

1 IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
2 IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

3 CASE NO.: 2008-CA-009724

4 DIVISION: B

5 WELLS FARGO BANK, N.A., as Trustee for Option
6 One Mortgage Loan Trust 2006-1 Asset-
7 Backed Certificates, Series 2006-1,

8 Plaintiff,

9 vs.

10 JENNIFER O'CUINNEAGAIN; et al.,

11 Defendant(s).
12 _____/

13 TELEPHONIC
14 PROCEEDINGS: PLAINTIFF'S MOTION FOR SUMMARY
15 JUDGMENT

16 BEFORE: The Honorable Roger Padgett
17 Circuit Court Judge

18 DATE: August 11, 2010

19 TIME: 10:34 a.m. to 10:41 a.m.

20 REPORTED BY: Melanie Keefe
21 Notary Public
22 State of Florida at Large

23 PLACE: Hillsborough County Courthouse
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Tampa, Florida 33602

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12 Reporter's Certificate 9

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16 EXHIBITS PAGE NUMBER

17 None

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1 PROCEEDINGS

2 THE COURT: Good morning.

3 MR. GRAHAM: Good morning.

4 THE COURT: What case are you here on?

5 MR. GRAHAM: Wells Fargo vs. Jennifer

6 O'Cuinneagain.

7 THE COURT: Okay. Have a seat. What are you

8 trying to accomplish today?

9 MR. GRAHAM: I think it's gonna be a telephonic

10 hearing with the plaintiff's counsel.

11 THE COURT: Yeah. They're on the phone. We've

12 already done two of theirs. We were waiting for you to

13 show up.

14 MR. GRAHAM: I apologize. We're opposing the

15 motion based on the failure of proof. Your Honor, if I

16 might, is she on the phone now?

17 THE COURT: Yeah.

18 MR. GRAHAM: Good morning.

19 MS. CONTE: Good morning, Your Honor.

20 THE COURT: What's the problem?

21 MR. GRAHAM: The critical issue here is standing.

22 I don't think there's any dispute that the complaint as

23 originally drafted -- and the complaint appears behind
24 Tab No. 2, Your Honor. The original complaint asserts
25 that the plaintiff is the holder of the note and

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1 mortgage as of the filing of the complaint. It also,
2 however, in Count II states they've lost the note and
3 they need to reestablish it. That's Count II. Now, we
4 filed in this complaint --

5 THE COURT: Well, that's no problem. Being the
6 holder of the note doesn't mean you're physically
7 holding it. It means you own it. You may have lost
8 it, but --

9 MR. GRAHAM: I understand that.

10 THE COURT: So what else do you have?

11 MR. GRAHAM: The problem here, as you'll see
12 behind tab 1, is an assignment of mortgage. The
13 assignment of mortgage was made after the filing of the
14 complaint by five days. So the question becomes: Does
15 Wells Fargo have standing to bring this action? And we
16 assert that they do not. And we filed an affirmative
17 defense setting forth that they do not have standing.

18 They responded -- first of all, our answer is
19 behind tab 3. And if the Court will look at the second
20 affirmative defense, which we, again, allege that the
21 note and mortgage was not assigned to plaintiff until
22 after the commencement of the action. And an equitable

23 interest in the mortgage was not transferred to the
24 plaintiff prior to the commencement of the action
25 because physical possession of the promissory note was

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1 not delivered to plaintiff as the term is defined in
2 671.201(15) and used in 673.203(11) of the Florida
3 statutes. And so it was at issue. And the response we
4 received, first of all, was a reply, which is filed
5 behind 4. It's just a general denial.

6 And then there's the supplemental affidavit that
7 appears to address this issue. And I would direct the
8 Court's attention to paragraph 6 of the affidavit,
9 appearing behind tab 5. Now, this is saying in the
10 last sentence (as read): "Furthermore, plaintiff was
11 in possession of the original note at the time the
12 instant case was initiated as evidenced by plaintiff
13 filing of the original note and mortgage with the Court
14 on September 22." Well, we know that's not true
15 because the judicial admission of the plaintiff is they
16 didn't have the note when they filed this.

