

REPORTED BY: DANIEL J. RUSSETTE, RMR
Notary Public
State of Florida at Large

Pages 1 - 35

MORGAN J. MOREY & ASSOCIATES

2

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ERICE D. DAVIS
GARY DAVIS

1 MR. WEIDNER: Good morning, Your Honor. Matthew
2 Weidner for the defendant, Erice Davis. Your Honor
3 issued a pretrial order directing that the parties be
4 here in person. I've been in communication with
5 counsel for plaintiff over the last couple weeks in
6 particular and we expected them to be here today.

7 THE COURT: They actually filed a motion to
8 appear telephonically and it looks like I granted it,
9 unfortunately. I didn't realize that I told them they
10 had to be here in person. It does make it difficult,
11 as you know, me trying to call them from the
12 courtroom. Apparently I granted it, so let me give
13 them a call. And you are representing?

14 MR. PEACOCK: I'm actually here as kind of a
15 friend of the court with Matt Weidner.

16 (Whereupon, a call was placed to Marie P. Montefusco and
17 she is present telephonically)

18 MS. MONTEFUSCO: This is Marie Montefusco.

19 THE COURT: Hi. This is Judge Williams. Can you

20 hear me all right?

21 MS. MONTEFUSCO: Yes, I can. Thank you, Your
22 Honor, for letting me appear by phone. I appreciate
23 it.

24 THE COURT: No problem. I didn't realize it was
25 a pretrial or I probably wouldn't have granted the

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4

1 order, but I did. I sign it yesterday.

2 MS. MONTEFUSCO: Okay.

3 THE COURT: Mr. Weidner is here in person because
4 I told everybody that they had to be here in person,
5 so I should apologize to him because if I'd known I
6 was let her, you could have appeared by phone too.

7 MR. WEIDNER: I would have appeared in person
8 anyway. I would still like to object to appearing
9 telephonically because it contradicts what Her Honor
10 ordered. More importantly, what she might have
11 ordered that counsel appear telephonically. The
12 pretrial order is quite clear that the purpose of
13 pretrial is to try and force a settlement, and that
14 has been a consistent problem, both with this case and
15 Your Honor's aware, with the entire docket. And so
16 the party not being here is a very big problem. It's
17 consistent in this case. So I state my objection to

18 appearing telephonically.

19 MS. MONTEFUSCO: I'm sorry to hear that, Judge,
20 because yesterday he had no objection to me appearing
21 by telephone.

22 MR. WEIDNER: If I may be clear, my statement was
23 I'm not in the position to speak to that because it
24 was the judge's order that you appear in person.

25 MS. MONTEFUSCO: Oh, that's not what I heard.

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5

1 Anyway --

2 THE COURT: Okay. But now I did not say that the
3 party would not appear in person. And I think the
4 order requires the parties to be present as I see the
5 defendant -- I think are these -- the defendants are
6 here in person?

7 MR. WEIDNER: Yes, Your Honor. The defendant,
8 Erice Davis, and her son, Gary Davis, are here in
9 person.

10 THE COURT: So I need a representative from
11 Indymac Federal Bank to be present in person. So,
12 Ms. Montefusco, did they misunderstand my court order?

13 MS. MONTEFUSCO: Yes, apparently. I
14 misunderstood it, yeah. I didn't understand the bank
15 had to be there in person.

16 THE COURT: Parties have to be present in person
17 at pretrial conferences. Well, I can do one of two
18 things. I can reschedule the pretrial or I'll see if
19 the two of you want to agree on something, and if you
20 do, maybe I won't have to reschedule it. Let me hear
21 what your proposal is and who has the pretrial
22 conference order?

23 MS. MONTEFUSCO: Judge, what we did was we
24 discussed settlement, and I believe that, you know,
25 the bank wants to work with Ms. Davis on some

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6

1 litigation efforts and we provided the HAMP package to
2 counsel for defense, and so, you know, we really
3 don't -- the bank doesn't really want to kick her out
4 of her home if it can be worked out at all. So --

5 THE COURT: And how would you propose that we do
6 that?

7 MS. MONTEFUSCO: I would propose that you take it
8 off the docket until we can get the paperwork
9 submitted. Counsel for defense is going to get the
10 paperwork by today and all the financials to see if
11 she can qualify for the HAMP package.

12 THE COURT: Okay. So the HAMP program was not
13 applied for previously?

14 MS. MONTEFUSCO: No, it was not. It was
15 explained at the mediation, Your Honor, but it was not
16 officially applied for by the defendant. And I
17 understand she's got some Social Security income that
18 would qualify her. You know, of course I don't know
19 without seeing the financials.

