Traynor/June 10, 2010), the Court dismissed with prejudice the Plaintiff's complaint

for fraud on the Court because, in part, the Plaintiff was now claiming that an entity other than itself owned the subject note and mortgage and that it was merely the servicer of same. The Court ultimately concluded that “the Plaintiff lacks standing and is not a proper party to the suit.”

44. Finally, with respect to the real party in interest, Fla. R. Civ. P. 1.210(a) provides, in pertinent part, that “[e]very action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.”

b. Argument

45. While the Plaintiff's name is identified in the caption of the Complaint, nowhere else in any of the Plaintiff's pleadings is the Plaintiff's entity status or capacity even pled. As a threshold matter, then, it is unclear exactly who the Plaintiff even is. As is clearly detailed by the complicated facts identified above, this failure to identify who the Plaintiff is prevents Defendant from understanding how this Plaintiff relates to the more than half dozen other entities that may have some interest in these proceedings.

46. Importantly, because the Plaintiff has failed to plead any facts as to its legal status, the Defendant is not even able to determine whether the Plaintiff has the capacity to sue. As detailed above, this is not merely a technical matter because there are legitimate facts that call into question this Plaintiff's capacity to proceed in this litigation. As such, the Plaintiff's complaint is impermissibly vague which alone constitutes grounds for dismissal pursuant to Asociacion de Perjudiacados, supra.

47. Because this issue is being attached in a Motion to Dismiss it is important to note that the four corners of the record are devoid of any pleading by the Plaintiff regarding the series of transactions which took place between it and several other institutions between July 11, 2008 and the present which severely call into question its ability to proceed with its claim.

48. Moreover, the Defendant has affirmatively called into question the Plaintiff's capacity on four separate occasions, and on each occasion the Plaintiff has failed to respond even though the Plaintiff was put on notice that capacity would be an issue for nearly two years.

49. The Plaintiff has simply failed in any way to plead that it is entitled to proceed on the claim in this case and neither has there been any attempt to establish the relationship to any of the other potential parties at interest in the documents at issue in this case such as HoldCo, Intermediate HoldCo, OneWest, Deutsche Bank, or even the FDIC in its receivership capacity.

50. Not only do the complex transactions between the Plaintiff and its predecessor and successors cast doubt onto the Plaintiff's ability to pursue with this case, Plaintiff's counsel has **admitted** that it is not the owner and holder of the note and mortgage.

51. Specifically, in the June 10, 2010 pre-trial conference, the Plaintiff's counsel expressly represented that "[s]ubsequent to the filing of this lawsuit, Judge, **the loan was sold**. So we have prepared a motion to substitute party plaintiff and will submit to the court as soon as the new assignment is finally executed." See Transcript of June 10, 2010 Pre-trial Hearing, page 15 lines 3-7.

52. Therefore, by the Plaintiff's own admission, it lacks capacity to sue on the subject mortgage and note because **it does not own the subject mortgage and note**.

53. More importantly, simply allowing the Plaintiff to substitute the party plaintiff **on the eve of trial** is extremely prejudicial to the Defendant because it prevents the Defendant from

performing proper discovery as to the substitute party and because it prevents the Defendant from properly responding to a lawsuit issued by the substitute party. Both of these omissions are violations of the procedural and substantive due process owed to the Defendant.

54. Finally, because the mortgage and the note have apparently been sold to some unnamed third party, the Plaintiff is **not** the real party in interest. Moreover, because the record is devoid of any mention that of any mention whatsoever that the Plaintiff is this third party's personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made, or a party expressly authorized by statute who may sue in the third party's name without joining the third party, the Plaintiff is estopped from any further action in this case.

55. The evidence and representations of opposing counsel reveal that the Plaintiff is not the owner or holder of the note or mortgage at issue in this case, just as the facts presented in the M&T Bank v. Smith case, *supra*. Accordingly, a dismissal with prejudice as to the named Plaintiff is the only appropriate action at this time.

