

A Compendium of Mortgage Cases

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BAC FUNDING CONSORTIUM INC. ISAOA/ATIMA, Appellant, v. Ginelle

JEAN-JACQUES, Serge Jean-Jacques, Jr., and U.S. Bank National

Association, as Trustee for the C-Bass Mortgage Loan Asset Backed

Certificates, Series 2006-CB5, Appellees.

No. 2D08-3553.

District Court of Appeal of Florida, Second District.

February 12, 2010.

Appeal from the Circuit Court, Sarasota County, Robert B. Bennett, Jr., J.

F. Malcolm Cunningham, Jr., and Amy Fisher of The Cunningham Law Firm, P.A., West Palm Beach, for Appellant. Page 937

Cindy L. Runyan of Florida Default Law Group, LP, Tampa, for Appellee U.S. Bank National Association.

No appearance for Appellees Ginelle M. Jean-Jacques and Serge Jean-Jacques, Jr.

VILLANTI, Judge.

BAC Funding Consortium Inc. ISAOA/ATIMA (BAC) appeals the final summary judgment of foreclosure entered in favor of U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset Backed Certificates, Series 2006-CB5 (U.S. Bank). Because summary judgment was prematurely entered, we reverse and remand for further proceedings.

On December 14, 2007, U.S. Bank filed an unverified mortgage foreclosure complaint naming the Jean-Jacqueses and BAC as defendants. The complaint included one count for foreclosure of the mortgage and a second count for reestablishment of a lost note. U.S. Bank attached a copy of the mortgage it sought to foreclose to the complaint; however, this document identified Fremont Investment and Loan as the "lender" and Mortgage Electronic Registrations Systems, Inc., as the "mortgagee." U.S. Bank also attached an "Adjustable Rate Rider" to the complaint, which also identified Fremont as the "lender."

Rather than answering the complaint, BAC responded by filing a motion to dismiss based on U.S. Bank's lack of standing. BAC argued that none of the attachments to the complaint showed that U.S. Bank actually held the note or mortgage, thus giving rise to a question as to whether U.S. Bank actually had

standing to foreclose on the mortgage. BAC argued that the complaint should be dismissed based on this lack of standing.

U.S. Bank filed a written response to BAC's motion to dismiss. Attached as Exhibit A to this response was an "Assignment of Mortgage." However, the space for the name of the assignee on this "assignment" was blank, and the "assignment" was neither signed nor notarized. Further, U.S. Bank did not attach or file any document that would authenticate this "assignment" or otherwise render it admissible into evidence.

For reasons not apparent from the record, BAC did not set its motion to dismiss for hearing. Subsequently, U.S. Bank filed a motion for summary judgment. At the same time, U.S. Bank voluntarily dismissed its count for reestablishment of a lost note, and it filed the "Original Mortgage and Note" with the court. However, neither of these documents identified U.S. Bank as the holder of the note or mortgage in any manner. U.S. Bank did not file the original of the purported "assignment" or any other document to establish that it had standing to foreclose on the note or mortgage.

Despite the lack of any admissible evidence that U.S. Bank validly held the note and mortgage, the trial court granted summary judgment of foreclosure in favor of U.S. Bank. BAC now appeals, contending that the summary judgment was improper because U.S. Bank never established its standing to foreclose.

The summary judgment standard is well-established. "A movant is entitled to summary judgment `if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.*, [928 So. 2d 1272, 1274](#) (Fla. 2d DCA 2006) (quoting Fla.R.Civ.P. 1.510(c)). When a plaintiff moves for summary judgment before the defendant has filed an answer, "the burden is upon the plaintiff to make it appear to a certainty that no answer which the defendant might properly serve could present a genuine issue of fact." *Settecasì v. Bd. of Pub. Instruction of Pinellas County*, [156 So. 2d 652, 654](#) (Fla. 2d DCA 1963); see also *W. Fla. Cmty. Builders, Inc. v. Mitchell*, [528 So. 2d 979, 980](#) (Fla. 2d DCA 1988) (holding that when plaintiffs move for summary judgment before the defendant files an answer, "it [is] incumbent upon them to establish that no answer that [the defendant] could properly serve or affirmative defense it might raise" could present an issue of material fact); *E.J. Assocs., Inc. v. John E. & Aliese Price Found., Inc.*, [515 So. 2d 763, 764](#) (Fla. 2d DCA 1987) (holding that when a plaintiff moves for summary judgment before the defendant files an answer, "the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact"). As these cases show, a plaintiff moving for summary judgment before an answer is filed must not only establish that no genuine issue of material fact is present in the record as it stands, but also that the defendant could not raise any genuine issues of material fact if the defendant were permitted to answer the complaint.

In this case, U.S. Bank failed to meet this burden because the record before the trial court reflected a genuine issue of material fact as to U.S. Bank's standing to foreclose the mortgage at issue. The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative. See *Mortgage Elec. Registration Sys., Inc. v. Azize*, [965 So. 2d 151, 153](#) (Fla. 2d DCA 2007); *Troupe v. Redner*, [652 So. 2d 394, 395-96](#) (Fla. 2d DCA 1995); see also *Philogene v. ABN Amro Mortgage Group, Inc.*, [948 So. 2d 45, 46](#) (Fla. 4th DCA 2006) ("[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question."). While U.S. Bank alleged in its unverified complaint that it was the holder of the

note and mortgage, the copy of the mortgage attached to the complaint lists "Fremont Investment & Loan" as the "lender" and "MERS" as the "mortgagee." When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint. *See, e.g., Hunt Ridge at Tall Pines, Inc. v. Hall*, [766 So. 2d 399, 401](#) (Fla. 2d DCA 2000) ("Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and may be the basis for a motion to dismiss."); *Blue Supply Corp. v. Novos Electro Mech., Inc.*, [990 So. 2d 1157, 1159](#) (Fla. 3d DCA 2008); *Harry Pepper & Assocs., Inc. v. Lasseter*, [247 So. 2d 736, 736-37](#) (Fla. 3d DCA 1971) (holding that when there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable"). Because the exhibit to U.S. Bank's complaint conflicts with its allegations concerning standing and the exhibit does not show that U.S. Bank has standing to foreclose the mortgage, U.S. Bank did not establish its entitlement to foreclose the mortgage as a matter of law.

Moreover, while U.S. Bank subsequently filed the original note, the note did not identify U.S. Bank as the lender or holder. U.S. Bank also did not attach an assignment or any other evidence to establish that it had purchased the note and mortgage. Further, it did not file any supporting affidavits or deposition testimony to establish that it owns and holds the note Page 939 and mortgage. Accordingly, the documents before the trial court at the summary judgment hearing did not establish U.S. Bank's standing to foreclose the note and mortgage, and thus, at this point, U.S. Bank was not entitled to summary judgment in its favor.

In this appeal, U.S. Bank contends that it was not required to file an assignment of the note or mortgage or otherwise prove that it validly held them in order to be entitled to summary judgment in its favor. We disagree for two reasons. First, because BAC had not yet answered the complaint, it was incumbent on U.S. Bank to establish that no answer that BAC could properly serve or affirmative defense that it might allege could raise an issue of material fact. Given the facial conflict between the allegations of the complaint and the contents of the exhibit to the complaint and other filings, U.S. Bank failed to meet this burden.

Second, regardless of whether BAC answered the complaint, U.S. Bank was required to establish, through admissible evidence, that it held the note and mortgage and so had standing to foreclose the mortgage before it would be entitled to summary judgment in its favor. Whether U.S. Bank did so through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer, it was nevertheless required to prove that it validly held the note and mortgage it sought to foreclose. *See Booker v. Sarasota, Inc.*, [707 So.2d 886, 889](#) (Fla. 1st DCA 1998) (holding that the trial court, when considering a motion for summary judgment in an action on a promissory note, was not permitted to simply assume that the plaintiff was the holder of the note in the absence of record evidence of such). **The incomplete, unsigned, and unauthenticated assignment attached as an exhibit to U.S. Bank's response to BAC's motion to dismiss did not constitute admissible evidence establishing U.S. Bank's standing to foreclose the note and mortgage, and U.S. Bank submitted no other evidence to establish that it was the proper holder of the note and/or mortgage.**

Essentially, U.S. Bank's argument in favor of affirmance rests on two assumptions: a) that a valid assignment or transfer of the note and mortgage exists, and b) that a valid defense to this action does not. However, summary judgment is appropriate only upon record proof — not assumptions. **Given the vastly increased number of foreclosure filings in Florida's courts over the past two years, which volume**

has taxed both litigants and the judicial system and increased the risk of paperwork errors, it is especially important that trial courts abide by the proper standards and apply the proper burdens of proof when considering a summary judgment motion in a foreclosure proceeding.

Accordingly, because U.S. Bank failed to establish its status as legal owner and holder of the note and mortgage, the trial court acted prematurely in entering final summary judgment of foreclosure in favor of U.S. Bank. We therefore reverse the final summary judgment of foreclosure and remand for further proceedings.

Reversed and remanded for further proceedings.

ALTENBERND and SILBERMAN, JJ., Concur. Page 940

Chemical Residential Mtg. v. Rector, 742 So.2d 300 (Fla. 1st DCA 1998)

CHEMICAL RESIDENTIAL MTG. v. RECTOR, 742 So.2d 300 (Fla.App. 1 Dist. 1998)

CHEMICAL RESIDENTIAL MORTGAGE, formerly known as Margaretten & Company, Inc., now known as Chase Manhattan Mortgage Corporation,
Appellant, v. TERRY RECTOR and PATRICIA RECTOR, et al., Appellees.

Nos. 97-4380 and 98-432.

District Court of Appeal of Florida, First District.

Opinion Filed October 7, 1998.

An appeal from the Circuit Court for Duval County, Judge Karen K. Cole.

Roger D. Bear of Roger D. Bear, P.A, Orlando, and Shawn G. Rader of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, for Appellant.

Fred Tromberg and Deborah L. Greene of Tromberg & Safer, Jacksonville, for Appellees Terry Rector and Patricia Rector.

BARFIELD, C.J.

In this appeal from several orders entered in a mortgage foreclosure action, we find that the trial court erred as a matter of law in its order of June 30, 1997, in which it denied the appellant/mortgagor's April 23, 1997, motion to amend the final judgment of foreclosure and reset the sale date, vacated the April 7, 1995, final judgment of foreclosure, and vacated the August 5, 1996, order amending the final judgment. We find that the complaint properly stated a cause of action for foreclosure by the holder of the note and mortgage. When they did not timely respond to the complaint, the appellees/mortgagees waived any denial of its allegations that the appellant was the owner and holder of the note and mortgage and that the appellees had defaulted on the note and mortgage. Because the lien follows the debt,[\[fn1\]](#) there was no requirement of attachment of a written and recorded assignment Page 301 of the mortgage in order for the appellant to maintain the foreclosure action.

The June 30, 1997, order is REVERSED. The appellees' motion for appellate attorney fees is DENIED. The appellant is entitled to appellate attorney fees. This case is REMANDED to the trial court, which shall reinstate the April 7, 1995, final judgment of foreclosure, vacate its order of June 30, 1997, and all subsequent orders, reconsider the appellant's motion to amend the final judgment of foreclosure and set a new sale date, and determine a reasonable appellate attorney fee.

DAVIS, J. and SHIVERS, DOUGLASS B., Senior Judge, Concur.

[fn1] See, Warren v. Seminole Bond & Mortgage Co., [172 So. 696](#) (Fla. 1937); Johns v. Gilliam, [184 So. 140](#) (Fla. 1938); American Central Ins. Co. v. Whitlock, [165 So. 380](#) (Fla. 1936); Collins v. W.C. Briggs, Inc., [123 So. 833](#) (Fla. 1929); Drake Lumber Co. v. Semple, [130 So. 577](#) (Fla. 1930).

Jeff-Ray Corp. v. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990)

JEFF-RAY CORP. v. JACOBSON, 566 So.2d 885 (Fla.App. 4 Dist. 1990)

JEFF-RAY CORPORATION, APPELLANT, v. JAMES CARY JACOBSON, BRUCE M. GOTTLIEB

AND MARY E. JACOBSON, APPELLEES.

Nos. 88-2594, 88-3363.

District Court of Appeal of Florida, Fourth District.

September 12, 1990.

Appeal from the Circuit Court, Broward County, Joseph E. Price, Jr., J.

Oliver Addison Parker of Law Office of Oliver Addison Parker, Fort Lauderdale, for appellant.

Charles A. Finkel of Jacobson and Associates, Hollywood, for appellees.

PER CURIAM.

We reverse the final summary judgment entered in favor of the plaintiffs in this mortgage foreclosure. The appellant made an un rebutted showing that it did not receive notice of the summary judgment motion or hearing until receipt of the judgment itself. **It was an abuse of discretion for the trial court to deny appellant's motion for relief and rehearing. The appellant has shown the likelihood that substantial prejudice may occur if not allowed to rebut and show misrepresentation or mistake in the amount due, which is substantially at variance with the defendant's claimed amortization.** Page 886

We recognize that an apparent prior lack of diligence in the defense may have influenced the trial court decision on the motion for rehearing. However, in the absence of findings or any rebuttal of the appellant's affidavits, the motion for rehearing should have been granted. We note that the defendants' motion was filed immediately upon receipt of the court order. *Cf. Zimmerman v. Vinylgrain Indus.*, [464 So.2d 1353](#) (Fla. 1st DCA 1985); *Lacore v. Giralda Bake Shop, Inc.*, [407 So.2d 275](#) (Fla. 3d DCA 1981). See also *Okeechobee Ins. Agency, Inc. v. Barnett Bank*, [434 So.2d 334](#) (Fla. 4th DCA 1983).

We also reverse and remand on the second point raised by appellant; that is, that the trial court erred in denying defendant's March 9, 1988, motion to dismiss for failure to state a cause of action. Appellees' complaint for mortgage foreclosure was filed on January 4, 1988, and alleged an assignment of the subject mortgage to them in 1986. However, it was not attached to the complaint. When the alleged assignment was finally produced, it was dated April 18, 1988, some four months *after the lawsuit was filed*.

