IN THE SECOND DISTRICT COURT OF APPEALS

CASE NO. 07-9600-CI-11

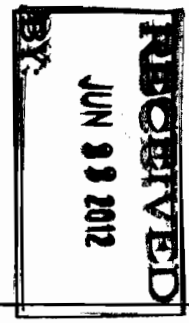
AMERICAN HOME MORTGAGE SERVICING, INC.,

Appellant,

vs.

LUCY BEDNAREK , et al.

Appellee.



ON MANDATORY REVIEW FROM

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

INITIAL BRIEF OF AMERICAN HOME MORTGAGE SERVICING, INC.

Albert Zakarian, Esquire
Florida Bar No. 0395218
Aaron W. Saoud, Esquire
Florida Bar No. 96124
The Law Office of Daniel C. Consuegra
9204 King Palm Drive
Tampa, FL 33619
Phone: 813/915-8660
Fax: 813/915-0559
Attorney for American Home

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

INTRODUCTION

This appeal involves a simple mortgage foreclosure action in which the mortgagee sought to foreclose a mortgage on real property in the principle sum of $630,000.[1] On July 1, 2007, Bednarek stopped paying on the loan. The loan now has accrued over $300,000 in additional charges. In this appeal, American Home Mortgage Servicing, Inc., a Delaware Corporation, will be referred to as "American Home – Delaware where necessary and "Plaintiff" generally." Appellee Lucy Bednarek will be referred to as "Bednarek." All references to the record on appeal are designated by the symbol "R" followed by the page range [R. ___]. All references to the trial transcript are designated by the symbol "T" followed by the page range [T.___].

STATEMENT OF THE CASE AND FACTS

On May 31, 2005, Bednarek executed and delivered a Note and Mortgage to American Brokers Conduit. [R. 124]. On June 1, 2005, the Loan was sold to and acquired by Deutsche Bank. [T. 23]. On July 1, 2007, and thereafter, Bednarek failed to pay her Loan. On September 27, 2007, American Home Mortgage Servicing, Inc., a Maryland Corporation ("American Home - Maryland"), filed the

[1] Bednarek also took out a second mortgage on the same day that is not the subject of this foreclosure. The total amount of loans was almost $1,000,000. The second mortgage also is in arrears since 2007.

initial Complaint in the Sixth Judicial Circuit, in and for Pinellas County, Florida, Case No. 07-9600-CI-11, against Bednarek, to foreclose on Bednarek's real property. [R. 2] In 2008, American Home - Maryland was subsequently purchased by American Home – Delaware, the Appellant in this case. [T. 27].

Deutsche Bank has been the owner and investor for the loan since before this action began. [T. 19, 23-24, 62, 86]. Deutsche Bank employed BB&T as the records custodian to hold all of the physical loan documents, and BB&T held the physical note and mortgage at all times relating to the foreclosure action. [T. 19-20, 23-24, 30].

The Complaint alleged Bednarek had defaulted on her Loan by not making the payment due on July 1, 2007. [R. 124] Plaintiff filed the original Note and Mortgage with the Court on June 8, 2009. [R. 194-218]. On December 29, 2009, Plaintiff Voluntarily Dismissed Count II of the original complaint, the "Lost Note Count". [R. 260-261].

On March 22, 2012, the matter went to trial before the Honorable Pamela Campbell. Plaintiff presented its corporate representative, Krystal Kearse, who provided extensive testimony in support of Plaintiff's case. [T. 5-88]. Bednarek did not present any testimony or evidence. At the close of the testimony, Bednarek

moved for an involuntary dismissal.[2] [T. 91]. Plaintiff moved for an Order conforming the pleadings to the evidence. [T. 92-94]. The Court denied Plaintiff's motion to conform [T. 94] and granted Bendarek's motion for involuntary dismissal by improperly construing this Court's ruling in McLean v. JP Morgan Chase Bank, N.A., 2012 WL 385532 (Fla. 4th Dist. App. 2012) and F.S. § 673.3011. [T. 98-99]. In making this ruling, the Hon. Campbell specifically noted that:

"I think the bigger issue in this case and the one that I think the appellate court would speak their wisdom on is this owner and holder issue.

So I'd rather if we could just give a final ruling on the owner and holder issuer, if we can do that. And then later on it gets remanded, then address the payment history and those other issues." [T. 92]; *see also* [T. 52-53].

On March 26, 2012, the Court entered its written Order. [R.314]. The Hon. Campbell was correct in pointing out the key issue for appeal. Plaintiff filed this appeal on April 13, 2012. [R. 315-318].