20 THE COURT: So what happened at the mediation?
21 Why wasn't all this done at the mediation?

22 MS. MONTEFUSCO: It was discussed at mediation,
23 Judge. I wasn't there. Defense counsel can speak to
24 that. But from what I understand the representative
25 from Indymac came and explained the HAMP program, and

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7

1 I don't know if there was any follow-up after that.

2 MR. WEIDNER: Would Your Honor like me to get
3 very specific about what happened at mediation? It's
4 the substance of this entire lawsuit and a fundamental
5 problem with this lawsuit as it has existed from the
6 beginning and has become more clear as this has
7 proceeded for the last two years. Indymac no longer
8 exists. As a corporation, Indymac is dead pursuant to
9 an order by the federal FDIC. Therefore, Indymac no
10 longer has any capacity to entertain discussions of
11 settlement, or, frankly, proceed with this litigation.

12 That's an issue that I raised, it's going on
13 years ago now, but a fundamental problem that we have
14 had with this case from the beginning is getting
15 consistent, clear information out of Indymac. And as
16 I review the public docket, I find that apparently the
17 assets of Indymac have been sold. First they were
18 taken over by the FDIC. They became a conservator of
19 the Indymac assets. Then all of those assets were
20 sold to One West Bank. It's my belief, it's my
21 understanding now that the real party in interest in
22 this litigation is One West Bank. It is no longer
23 Indymac.

24 And as to what happened in mediation, I will
25 represent to you that the representations made by

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8

1 whomever the representative was, and while I need to
2 be very careful about not breaching any of the
3 mediation discussions, opposing counsel attempted to
4 appear at that mediation, have the plaintiff's
5 representative appear telephonically. Her Honor on
6 her own motion denied that. I am not convinced that
7 the individual that was at mediation had authority.

8 THE COURT: Well, if they didn't even bring the
9 HAMP packet and hand it over on September 8th, this

10 should have all been done by now. That's why I
11 ordered mediation last year, folks. So I'm fairly
12 disgusted.

13 MS. MONTEFUSCO: Judge, first of all, Indymac
14 Federal Bank is a bridge depository that was put
15 together by the FDIC because Indymac Bank was taken
16 over. All right? So we have the federal holder in
17 due course right in this case.

18 THE COURT: Who is running the show? They are
19 supposed to be here today and they are supposed to be
20 taking care of litigation. Somebody is not paying
21 attention to it.

22 MS. MONTEFUSCO: Okay. Well, the defense is the
23 one who wants to stay in the home. They have an
24 obligation to apply. They sent out several HAMP
25 packages to the defendant. And they've never followed

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9

1 through by filling out the application and providing
2 the financials.

3 THE COURT: Okay. Tell me when the HAMP program
4 documents were sent to the defendant. I have the
5 defendant right here. What was the date that the HAMP
6 brochure, packet, was sent to them?

7 MS. MONTEFUSCO: Well, I don't have that in front

8 of me, Judge, but that's something they do on a
9 regular basis.

10 THE COURT: How do you know it was sent? Then
11 how do you know it was sent?

12 MS. MONTEFUSCO: I'm just representing to Your
13 Honor that that's something that is done by Indymac
14 Federal. And, again --

15 THE COURT: Okay. So you have no personal
16 knowledge that a packet for HAMP was ever sent to
17 Eric Davis? Is that right? Yes or no?

18 MS. MONTEFUSCO: You're right, Judge. I don't.
19 But from my understanding --

20 THE COURT: That's okay. I'm going to ask
21 Ms. Davis because I have her here in the courtroom.
22 Ms. Davis, did you ever get a HAMP packet from the
23 bank?

24 MS. DAVIS: Not that I know of, no.

25 THE COURT: Did you ever get any packet asking

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10

1 you to fill out some documents to modify the loan?

2 MS. DAVIS: I got all kind of mail but I don't
3 know.

4 MR. WEIDNER: May I direct some questioning, Your
5 Honor?

6 THE COURT: Sure.

7 MR. WEIDNER: Your Honor, we have here the
8 defendant, Ms. Erice Davis. As is my practice with
9 all of my clients, I required them to keep an active
10 and regular communication with whomever purports to be
11 the lender. I have directed Ms. Davis and her son,
12 Gary Davis, to direct communications at the lender. I
13 want you to explain to me, summarize briefly what had
14 been the substance of your communications. What has
15 Indymac said to you as you called and talked to them?

16 MS. DAVIS: I don't know.

17 MR. WEIDNER: If I may. Mr. Davis is her son. I
18 would ask the court to recognize the disability of my
19 client, and I'm going to ask her son to briefly
20 summarize what has been the substance of the
21 communication with Indymac Bank about this loan.