Our opinion in *Safeco Insurance Co. v. Ware*, [401 So.2d 1129](#) (Fla. 4th DCA 1981), would support dismissal of the action based on failure to comply with Florida Rule of Civil Procedure 1.130. Given the scenario before us, appellees' complaint could not have stated a cause of action at the time it was filed,

based on a document that did not exist until some four months later. *Marianna & B.R. Co. v. Maund*, 62 Fla. 538, 56 So. 670 (Fla. 1911). If appellees intend to proceed on the April 18, 1988, assignment, they must file a new complaint.

Therefore, the final summary judgment is reversed and remanded for further proceedings in accordance with this opinion.

ANSTEAD and POLEN, JJ., concur.

STONE, J., concurs in part and dissents in part with opinion.

STONE, Judge, concurring in part and dissenting in part.

I concur in reversing the order denying appellant's motion for relief and rehearing for the reasons stated in the majority opinion. As to the second point discussed in the majority opinion and as to all other issues raised on appeal, I would affirm.

Johns, et ux., v. Gillian, et al., 134 Fla. 575 (1938)

JOHNS, ET UX., v. GILLIAN, ET AL., 134 Fla. 575 (1938)

184 So. 140

J.J. JOHNS, *et ux.*, v. SAM GILLIAN, CHARLES L. BROWN, *et ux.*, JUDITH BROWN,
a minor, heirs at law of PEARL M. BROWN, deceased, and all unknown heirs,
 devisees, grantees or other claimants of the said PEARL M. BROWN deceased.

Supreme Court of Florida.

Opinion Filed October 15, 1938.

Rehearing Denied November 14, 1938.

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[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.] Page 577

An appeal from the Circuit Court for Broward County, George W. Tedder, Judge.

G.H. Martin, for Appellants;

Robert J. Davis, for Appellees.

PER CURIAM.

This appeal is from a final decree rendered in a suit involving the foreclosure of a mortgage on real estate. In 1923 Pearl M. Brown, a married woman, was the owner of the property, and purchased building material from Everglade Lumber Company, a corporation, for the purpose of repairing and improving the property. In payment either in full or in part for the material, the said Pearl M. Brown, and her husband, Charles L. Brown, made, executed and delivered to the Everglade Lumber Company their promissory note secured by a mortgage upon the property. The mortgage was not recorded until shortly before the institution of this suit.

In 1926 Pearl M. Brown reduced the indebtedness to \$400.00 by payment to the corporation, for which it granted her an extension of 90 days on the payment of the balance, and delivered to her the original note with the understanding that the corporation would receive a new note as evidence of the unpaid balance. The new note was given and signed by Pearl M. Brown alone, which the corporation accepted. Pearl M. Brown died, leaving as her heirs her husband and a minor daughter. The husband subsequently remarried and moved away, leaving the property abandoned.

Sam Gillian, Plaintiff in the court below, had a considerable interest in Everglade Lumber Company, holding more Page 578 than a majority of the stock. In 1927-28, when the Everglade Lumber Company fell into financial difficulties, Gillian advanced money to the corporation for which it delivered to him a number of securities, among which was the mortgage herein sued on. No written assignment of the mortgage was made at that time.

Gillian was concerned for the protection of the property, and about 1932 he took possession of the mortgaged premises, allowing appellant J.J. Johns to move in. There is some conflict in the testimony relating to the arrangement entered into between Gillian and Johns. Gillian contends that Johns was to repair the house during his spare time and take care of it, that he (Gillian) was to furnish the materials for making it livable and that Johns could apply whatever charge he made for services on the rent. Johns contends that the property was to be the home of himself and his wife for the balance of their lives.

In January, 1937, Gillian began foreclosure proceedings in the name of the corporation, naming as defendants the heirs of Pearl M. Brown and Johns and his wife. When it was discovered that the debt and mortgage had been transferred to Gillian in 1927 or 1928 the directors of Everglade Lumber Company executed a written assignment, purporting to assign the mortgage to Gillian, and Gillian was substituted as plaintiff. Decrees *pro confesso* were entered against the heirs of Pearl M. Brown. Appellants J.J. Johns and Rachel Johns, his wife, appeared and upon their amended answer the issues were made up and the cause proceeded.

A final decree was rendered in favor of the plaintiff allowing him credits for payments made on taxes, materials and plumbing supplies. The lower court recognized Johns as a tenant of Gillian, and allowed the heirs of the mortgagor a credit for rent in the final decree, but refused to Page 579 allow appellant Johns any credit for the improvements made by him. From the final decree this appeal was taken.

Appellant Johns in his brief has stated his first question as follows:

"Where there is no proof that a corporation of Florida has or has not been dissolved, does an Assignment of Mortgage, executed by several persons designated to be directors, who signed in their respective individual capacity, operate to transfer ownership of a mortgage of which the corporation is mortgagee?"

Section 5672 C.G.L., 1927, sets out the method by which a corporation may convey lands:

"Any corporation may convey lands by deed sealed with the common or corporate seal and signed in its name by its president or any vice-president or chief executive officer."

The formal parts of the assignment are as follows:

"Know all men by these presents: That U.S. Cayot, Sam Gillian, Mrs. Ivey Stranahan and William Wingate, Directors of Everglade Lumber Company, a corporation, of the first part, in consideration of the sum of Ten Dollars and other valuable consideration, Dollars, lawful money of the United States, to them in hand paid by Sam Gillian, * * *," etc.

The attestation clause reads thus:

"In witness whereof, we have hereunto set our hands and seals, the 17th day of February, in the year one thousand nine hundred and thirty-seven. U.S. Cayot, Pres. (Seal); Sam Gillian, Sec. Tr. (Seal); Ivy J. Stranahan (Seal); William Wingate (Seal)."

The certificate of acknowledgment states that: "* * * before me personally came U.S. Cayot, Sam Gillian, Mrs. Ivey Stranahan and William Wingate, to me known to be the individuals described in and who executed the within and foregoing assignment, and they acknowledged before Page 580 me that they executed the same for the purposes therein expressed."

Private seals of officers and directors are not seals of the corporation. Mitchell v. St. Andrews' Bay Land Co., 4 Fla. 200. It is essential to the proper execution of a deed or mortgage by a corporation that it be done in the name and in behalf of the corporation, and under its corporate seal. The seals affixed in the above assignment are the private seals of the parties signing, and not the common seal of the corporation. The attestation clause is conclusive of this point, and as the corporation could only convey under its corporate seal, the assignment is necessarily inoperative as the foundation of any right or claim to the corporate property. A corporation may alter its seal at pleasure, and may adopt as its own the private seal of an individual if it chooses to do so, but when adopted it must be used as the seal of the individual, it cannot be treated as that of the corporation, and a declaration in the instrument that it is so affixed is conclusive of its character and effect. Brown, *et al.*, v. Farmer's Supply Depot Co., *et al.*, 23 Or. 541, 32 P. 548; Richardson v. Scott River W. & M. Co., 22 Cal. 150; Shackleton v. Allen Chapel African M.E. Church, 25 Mon. 421, 65 P. 428; Combe's Case, 9 Co. Rep. 75 (a), 76 (b), 77 Reprint 843, 847; Brinley v. Mann, 2 Cushing (Mass.) 337, 48 Am. Dec. 669; Notes to Am. Dec., Vol. 7, page 450. See also Campbell v. McLaurin Investment Co., 74 Fla. 501, 77 So. 277. However, it has frequently been held that a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt. If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident of the debt, unless there be some plain and clear agreement Page 581 to the contrary, if that be the intention of the parties. Jones, on Mortgages, Vol. 2, Sec. 1033; Collins v. W.C. Briggs, Inc., [98 Fla. 422](#), [123 So. 833](#); Miami Mortgage & Guaranty Co. v. Drawdy, [99 Fla. 1092](#), [127 So. 323](#).

The renewal note signed by Pearl M. Brown alone was, of course, void. Although an action may not be maintained on the note itself, it can be used in the foreclosure proceedings as evidence of the amount of the unpaid indebtedness and the terms on which the loan was made. National Granite Bank v. Tyndale, [176 Mass. 547](#), 57 N.E. 1022.

Although the assignment of the mortgage from Everglade Lumber Company to Gillian was defectively executed, it may be taken as evidence to show that the company had, before the commencement of the suit, sold and transferred to Gillian its entire interest in the note and mortgage. Dougherty v. Randall, 3 Mich. 571. A mere delivery of a note and mortgage, with intention to pass the title, upon a proper consideration, will vest the *equitable* interest in the person to whom it is so delivered. Daly v. New York & G.L. Ry. Co., *et al.* (N.J.), 38 A. 202.

"The transfer of the note or obligation evidencing the debt being as a general rule the equivalent of the assignment of the debt itself, such transfer operates as an assignment of the mortgage securing the debt, and it is not necessary that the mortgage papers be transferred, nor, in order that the beneficial interest shall pass, that a written assignment be made." 41 C.J., Mortgages, Sec. 686, pp. 673.

"Generally speaking, wherever it was the intention of the parties to a transaction that the mortgage interest should pass, but a written assignment was not made, or else the writing was insufficient to transfer the legal title to the security, equity will effectuate such intention and invest the Page 582 intended owner of the mortgage with the equitable title thereto." 41 C.J., Mortgages, Sec. 691, pp. 677.

Any form of assignment of a mortgage, which transfers the real and beneficial interest in the securities unconditionally to the assignee, will entitle him to maintain an action for foreclosure. See Jones on Mortgages, (8 Ed.), Sec. 1029, and cases cited. Or if there had been no written assignment, Gillian would be entitled to foreclose in equity upon proof of his purchase of the debt. Pease v. Warren, 29 Mich. 9, 18 Am. Rep. 58.

In the foreclosure proceedings appellee Gillian gave the following testimony in regard to the transfer of the debt owed by the Browns to Everglade Lumber Company:

"MR. DAVIS: Q. And who is the owner of this note at the present time?

"MR. MARTIN: Object to the question, it calls for the conclusion of the witness.

"WITNESS: A. I am.

"MR. DAVIS: Q. How did you acquire the note? A. Bought it from the Everglade Lumber Co.

"Q. And did they give you any evidence of the sale of the note?

A. Well, they assigned the note to me. I don't just understand the question.

"Q. Did they give you any written evidence of the transfer of the note to you? A. Well, when I take over papers of that kind the officers of the company transfer it as they do in any transaction."

And upon cross-examination by Mr. Martin, Gillian testified as follows:

"Q. Did you ever see any deed of conveyance of any sort to that property from any person? A. Why the lumber company conveyed their interests to me, whatever it is.

"Q. Did you or the lumber company, one of the two Page 583 have a deed to the property from the Browns or some other person?

A. Well, it isn't my understanding, with the exception of the mortgage deed, that we had. We had a mortgage there.

"Q. You told Mr. Johns here that you owned the property didn't you when you put him in possession?

A. No.

"Q. How long before Mr. Johns went into possession was it that you took possession of the property?

A. I don't know exactly, we made some transfers, at least things went to pieces, and I put up some money for the company, and they gave me as security that property and other stuff. I was trying to carry the company along, and that was the time that that happened.

"Q. When did you become the owner of this mortgage then?

A. It was back probably in 1927 or '28. That was the time we had the trouble. That was when they transferred a bunch of the stuff to me as security. I could find out by going to the records.

"Q. When you started this case last winter, you told your attorney that the Everglade Lumber Co. owned that mortgage, did you not? A. Well, I think the mortgage is made out to me, or something to that effect.

"Q. But you owned the mortgage from 1927? A. Yes, down to date, from whatever time the transfers were made, of bunch of securities, I don't remember what time it was, I just don't remember."

The testimony as to the assignment of the debt and other securities was uncontradicted. We are of the opinion that this was sufficient to constitute Gillian the equitable owner of the mortgage and entitle him to foreclose the same.

Appellants further contend that irrespective of where the ownership of the alleged mortgage reposes, the fact that appellants made valuable improvements on the mortgaged property at the request of Gillian, who represented himself Page 584 to be the owner of the property, gives appellants an equity in the property to the extent of the value of the improvements, that is superior to the rights of the holder of the mortgage. This contention is based upon allegations and testimony that Gillian represented himself to be the owner of the property in question and Johns, without knowledge of the real state of the title, was misled by these misrepresentations. However, Gillian denied that he made such representations and contended that his understanding with Johns was that he (Johns) could move into the property involved herein and repair it during his spare time, that Gillian would furnish the materials, and that Johns could apply whatever charge he made for services on the rent.

The decree of the Court below could not have been rendered denying appellant Johns the right to compensation for his alleged improvements unless the Chancellor found that Gillian had not represented himself to be the owner of the property and Johns made the improvements with knowledge of the true state of the title. Because of the fact that the evidence upon the question of appellee Gillian's representations as to his ownership of the property involved herein was conflicting, we cannot say the conclusion of the Chancellor was clearly erroneous. *Smith v. Hollingsworth*, 85 Fla. 431, 96 So. 394.

The rule as to when an equitable lien arises by implication for improvements or benefits to property is set out as follows in 37 C.J. 321, Liens, Sec. 26:

"An equitable lien on the property benefited has been held to arise where a person in good faith, and under a mistake as to the condition of the title, makes improvements, renders services, or incurs expenses that are permanently beneficial to another's property. But there is no such lien where the expenditures are made with knowledge of the Page 585 real state of the title; nor will such a lien arise where there is an adequate remedy at law."

And in a note in Ann. Cas. 1916B, 57, it is stated:

"As a corollary of the rule that an occupying claimant ousted by a paramount title can recover for such improvements only as are made under a *bona fide* belief in his own title, many decisions have announced the broad proposition that no recovery can be had for improvements made with actual notice of the existence of an adverse claim which subsequently proves to be superior to that of the occupant."