56. This remedy is consistent with the equities in this case and does not prohibit whoever the true owner of subject note and mortgage is from bringing foreclosure upon proof of its interest.

WHEREFORE, because the Plaintiff has not asserted its capacity to sue within the four corners of the record and because the Plaintiff is not the real party in interest to these proceedings, the Defendants respectfully request that this Court dismiss the instant litigation with prejudice, and any other relief the Court deems just and proper.

II. Plaintiff's Complaint Should be Dismissed for Failure to State a Cause of Action

a. Legal Standards

57. Fla. R. Civ. P. 1.140(b)(6) provides, in pertinent part, that “the following defenses may be made by motion at the option of the pleader...failure to state a cause of action... A motion making any of these defenses shall be made before pleading if a further pleading is permitted.”

58. “When a party brings an action based upon a contract and fails to attach a necessary exhibit under Rule 1.130(a), the opposing party may attack the failure to attach a necessary exhibit through a motion to dismiss. Where a complaint is based on a written instrument, the complaint does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the complaint.” Samuels v. King Motor Co. of Fort Lauderdale, 782 So.2d 489, 500 (Fla. 4th DCA 2001).

59. Fla. R. Civ. Pro. 1.190(a) provides, in pertinent part, that “[a] party may amend a pleading once as a matter of course at any time before a responsive pleading is served...[o]therwise, a party may amend a pleading only by leave of court or by written consent of the adverse party.”

60. Moreover, “[t]he proper method of deleting less than all counts from a pleading is amendment of the pleading pursuant to Fla.R.Civ.P. 1.190.” Deseret Ranches of Florida, Inc. v. Bowman, 340 So.2d 1232, 1233 (Fla. 4th DCA 1976) *cert. denied*, 349 So.2d 155 (Fla. 1977).

61. This is because “it is well-settled that only an entire action may be voluntarily dismissed under Fla.R.Civ.P. 1.420(a)(1); there can be no partial dismissal, no dismissal of less than all causes of action.” Marine Contractors, Inc. v. Armco, Inc., 452 So.2d 77, 80 (Fla. 2d DCA 1984).

62. Finally, any attempt to voluntarily dismiss less than an entire action is a nullity. *See* Murillo v. Tri-State Employment Services, Inc., 925 So.2d 376 (Fla. 1st DCA 2006); Perez v. Winn-Dixie, 639 So.2d 109 (Fla. 1st DCA 1994). *See also generally* Marine Contractors, Inc. v.

Armco, Inc., 452 So.2d 77, 80 (Fla. 2d DCA 1984); Deseret Ranches of Florida, Inc. v. Bowman, 340 So.2d 1232, 1233 (Fla. 4th DCA 1976) *cert. denied*, 349 So.2d 155 (Fla. 1977).

63. It should be noted by this Court that circuit courts in this State are dismissing foreclosure complaints with prejudice for fraud on the Court when a note reestablishment count is included in the complaint but the Plaintiff subsequently produces the note. Specifically, in the M&T Bank case, *supra*, the Seventh Judicial Circuit dismissed the complaint with prejudice because the Court had been misled by the Plaintiff from the onset of the litigation, in part, because the complaint initially pled for reestablishment of a lost note which the Plaintiff subsequently filed with the Court.

64. The fact that it is improper to drop the lost note count has now apparently become recognized by foreclosure Plaintiff's firms because Plaintiff law firms are now filing motions to dismiss single counts of the complaint, wherein they affirm the technical infirmities detailed above including the attached motion from the case of U.S. Bank National Association v. Graciela Mills Glass and Steven Glass, Case No. 09-39440-CA-30. Quoting the language of the foreclosure plaintiff's motion "**there can be no dismissal without order of Court**, of less than all the causes contained in the action." *Bold emphasis added. See also Letta v. H.F. Mason Equipment Corp.*, 407 So. 2d 392 (Fla. 3d DCA 1981).