22 MR. DAVIS: She's made numerous calls to Indymac
23 Bank. If you can ever get through to anybody to talk
24 to to start with. That's the number one problem is
25 getting anybody who has any kind of authority to do

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11

1 anything at the very beginning. You're basically
2 talking to a clerk who is there to take your telephone
3 conversation, and it means nothing. It's useless.

4 But several calls have been made. How many in total
5 calls have you made to them?

6 MS. DAVIS: I don't know how many.

7 MR. DAVIS: She's got a paper about this long, so
8 I'm assuming it's around 10, 12 times that she's made
9 communication, written down what they have said to
10 her.

11 THE COURT: And do you know if they've ever sent
12 her a packet to fill out?

13 MR. DAVIS: No, I don't. I don't think they
14 have. Otherwise she probably would have showed it to
15 me.

16 MR. WEIDNER: Your Honor, I will clarify. I was
17 just provided for the first time a HAMP package from
18 opposing counsel. She filled it out within 24 hours
19 and it was returned to opposing counsel and to the
20 number on the fax sheet. I want to be --

21 THE COURT: Can you tell me what month that
22 happened?

23 MR. WEIDNER: This happened June 7th. I believe
24 the package was provided to us on June 7th, they
25 filled it out and returned to opposing counsel. I

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12

1 want to make the point, Your Honor, that this

2 litigation has been proceeding since 2008. The nature
3 of the case as it exists today, the plaintiff cannot
4 prevail upon. You were set for trial. You've issued
5 an order that everything is locked down. But, that
6 notwithstanding, the case as it exists today, the
7 plaintiff could not prevail on.

8 And so that, alone, from a technical perspective
9 should be enough for the court to dismiss the case.
10 And if in fact it is opposing counsel's representation
11 that they want to keep this individual in the home,
12 then we should be negotiating outside of litigation.
13 And I want to draw the court's attention to a number
14 of depositions had regarding Indymac that were
15 represented by this law firm where they got into the
16 specifics of the corporate status of Indymac.

17 I want Her Honor to recognize that one of the
18 first times I made the capacity argument, in fact the
19 first time I made it, was in Her Honor's courtroom a
20 couple of years ago. You first properly denied that
21 motion because I drafted it sloppily and didn't do my
22 research.

23 The very next morning I had the exact same motion
24 in front of you. I stayed up all night long 'cause I
25 knew you were going to put me through my paces, and I

1 came back before you with an inch stack of case law
2 from across the country which got into the basics of
3 capacity. And, frankly, the specifics of capacity.
4 You were convinced at that time that the capacity
5 argument was legitimate. And while it may be
6 relatively abstract in some cases, this case before
7 the court right now illustrates exactly why capacity
8 is so key and so critical.

9 I raised the issue of capacity at the beginning.
10 I said consistently now going on two years that this
11 plaintiff does not have the capacity to continue with
12 the litigation. And I have deposition transcripts of
13 the affiant in this file in which she admits Indymac
14 ceased to exist. When a corporation ceases to exist
15 they no longer have the authority, they no longer have
16 the capacity to continue with the litigation, and that
17 is exactly what we have in front of this court, Your
18 Honor.

19 And so on that basis, on the basis of the
20 technical infirmities in this case, and, frankly, on
21 the basis of representation of counsel for the
22 plaintiff that they don't wish to throw this woman out
23 of her house, I would respectfully request that the
24 case be dismissed.

25 MS. MONTEFUSCO: Judge, this is ridiculous. I

1 was speaking with defense counsel in an effort to
2 negotiate settlement. He's the one who came to me
3 requesting that we not throw the defendant out of her
4 home. Okay? That's the only reason I'm representing
5 that to Your Honor today. Now, Indymac Bank is no
6 longer a corporation. Of course not. They were taken
7 over by the FDIC. Indymac Federal Bank, FSB, is a
8 federal bridge depository which was formed by the FDIC
9 when Indymac was taken over. Okay? And we absolutely
10 have the federal holder in due course.

11 MR. WEIDNER: If I may. It was my understanding
12 that you were going to move for a motion to substitute
13 party plaintiff and substitute One West in.

14 MS. MONTEFUSCO: That's correct. It's not One
15 West, though. We're moving to substitute the party
16 that the note was sold to after the Indymac Federal
17 took over.

18 MR. WEIDNER: Okay. So, again, we have a
19 pretrial order which closes all motions and I would
20 certainly think that would include a motion to
21 substitute party plaintiff.