Notice in this connection does not mean direct and positive information; but anything calculated to put a man of ordinary prudence on the alert is notice. Note in Ann Cas. 1916B, 59; Lee v. Bowman, *et al.*, 55 Mo. 400.

Appellant Johns in his testimony stated that when he first started to make repairs on the property he went to Mr. Moore, the Tax Collector, at the request of the appellee Gillian to get a tax statement on the property, and that Mr. Moore informed him that appellee Gillian did not own the property. This was clearly sufficient to put a man of ordinary prudence on the alert.

The facts, as found by the Chancellor and by which we are bound, are that Gillian did not represent himself to be the owner of the property in question, that Johns had knowledge of the real state of the title, and that the improvements were made subsequently to Johns' acquisition of such knowledge. Under these facts the cases cited by appellants in their brief based upon the alleged fraudulent representations of Gillian are not controlling. The decree of the Circuit Court is therefore affirmed.

ELLIS, C.J., and WHITFIELD, TERRELL, BROWN, BUFORD and CHAPMAN, J.J., concur.
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JP Morgan Chase v. New Millennial, 6 So.3d 681 (Fla. 2nd DCA 2009)

JP MORGAN CHASE v. NEW MILLENNIAL, 6 So.3d 681 (Fla.App. 2 Dist. 2009)

JP MORGAN CHASE, as Trustee for Residential Funding Corporation,
Appellant, v. NEW MILLENNIAL, LC; Branch Banking & Trust Company,
Successor by merger to Republic Bank; Ross W. Jahren; Unknown Tenant
No. 1; Unknown Tenant No. 2; and All Unknown Parties Claiming Interests by,
Through, under or against a named defendant to this action, or having or
claiming to have any right, title, or interest in the property herein
described, Appellees.

No. 2D07-5937.

District Court of Appeal of Florida, Second District.

March 18, 2009.

Appeal from the Circuit Court, Pinellas County, W. Douglas Baird, J. Page 682

Roy A. Diaz of Smith, Hiatt & Diaz, P.A., Fort Lauderdale, for Appellant.

A. Christopher Kasten and Karen Cox of Bush Ross, P.A., Tampa, for Appellees New Millennial, LC, and Branch Banking & Trust Company.

No appearance for remaining Appellees.

VILLANTI, Judge.

JP Morgan Chase (JP Morgan) appeals an order granting summary judgment in favor of New Millennial, L.C., and Branch Banking & Trust (BB & T). The appeal arises from a mortgage foreclosure action filed by JP Morgan against New Millennial and BB & T. JP Morgan sought to foreclose two mortgages which originated in favor of AmSouth Bank and which were subsequently assigned to JP Morgan. Because the assignments from AmSouth to JP Morgan were not recorded, the trial court granted summary judgment against Page 683 JP Morgan and in favor of New Millennial and BB & T, finding that New Millennial was a subsequent purchaser and BB & T was a subsequent creditor for valuable consideration without notice of the assignments to JP Morgan. Because the trial court erred in so holding under the facts of this case, we reverse.

FACTS

In 2000, Ross W. Jahren obtained two mortgages from AmSouth in connection with the purchase of real property located in Pinellas County. The two mortgages in favor of AmSouth were recorded in the public records of Pinellas County. In 2004, AmSouth assigned the mortgages to JP Morgan, but this assignment was not recorded in the public records.

In 2006, Jahren entered into an agreement to sell the property to New Millennial. BB & T financed New Millennial's purchase. As part of the sales process, New Millennial's closing agent performed a title search on the property and discovered the two recorded AmSouth mortgages, which were reflected as still outstanding. Chicago Title Insurance Company then issued a Commitment for Title Insurance indicating that it would issue title insurance upon receipt of the "cancelled note[s] and satisfaction[s] or release[s]" for the two mortgages executed by Jahren in favor of AmSouth. New Millennial's closing agent failed to obtain the cancelled notes and satisfactions or releases requested by Chicago Title. Instead, the closing agent contacted AmSouth by telephone and was allegedly told by an unidentified^[fn1] AmSouth representative that the loans were paid off and that written confirmation of this fact would be provided. On April 24, 2006, someone on behalf of AmSouth faxed to the closing agent two computer screen printouts styled "Installment Loan Account Profile," which reflected that the loans had a "close date" of June 30, 2004, and had a current balance of \$0. The documents also stated "*PD OFF." Jahren and New Millennial finalized the sale of the property without obtaining the cancelled notes and satisfactions or releases specifically requested by Chicago Title.

The AmSouth mortgages were never satisfied, and JP Morgan began foreclosure proceedings as AmSouth's assignee. Importantly, New Millennial and BB & T did not defend by arguing that the two notes had been paid off and the mortgages satisfied.^[fn2] Rather, they defended by arguing that the mortgages were ineffective and unenforceable against them because JP Morgan had not recorded the assignments received from AmSouth, as required by section [701.02](#), Florida Statutes (2004). Both sides filed motions for summary judgment. On September 11, 2007, the trial court denied JP Morgan's motion for summary judgment and granted New Millennial and BB & T's motion, finding:

1. AmSouth Bank assigned the two mortgages at issue in this case to JP Morgan Chase ("**Assignments**"). The Assignments were not recorded in accordance with § [701.02](#), *Florida Statutes*. Page 684
2. New Millennial is a subsequent purchaser for valuable consideration, *was without notice of the Assignments*, and is protected by § [701.02](#), *Florida Statutes*.
3. BB & T is a subsequent creditor for valuable consideration, *was without notice of the Assignments*, and is protected by § [701.02](#), *Florida Statutes*.
4. The mortgages being foreclosed by JP Morgan Chase in this case are ineffective and unenforceable against New Millennial and BB & T[.]

(Underline emphasis added.) The court subsequently denied JP Morgan's motion for rehearing or reconsideration, stating:

Moreover, the Court finds that the Defendant New Millennial was a subsequent purchaser for valuable consideration, who *had no knowledge or notice of the mortgages at issue here*. Rather, New Millennial made a diligent inquiry to determine whether any amounts were due on the AmSouth mortgage and

they were advised that the loan in question was paid in full. Moreover Defendant BB & T is a subsequent creditor for valuable consideration with *no knowledge or notice of the mortgages at issue*. Accordingly, pursuant to section [701.02](#), *Florida Statutes*, the mortgages at issue are not effective or enforceable against New Millennial or BB & T.

(Underline emphasis added.) This appeal followed.

ANALYSIS

We review de novo an order granting summary judgment. *Knowles v. JPMorgan Chase Bank, N.A.*, [994 So.2d 1218, 1219](#) (Fla. 2d DCA 2008). Summary judgment should be granted "only if (1) no genuine issue of material fact exists, viewing every possible inference in favor of the party against whom summary judgment has been entered, and (2) the moving party is entitled to a judgment as a matter of law." *Id.* (citations omitted).

Chapter [701](#), *Florida Statutes* (2004), is entitled "**ASSIGNMENT AND CANCELLATION OF MORTGAGES.**" Section [701.01](#) states:

Assignment. — Any mortgagee may assign and transfer any mortgage made to her or him, and the person to whom any mortgage may be assigned or transferred may also assign and transfer it, and that person or her or his assigns or subsequent assignees may lawfully have, *take and pursue the same means and remedies which the mortgagee may lawfully have, take or pursue for the foreclosure of a mortgage and for the recovery of the money secured thereby.*

(Underline emphasis added.) Section [701.02](#) provides, in relevant part:

Assignment not effectual against creditors unless recorded and indicated in title of document.

—

(1) No assignment of a mortgage upon real property or of any interest therein, shall be good or effectual in law or equity, against creditors or subsequent purchasers, for a valuable consideration, *and without notice*, unless the assignment is contained in a document which, in its title, indicates an assignment of mortgage and is recorded according to law.

(2) The provisions of this section shall also extend to assignments of mortgages resulting from transfers of all or any part or parts of the debt, note or notes secured by mortgage, and none of same shall be effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration without notice, unless a duly executed assignment be recorded according to law.

(Underline emphasis added.)

JP Morgan first argues that the trial court misapplied section [701.02](#) when Page 685 it held that New Millennial was a subsequent purchaser and BB & T was a subsequent creditor for valuable consideration and without notice of the assignments. JP Morgan's position is that section [701.02](#)(1) only applies to estop an earlier purchaser/assignee of a *mortgage*"the person or entity that loaned the money involved in the mortgage and obtained a security interest on the piece of property — from claiming priority in the same mortgage chain as against a subsequent assignee of the same mortgage when the earlier *mortgagee* fails to record the earlier assignment of the mortgage. In other words, if the original

mortgagee assigns the mortgage to Entity A and Entity A fails to record that assignment, Entity A cannot claim priority over a latter assignee of the same mortgage (Entity B). We agree with JP Morgan's interpretation of the statute.

Although this is an issue of first impression in this district, we are guided in its resolution by *Kapila v. Atlantic Mortgage & Investment Corp. (In re Halabi)*, [184 F.3d 1335](#) (11th Cir. 1999). In that case, Mr. Halabi gave Republic Savings Bank a mortgage on real property. *Id.* at 1336. Although Republic Savings Bank recorded the mortgage, that mortgage was later assigned several times and the entity to which the mortgage was last assigned failed to record its assignment. *Id.* When the bankruptcy trustee, standing in the shoes of mortgagor Halabi, tried to avoid the mortgage debt based on the last assignee's failure to record the assignment, the bankruptcy court held that section "[701.02](#)'s recording requirement is applicable only to (and enforceable by) competing creditors or subsequent *bona fide* purchasers of the mortgagee, not by the mortgagor." *Id.* at 1338 (underline emphasis added). The court concluded that the statute does not protect the mortgagor, nor anyone "claiming under a mortgagor." *Id.* We agree with the reasoning of *In re Halabi* because its interpretation of the statute makes sense.

First, "[w]hen interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in the statute." *Joshua v. City of Gainesville*, [768 So.2d 432, 435](#) (Fla. 2000). Here, the title of chapter 701 — Assignment and Cancellation of Mortgages — bears out the obvious: it applies to purchasers of mortgages, not to purchasers of real property or their lenders.

Furthermore, as noted in *In re Halabi*:

The recording requirement is not intended to protect one claiming under a mortgagor-against whose property there is already a perfected mortgage-with respect to subsequent assignments of the mortgage. The mortgagor has actual notice of the original mortgage, and *anyone claiming under the mortgagor has constructive notice if the mortgage is recorded*. From the point of view of the mortgagor or someone standing in his shoes, *a subsequent assignment of the mortgagee's interest-whether recorded or not-does not change the nature of the interest of the mortgagor or someone claiming under him*. Nor should a failure to record any subsequent assignment afford the mortgagor or [anyone] standing in his shoes an opportunity to avoid the mortgage.

[184 F.3d at 1338](#) (emphasis added). Because the mortgagor's successor "had constructive notice of a mortgage *by whomever held*, he cannot assume the status of a *bona fide* purchaser without notice." *Id.* at 1338 n. 1 (underline emphasis added). Any other interpretation of section [701.02](#) would turn well-established secured transaction principles on their heads: a buyer could effectively ignore a recorded mortgage simply because the mortgage/note Page 686 has been sold in the aftermarket to a different financial institution which has failed to record the assignment. Like the court in *In re Halabi* we find that "[w]hile each subsequent assignment had a bearing on the rights of the mortgagees *inter se*, it did not affect the rights or interests of the debtor or the debtor's [successor]. . . ." *Id.*, at 1339.

As pointed out in *In re Halabi*, in *Bradley v. Forbs*, [116 Fla. 350, 156 So. 716](#) (1934), the Florida Supreme Court held that the predecessor of section [701.02](#) applied only to creditors or subsequent purchasers of a mortgagee. *In re Halabi* [184 F.3d at 1338](#) n. 1. The court in *Bradley* explained:

[W]hen the original mortgage was recorded and no satisfaction thereof entered upon the record, in the absence of other definite proof to the contrary, it must be assumed that the mortgage is still in full force

and effect in the hands of some one and a subsequent purchaser or mortgagee has the right to require the production of the mortgage and note which it is given to secure, or a satisfaction on record.

[156 So. at 718](#); see also *Huntington Nat'l Bank v. Merrill Lynch Credit Corp.*, [779 So.2d 396, 398](#) (Fla. 2d DCA 2000) ("As long as the debt remained and the mortgage was unsatisfied of record, there was no right to presume that it had been satisfied or extinguished.").

The fact of the matter is that, in this case, the original mortgages on the property were duly recorded and no satisfaction was entered on the public record. New Millennial and BB & T had actual knowledge of the existence of the two recorded mortgages and also had actual knowledge that the public records reflected that those mortgages had not been satisfied. Therefore, until they received satisfactions on record, New Millennial and BB & T should have assumed that the mortgages were still in full force and effect in someone's hands. Their title insurance agent, Chicago Title, specifically requested "production of the cancelled note[s] and satisfaction[s] or release[s]" of the recorded mortgages executed by Jahren to AmSouth. Nevertheless, New Millennial and BB & T failed to obtain those documents which would have eliminated any doubt that the debt had been satisfied or which would have alerted them to the fact that they needed to withhold monies at the closing to satisfy the notes and mortgages. By failing to do so, they cannot be considered a bona fide purchaser and a bona fide creditor without notice and cannot consequently avoid the mortgages assigned to JP Morgan. Accordingly, the trial court erred in concluding that New Millennial and BB & T could avoid the mortgages just because JP Morgan had failed to record the assignments.[\[fn3\]](#)

Next, New Millennial and BB & T posit that even if this court agrees with the reasoning and holding of *In re Halabi* that case is inapplicable here because their representatives followed the procedures set forth in section [701.04](#) by obtaining a computer printout furnished by AmSouth indicating that the recorded debt had been satisfied. Therefore, their argument follows, they had no notice of the assignment, and they reasonably believed the original mortgages had been paid off. The trial court adopted this argument, finding that New Millennial was a bona fide purchaser Page 687 without notice because it had "diligently" inquired about the AmSouth mortgages and had been advised that they had been paid in full. We reject New Millennial and BB & T's argument because the procedures outlined in section [701.04](#) were *not* followed in this case.