STANDARD OF REVIEW

In Allard v. Al-Nayem Intern., Inc., this Court specifically held that: "We review the judgment granting the motion for involuntary dismissal at the close of

[2] The Parties and the Court agreed to *de facto* bifurcate the trial as to judgment figures until the issue before this Court is resolved as to the "owner and holder" issue. [T. 91-21].

Al-Nayem's case de novo." Allard v. Al-Nayem Intern., Inc., 59. So.3d 198, 201 (Fla. 2nd Dist. App. 2011)(non-jury trial case involving real property).

SUMMARY OF THE ARGUMENT

Plaintiff appeals because: (1) the lower court applied the improper legal standard concerning the "owner and holder" issue; (2) failed to properly credit the testimony of Ms. Kearse in establishing Plaintiff's entitlement to foreclose by failing to consider this evidence in a light most favorable to the Plaintiff, Wright v. Emory, 41 So.3d 290, 292 (Fla. 4th Dist. App. 2010); and (3) improperly denied Plaintiff's Motion to Conform the pleadings to the evidence.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY CONCLUDED THAT MCLEAN V. JP MORGAN CHASE BANK, N.A. REQUIRED PLAINTIFF BE BOTH OWNER AND HOLDER OF THE NOTE.

When it granted the involuntary dismissal, the lower court improperly concluded that McLean v. JP Morgan Chase Bank, N.A., 2012 WL 385532 (Fla. 4th Dist. App. 2012) and F.S. § 673.3011 required that Plaintiff show it was the "owner and holder" at the time of the filing of the Complaint. [T. 93, 98-99].

During the trial, the Court repeatedly said that Plaintiff at the time of filing must show that it was the owner and holder. [T. 91, 92, 93, 98-99]. For that reason, the lower court involuntarily dismissed the case. [T. 98-99].

At the outset of the trial session, the lower court immediately telegraphed its intention to apply McLean by stating that [T. 4]:

> **"THE COURT: All right. So in case you all haven't realized, the calendar is for mortgage foreclosures and they're all set for trial this afternoon. I'm going through the files. I would like to remind everybody of the standard that was set out in the McLean versus JP Morgan Chase. That somebody has got to -- the plaintiff has got to prove standing at the time of the filing of the lawsuit. It seems to me that most of these files today have that problem."**

The lower court did rely on McLean in dismissing Plaintiff's case as it predicted prior to trial. [T. 98-99]

It is well established that in order to have proper standing a plaintiff pursuing foreclosure must (1) assert standing in the complaint; and (2) show that Plaintiff was either the owner or holder of the Note at or before the Complaint was filed or both. McLean v. JP Morgan Chase Bank, N.A., 2012 WL 385532 at *2 (Fla. 4th Dist. App. 2012)(summary judgment case).

In McLean, this Court clearly and succinctly explained how standing is determined in foreclosure cases:

> "Standing may be established by either an assignment or an equitable transfer of the mortgage prior to the filing of the complaint. *See WM Specialty Mortg., LLC v. Salomon,* 874 So.2d 680, 682–83 (Fla. 4th DCA 2004) ("[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 ...."); *see also Taylor v. Bayview Loan Servicing, LLC,* 74 So.3d 1115, 1117–18 (Fla. 2d DCA 2011). For example, standing may be established from a plaintiff's status as the note holder, regardless of any recorded assignments. *Harvey v. Deutsche Bank Nat'l Trust Co.,* 69 So.3d 300, 304 (Fla. 4th DCA 2011).
>
> "If the note does not name the plaintiff as the payee, the note must bear a special endorsement in favor of the plaintiff or a blank endorsement. *See Servedio v. U.S. Bank Nat'l Ass'n,* 46 So.3d 1105, 1106–07 (Fla. 4th DCA 2010); *Riggs v. Aurora Loan Servs., LLC,* 36 So.3d 932, 933 (Fla. 4th DCA 2010). Alternatively, the plaintiff may submit evidence of an assignment from the payee to the plaintiff or an

affidavit of ownership to prove its status as a holder of the note. *See Servedio,* 46 So.3d at 1107.

Even in the absence of a valid written assignment, the "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." *Johns v. Gillian,*134 Fla. 575, 184 So. 140, 143 (1938). Thus, where there is an indication that equitable transfer of the mortgage occurred prior to the assignment, dismissal of the complaint is error, even if the assignment was executed after the complaint was filed. *See Salomon,* 874 So.2d at 682–83 ("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 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.*") (emphasis added).