22 MS. MONTEFUSCO: It doesn't close all motions.
23 It allows amendments of the pleadings, when necessary.

24 THE COURT: And when did the FDIC take them over?

25 MR. WEIDNER: 2008, Your Honor.

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15

1 MS. MONTEFUSCO: July 11th, 2008.

2 MR. WEIDNER: And the second --

3 MS. MONTEFUSCO: Subsequent to the filing of this
4 lawsuit, Judge, the loan was sold. So we have
5 prepared a motion to substitute party plaintiff and
6 will submit it to the court as soon as the new
7 assignment is finally executed.

8 MR. WEIDNER: But, Your Honor, while FDIC took
9 over Indymac in 2008, March 19th, 2009 the assets of
10 Indymac were sold to an entity identified as One West
11 Bank.

12 MS. MONTEFUSCO: Not all of them. Not all of
13 them.

14 MR. WEIDNER: Well, then maybe not all of them.

15 MS. MONTEFUSCO: Not this one.

16 MR. WEIDNER: Well, we'll get to that in a
17 second. Let's just talk about that transaction. Some
18 of the assets of Indymac were transferred to a
19 corporation identified as One West. The agreement
20 between the FDIC, Indymac and One West was that all of
21 the notes were supposed to be endorsed to One West,
22 all of the assignments of mortgages were supposed to

23 be assigned to One West. Importantly for purposes of
24 litigation the contract specifically provides that
25 litigation, pending litigation cases, they were to

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16

1 advise the local courts of the pending litigation.
2 They were supposed to do substitution of party
3 plaintiff and they were supposed to change counsel.

4 MS. MONTEFUSCO: Judge, this is a speaking
5 motion, Your Honor. I mean I don't know what he's
6 doing.

7 MR. WEIDNER: The speaking motion is the case
8 should be dismissed because you're telling the court
9 now that you want to substitute party plaintiff at the
10 last hour and we've known for -- apparently you've
11 known for a year that Indymac is not the proper party
12 plaintiff. And it's unfairly prejudicial to my
13 client, an 84 year old disabled woman, with limited --

14 MS. MONTEFUSCO: I'm sorry, I don't understand
15 how it prejudices.

16 MR. WEIDNER: Theoretically, at least, this
17 client is liable to me for attorneys' fees and other
18 costs. Theoretically -- well, not theoretically, very
19 specifically she's been engaged in litigation for a
20 number of years. She stands here before the court

21 ready to have this concluded and this plaintiff wants
22 to change all the facts in violation of the court's
23 order.

24 MS. MONTEFUSCO: She's been living in the home
25 without paying for it and it's a benefit to her, and

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17

1 that is case law in Florida, so there is no prejudice
2 to the defendant.

3 THE COURT: Okay. Well, I'm not going to dismiss
4 the case today because it's set for a pretrial and I
5 don't have a written motion to dismiss and it's not
6 been scheduled for hearing for a motion to dismiss,
7 and there is a case out of the Second that says if a
8 case is not properly noticed for hearing a motion,
9 then the court should not rule on it. So I won't be
10 ruling on the motion to dismiss today. I will be
11 leaving it on the trial docket and I'll see you all
12 here for trial on July 14th at nine o'clock a.m. And
13 I've been handed a Uniform Pretrial Conference Order
14 by counsel for the defense. And, Ms. Montefusco, have
15 you seen this document?

16 MS. MONTEFUSCO: Yes, I have, and I totally
17 disagree with it, Judge, and I submitted mine to
18 defense counsel, and he totally disagrees with mine.

19 MR. WEIDNER: I have yours, counsel, that I'll
20 submit to the court to compare, and I just want to
21 draw your attention, I've made one or two minor
22 revisions to what you saw previously. I added, as you
23 suggested, the notice that you sent to me on May 19th,
24 an expert request to produce. I think that is
25 substantially the only change to the pretrial order

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18

1 from what you saw yesterday.

2 THE COURT: All right. Well, let's go through it
3 and I'll see what the objections are. That's what I
4 determine today at pretrial. Okay. So I have the
5 pretrial order that's been proposed. It has,
6 Ms. Montefusco, you're going to be appearing at trial
7 for the plaintiff, is that right?

8 MS. MONTEFUSCO: Yes, I will.

9 THE COURT: All right. And it has Mr. Weidner
10 appearing on behalf of Ms. Davis. All right. Then
11 the statement of the case. Do you have any objection
12 to the statement of the case as its listed,
13 Ms. Montefusco?

14 MS. MONTEFUSCO: I'm sorry, Judge. Yes, I do.

15 THE COURT: Let's go paragraph by paragraph then
16 to see. How about Paragraph One. Any objection to

17 it?

18 MS. MONTEFUSCO: Well, you know, he's got a
19 misspelling. A two count complaint.

20 THE COURT: All right. I've got that.

21 MS. MONTEFUSCO: And that's true, but we did drop
22 our first count, the lost note.

23 MR. WEIDNER: I addressed that subsequently.

24 THE COURT: Okay. Mine says count one is an
25 action on a promissory note. And count two is an

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19

1 action to foreclose mortgage. Is that stated
2 correctly?