Section [701.04](#) provides, in relevant part:

Cancellation of mortgages, liens, and judgments. —

(1) Within 14 days after receipt of *the written request of a mortgagor*, the holder of a mortgage shall deliver to the mortgagor at a place designated in the written request *an estoppel letter* setting forth the unpaid principal balance, interest due, and the per diem rate. Whenever the amount of money due on any mortgage, lien, or judgment shall be fully paid to the person or party entitled to the payment thereof, the mortgagee, creditor, or assignee, or the attorney of record in the case of a judgment, to whom such payment shall have been made, *shall execute in writing an instrument acknowledging satisfaction of said mortgage, lien, or judgment and have the same acknowledged, or proven, and duly entered of record in the book provided by law for such purposes in the proper county. Within 60 days of the date of receipt of the full payment of the mortgage, lien, or judgment*, the person required to acknowledge satisfaction of the mortgage, lien, or judgment shall send or cause to be sent the recorded satisfaction to the person who has made the full payment. In the case of a civil action arising out of the provisions of this section, the prevailing party shall be entitled to attorney's fees and costs.

(Underline emphasis added.) The plain effect of the above provision is to enable the closing agent to timely obtain a satisfaction of mortgage if it remits to the mortgagee the amount set forth in an estoppel letter. In this case, the title search reflected two recorded mortgages on the property. In an affidavit signed by Jahren on May 8, 2006, before closing on the transaction, he stated that the property was free and clear of all encumbrances, *except* those which were shown on the Title Insurance Commitment issued by Chicago Title. By so qualifying his affidavit, Jahren thereby acknowledged the debt with AmSouth was still outstanding as of that date. Yet, neither Jahren nor New Millennial nor its agents made a *written* request for an estoppel letter related to the two recorded mortgages, as required by section [701.04\(1\)](#). Instead, they proceeded to closing even though there was no recorded instrument acknowledging satisfaction of [the] mortgage, lien, or judgment . . . *duly entered of record in the book provided by law for such purposes in the proper county.*" § [701.04\(1\)](#) (emphasis added). The computer printouts faxed by AmSouth to the closing agent pursuant to a telephone inquiry were, at best, a red flag that raised the questions: (1) Did the printouts mean that the mortgages and notes were satisfied *two years prior* or were the notes "closed out" because they and the mortgages were transferred to or purchased by a third party?;[fn4](#) and (2) Given that section [701.03](#) requires that the mortgagee cancel a fully paid mortgage "within 60 days" of payment, why was there no satisfaction of the mortgages on record *two years* after the debt was allegedly Page 688 satisfied? Thus, the printout screens obtained by New Millennial and BB & T could not be viewed as an estoppel letter, nor could they serve as substitute for duly recorded satisfactions of mortgage documents. Under any interpretation of the undisputed facts, the continued existence and validity of the mortgages and notes was never explained away so as to establish New Millennial's and BB & T's status as bona fide purchaser and creditor for value.

CONCLUSION

"[I]t is the debt and not the mere evidence of it which is secured." *Drake Lumber Co. v. Semple*, [100 Fla. 1757, 130 So. 577, 581](#) (1930). Under the circumstances of this case, in the absence of cancelled notes or recorded satisfactions of the two mortgages, the trial court could not legally declare the loans "ineffective and unenforceable" as against New Millennial and BB & T. To do so deprived JP Morgan of its right to pursue the means and remedies of foreclosure, which are legal attributes of the mortgages it purchased. Hence, we reverse the summary judgment. Because the record is clear that JP Morgan's priority was not impugned vis-à-vis the Appellees, we remand for the trial court to vacate the summary judgment and reinstate the foreclosure proceedings with the priority status established as set forth in this opinion.[fn5](#)

Reversed and remanded with directions.

ALTENBERND and DAVIS, JJ., Concur.

[fn1] The closing agent did not obtain the name of the AmSouth representative who provided this information.

[fn2] Although Jahren is a nominal party to this appeal and did not file an appearance, we note that his defenses below did not create a disputed issue of material fact as to whether the two AmSouth notes had been paid off and the mortgages satisfied. He did not attach proof of payment, such as checks showing that the two AmSouth notes had been paid off and the mortgages satisfied. Rather, he filed

copies of the same two computer screen printouts discussed above. As discussed herein, these documents did not demonstrate that the mortgages had been satisfied.

[fn3] Our opinion should not be viewed as condoning JP Morgan's failure to record the assignment. Rather, we simply conclude that the failure to record the assignment here was not fatal to JP Morgan's right as a matter of law to pursue the remedy of foreclosure. Obviously, a large part of the underlying litigation would have been avoided if the assignment had been duly recorded, as is typically done.

[fn4] In opposition to New Millennial and BB & T's motion for summary judgment, JP Morgan filed the affidavit of Brian Buzbee, Assistant Vice President of Regions Bank. Regions Bank is the successor to AmSouth. Mr. Buzbee's affidavit stated that the type of screen printout obtained by New Millennial's closing agent would show a zero balance on a loan either when a loan is legitimately paid off in full *or* when the loan was transferred, assigned, or sold.

[fn5] Although this opinion likely precludes New Millennial and BB & T from obtaining relief from JP Morgan, nothing herein should be construed to preclude them from pursuing any other remedies that may be available to them against any other party involved in this transaction.

Mortgage Elec. v. Azize, 965 So.2d 151 (Fla. 2nd DCA 2007)

MORTGAGE ELEC. v. AZIZE, 965 So.2d 151 (Fla.App. 2 Dist. 2007)

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. George AZIZE; Unknown Spouse Of George Azize; John Doe, Jane Doe as Unknown Tenant(s) In Possession of the Subject Property # 1; John Doe, Jane Doe as Unknown Tenant(s) In Possession of the Subject Property # 2, Appellees.

No. 2D05-4544.

District Court of Appeal of Florida, Second District.

February 21, 2007.

Appeal from the Circuit Court, Pinellas County, Walt Logan, J.

Robert M. Brochin of Morgan, Lewis & Bockius LLP, Miami, for Appellant.

No appearance for Appellees.

John R. Hamilton of Foley & Lardner, LLP, Orlando, for Amicus Curiae Federal National Mortgage Association.

Elliot H. Scherker of Greenberg Traurig, P.A., Miami, for Amicus Curiae Chase Home Finance LLC.
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William P. Heller of Akerman Seuterfitt, Fort Lauderdale, for Amicus Curiae Countrywide Home Loans, Inc.

Michael Ray Gordon and Kenton W. Hambrick, McLean, VA, for Amicus Curiae Federal Home Loan Mortgage Corporation.

W. Bard Brockman of Powell Goldstein, LLP, Atlanta, GA, for Amicus Curiae Mortgage Bankers Association.

April Carrie Charney, Jacksonville, for Amicus Curiae Jacksonville Area Legal Aid, Inc.

DAVIS, Judge.

Mortgage Electronic Registration Services, Inc. (MERS), appeals the trial court's dismissal with prejudice of its complaint seeking reestablishment of a lost note and the foreclosure of a mortgage. The trial court

determined that MERS was not a proper party to bring the action and dismissed the complaint with prejudice for failure to state a cause of action. We reverse.

On May 27, 2004, George Azize executed and delivered a promissory note and a mortgage as part of the closing in the purchase of real property in Pinellas County. The note listed Aegis Lending Corporation as payee. However, the mortgage given to secure the note identified MERS as the mortgagee. The mortgage further specified that in this capacity MERS was serving as the nominee for the lender, which was identified as Aegis. The mortgage included the following language:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

The mortgage also specified, "MERS is the mortgagee under this Security Instrument."

In February 2005, MERS filed a complaint seeking to reestablish a promissory note and to foreclose a mortgage. The complaint identified the plaintiff as "Mortgage Electronic Registration Systems, Inc. as nominee for Aegis Lending Corporation." The complaint alleged that Azize was in default of the note and mortgage for failing to make the payment due on September 1, 2004, and all payments due subsequent to that date. In count one of the two-count complaint, MERS alleged that it was the owner of the note and that the note had been lost or destroyed after MERS acquired it. Specifically, MERS alleged that because the note was in its possession when it was lost, MERS was entitled to enforce the note. The complaint also explained that the loss of the note was not due to a transfer by MERS or a lawful seizure. The complaint did not allege the circumstances by which MERS came into possession of the note, specifying only that MERS was the owner and holder of the note. MERS asked the trial court to reestablish the lost note.

In count two, MERS sought foreclosure of the mortgage based on the default by Azize. MERS alleged that it owned the note and mortgage and that the note was secured by the mortgage.

No answer or responsive pleading was filed by Azize. The trial court, however, sua sponte issued an order to show cause why complaint should not be dismissed for lack of proper plaintiff. In this order, the trial court noted that multiple cases were pending in which MERS was seeking foreclosure Page 153 of mortgages and that, in each case, the plaintiff was either MERS, individually, or MERS acting as nominee for another plaintiff. [\[fn1\]](#) Because the trial court questioned how MERS could file as plaintiff in the capacity of nominee of another corporation, the order set a show cause hearing to allow MERS to demonstrate that it was a proper party to bring the action.

Although counsel for MERS filed a memorandum of law addressing the general issue raised by the trial court's order and appeared at the hearing, neither Azize nor anyone on his behalf, was present at the hearing. Following the hearing, the trial court dismissed all of the pending cases in which MERS sought mortgage foreclosures, entering a specific order in this case that referred to a much longer general order that addressed the common issue of all the cases. Although many issues were discussed at the hearing and in the general order, this court need not address all of those issues as the case sub judice is limited to the issues presented by the pleadings and addressed by the trial court, which present the question of whether MERS is the owner of the note.

This court reviews a trial court's decision to dismiss a complaint de novo. *Trotter v. Ford Motor Credit Corp.*, [868 So.2d 593](#) (Fla. 2d DCA 2004). Similarly, this court reviews findings regarding standing de novo. *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, [801 So.2d 175](#) (Fla. 5th DCA 2001). In most circumstances, the trial court's dismissal of a complaint for failure to state a cause of action should be without prejudice to the plaintiff's amendment of the complaint to cure the deficiencies. See *Wittington Condo. Apartments v. Braeinar Corp.*, [313 So.2d 463, 466](#) (Fla. 4th DCA 1975) (stating that a pleading's failure to allege the proper representation is not a basis for a final dismissal until an opportunity to amend has been granted).

The trial court's decision, as reflected in its general order, is based on its finding that MERS could never, under any circumstances, be the proper plaintiff to bring the foreclosure action. Specifically, the trial court found that because MERS was not the owner of the beneficial interest in the note, even if the lost note was reestablished and MERS proved that it was the owner and holder of the note, MERS could not properly bring the foreclosure action.

We disagree. The holder of a note has standing to seek enforcement of the note. See *Troupe v. Redner*, [652 So.2d 394](#) (Fla. 2d DCA 1995); see also *Philogene v. ABN Amro Mortgage Group, Inc.*, [948 So.2d 45, 45](#) (Fla. 4th DCA 2006) ("[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question."). Furthermore, standing is broader than just actual ownership of the beneficial interest in the note. "The Florida real party in interest rule, Fla.R.Civ.P. 1.210(a), permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest." *Kumar Corp. v. Nopal Lines, Ltd.*, [462 So.2d 1178, 1183](#) (Fla. 3d DCA 1985).

Here, MERS's counsel explained to the trial judge at the hearing that, in these transactions, the notes are frequently transferred to MERS for the purpose of foreclosure without MERS actually obtaining the beneficial interest in the note. Although Page 154 the complaint does not allege how or why MERS came to be the owner and holder of the note, the trial court's dismissal was not based on this deficit.^[fn2] Rather, the trial court found that even if MERS was the holder of the note based on a transfer by the lender or a servicing agent, MERS could never be a proper plaintiff because it did not own the beneficial interest in the note.^[fn3] This was an erroneous conclusion.

MERS alleged that it is the owner and holder of the note and mortgage, and that allegation has not been contested by responsive pleading. Assuming that the complaint properly states a cause of action to reestablish the note and that MERS can show prima facie proof of such allegations, MERS would have standing as the owner and holder of the note and mortgage to proceed with the foreclosure. We also note that the trial court's conclusion that MERS further lacked standing because one corporation cannot serve as the agent for another corporation is incorrect. See 2 Fla. Jur.2d *Agency and Employment* § 3 (2005). Although the trial judge was particularly concerned about MERS's status as nominee of Aegis, in light of the allegations of the complaint, the language contained in the note and mortgage, and Azize's failure to contest the allegations, the issue of MERS's ownership and holding of the note and mortgage was not properly before the trial court for resolution at this stage of the proceedings. Accordingly, we reverse the dismissal and remand for further consideration.

Reversed and remanded.

NORTHCUTT and SILBERMAN, JJ., Concur.

[fn1] The same trial court order of dismissal was filed in twenty separate mortgage foreclosure actions.

[fn2] Since the trial court did not base its ruling on this issue, we offer no opinion as to whether the complaint fails to properly plead a cause of action without this information being alleged.

[fn3] MERS's counsel explained to the trial court at the hearing that notes such as the one executed in this case are frequently sold on the secondary mortgage market and then often sold again to investors, such as insurance companies or mutual funds. As such, technically, there may be several owners of the beneficial interest in a note. Additionally, to facilitate the handling of these transactions, the owners contract with a servicing agent to collect the payments and distribute the proceeds to the owners. MERS's counsel advised the court that such collection agents have been determined to have standing to seek enforcement of such notes for the benefit of the owners. *See Greer v. O'Dell*, 305 F.3d 1297(11th Cir.2002).

Mortgage Elec. v. Badra, 991 So.2d 1037 (Fla. 4th DCA 2008)

MORTGAGE ELEC. v. BADRA, 991 So.2d 1037 (Fla.App. 4 Dist. 2008)

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. Jubran A.