***3**While it is true that standing to foreclose can be demonstrated by the filing of the original note with a special endorsement in favor of the plaintiff, this does not alter the rule that a party's standing is determined at the time the lawsuit was filed. *See Progressive Exp. Ins. Co. v. Mc-Grath Cmty. Chiropractic,* 913 So.2d 1281, 1286 (Fla. 2d DCA 2005). Stated another way, "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." *Id.* at 1285. Thus, a party is not permitted to establish the right to maintain an action retroactively by acquiring standing to file a lawsuit after the fact. *Id.* at 1286.

To summarize, the plaintiff must prove that it had standing to foreclose when the complaint was filed. *See Country Place Cmty. Ass'n v. J.P. Morgan Mortg. Acquisition Corp.,* 51 So.3d 1176, 1179 (Fla. 2d DCA 2010) ("Because J.P. Morgan did not own or possess the note and mortgage when it filed its lawsuit, it lacked standing to maintain the foreclosure action."); *see also Jeff–Ray Corp. v. Jacobson,* 566 So.2d 885, 886 (Fla. 4th DCA 1990) (holding that a foreclosure complaint failed to state a cause of action where plaintiffs

relied on assignment of mortgage that was dated four months after the lawsuit was filed).

> Even where an assignment of mortgage does not occur until after the complaint is filed, there are several ways a plaintiff may establish its standing to foreclose at the inception of the suit. Where the plaintiff contends that its standing to foreclose derives from an endorsement of the note, the plaintiff must show that the endorsement occurred prior to the inception of the lawsuit. If the note or allonge reflects on its face that the endorsement occurred before the filing of the complaint, this is sufficient to establish standing. *See, e.g., Taylor,* 74 So.3d at 1117–18. Similarly, if the plaintiff relies upon an affidavit of ownership to prove its status as a holder of the note on the date the lawsuit was filed, it is sufficient if the body of the affidavit indicates that the plaintiff was the owner of the note and mortgage before suit was filed. Alternatively, if the affidavit itself is executed before the lawsuit is filed, the allegation that the plaintiff is the "owner and holder of the note" is sufficient to establish the plaintiff's standing at the inception of the lawsuit."

(1) Plaintiff properly pled Standing in the Initial Complaint

Both the initial Complaint [R. 1-30] and the Amended Complaint [R. 123-151] pled that American Home – Maryland, the original Plaintiff, was the owner and holder of the Note at the outset of the filing of the Complaint. [R. 124]. This was specifically addressed at trial. [T. 80-82]. In addition, there also was an Assignment of Mortgage attached to the original Complaint that pre-dated the filing of the Complaint by almost one year. [T. 81-82]. This Assignment provided that the original named lender assigned the mortgage to American Home-Maryland, the original Plaintiff, on or about March 30, 2006, more than one year prior to the filing of the original Complaint. The Assignment was recorded in the

Public Records of Pinellas County, Florida. [T. 81-82]. Also attached to the complaint and amended complaint was a copy of the Note showing the blank endorsement. Nothing more is required.

2. Plaintiff Demonstrated The Original Plaintiff Was The Holder Of The Note At The Time Of The Filing Of The Original Complaint

First, Plaintiff filed the original Note and Mortgage with the Court on June 8, 2009. [R. 194-218]. The original Note has a blank endorsement. *See* [T. 46-47] and [R. 194-218]. Second, Plaintiff's corporate representative, Ms. Kearse, testified at trial that the records custodian for Bednarek's Loan was always BB&T. [T. 18-20; 23-24, 25]. Ms. Kearse further testified about the path of the original Note and Mortgage from right after closing up and until those documents were sent to counsel for filing with the lower court. [T. 23-24; 49-50]. It is undisputed from Ms. Kearse's testimony that the original Note and Mortgage were maintained on behalf of American Home-Maryland, the original Plaintiff, through Deutsche Bank's records custodian BB&T, until those documents were filed with the Court. Bednarek failed to provide any contrary testimony. The Court received the original Note and Mortgage into evidence. [T. 50-51].

In addition to this Court's explanation in McLean, the plain language of Fla. Stat. §673.3011 shows that the original Plaintiff was entitled to enforce the Note and Mortgage at the filing of the Complaint.

F.S. § 673.3011 states, in pertinent part:

"The term 'person entitled to enforce an instrument' means:

1. The holder of the instrument;
2. A nonholder in possession of the instrument who has the rights of a holder; or
3. A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4).

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." (Emphasis Added)

The holder may be the owner or a nominee, such as a servicer, assignee or a collection and litigation agent. See also, Kumar Corp. v. Nopal Lines, Ltd., 462 So.2d 1178, 1184 (Fla. 3d Dist. App. 1985) (holding that standing encompasses not only the sufficient stake requirement but also the requirement that the claim be brought by or on behalf of one who is recognized in the law as a real party in interest, i.e. the person in whom rest, by substantive law, claim sought to be enforced.)