3 MS. MONTEFUSCO: Well, count one is an action to
4 reestablish a lost or destroyed note.

5 THE COURT: Is that still -- that's still what
6 you're going to do, reestablish a lost note?

7 MS. MONTEFUSCO: No, Judge. We found the note,
8 and the original note and original mortgage are filed
9 with the court.

10 MR. WEIDNER: If we could continue on to the
11 second paragraphs, that will become clear in
12 subsequent paragraphs, Your Honor.

13 THE COURT: Any objection to his Paragraph Two?

14 MS. MONTEFUSCO: No.

15 THE COURT: Okay. How about Paragraph Three?

16 MS. MONTEFUSCO: Yes, I object to that.

17 THE COURT: All right. Tell me why, please.

18 MS. MONTEFUSCO: Because when Your Honor denied
19 the original defense attorney's motion to dismiss, it
20 says that the defense has 10 days to file an answer.
21 So that meant that there was a pending motion to
22 dismiss. So we dropped the count one prior to them
23 filing an answer, which is procedurally correct under
24 the Rules of Civil Procedure. And, thereafter, the
25 defendant retained Mr. Weidner, and he filed a

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20

1 subsequent motion to dismiss, which was totally
2 improper.

3 MR. WEIDNER: But then I subsequently filed an
4 answer, affirmative defenses, and I submit to the
5 court that under Paragraph Four the motion to dismiss
6 that I filed on March 28th, 2009, which asserted the
7 lack of capacity of the plaintiff, the case law is
8 clear that any party may raise capacity as an issue at
9 any time. That notwithstanding, I filed an answer and
10 affirmative defenses, and I'll represent to the court
11 that I will bring that motion to dismiss for lack of
12 capacity up once again for reconsideration.

13 MS. MONTEFUSCO: Well, Judge, once an answer and
14 affirmative defenses is filed, that forecloses them
15 filing any kind of motion to dismiss the complaint.
16 Now, he can plead that as an affirmative defense, but
17 that's a different story.

18 MR. WEIDNER: I have pled it as an affirmative
19 defense, but I will also be raising it as a motion to
20 dismiss, and the case law is clear I can do so. The
21 court, of course, can deny it, but I will raise it as
22 another motion to dismiss before trial.

23 THE COURT: Okay. But I'm wondering what the
24 objection is on Paragraph Three first.

25 MS. MONTEFUSCO: The last sentence, defendant

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21

1 asserts based on the authority of Desert Ranch, et al,
2 that plaintiff may not drop the lost note count but
3 can only amend his complaint. I disagree with that.

4 MR. WEIDNER: But if I may, Your Honor, we're
5 not -- this is not a statement of the ultimate facts.
6 This is the position that will be tried at trial.

7 MS. MONTEFUSCO: This is defendant's position,
8 not the plaintiff's position.

9 MR. WEIDNER: I'm alerting the court to this is
10 an issue that will be litigated at trial.

11 MS. MONTEFUSCO: That's a statement of the case,
12 though, Judge.

13 THE COURT: I agree.

14 MS. MONTEFUSCO: It is not the statement of the
15 case. That's the defendant's argument.

16 THE COURT: All right. I've lined out Sentence
17 Two of Paragraph Three and I'll leave the first
18 sentence. The plaintiff filed the purported lost note
19 and the notice of dropping lost note count, that you
20 find that correct?

21 MS. MONTEFUSCO: That's correct.

22 THE COURT: Okay. All right. We're on to
23 Paragraph Four now. The defendants retained
24 Mr. Weidner who filed a motion to dismiss based on
25 capacity and that motion was denied. Any objection?

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22

1 MS. MONTEFUSCO: No.

2 THE COURT: Okay. Paragraph Five, any objection?

3 MS. MONTEFUSCO: No.

4 THE COURT: Paragraph Six, any objection?

5 MS. MONTEFUSCO: Well, yeah. Well, okay, no, he
6 did file objections to the affidavits filed by
7 plaintiff, but --

8 THE COURT: That's all I'm doing now is the

9 statement of the case. Paragraph Seven, any
10 objection?

11 MS. MONTEFUSCO: No.

12 THE COURT: Paragraph Eight, any objection?

13 MS. MONTEFUSCO: I'm not sure what Paragraph
14 Eight is. I believe we propounded expert
15 interrogatories.

16 MR. WEIDNER: I'm sorry, Ms. Montefusco, this is
17 where it changed. I have Paragraph Eight, I added in
18 May 6th, 2010 defendants served request for
19 admissions, request for production and interrogatories
20 on plaintiff. And then the next paragraph, Paragraph
21 Nine, it simply states May 19th, 2010 plaintiff files
22 plaintiff's expert request to produce.