BADRA; Emily G. Badra; Unknown Person(s) in Possession of the Subject

Property; Monarch Country Club Homeowners Association, Inc.; Martin Downs

Property Owners Association, Inc., Appellees.

No. 4D07-4605.

District Court of Appeal of Florida, Fourth District.

October 15, 2008.

Appeal from the Circuit Court, Nineteenth Judicial Circuit, Martin County, Larry Schack, J.

Steven Ellison and Franklin Homer of Broad and Cassel, West Palm Beach, for appellant.

Joseph L. Mannikko of Mannikko & Baris, Palm City, for Appellees-Badra.

STONE, J.

This is the third attempt to foreclose on the Badras' \$320,000 home mortgage. Mortgage Electronic Registration Systems, Inc. (MERS), the mortgagee by assignment, appeals a summary judgment entered in favor of the mortgagor, the Badras. The trial court concluded that the promissory note, which was lost, cannot be re-established under the 2004 version of section [673.3091](#), Florida Statutes, notwithstanding an earlier final judgment of foreclosure of this note and mortgage (reversed on other grounds) that re-established the note.

As this court previously explained in *Badra II*, the following is the history of the note's ownership:
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On September 16, 1988, the Badras executed and delivered to Amerifirst Bank a promissory note and purchase money mortgage. . . . On October 1, 1991, the promissory note was assigned to State Street Bank and Trust Company (State Street Bank), as Trustee, through the Resolution Trust Corporation [RTC]. . . . The original note was lost on October 1, 1991, when [RTC] transferred the mortgage and note to State Street Bank.

State Street Bank & Trust Co. v. Badra (Badra II), [765 So.2d 251](#), [252](#) (Fla. 4th DCA 2000).

In the first foreclosure (*Badra I*), State Street Bank (State Street) sued to both reestablish the note and foreclose on the mortgage. There, the trial court entered a final judgment, ruling that it was adopting the fact findings made on the record. One of the court's findings was a determination that the note was re-established pursuant to section [71.011](#). The final judgment, however, was in favor of the Badras because that trial court concluded, as to the foreclosure of the mortgage based on the re-established note, that State Street failed to meet a condition precedent to accelerating the mortgage. Specifically, State Street did not give proper notice prior to accelerating. With respect to the re-established note, the judgment is clear that it is a definitive ruling in favor of State Street Bank. The effect of the judgment in *Badra I* was simply to permit the Badras to cure the initial default in the re-established note, as there could be no acceleration of the note for that default without proper notice. No appeal was taken from *Badra I*.

A year later, State Street instituted a second action. The trial court granted the Badras' motion for summary judgment, finding the second action barred by res judicata. *Id.* This court reversed and remanded for further proceedings. *Id.* at 255. However, State Street failed to prosecute, and the case was ultimately dismissed on January 9, 2003. State Street then assigned the note and mortgage to MERS.

Finally, on January 21, 2003, MERS, as successor in interest by assignment, instituted the instant action to re-establish the note and to foreclose on the mortgage. In granting summary judgment in favor of the Badras, the trial court found the lost note unenforceable as a matter of law. In this action, MERS relied on section [673.3091](#), Florida Statutes. In the earlier foreclosures, the mortgagee relied on section [71.011](#) in seeking to re-establish the note.

We conclude that Badras' motion for summary judgment should have been denied based on principles of collateral estoppel, notwithstanding that this third foreclosure is not based on the same notice of default as the action in *Badra I*.

In *Badra II*, the Badras asserted that res judicata barred State Street's second foreclosure action against them. *Badra*, [765 So.2d at 253](#). This court, however, disagreed "because 'identity of the cause of action' had not been met and there had been no adjudication on the merits." *Id.* Specifically, this court explained that because "the first and second actions involved different notices of acceleration, . . . there existed essential facts between the two cases which differed." *Id.* at 254. In *Badra II*, we also recognized that res judicata did not apply to the second action because "[t]he Final Judgment in the first action was not an adjudication on the merits," as the trial court determined that the action was premature. *Id.*

The Badras contend, here, that lack of unity of parties prevents application of Page 1039 MERS' collateral estoppel argument. However, it is clear that MERS is the successor in interest, as assignee, of State Street, and that the trial court, in *Badra I*, reinstated this note in favor of State Street.

Collateral estoppel precludes re-litigating an issue where the same issue has been fully litigated by the same parties or their privies, and a final decision has been rendered by a court. *See Rice-Lamar v. City of Fort Lauderdale*, [853 So.2d 1125](#), [1131](#) (Fla. 4th DCA 2003).

We recognize that in *Badra I*, the trial court said it was re-establishing the note pursuant to section [71.011](#), Florida Statutes, rather than the statutory section relied on here by MERS. Nevertheless, the issue, whether the lost note is re-established, is the same, and it meets the identity of issues

requirement for finding collateral estoppel. In either case, the essential issue is whether the lost note is legally enforceable.

The 2003 version of section [673.3091](#), which we apply here, required a person seeking to enforce a lost note to have been in possession of the instrument when it was lost. [\[fn1\]](#) Effective March 29, 2004, the section provides that a person seeking to enforce a lost note must show only that the person was entitled to enforce it when it was lost. The earlier version provides that "a person not in possession of an instrument is entitled to enforce the instrument if: *The person was in possession of the instrument and entitled to enforce it when loss of possession occurred[.]*" § [673.3091](#)(1)(a), Fla. Stat. (2003) (emphasis added).

The 2003 version of section [673.3091](#) provides, in pertinent part:

(1) A person not in possession of an instrument is entitled to enforce the instrument if:

(a) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred;

(b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

§ [673.3091](#), Fla. Stat. (2003). Thus, it is MERS' burden to prove State Street's possession. This, however, was resolved by the reinstatement of the note in *Badra I*, thus, placing the note, as of that time, in the possession of State Street. Once the note was re-established and that ruling not appealed, it was effectively in the possession of State Street and subject to assignment. Certainly, **it should not be the duty of an assignee of the mortgage securing a re-established note to independently reestablish the note once again in order to declare it in default. Any such need to do so is mooted by our conclusion that collateral estoppel applies to that aspect of the judgment in *Badra I*.** We can discern no basis for requiring that that issue be re-litigated once resolved.

It was, therefore, error to enter summary judgment for the Badras and to deny partial summary judgment (as to the lost note) in favor of MERS. We remand for Page 1040 further proceedings consistent with this opinion.

Reversed and Remanded.

GROSS and TAYLOR, JJ., concur.

[fn1] We need not resolve, here, whether the 2004 amendment to section [673.3091](#) was substantive, as argued by the Badras, and cannot be applied retrospectively to this action, filed in January 2003. See *Serna v. Milanese, Inc.*, [643 So.2d 36, 38](#) (Fla. 3d DCA 1994).

Progressive Exp. v. McGrath Chiro., 913 So.2d 1281 (Fla. 2nd DCA 2005)

PROGRESSIVE EXP. v. McGRATH CHIRO., 913 So.2d 1281 (Fla.App. 2 Dist. 2005)

PROGRESSIVE EXPRESS INSURANCE COMPANY, Petitioner, v. McGRATH COMMUNITY

CHIROPRACTIC, f/k/a Naples Community Chiropractic, as assignee of Abner

Joseph, Respondent.

No. 2D05-1497.

District Court of Appeal of Florida, Second District.

November 18, 2005.

Appeal from the County Court, Lee County.
Page 1282

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.] Page 1283

Valeria Hendricks of Davis & Harmon, P.A., Tampa, for Petitioner.

Jack C. Morgan III of Morgan Law Firm, P.A., Fort Myers, for Respondent.

WALLACE, Judge.

Progressive Express Insurance Company (Progressive) seeks second-tier certiorari review of the appellate decision of the Twentieth Judicial Circuit reversing the Lee County Court's final judgment dismissing a small claims action filed by McGrath Community Chiropractic (the Provider). We grant Progressive's certiorari petition.

BACKGROUND

In May 2001, the Provider filed a small claims action against Progressive in the Lee County Court. The Provider sought the recovery of PIP benefits allegedly assigned to it by Abner Joseph under a policy of insurance issued by Progressive to Mr. Joseph. The Provider alleged in its statement of claim that the policy provided personal injury benefits and/or medical payments coverage and that the policy was required by law to comply with the Florida Motor Vehicle No-Fault Law, sections [627.730](#)—.7405, Florida Statutes (1999) (the No-Fault Law). The Provider alleged further that it had "accepted, from

ABNER JOSEPH, a written and/or equitable assignment of rights under the policy." However, the Provider did not attach a copy of a written assignment to its statement of claim.

Later, the Provider amended its statement of claim by attaching to it an "Assignment of Benefits Form" assigning to the Provider benefits payable under the policy for services rendered by the Provider. The form also authorized Progressive to pay such benefits directly to the Provider. The form bore the signature "Abner Joseph" and was dated January 8, 2002, more than six months after the action had been filed.

Progressive moved for a summary disposition in its favor on the ground that the Provider had no standing to file the action. The county court agreed with Progressive. It ruled as follows:

[T]here was no Assignment of Benefits, from Abner Joseph to the [Provider], either written or equitable, in existence at the time the [Provider] filed this lawsuit in May, 2001. Therefore, the [Provider] lacked standing to file suit at the time the original complaint was filed. The [Provider] cannot now assert standing based upon a questionable assignment of benefits that came into existence many months after the filing of the original complaint.

Therefore, this Court lacks subject matter jurisdiction to hear this claim. . . .

Based on this ruling, the county court dismissed the Provider's action.

The Provider appealed the dismissal of its action to the circuit court. A panel of three circuit judges heard the appeal. With one judge dissenting, the circuit court reversed the county court's dismissal of the action and remanded the case for further proceedings. Progressive timely filed its petition for writ of certiorari in this court seeking review of the circuit court's appellate decision. Page 1284

THE STANDARD OF REVIEW

In considering a petition for second-tier certiorari, we do not provide the parties with an opportunity for a second appeal. Instead, we may grant such a petition only in "those instances in which the lower court did not afford procedural due process or departed from the essential requirements of the law." *Hous. Auth. v. Burton*, [874 So.2d 6, 8](#) (Fla. 2d DCA 2004) (citing *Allstate Ins. Co. v. Kaklamanos*, [843 So.2d 885, 889](#) (Fla. 2003)). "A failure to observe 'the essential requirements of law' has been held synonymous with a failure to apply 'the correct law.'" *Id.* (citing *Haines City Cmty. Dev. v. Heggs*, [658 So.2d 523, 530](#) (Fla. 1995)). In this case, Progressive does not claim that the circuit court's appellate decision deprived it of procedural due process. Therefore, we may not grant relief unless we determine that the circuit court departed from the essential requirements of law with a resulting miscarriage of justice. *Ivey v. Allstate Ins. Co.*, [774 So.2d 679, 682](#) (Fla. 2000); *Combs v. State*, [436 So.2d 93, 95-96](#) (Fla. 1983).

DISCUSSION

A. The Applicability of the "Relation Back" Rule

The Provider did not attach a copy of a written assignment of benefits to its original statement of claim filed in May 2001. To a subsequently filed amended statement of claim, the Provider attached a copy of the Assignment of Benefits Form dated January 8, 2002. The circuit court held that the written assignment related back to the date of the original statement of claim under Florida Rule of Civil

Procedure 1.190(c).^[fn1] The circuit court reasoned: "A plaintiff can perform a condition precedent to the filing of a complaint after the complaint is filed provided the plaintiff amends the complaint to allege the condition within the time allowed by the statute of limitations." As authority, the circuit court cited *Holding Electric, Inc. v. Roberts*, [530 So.2d 301](#) (Fla. 1988).

In *Holding Electric, Inc.*, the "condition precedent" to maintaining the action was the statutory requirement that a contractor seeking to foreclose a construction lien must first serve a contractor's affidavit. *Id.* at 302. The Supreme Court of Florida held that failure to serve the contractor's affidavit before filing the action was not a fatal jurisdictional defect requiring dismissal of the action. Instead, the contractor could satisfy the statutory prerequisite after filing the original complaint but before filing an amended complaint pleading compliance with the statute. Thus the contractor would be permitted to continue the action provided the affidavit was served within the statutory limitations period. *Id.* at 303.

A claimant's standing to bring an action is distinct from questions arising from the claimant's noncompliance with one or more conditions precedent to maintaining the action. For example, in *Voges v. Ward*, [98 Fla. 304](#), [123 So. 785](#) (1929), the plaintiff held only one of twelve notes necessary to the replevin of the collateral under a conditional sales contract when the action for replevin was filed. Although the plaintiff acquired all of the notes before the suit was tried, the trial court ruled that the suit was prematurely brought. The supreme court affirmed the trial court's ruling on this point, explaining that Page 1285 "the general rule in actions at law is that the right of a plaintiff to recover must be measured by the facts as they exist [sic] when the suit was instituted." *Id.* at 793 (citing *Cobbey on Replevin* § 257 (2d ed. 1900); 1 C.J. 1149). Similarly, in *Marianna & B.R. Co. v. Maund*, 62 Fla. 538, 56 So. 670 (1911), a landowner sought to recover for permanent damages to land committed by a railroad company. *Id.* at 670-71. The landowner did not expressly plead or offer proof that the damages occurred before the landowner acquired his ownership interest in the property. *Id.* at 672. After he filed suit against the railroad, the landowner obtained an assignment of the claim for damages to the property from the former owner and alleged the fact of the assignment in an amended pleading. *Id.* at 671. The trial court entered a decree in favor of the landowner, and the railroad appealed. *Id.* at 671-72. The Supreme Court of Florida reversed the decree and remanded the case to the trial court with directions to dismiss the landowner's case without prejudice. *Id.* at 673. In explaining its decision, the court said:

[I]t is obvious [the landowner] has not clearly shown a right of action when the suit was brought on the 24th of March, 1910, under the assignment of the right to sue executed on January 5, 1911. That assignment gave a new right of action long subsequent to the date of the bringing of the suit. It is decided in this state that in ejectment a plaintiff cannot recover upon a deed made after the suit is brought. We know of no reason why the same principle should not apply to a case like the instant one.