65. Repugnancy should be attacked by motion to dismiss a pleading for failure to state a cause of action. Don Mar, Inc. v. Gillis, 483 So.2d 870 (Fla. 5th DCA1986). Finally, the Appellate Courts of this State have upheld dismissals based upon repugnant claims. *See e.g. Salit v. Ruden, McClosky, Smith*, 742 So. 2d 381 (Fla. 4th DCA 1999).

b. Argument

66. Here, the Plaintiff's original complaint pled two counts: one for reestablishment of a lost promissory note and two for foreclosure of a mortgage.

67. The clear and specific language in Plaintiff's complaint must be read and observed by this court because the allegations contained within that language form the entire basis for Defendant's response to the Plaintiff's Complaint. In its complaint, Plaintiff asserts:

- A) The Original Promissory Note was lost or destroyed subsequent to Plaintiff's acquisition thereof... (Plaintiff's Complaint ¶3)
- B) Plaintiff was in possession of the promissory note and entitled to enforce it when loss of possession occurred. (Plaintiff's Complaint ¶3)
- C) The loss of possession was not the result of a transfer by Plaintiff or a lawful seizure. (Plaintiff's Complaint ¶3)
- D) Said Note is not in the custody or control of Plaintiff. (Plaintiff's Complaint ¶3)
- E) Plaintiff cannot reasonably obtain possession of the promissory note because its whereabouts cannot be determined. (Plaintiff's Complaint ¶4)

68. These allegations were filed by Plaintiff on October 20, 2008, notwithstanding this pleading, the Plaintiff filed the purported original note with this Court on or about January 23, 2009. It should be noted that this filing was not served on Defendant as required by rules and the Plaintiff failed to amend its complaint as required by the Florida Rules of Civil Procedure to incorporate this new contract into its complaint.

69. Because no amended complaint was filed, and because the purported document it is unclear as to what contractual basis the Plaintiff is suing upon. This is because the Plaintiff is either suing upon the lost note which it pled for reestablishment in its complaint or its suing upon the purported original which it filed on or about January 23, 2009. By not providing a clear contractual basis in its pleadings, the Plaintiff has prohibited the Defendant from properly litigating this case.

70. Because the purported original note has not been incorporated into its complaint, then, a motion to dismiss is proper based upon the holding of Samuels v. King Motor Co. of Fort Lauderdale, supra.

71. Moreover, if this was not enough, the Plaintiff attempted to do the impossible when it issued notice of voluntary dismissal of Count I of its complaint pursuant to the authority of Deseret Ranches of Florida, Inc., supra, and its progeny.

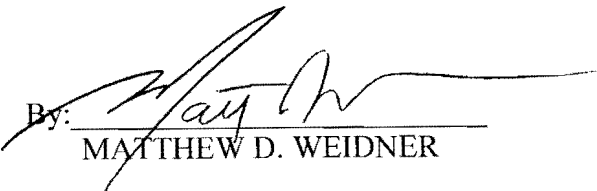
72. Because the Plaintiff's attempt was a nullity, the only pleading before this Court is the Plaintiff's initial complaint in its entirety, **including Count I for reestablishment of a purportedly lost note.**

73. This Court, however, is a direct repugnancy to the Plaintiff's assertion that it has filed the purportedly original note document with this Court. The proper remedy for this situation, then, is dismissal pursuant to Don Mar, Inc. v. Gillis.

WHEREFORE, because the Plaintiff has both failed to incorporate into its complaint the contract upon which it is suing and because its complaint is repugnant to its subsequent assertions, the Plaintiff has failed to state a cause of action upon which relief may be granted and the Defendant therefore respectfully requests that this Court dismiss its complaint and any other relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 17th day of June, 2010 to MARIE MONTEFUSCO, Kahane & Associates, P.A., 1815 Griffin Road, Suite 104, Dania Beach, FL 33004.

By: 
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