17 THE COURT: No, no, no, no. You're making a
18 mountain out of a molehill. All the assignment was was
19 an assignment of the interest in the note of the --
20 from the assignor to the assignee of the interest in
21 the note. Possession, they may have had possession of

22 it.

23 MR. GRAHAM: Well, the point is though that they
24 had to have their assignment in place prior to filing
25 the complaint.

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1 THE COURT: No, they don't. You can be a holder
2 without possession. You can be a holder without an
3 assignment. You can be a holder without either one of
4 those things.

5 MR. GRAHAM: In equity if there was -- intend to
6 be transferred, I agree with you.

7 THE COURT: Later you gather in the loose ends.
8 You get an assignment, if you can. And you actually
9 try to find the physical note, if you can. But if you
10 can't, you file an affidavit of lost note. But that
11 doesn't make anything less than the equitable holder,
12 the one who has the right to proceed with the lawsuit.

13 MR. GRAHAM: Right. And we put an issue whether
14 or not they were, in fact, an equity holder. That's
15 not what their complaint says. Their complaint says
16 they were the holder of the complaint. So the only
17 issue presented by the complaint is: Was this
18 plaintiff the holder of the note as it alleged?

19 THE COURT: Well, the affidavit indicates they
20 were.

21 MR. GRAHAM: No, they don't. Actually, they

22 indicate that they became the holder of the note when
23 they took the assignment. But they don't really speak
24 to the -- the complaint doesn't speak to this equitable
25 notion. I grant the Court, absolutely, if they can

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1 demonstrate that the parties agree, the original
2 mortgagee, in this case Mortgage One, agreed to
3 transfer ownership of the note and mortgage to Wells
4 Fargo then -- and they can document that and
5 demonstrate to the satisfaction of the Court that that
6 is, in fact, true, then they satisfactorily met their
7 burden of establishing equitable ownership. The
8 complaint does not put that before the Court.

9 THE COURT: We're beyond the complaint. We're in
10 a motion for summary judgment, affidavits filed by the
11 plaintiff.

12 MR. GRAHAM: Right. I think the issues presented
13 to the Court are delineated by the complaint. And the
14 complaint does not allege this equitable -- this claim
15 of equitable ownership.

16 MS. CONTE: Your Honor, if I may interject,
17 paragraph 6 of our complaint does read: The plaintiff
18 is a legal and/or equitable owner and holder of the
19 note and mortgage."

20 THE COURT: What else?

21 MR. GRAHAM: In my conclusion, I think that we
22 have a material issue of fact and one other fact.

23 THE COURT: What?

24 MR. GRAHAM: I requested in document production
25 any evidence, any documents that supported the cause of

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1 action of the complaint, and they objected to it based
2 on the fact that it was not relevant. And so
3 apparently now they're relying on some sort of
4 agreement or something.

5 THE COURT: Well, it's too late to have a hearing
6 on your motion to produce. The Court's going to
7 overrule your objection or to grant their motion for
8 summary judgment, whichever way you want to look at it.
9 I guess we're here on the motion for summary judgment,
10 so the Court will grant the motion for summary
11 judgment.

12 MR. GRAHAM: All right.

13 THE COURT: Good seeing you again.

14 MR. GRAHAM: Good seeing you. Thank you.

15 Thank you, Counselor.

16 MS. CONTE: Thank you, Counselor.

17 (The hearing concluded at 10:41 a.m.)

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1 REPORTER'S CERTIFICATE

2 STATE OF FLORIDA)
3 COUNTY OF HILLSBOROUGH)

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5 I, Melanie Keefe, court reporter, certify that I
6 was authorized to and did stenographically report the above
7 proceedings, and that the transcript is a true and complete
8 record of my stenographic notes.

9

10 I further certify that I am not a relative,
11 employee, attorney, or counsel of any of the parties, nor
12 am I a relative or employee of any of the parties' attorney
13 or counsel connected with the action, nor am I financially
14 interested in the action.

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16 Dated this 27th day of August, 2010.

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Melanie Keefe
Court Reporter

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