Id. at 672 (citations omitted). As these cases demonstrate, the plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed.

Unlike a statutory requirement of the construction lien law, an assignment of PIP benefits concerns the claimant's standing to bring the action. "Standing is . . . that sufficient interest in the outcome of litigation which will warrant the court's entertaining it." *Gen. Dev. Corp. v. Kirk*, [251 So.2d 284](#), [286](#) (Fla. 2d DCA 1971). At any one time, only the insured or the medical provider "owns" the cause of action against the insurer for PIP benefits. *Oglesby v. State Farm Mut. Auto. Ins. Co.*, [781 So.2d 469](#), [470](#) (Fla. 5th DCA 2001). For a medical provider to bring an action for PIP benefits, the insured must assign his or her right to such benefits under the policy to the medical provider.

Thus the assignment of PIP benefits is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place. If the insured has assigned benefits to the medical provider, the insured has no standing to bring an action against the insurer. *Livingston v. State Farm Mut. Auto. Ins. Co.*, [774 So.2d 716, 718](#) (Fla. 2d DCA 2000). In this case, the converse is true. If on the date the Provider filed the original statement of claim Mr. Joseph had not assigned benefits to the provider, only Mr. Joseph had standing to bring the action. It follows that the Provider would have lacked standing under these circumstances, and the case should have been dismissed.

In relying exclusively on the "relation back" rule when considering the Provider's standing, the circuit court implicitly affirmed the county court's finding that the Provider did not possess an assignment of benefits when it filed the action. In other words, the Provider was without standing at the time it filed the action, but it offered proof that it acquired standing in Page 1286 the amended statement of claim, which purportedly related back to the original statement of claim. Rule 1.190(c) provides:

Relation Back of Amendments. When the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

This rule does not permit a party to establish the right to maintain an action retroactively by acquiring standing to file a lawsuit after the fact. In this case, if the Provider was without standing when the action was filed, the PIP action was at best premature. See *Livingston*, [774 So.2d at 717](#). A new lawsuit must be filed. See *Jeff-Ray Corp. v. Jacobson*, [566 So.2d 885, 886](#) (Fla. 4th DCA 1990) (holding that the assignee of a mortgage could not maintain the mortgage foreclosure action because the assignment was dated four months after the action was filed; if the plaintiff wished to proceed on the assignment, it must file a new complaint). In relying on rule 1.190(c) and the "relation back" rule to cure the Provider's lack of standing when it filed the original complaint, the circuit court applied the incorrect law.

B. The Miscarriage of Justice Question

Our conclusion that the circuit court applied the incorrect law requires us to address the separate issue of whether this error has resulted in a miscarriage of justice. In *Department of Highway Safety & Motor Vehicles v. Alliston*, [813 So.2d 141](#) (Fla. 2d DCA 2002), this court offered the following perspective on the "miscarriage of justice" element:

The more difficult question in this case is whether the circuit court's error rises to the level that can be corrected as a "miscarriage of justice." Despite all of the efforts of the supreme court and the district courts, the test to determine when a "miscarriage of justice" has occurred remains easier to state than to apply. In measuring the seriousness of an error to determine whether second-tier certiorari is available, one consideration is whether the error is isolated in its effect or whether it is pervasive or widespread in its application to numerous other proceedings. Thus, a circuit court order that is particularly fact-specific and fact-dependent, or an order that provides a result without a written opinion and therefore cannot act as precedent in future cases, will generally not merit certiorari review in the district court, even if the district court might disagree with the result.

Id. at 145 (citations omitted). The facts in *Alliston* and two of this court's other decisions provide some guidance pertinent to the facts of this case in determining whether a miscarriage of justice has occurred.

In *Alliston*, we determined that the circuit court had applied the incorrect law in its review of an administrative order involving a license suspension. *Id.* at 144-45. We held that the circuit court's order qualified as a miscarriage of justice requiring certiorari relief because the order had precedential value and the circuit court was "applying the same error to numerous other administrative proceedings involving the suspension of driver's licenses." *Id.* at 145. In *Maple Manor, Inc. v. City of Sarasota*, [813 So.2d 204](#) (Fla. 2d DCA 2002), we decided that the circuit court had incorrectly applied the law by ruling that a local board had afforded a property owner procedural due process in an administrative proceeding. *Id.* at 207. Because the circuit court's decision had the potential to be applied in future administrative proceedings conducted by the local board, we Page 1287 concluded that the circuit court's error resulted in a miscarriage of justice. *Id.* At the other end of the spectrum, we found no violation of a clearly established principle of law resulting in a miscarriage of justice in a circuit court's per curiam affirmance of a county court judgment. *Stilson v. Allstate Ins. Co.*, [692 So.2d 979](#) (Fla. 2d DCA 1997). In *Stilson*, the circuit court's per curiam decision could not serve as precedent in another proceeding. *Id.* at 980.

The Provider argues that even if the circuit court applied the incorrect law, its decision has not resulted in a miscarriage of justice in this case. In the Provider's view, this "is a fact-specific and fact-dependent case with distinguishable facts from other similar cases seeking the repayment of personal injury protection benefits." We disagree. The circuit court's decision establishes a rule of general application concerning the relation back of amended pleadings to remedy the claimant's lack of standing when an action is filed. This rule has the potential to be applied not only in PIP cases, but also in mortgage foreclosure cases where assignments are common. We are aware that PIP issues are heavily litigated in the county courts. *Cf. State v. Wilson*, [690 So.2d 1361, 1365](#) (Fla. 2d DCA 1997) (Altenbernd, J., dissenting) (noting that county courts are now resolving almost all PIP claims). The circuit court appellate decision in this case is binding on all five county courts within the Twentieth Judicial Circuit. *See Fieselman v. State*, [566 So.2d 768, 770](#) (Fla. 1990); *State v. Lopez*, [633 So.2d 1150, 1150](#) (Fla. 5th DCA 1994). As a result, the circuit court appellate decision will have great influence, thus exacerbating the effect of the legal error. For these reasons, we conclude that the circuit court's decision does result in a miscarriage of justice that warrants the exercise of our certiorari jurisdiction.

CONCLUSION

Accordingly, Progressive's petition for writ of certiorari is granted, the circuit court's decision is quashed, and this case is remanded to the circuit court for further proceedings consistent with this opinion.

FULMER, C.J., Concur.

DAVIS, J., Concur specially.

[fn1] Although it is not material to our decision, we note that rule 1.190(c) is not included as one of the rules designated as being applicable in all actions covered by the small claims rules. *See Fla. Sm. Cl. R. 7.020(a)*. In addition, rule 1.190(c) has no counterpart in the small claims rules.

DAVIS, Judge, Specially concurring.

I concur fully in the majority opinion. I write only to note that the record reveals the existence of an issue of fact concerning whether Mr. Joseph had equitably assigned PIP benefits to the Provider before the Provider filed the original statement of claim in May 2001. Both the county court and the circuit court apparently overlooked this fact issue in considering the Provider's claim.

In the original statement of claim, the Provider alleged that it had "accepted, from ABNER JOSEPH, a written and/or equitable assignment of rights under the policy." Based on this allegation, the Provider's failure to attach a formal, written assignment to its statement of claim was not fatal. While I do not condone the use of the justly-condemned expression "and/or" in pleadings,^[fn2] the claim's allegation that the Provider had accepted an equitable assignment was sufficient to allege the Provider's standing to bring the action.^[fn3] Page 1288 *Cf. WM Specialty Mortgage, LLC v. Salomon*, [874 So.2d 680, 682-83](#) (Fla. 4th DCA 2004) (holding that a mortgage foreclosure complaint stated a cause of action where a subsequently filed assignment of mortgage executed after the date of the filing of the complaint indicated that the mortgage was physically transferred to the plaintiff before the complaint was filed, raising the possibility of an equitable assignment).

Progressive alleged as an affirmative defense that the Provider did not have standing for lack of an assignment of benefits. Progressive moved for summary disposition of the Provider's claim on this ground. In opposition to summary disposition, the Provider submitted the affidavits of Mr. Joseph and the Provider's office manager, as well as all of the forms signed by Mr. Joseph, including forms acknowledging receipt of specific therapies.

In general, any instruction, document, or act that vests in one party the right to receive funds arguably due another party may operate as an equitable assignment. *McClure v. Century Estates, Inc.*, [96 Fla. 568, 120 So. 4, 10](#) (1928). "No particular words or form of instrument is necessary to effect an equitable assignment[,] and any language, however informal, which shows an intention on one side to assign a right or chose in action and an intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment." *Giles v. Sun Bank, N.A.*, [450 So.2d 258, 260](#) (Fla. 5th DCA 1984); *see also WM Specialty Mortgage, LLC*, [874 So.2d 680](#). These general rules give rise to two issues concerning an assignment of PIP benefits: (1) the necessity of a writing and (2) the necessity of consideration.

Except where a writing is required by statute, an assignment may be oral and proven by parol evidence. *Blvd. Nat'l Bank of Miami v. Air Metal Indus., Inc.*, [176 So.2d 94, 97-98](#). (Fla. 1965). The affidavits of Mr. Joseph and the office manager are parol evidence that Mr. Joseph had assigned his right to PIP benefits to the Provider at the time he received treatment.

The No-Fault Law, however, appears to require some form of writing. A medical provider's authorization to receive payment directly from the insurer derives from section [627.736\(5\)\(a\)](#), Florida Statutes (1999), which provides in part:

Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge only a reasonable amount for the products, services, and accommodations rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment, if the insured receiving such treatment or his or her guardian has countersigned the invoice, bill, or claim form approved by the Department of Insurance upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian.

Thus the Provider's right to receive payment directly from the insurer depends upon some instrument such as an invoice, bill, or claim form countersigned by the insured. Such an instrument may constitute evidence that the insured assigned PIP benefits to the medical provider. *Cf. Hartford Ins. Co. of the S.E. v. St. Mary's Hosp., Inc.*, [771 So.2d 1210, 1212](#) (Fla. 4th DCA 2000) (holding that there was no Page 1289 evidence that the insured assigned PIP benefits to the hospital because the insured never signed a document described in section [627.736\(5\)\(a\)](#)).

In this case, the record contains nineteen documents dated between October 4, 1999, and November 29, 1999 — signed by Mr. Joseph — acknowledging the services provided to him on the dates specified. Arguably, a fact issue exists on whether these documents are "invoices" under section [627.736\(5\)\(a\)](#), which, combined with parol evidence, establish that Mr. Joseph equitably assigned his right to PIP benefits to the Provider at the time he received treatment.

As noted, an equitable assignment requires valuable consideration. Progressive argues that the existence of an equitable assignment must fail because there is no record evidence of such consideration in this case. At the outset, Progressive, as a third party to the assignment agreement between Mr. Joseph and the Provider, is not entitled to make this challenge. The affirmative defense of lack of consideration for an assignment can be raised only by the assignor. *McCampbell v. Aloma Nat'l Bank of Winter Park*, [185 So.2d 756, 758](#) (Fla. 1st DCA 1966).

Moreover, even if a showing of consideration is required, the provision of medical services fulfills this requirement. In *State Farm Fire & Casualty Co. v. Ray*, [556 So.2d 811, 813](#) (Fla. 5th DCA 1990), the issue was whether an assignment of insurance benefits to a hospital was revocable or irrevocable. An assignment is irrevocable if it is given for consideration. *See id.* (citing *Richmond Metro. Hosp. v. Hazelwood (In re Hazelwood)*, [43 B.R. 208, 214](#) (Bankr.E.D.Va. 1984)). Because the insured gave the assignment to the hospital in exchange for medical care and treatment, the assignment was given for consideration and thus was irrevocable. *Id.* In this case, an issue of fact exists concerning whether Mr. Joseph assigned PIP benefits to the Provider at the time he received treatment.

For this reason, the circuit court could have predicated its reversal of the county court's final judgment of dismissal on the existence of an issue of fact concerning whether Mr. Joseph had equitably assigned PIP benefits to the Provider before the Provider filed its original statement of claim. However, this fact does not vitiate the analysis in the majority opinion. To uphold the circuit court's decision based on the fact issue concerning equitable assignment, we would need to consider this case as if we were conducting a de novo review of the county court's summary disposition. Such an exercise is beyond the scope of our review in this case. On second-tier certiorari review, this court's task is only to determine whether the circuit court afforded procedural due process and applied the correct law. As the majority opinion demonstrates, the circuit court did not apply the correct law, resulting in a miscarriage of justice. Therefore, the issuance of the writ of certiorari quashing the circuit court's decision is entirely appropriate.

[fn2] *See Cochrane v. Fla. E. Coast Ry.*, [107 Fla. 431, 145 So. 217, 218-19](#) (1932); *Leon v. State*, [695 So.2d 1265, 1266-67](#) (Fla. 4th DCA 1997). *See generally* Bryan A. Garner, *ADictionary of Modern Legal Usage* 56 (2d ed. 1995).

[fn3] The Provider would have been well advised to attach to its statement of claim any written documents supporting its cause of action based on an equitable assignment to ensure compliance with Florida Small Claims Rule 7.050(a)(1).

Republic Federal Bank v. Doyle, 19 So.3d 1053 (Fla. 3rd DCA 2009)

REPUBLIC FEDERAL BANK v. DOYLE, 19 So.3d 1053 (Fla.App. 3 Dist. 2009)

REPUBLIC FEDERAL BANK, N.A., Petitioner, v. Joseph M. DOYLE and Blanca

Alicia Doyle, Respondents.

No. 3D09-2405.

District Court of Appeal of Florida, Third District.

September 30, 2009.

Appeal from the Circuit Court, Miami-Dade County, Valerie Manno Schurr, J.