23 MS. MONTEFUSCO: Well --

24 THE COURT: Okay. All right. I'm fine with the
25 statement of the case then as it is now. How about

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23

1 the issues? Is there an objection to the issues in
2 Paragraph One?

3 MS. MONTEFUSCO: Yes. Again, plaintiff attempts
4 to drop the lost note count was nullity, and that last
5 sentence, I disagree with, Judge.

6 THE COURT: All right. I'll line out that

7 sentence that says plaintiff's attempt to drop the
8 lost note was nullity and --

9 MS. MONTEFUSCO: It's a one count mortgage
10 foreclosure case. It's only count two.

11 THE COURT: You have dropped count one?

12 MS. MONTEFUSCO: Yes, we have, Judge.

13 THE COURT: Okay. All right. I'll change it to
14 one count, mortgage foreclosure.

15 MS. MONTEFUSCO: And take out the lost note
16 complaint.

17 THE COURT: Yes, I've lined that out. Okay.
18 Plaintiff has not incorporated or attached -- you know
19 what? I think I'll just dispense with the issues.
20 This is a nonjury trial.

21 MS. MONTEFUSCO: Right.

22 THE COURT: I'm just going to line through this
23 because we don't really have time on a mortgage
24 foreclosure case, unfortunately, to spend an hour on a
25 pretrial conference. So I'm just going to line out

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24

1 that. And I know what the issues are and I'll be
2 trying the case as far as I know. If not, I'm sure
3 the judge can figure it out. The admissions are --
4 let me see if you agree with this. It says the

5 parties agree to the introduction into evidence,
6 copies of documents evidencing they have been recorded
7 in the public records of Pinellas County without the
8 need of having them certified or being authenticated
9 by a records custodian. Do you agree?

10 MS. MONTEFUSCO: I agree with that, certainly.
11 And I have submitted some information which Your Honor
12 doesn't have, that the defendant didn't agree to it,
13 but --

14 MR. WEIDNER: Your Honor has it. I provided it
15 to her, counsel.

16 THE COURT: Okay. What is it that you want? Is
17 there something you wanted to add to the pretrial
18 conference order?

19 MS. MONTEFUSCO: A stipulation that the note is
20 the original note. The note on file is the original
21 note.

22 THE COURT: Do you agree?

23 MR. WEIDNER: No, Your Honor.

24 THE COURT: Okay. He doesn't stipulate.

25 MS. MONTEFUSCO: Okay. That's fine. We'll prove

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25

1 it at trial.

2 THE COURT: All right. Let's look under

3 Paragraph Four now on Page Three, it says stipulations
4 and waivers. Less than six jurors, I don't think
5 that's applicable here, do you?

6 MS. MONTEFUSCO: No jury trial, right. Nonjury.

7 THE COURT: I'll put N/A there. Use of expert
8 testimony any time during trial as a result of
9 unavailability at another time? Do you want to
10 stipulate to that or not?

11 MS. MONTEFUSCO: I believe that the counsel for
12 defense has the only listed expert and he told me
13 yesterday he dropped him as an expert.

14 MR. WEIDNER: Yes, Your Honor.

15 THE COURT: So there is no experts for either
16 side?

17 MS. MONTEFUSCO: No experts.

18 THE COURT: I'm just going to put none then.
19 Okay. Under C, waived. We don't have any imaging
20 studies here, right?

21 MS. MONTEFUSCO: No.

22 THE COURT: Not applicable. Records custodians
23 for documents produced in discovery to date?

24 MR. WEIDNER: And that's no to that, Your Honor.

25 THE COURT: That's no?

1 MR. WEIDNER: Yes, Your Honor.

2 MS. MONTEFUSCO: I'm sorry, he put yes. What
3 does that mean, waived records custodian for
4 documents?

5 MR. WEIDNER: We're not waiving that. We want
6 record custodians present.

7 THE COURT: He's saying he doesn't stipulate to
8 that, so I'll put no on that. We have no
9 photographers, right?

10 MR. WEIDNER: No, Your Honor.

11 MS. MONTEFUSCO: There is no photographs.

12 THE COURT: Okay. Copies of ordinances, it says,
13 or foreign laws. We have yes here?

14 MR. WEIDNER: No, Your Honor.

15 THE COURT: No? Should be a no?

16 MS. MONTEFUSCO: I'm sorry?

17 THE COURT: There are no ordinances or foreign
18 laws that are coming in?

19 MS. MONTEFUSCO: Not foreign, no.

20 THE COURT: Okay. What about the FDIC stuff?

21 MS. MONTEFUSCO: FDIC, yes. There are ordinances
22 that are coming in.

23 THE COURT: All right. I'll put in parenthesis
24 FDIC, if that's necessary. Okay. There are no motion
25 in limines, is that right?