Carlton Fields and Matthew J. Conigliaro, St. Petersburg, and Charles M. Rosenberg, for petitioner.

Barry L. Simons, Miami, for respondents.

Before GERSTEN and LAGOA, JJ., and SCHWARTZ, Senior Judge. Page 1054

SCHWARTZ, Senior Judge.

We treat the petition for writ of mandamus as one for certiorari and deny the petition.

Following a November 4, 2008 final judgment of foreclosure, and after several delays — caused in part by the filing and the dismissal of a frivolous bankruptcy petition on the eve of a previous sale and a foul-up or two in the clerk's office — the trial court on July 29, 2009, entered an order fixing August 27, 2009, as the date of the sale. On motion of the defendants, however, apparently on the basis that in the case, like this one, of the foreclosure of a residence she routinely grants continuances of the sale rather than see "anybody lose their house," the trial judge granted a continuance until October 1, 2009. [\[fn1\]](#) The mortgagee now challenges this ruling. We deny its petition.

Although granting continuances and postponements are, generally speaking, within the discretion of the trial court, the "ground" of benevolence and compassion [\[fn2\]](#) (or the claim asserted below that the defendants might be able to arrange for payment of the debt during the extended period until the sale) does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other, and thus cannot support the order below: no judicial action of any kind can rest on such a foundation. This is particularly true here because the order contravenes the terms-of the statute that a sale is to be conducted "not less than 20 days or more than 35 days after the date" of the order or judgment. § [45.031](#)(1)(a), Fla. Stat. (2008). See also *Kosoy Kendall Assocs., LLC v. Los Latinos Restaurant, Inc.*, [10 So.3d 1168](#) (Fla. 3d DCA 2009); *Comcoa, Inc. v. Coe*, [587 So.2d 474](#) (Fla. 3d DCA 1991).

The continuance thus constitutes an abuse of discretion in the most basic sense of that term. As the Court stated in *Canakaris v. Canakaris*, [382 So.2d 1197](#), [1203](#) (Fla. 1980):

The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness. In this regard, we note the cautionary words of Justice Cardozo concerning the discretionary power of judges:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. Page 1055 He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

B. Cardozo, *The Nature of the Judicial Process* 141 (1921).

See *Storm v. Allied Universal Corp.*, [842 So.2d 245](#), [246](#) n. 2 (Fla. 3d DCA 2003) (trial judge refused to preclude plaintiff, who misled and deceived the defendants, the jury and the trial court, from further litigation "to give the Plaintiff the break of his life"); *Arango v. Arango*, [450 So.2d 583](#) (Fla. 3d DCA 1984) (trial judge reduced attorney's fee award to spouse of attorney on ground of "professional courtesy"). See also *Flagler v. Flagler*, [94 So.2d 592](#), [594](#) (Fla. 1957) ("[C]ourts of equity have [no] right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law."); *Nordberg v. Green*, [638 So.2d 91](#)' (Fla. 3d DCA 1994) (trial court may not decline to follow controlling law on ground it considers its application "inequitable" in particular case), review denied, 649 So.2d 233 (Fla. 1994).

Although we thus thoroughly disapprove of the order, in view of the fact that the postponed sale is due to take place within a short time of this decision,' no useful purpose will be served by formally quashing the order or ordering the sale to take place on an earlier date with all the procedural complications which would then result. For that reason alone, relief will be denied. We do emphasize that there are to be no further postponements of the sale.

Petition denied.

[fn1] The court's remarks on the issue included the following:

I was trying to make everybody happy.

....

We have so many foreclosures here and I give continuances on these sales. I just do.

....

Unless it is so abundantly clear to me that it is just an abuse of the process, I give extensions on these because I don't want anybody to lose their house. If there is any chance that he can do this deal, get the money and try to save this home, you know, people are having a hard time now. They are having a difficult time. Everybody knows it. Businesses are failing. People are losing money in the stock market. You know, unemployment is high. It's just everybody knows that we are in a bad time right now and I hate to see anybody lose their home.

[fn2] See also the term referred to in *Cooper v. Brickell Bayview Real Estate, Inc.*, [711 So.2d 258, 258](#) n. 1 (Fla. 3d DCA 1998).

Riggs v. Aurora Loan Services, 4D08-4635 (Fla. 4th DCA 4-21-2010)

RIGGS v. AURORA LOAN SERVICES, 4D08-4635 (Fla.App. 4 Dist. 4-21-2010)

JERRY A. RIGGS, SR., Appellant, v. AURORA LOAN SERVICES, LLC,

Appellee.

No. 4D08-4635

District Court of Appeal of Florida, Fourth District.

April 21, 2010.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. CACE 07-17670 (14).

Jerry A. Riggs, Sr., Cooper City, pro se.

Diana B. Matson and Roy A. Diaz of Smith, Hiatt & Diaz, P.A., Fort Lauderdale, for appellee.

STEVENSON, J.

Aurora Loan Services, LLC, filed a mortgage foreclosure action against Jerry Riggs, Sr., alleging that it was the "owner and holder" of the underlying promissory note. Aurora filed a copy of the mortgage and a copy of the promissory note, which named Riggs as the mortgagor and First Mangus Financial Corporation as the mortgagee. The promissory note reflected an "endorsement in blank," which is a stamp with a blank line where the name of the assignee could be filled in above a pre-printed line naming First Mangus. Aurora moved for summary judgment, and, at the hearing, produced the original mortgage and promissory note reflecting the original endorsement in blank. The trial court granted summary judgment in favor of Aurora over Riggs' objections that Aurora's status as lawful "owner and holder" of the note was not conclusively established by the record evidence. We agree with Riggs and reverse the summary judgment.

The Second District confronted a similar situation in *BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936 (Fla. 2d DCA 2010), when the trial court granted alleged assignee U.S. Bank's motion for summary judgment. In order to establish its standing to foreclose, U.S. Bank filed an assignment of mortgage, which, as described, is comparable to the endorsement in blank in the instant case. *Id.* at 937. That court reversed because, *inter alia*, "[t]he incomplete, unsigned, and unauthenticated assignment attached as an exhibit to U.S. Bank's response to BAC's motion to dismiss did not constitute admissible evidence establishing U.S. Bank's standing to foreclose the note and mortgage." *Id.* at 939. The court in *BAC Funding Page 2 Consortium*, properly noted that U.S. Bank was "required to prove that it validly held the note and mortgage it sought to foreclose." *Id.*

In the instant case, the endorsement in blank is unsigned and unauthenticated, creating a genuine issue of material fact as to whether Aurora is the lawful owner and holder of the note and/or mortgage. As in *BAC Funding Consortium*, there are no supporting affidavits or deposition testimony in the record to establish that Aurora validly owns and holds the note and mortgage, no evidence of an assignment to Aurora, no proof of purchase of the debt nor any other evidence of an effective transfer. Thus, we reverse the summary judgment and remand for further proceedings. We find no merit in any of the other arguments raised on appeal.

Reversed and remanded.

GROSS, C.J., and POLEN, J., concur.

Not final until disposition of timely filed motion for rehearing. Page 1

Safeco Ins. Co. of America v. Ware, 401 So.2d 1129 (Fla. 4th DCA 1981)

SAFECO INS. CO. OF AMERICA v. WARE, 401 So.2d 1129 (Fla.App. 4 Dist. 1981)

SAFECO INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLANT, v. LAWRENCE

AARON WARE, APPELLEE.

No. 80-2119.

District Court of Appeal of Florida, Fourth District.

July 1, 1981.

Rehearing Denied August 26, 1981.

Appeal from the Circuit Court, Broward County, W. Clayton Johnson, J. Page 1130

Michael B. Davis of Walton, Lantaff, Schroeder & Carson, West Palm Beach, for appellant.

K. Jack Breiden of Law Office of E. Louis Fields, P.A., Fort Lauderdale, for appellee.

DOWNEY, Judge.

The trial court struck as frivolous appellant's motion to dismiss, which was directed to appellee's complaint, and entered a default judgment against appellant. This appeal involves the propriety of that judgment.

Appellee sued appellant and others for damages arising out of an automobile accident. Appellant initially moved for an enlargement of time within which to plead. While that motion was pending, but as yet unheard because of calendar problems, appellant filed a motion to dismiss or abate the action, essentially contending that the cause of action against appellant was based upon an insurance contract which, according to the allegations of the complaint, was not attached to the complaint because the policy was in the exclusive possession of the appellant. The motion states that appellant has furnished appellee a certified copy of the policy and suggests appellee should be required to attach to the complaint the policy he relies upon. Thereafter appellee filed a motion for final default judgment against appellant, contending that the motion to dismiss was a sham and frivolous and should be stricken and final default judgment entered. Appellant subsequently filed a motion attacking appellee's complaint on various grounds.

In due course, a hearing was had on all of the pending motions; after the hearing the trial court struck appellant's motion to dismiss as frivolous and entered a final default judgment against appellant.

Florida Rule of Civil Procedure 1.130 provides that contracts "upon which action may be brought or defense made" or copies thereof "shall be incorporated in or attached to the pleading." One of the ways

to reach a failure to attach a necessary exhibit is by motion to dismiss. *Trawick*, Florida Practice & Procedure § 6-15 (1980). Of course, if a pleader states that he does not have a copy of the writing involved, then he should obtain a copy thereof through discovery or otherwise and attach it to the appropriate pleading by amendment. See *Meadows v. Edwards*, [82 So.2d 733](#) (Fla. 1955). In the case of a complaint based on a written instrument it does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the pleading in question. *Trawick, supra*. In the present case the appellant furnished appellee with a certified Page 1131 copy of the policy and then moved to have the court require appellee to attach the policy or suffer dismissal of the complaint.

In view of the foregoing the appellant's motion to dismiss was not frivolous; it was perfectly appropriate. Therefore, the order striking the motion and entering default judgment was erroneous. For this reason the judgment appealed from is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

BERANEK and GLICKSTEIN, JJ., concur.

Sobel v. Mutual Development, Inc., 313 So.2d 77 (Fla. 1st DCA 1975)

SOBEL v. MUTUAL DEVELOPMENT, INC., 313 So.2d 77 (Fla.App. 1 Dist. 1975)

THEODORE SOBEL, AS TRUSTEE, APPELLANT, v. MUTUAL DEVELOPMENT, INC., A

FLORIDA CORPORATION, ET AL., APPELLEES.

No. Y-26.

District Court of Appeal of Florida, First District.

June 3, 1975.

Appeal from the Circuit Court for Alachua County, R.A. Green, Jr., J. Page 78

Jonathan F. Wershow of Wershow, Burwell, Carroll & Wershow, Gainesville, and Herbert C. Zemel of Sparber, Zemel, Roskin, Heilbronner & Karp, Miami, for appellant.

Henry L. Gray, Jr., of Chanler, O'Neal, Avera, Gray, Lang & Stripling, James S. Quincey of Clayton, Duncan, Johnston, Clayton, Quincey, Ireland & Felder William B. Watson, III, of Watson, Watson & Steadham, Gainesville, Brooks P. Hoyt of MacFarlane, Ferguson, Allison & Kelly, Tampa, and P. Ause Brown, Gainesville, for appellees.

BOYER, Acting Chief Judge.

A detailed recitation of the facts surrounding the intricate and complicated mobile home park financing and operation transactions which form the basis of the suit giving rise to this interlocutory appeal would serve no purpose except to lengthen this opinion. By the order here appealed the learned trial judge granted a defense motion to strike portions of a third amended complaint. Although several points have been raised by the parties in their briefs; the issue, the resolution of which is dispositive of this appeal, is whether the pledge [\[fn1\]](#) of a mortgage without reference to the note or obligation secured vests any right in the pledgee. The law seems to be well settled that it does not. [\[fn2\]](#) A mortgage is a mere incident of, and ancillary to, the note or other obligation secured thereby, and an assignment of the pledge of the mortgage without an assignment of the pledge of the note or obligation secured thereby creates no right in the assignee or pledgee. [\[fn3\]](#)

The instrument by which the pledge sub judice was granted is a "wrap around" mortgage executed by appellant Sobel in favor of appellee Mutual Development, Inc. which mortgage secured two promissory notes from Sobel to Mutual, the pertinent portion of which mortgage provides as follows:

"If at any time there occurs a default by the mortgagee (Mutual) with respect to this mortgage or any of the other agreements incorporated herein, the mortgagor (Sobel) maintains the express right to set-off against any monies payable hereunder by it. It is agreed by and between the parties hereto that this

mortgage is expressly pledged to satisfy any such obligations if and whenever such a default occurs." (Emphasis added)

It is readily apparent from the above quoted provision of the mortgage that no reference is made to the notes secured by the mortgage, the mortgage being Page 79 the instrument which is "expressly pledged". The parties agree that neither the pledged mortgage nor the notes secured thereby were ever physically transferred to the pledgee nor was there any other written assignment or pledge thereof.

Appellant urges that the trial judge should have looked to the entire transaction to determine the true intent of the parties and that upon his failure so to do we should now do so; it being the contention of appellant that the "wrap around" mortgage is but a minute fragment of the entire complicated transaction and that all of the instruments involved in the transaction should be examined and considered as an integral part of the mortgage which contains the recitation providing for an express pledge of that mortgage.

We do indeed find that there were numerous other documents which apparently were executed incident to the transaction in which the above mentioned mortgage was executed. In fact, immediately preceding that portion of the mortgage which is hereinabove quoted, and as part of the same paragraph, we find the following recitation:

"Contemporaneously with the execution of the mortgage the parties hereto have entered into various other agreements pertaining to the acquisition, development, and operation of the encumbered premise as a mobile home park. Such agreements designated as the Sale and Purchase Agreement, Lease Agreement, Management Agreement and Supervision Agreement, provide for certain rights on the part of the Mortgagor with respect to payments thereunder, and for that purpose such agreements are incorporated herein by reference thereto."

However, appellant has not cited to us any portion of such other instruments which recite or necessarily imply a pledge of the notes secured by the pledged mortgage, nor has our examination thereof revealed any.

Appellant urges that the parties intended that the expressed pledge of the mortgage included the notes secured thereby. If such be the case appellant's remedy is in an action for reformation, but the trial court in the action giving rise to this appeal was without authority, in the absence of appropriate pleadings, to make such reformation and we are equally bound by the pleadings before us.

Having determined that the pledge of the mortgage without reference to the notes secured thereby vested no right of the pledgee and it further appearing that the notes have never been physically delivered into the possession of the pledgee of the mortgage (since the date of that pledge) we do not find it necessary to determine whether a pledge recited in a mortgage signed only by the pledgee (mortgagor) is sufficient, in the absence of delivery of possession, to create a valid and legal pledge.^[fn4]

It logically follows from that which we have above stated that the learned trial judge was eminently correct under the status of the pleadings before him when he struck that portion of the complaint by which the plaintiff sought a judicial sale of the "wrap around" mortgage and the notes secured thereby. This interlocutory appeal is therefore dismissed.

It is so ordered.

JOHNSON and MILLS, JJ., concur.

[fn1] Guaranty Mortgage and Insurance Co. v. Harris, Fla.App.1st 1966, [182 So.2d 450](#).

[fn2] Vance v. Fields, Fla.App.1st 1965, [172 So.2d 613](#) and the authorities therein cited.

[fn3] Vance v. Fields, supra.

[fn4] Please see F.S. 679.203 and 25 Fla.Jur., Pledge and Collateral Security, Section 8 Page 80

Verizzo v. The Bank of New York, 28 So.3d 976 (Fla. 2nd DCA 2010)

VERIZZO v. THE BANK OF NEW YORK, 28 So.3d 976 (Fla.App. 2 Dist. 2010)

David VERIZZO, Appellant, v. The BANK OF NEW YORK, as Successor Trustee

Under Novastar Mortgage Funding Trust, Series 2006-3, Appellee.

No. 2D08-4647.

District Court of Appeal of Florida, Second District.

March 3, 2010.

Appeal from the Circuit Court, Sarasota County, Robert W. McDonald, Jr., J.

David Verizzo, pro se. Page 977

Patricia A. Arango of Law Offices of Marshall C. Watson, P.A., Fort Lauderdale, for Appellee.

SILBERMAN, Judge.

David Verizzo, pro se, appeals a final judgment of foreclosure entered after the trial court granted the motion for summary judgment filed by the Bank of New York, as successor trustee under Novastar Mortgage Funding Trust, Series 2006-3 (the Bank). Because the Bank's summary judgment evidence was not timely served and filed and because a genuine issue of material fact remains, we reverse and remand for further proceedings.

The Bank filed a two-count complaint against Verizzo seeking to reestablish a lost promissory note and to foreclose a mortgage on real property. Included in the attachments to the complaint was a copy of the mortgage. The mortgage indicated that the lender was Novastar Mortgage, Inc., a Virginia corporation (Novastar), and that the mortgagee was Mortgage Electronic Registration Systems, Inc. (MERS), acting as a nominee for Novastar. The attachments to the complaint did not include copies of the note or any assignment of the note and mortgage to the Bank. Verizzo filed a motion for enlargement of time to respond to the complaint. The Bank agreed to the entry of an order allowing Verizzo to file a response within 20 days from the date of entry of the order.

On August 5, 2008, before Verizzo had responded to the complaint, the Bank served its motion for summary final judgment of foreclosure. The summary judgment hearing was scheduled for August 29, 2008. On August 18, 2008, the Bank served by mail a notice of filing the original promissory note, the original recorded mortgage, and the original recorded assignment of mortgage. The assignment reflects that MERS assigned the note and mortgage to the Bank of New York. However, the note bears an endorsement, without recourse, signed by Novastar stating, "Pay to the Order of: JPMorgan Chase Bank, as Trustee."

On the date of the summary judgment hearing, Verizzo filed a memorandum in opposition to the Bank's motion. He argued, among other things, that his response to the complaint was not yet due in accordance with the agreement for enlargement of time, that the Bank did not timely file the documents on which it relied in support of its motion for summary judgment, and that the documents were insufficient to establish that the Bank was the owner and holder of the note and mortgage.

On August 29, 2008, the trial court granted the motion for summary judgment and entered a final judgment of foreclosure. We review the summary judgment by a de novo standard. *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.*, [928 So.2d 1272](#), [1274](#) (Fla. 2d DCA 2006). "A movant is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fla.R.Civ.P. 1.510(c)). If a plaintiff files a motion for summary judgment before the defendant answers the complaint, "the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact." *E.J. Assocs., Inc. v. John E. & Aliese Price Found., Inc.*, [515 So.2d 763](#), [764](#) (Fla. 2d DCA 1987).

Rule 1.510(c) requires that the movant "serve the motion at least 20 days Page 978 before the time fixed for the hearing[] and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court." Further, cases have interpreted the rule to require that the movant also file the motion and documents with the court at least twenty days before the hearing on the motion. *See Mack v. Commercial Indus. Park, Inc.*, [541 So.2d 800](#), [800](#) (Fla. 4th DCA 1989); *Marlar v. Quincy State Bank*, [463 So.2d 1233](#), [1233](#) (Fla. 1st DCA 1985); *Coastal Caribbean Corp. v. Rawlings*, [361 So.2d 719](#), [721](#) (Fla. 4th DCA 1978). The promissory note and assignment constituted a portion of the evidence that the Bank relied on in support of its motion for summary judgment, and it is undisputed that the Bank did not attach those documents to the complaint or serve them at least twenty days before the hearing date. In fact, although the Bank's notice of filing bears a certificate of service indicating that the notice was served on August 18, 2008, the notice and the documents were not actually filed with the court until August 29, 2008, the day of the summary judgment hearing.

In addition to the procedural error of the late service and filing of the summary judgment evidence, those documents reflect that at least one genuine issue of material fact exists. The promissory note shows that Novastar endorsed the note to "JPMorgan Chase Bank, as Trustee." Nothing in the record reflects assignment or endorsement of the note by JPMorgan Chase Bank to the Bank of New York or MERS. Thus, there is a genuine issue of material fact as to whether the Bank of New York owns and holds the note and has standing to foreclose the mortgage. *See Mortgage Electronic Registration Sys., Inc. v. Azize*, [965 So.2d 151](#), [153](#) (Fla. 2d DCA 2007) (recognizing that the owner and holder of a note and mortgage has standing to proceed with a mortgage foreclosure action); *Philogene v. ABN Amro Mortgage Group, Inc.*, [948 So.2d 45](#), [46](#) (Fla. 4th DCA 2006) (determining that the plaintiff "had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question").

Therefore, based on the late service and filing of the summary judgment evidence and the existence of a genuine issue of material fact, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded.

WHATLEY and MORRIS, JJ., Concur.

WM Specialty Mortgage v. Salomon, 874 So.2d 680 (Fla. 4th DCA 2004)

WM SPECIALTY MORTGAGE v. SALOMON, 874 So.2d 680 (Fla.App. 4 Dist. 2004)

WM SPECIALTY MORTGAGE, LLC, Appellant, v. ALAN F. SALOMON and FRANCES

SALOMON, et al., Appellees.

Case No. 4D03-3318.

District Court of Appeal of Florida, Fourth District.

Opinion filed May 26, 2004.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit,
Broward County, J. Leonard Fleet, Judge, L.T. Case No. 02-22566 CACE.

Mark Broderick of Echevarria & Associates, P.A., Tampa, for
appellant.

Gary Barcus, Pembroke Pines, for appellees Alan and Frances Salomon.

STEVENSON, J.

In the instant case, WM Specialty Mortgage, LLC, (WM Specialty) appeals a final order dismissing its mortgage foreclosure action with prejudice and an order vacating default. We affirm the order vacating default, but reverse the order of dismissal.

On December 3, 2002, WM Specialty filed a mortgage foreclosure complaint Page 681 against the borrower/appellee, Alan F. Salomon. Salomon failed to respond to the complaint and a default was entered. He subsequently hired an attorney, however, who moved to vacate the default. In addition, Salomon filed a motion to dismiss, along with affidavits. Salomon challenged the complaint as not complying with Florida Rule of Civil Procedure 1.130(a) in that it attached a mortgage in favor of Fremont Investment and Loan (Fremont), but no assignment of mortgage showing that WM Specialty was in privity with Fremont. In his affidavit, Salomon stated that he did not execute a mortgage with WM Specialty. In response, WM Specialty filed an assignment of mortgage.

The assignment reflected that the mortgage was transferred to WM Specialty by Fremont on November 25, 2002; however, the jurat indicated that the assignment was not executed until January 3, 2003. Following a hearing, the trial court entered an order vacating the default against Salomon, finding that

[T]he present plaintiff, WM Specialty Mortgage, LLC, did not own and hold the note when it filed its foreclosure lawsuit on December 3, 2002; did not own and hold the note when it served Alan Salomon and Frances Salomon on December 17, 2002; and only on January 3, 2003, at the earliest did the plaintiff

acquire the mortgage note by assignment, long after the lawsuit was filed and after these named defendants were served. The complaint is therefore void ab initio.

In a subsequent order entitled "Final Order," the court denied a motion to compel discovery as moot, stating The July 23, 2003 Order Vacating Defaults found that plaintiff's complaint was void ab initio since the assignment of mortgage was executed after the complaint was filed. The effect of this finding was to dismiss the complaint as of July 23, 2003. Plaintiff may file refile [sic] a separate [sic] action as the July 23, 2003 Order did not provide for amending the complaint.

WM Specialty filed a timely notice of appeal.

Procedurally, the instant case presents itself to this court in a somewhat awkward posture. Instead of challenging WM Specialty's interest in a motion to dismiss, Salomon did so in his motion to vacate the default. In disposing of that motion, the court granted the motion, but went further than vacating the default and found that the complaint was "void ab initio." Subsequently, in denying a motion to compel discovery as moot, the trial court indicated that the effect of the earlier order vacating the default was to dismiss the complaint as of the date of that order. Because the trial court clearly intended that the two orders finally dispose of the case, this court has jurisdiction.[\[fn1\]](#)

In vacating the default against Salomon and essentially dismissing the cause for lack of standing, the trial court relied upon *Jeff-Ray Corp. v. Jacobson*, [566 So.2d 885](#), 886 (Fla. 4th DCA 1990). In that case, the defendant sought to dismiss a foreclosure complaint on the ground that it failed to state a cause of action. The trial court denied the motion to dismiss. This court reversed because the complaint for foreclosure, which had been filed on January 4, 1988, had alleged an assignment of mortgage dated in 1986, but the assignment was not attached to the complaint. When the assignment was produced, it was dated Page 682 April 18, 1988, some four months after the lawsuit was filed. *Id.*

The court in *Jeff-Ray* held that the trial court erred in not dismissing the complaint for failure to state a cause of action because it relied upon an assignment which was not in existence at the time the complaint was filed. The court cited rule 1.130, which requires a plaintiff to attach to the complaint all documents upon which the action is based. *Id.*

In *Jeff-Ray*, there was no mention in the opinion as to whether, although the assignment was executed after the complaint was filed, equitable transfer of the mortgage occurred prior. This situation was addressed in *Johns v. Gillian*, [184 So. 140](#), 143 (Fla. 1938). In *Johns*, a homeowner purchased building materials from a lumber company in 1923 and gave, in exchange for the debt, the promissory note and mortgage on her home. *Id.* at 141. The homeowner thereafter died. In 1927, the lumber company fell on hard times and received an advance of money from Gillian. In exchange, the company delivered to Gillian a number of securities, among which was the homeowner's note and mortgage. No assignment of the mortgage was executed. *Id.*

In 1937, Gillian began foreclosure proceedings in the name of the company against the homeowner's surviving husband and heirs. After suit was initiated, the company executed an assignment purporting to assign the note and mortgage to Gillian and Gillian was substituted as the plaintiff. *Id.* The assignment was found to have been defectively executed because the corporate seal was not used; the court nevertheless held that equitable interest in the property had passed to Gillian, based on the following reasoning:

However, it has frequently been held that a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt. If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt, unless there be some plain and clear agreement to the contrary, if that be the intention of the parties. . . .

Although the assignment of the mortgage from Everglade Lumber Company to Gillian was defectively executed, it may be taken as evidence to show that the company had, before the commencement of the suit, sold and transferred to Gillian its entire interest in the note and mortgage. A mere delivery of a note and mortgage, with intention to pass the title, upon a proper consideration, will vest the equitable interest in the person to whom it is so delivered. . . .

Any form of assignment of a mortgage, which transfers the real and beneficial interest in the securities unconditionally to the assignee, will entitle him to maintain an action for foreclosure. Or if there had been no written assignment, Gillian would be entitled to foreclose in equity upon proof of his purchase of the debt.

Id. at 143-44 (citations omitted).

The analysis applied in *Johns* is applicable to this case; therefore, the dismissal was error. Here, the assignment indicates that on November 25, 2002, Fremont physically transferred the mortgage to WM Specialty, even though the assignment was not actually executed until January 3, 2003. At a minimum, as WM Specialty suggests, the court should have upheld the complaint because it stated a cause of action, but considered the issue of WM Page 683 Specialty's interest on a motion for summary judgment. An evidentiary hearing would have been the appropriate forum to resolve the conflict which was apparent on the face of the assignment, i.e., whether WM Specialty acquired interest in the mortgage prior to the filing of the complaint.

Accordingly, we reverse the order of dismissal and remand for further proceedings. Appellant has failed to demonstrate error with respect to the order vacating default.

AFFIRMED in part, REVERSED in part, and REMANDED.

GUNTHER and TAYLOR, JJ., Concur.

[fn1] In the order on the motion to compel, the trial court indicated that WM Specialty could refile a separate action since the order vacating default and dismissing the complaint did not provide the opportunity for WM Specialty to amend the complaint.