1 MS. MONTEFUSCO: No.

2 THE COURT: Now, pending motions, you're saying
3 you still want to argue your motion to dismiss?

4 MR. WEIDNER: Yes, Your Honor. And --

5 MS. MONTEFUSCO: I believe he's stipulated above
6 that it was denied in Paragraph Four. March 28th,
7 2009, defendant, Matthew Weidner, who filed a motion
8 to dismiss based on capacity. Motion was denied.

9 MR. WEIDNER: That was the prior order, Your
10 Honor. I didn't stipulate to anything. We're raising
11 a new issue regarding capacity based on facts that
12 have come to light subsequent to March 28th, 2009.

13 MS. MONTEFUSCO: That is not an issue that's at
14 issue right now. Okay?

15 MR. WEIDNER: I'm asking the court to entertain
16 it, and the court can deny it if the court so chooses.

17 THE COURT: All right. I'll take it up at the
18 trial.

19 MR. WEIDNER: And, Your Honor, we'll want a
20 motion in limine as to the evidence based on what's
21 happened here today.

22 THE COURT: You want to file a motion in limine?

23 MR. WEIDNER: Yes, Your Honor.

24 THE COURT: Okay.

25 MS. MONTEFUSCO: Does that mean motion in limine

1 based on what's happened here today?

2 THE COURT: I'm going to require that all motions
3 in limines be filed by June 24th. So if either side
4 has any motions in limine, you can file them by June
5 24. I'm just writing that in now. And those will be
6 heard, by the way, on July 8th, 2010, at 1:30. 1:30
7 p.m.

8 MS. MONTEFUSCO: May I appear telephonically for
9 that, Your Honor?

10 THE COURT: Do you object?

11 MR. WEIDNER: No, Your Honor.

12 THE COURT: Okay. You may attend telephonically
13 on July 8th.

14 MS. MONTEFUSCO: And can you please tell me, Your
15 Honor, again, when the trial is, July the --

16 THE COURT: July 12, and calendar call is at nine
17 a.m.

18 MS. MONTEFUSCO: Calendar call?

19 THE COURT: Nine a.m., and the calendar call is
20 in Courtroom B, as in boy. That's at the
21 St. Petersburg Courthouse, 545 - 1st Avenue North,
22 St. Pete, and it's directly outside the elevator on
23 the fourth floor is where Courtroom B is.

24 MS. MONTEFUSCO: Okay. You mean calendar call is
25 on July 12th. Is that the date we'll find out when

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29

1 the trial is?

2 THE COURT: Well, yeah. It will either be tried
3 that day or another day that week.

4 MS. MONTEFUSCO: Okay. Because I need to get my
5 representative there from out of state.

6 THE COURT: Right. Any corporate representatives
7 have to be there on the 12th at nine a.m.

8 MS. MONTEFUSCO: Okay.

9 THE COURT: We'll be able to then tell you then
10 which day we'd be trying it, and so then they need to
11 be present so we can say are you going to still be
12 here on Wednesday, let's say, if yours is going to be
13 heard Wednesday. We also pick all the jurors on
14 Monday, but obviously your case, we won't be picking
15 the jury, so you probably won't start on Monday, but
16 you could, if all my jury trials settle, then you
17 could start on Monday. So I can't tell you for sure
18 that you won't.

19 MS. MONTEFUSCO: So my representative is from out
20 of Texas, I believe.

21 THE COURT: Right. They have to be here at

22 calendar call too.

23 MS. MONTEFUSCO: They have to be here at nine
24 a.m.?

25 THE COURT: Right.

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30

1 MS. MONTEFUSCO: Okay.

2 THE COURT: Is there anything else? Otherwise I
3 think I can go ahead and finalize this and I can
4 send -- I can have Mr. Weidner send a copy of this to
5 you then.

6 MS. MONTEFUSCO: Okay. We are filing a motion to
7 substitute the party plaintiff.

8 THE COURT: Okay. Let me put that as a pending
9 motion. Plaintiff's motion --

10 MS. MONTEFUSCO: We're just waiting for the
11 assignment to be recorded

12 THE COURT: Party plaintiff. Now, I generally on
13 these cases sign an order on those ex party, but do
14 you have an objection to it?

15 MR. WEIDNER: I do, Your Honor.

16 THE COURT: You object to it. Okay. So probably
17 have to find hearing time then. I guess we'll hear it
18 July 8th at 1:30.

19 MS. MONTEFUSCO: Also at 1:30? Okay.

20 THE COURT: Yeah. There is no reason to make
21 separate hearing times. So July 8th at 1:30 for any
22 motions in limine, the motion to substitute party
23 plaintiff and then the capacity dismissal, if that's
24 still an issue, then that will be argued then too.

25 MS. MONTEFUSCO: Shall we notice that for

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31

1 hearing?

2 THE COURT: Yes. The same time, July 8th, 1:30.
3 Do them all at the same time. All right. Is there
4 anything else that you want me to add here or does
5 that pretty much do it?

6 MS. MONTEFUSCO: All this other stuff he's got on
7 his order, you know, I guess do we need it? I mean --

8 THE COURT: Like what? Tell me what.

9 MS. MONTEFUSCO: Paragraph Seven, Eight, Nine,
10 10, 11, 12, 13, 14.

11 THE COURT: Yeah, I need to know the length of
12 the trial. It says one half day.

13 MS. MONTEFUSCO: Yeah, one half day. Right.

14 THE COURT: That's fine. Settlement
15 possibilities, that's just a part of our pretrial
16 form.

17 MR. WEIDNER: And, Ms. Montefusco, I'd like to

18 just state, you know, we would all like to just have
19 this settled with this disabled 84 year old woman
20 staying in her home, and if we can focus our efforts
21 on that, we can dispense with all of this.

22 THE COURT: Well, no. Wait, wait. No offense,
23 but you can't dispense with all this because this
24 trial is remaining on the docket. I am counting on
25 you all, since not a lot of settlement has really

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32

1 taken place between October of '08 and today, I'm not
2 taking it off the trial docket. I don't set these
3 matters twice. I don't continue things on the trial
4 docket. This case has been going on for a year and a
5 half and it's going to be tried next month unless you
6 all settle it. So you need to let your clients know
7 that I am serious about this and it's going to go to
8 trial unless you all worked it out. There's been
9 plenty of time to work it out. There are no more
10 delays.

11 MS. MONTEFUSCO: Judge, if we could have a
12 hearing date for a Motion for Summary Judgment, then
13 we could dispose of it so we wouldn't have to try the
14 case.

15 THE COURT: I think there's already been summary

16 judgment, hasn't it?

17 MS. MONTEFUSCO: It was on the docket, and then
18 defense counsel filed an objection, so we had to
19 cancel that hearing date.

20 THE COURT: I don't have any summary judgment
21 hearing dates between now and this trial date.

22 MR. WEIDNER: And I just represent that's
23 inconsistent with your statement that your client
24 wants to keep her in the house. I think we should be
25 focusing our efforts on keeping this woman in her

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33

1 house, not trying to set summary judgment.

2 MS. MONTEFUSCO: Well, counsel, the judge is not
3 going to take it off the trial docket, so I'm just
4 trying to avoid a trial, if that's what's going to
5 have to happen.

6 THE COURT: Okay. I will see you all on July 8th
7 at 1:30, and if it's not me there, Judge Hessinger
8 will be doing that hearing on the 8th because she is
9 going to be covering the trial docket on July 12. All
10 right? So you probably won't see me, but you'll see
11 Judge Hessinger. If you want to just have Anna make a
12 copy of that for both you and counsel, and you could
13 fax it to her or mail it to her or however you want to

14 get it to her.

15 MR. WEIDNER: Yes, Your Honor.

16 THE COURT: Okay. All right. Thank you all.
17 You'll see Judge Hessinger, both on the 8th and on the
18 12th, unless you get it resolved. And, Ms. Davis, I
19 hope it gets worked out for you. Mr. Davis, thank you
20 for coming. And I hope that -- one of the reasons I
21 keep it on the trial docket is so that things do get
22 worked out, because I find if I don't keep my finger
23 on these, they just go into the abyss somewhere and
24 nothing ever seems to get done. So I hope you
25 know that I'm trying to do this for the best for

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34

1 everybody, both for the bank and for you. I'm hoping
2 to light a fire under everybody.

3 MS. DAVIS: Thank you.

THE COURT: Thank you.

(HEARING CONCLUDED AT 11:39 a.m)

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35

STATE OF FLORIDA)

COUNTY OF PINELLAS)

I, Daniel J. Russette, Registered Merit Reporter
certify that I was authorized to and did
stenographically report the hearing; and that the
transcript is a true and complete record of my
stenographic notes.

I further certify that I am not a relative,
employee, attorney, or counsel of any of the parties,

nor am I a relative or employee of any of the parties'
attorney or counsel connected with the action, nor am I
financially interested in the action.

Dated this ____ day of June, 2010.

Daniel J. Russette, RMR

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