In the current case, American Home - Maryland had standing because counsel attached a copy of the original note, indorsed in blank, to the complaint.[3] The original Plaintiff's standing can be adequately established by the mere holding of the note. However, Plaintiff also established the chain of title of the Note through Plaintiff's witness at trial.

In establishing the chain of title, Ms. Kearse testified that original lender was American Brokers Conduit. [T. 48 at 9-11]. The loan was originally serviced by American Home - Maryland. [T. 48 at 22 - 49 at 2]. Thereafter, it went to American Home - Delaware. [T. 49 at 2]. Deutsche Bank was the investor and owner throughout the duration of the loan. [T. 25 at 14-15]. Deutsche Bank's record's custodian was BB&T. [T.25 at 16-18]. In June of 2005, American Home - Maryland was servicing the loan, until it was bought by American Home - Delaware; this purchase gave the Plaintiff all servicing rights previously held by American Home – Maryland. [T. 27 at 6-19]. American Home - Delaware became the servicer through the pooling and servicing agreement of a trust, wherein the loan was contained. [T. 56 at 24-25 to 57 at 1-5]. On July 21, 2009, Deutsche

[3] There was a "Lost Note Count" contained in the amended complaint [R. 123-151], but there was not actually a lost note; the "Lost Note Count", itself, was a mis-alleged portion of the complaint, incorrectly added, and voluntarily dismissed by the Plaintiff. The original complaint had a copy of the original note attached to it. Despite the initial "Lost Note Count", Plaintiff's mere possession of the Note is sufficient to show standing, as established by the above-cited case law.

Bank signed a power of attorney in favor of Plaintiff giving it authority to pursue legal remedy. [T. 60 at 6-8]. Thus, Plaintiff can show standing through their unbroken chain of title.

The trial court disagreed. The lower court stated, "Here's where I differ with best as to who's actually the owner... I think that McLean requires you [Plaintiff] to be the owner and holder." [T. 93 at 6-9.]. Plaintiff responded, "I respectfully disagree with the Court that Fla. Stat. §673.3011[4] requires both ownership and holder. I believe the holder can enforce, understanding the Court's disagreement with my position." [T.93 at 10-14].

In McLean[5], there was a residential foreclosure with a two-count complaint; one of those counts was a "Lost Note Count". Id. at 1. There was not an original or copy of the Note attached to the complaint, and the Court could not determine that plaintiff had proper standing to sue. Id. The plaintiff in McLean later tried to

---

[4] Person entitled to enforce instrument: The term "person entitled to enforce" an instrument means:
(1) The holder of the instrument;
(2) A non-holder in possession of the instrument who has the rights of a holder; or (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4).
A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

[5] McLean v. JP Morgan is on Rehearing as of February 2012.

establish its standing by providing the original note, endorsed in blank. Id. The blank endorsement was not dated. Id. Then, plaintiff also filed an affidavit to prove ownership, but the affidavit did not indicate that the plaintiff had become the owner of the note *before* suit was filed. Id. Due to these problems with plaintiff's standing, the original order granting summary judgment to the plaintiff was reversed. Id. at 4.

The case at issue is distinguishable from McLean. Most importantly, Plaintiff attached a copy of the original note, indorsed in blank, with their amended complaint. [R. 123-151]. By providing the note with the complaint, the Court can determine that Plaintiff held the note and was entitled to enforce it at the time of the filing of the complaint. Furthermore, possession of a blank note, however obtained and whatever the chain of title, is enough to get past the issue of standing, as discussed *supra*.

Another distinguishable feature of the McLean case is the heightened burden of proof. There, that Appellate Court was reviewing an order of Summary Judgment, which requires, "No genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510.

This burden [of summary judgment] is a higher burden of proof for the plaintiff than the trial burden of 'greater weight of the evidence'. See Lawton v.

State, 152 Fla. 821, 13 So. 2d 211 (1943); Pope v. O'Brien, 213 So. 2d 620 (Fla. Dist. Ct. App. 1st Dist. 1968). The case at issue was being decided at trial, and not at summary judgment.

Further, the trial judge in the present case may have been unaware of the controlling case law. She stated, "They [Deutsche Bank] may be the holder, but I don't know how they became the owner." [T. 55 at 2-3]. She also states, "I'm not concerned about the holder. I'm concerned about the owner." [T. 55 at 15-16].

The lower court did not accept that the holder of the note can enforce the note, simply by having possession. The lower court's statements and continued insistence on establishing both ownership and possession is a misunderstanding of the law.

The lower court's involuntarily dismissal should be reversed because Plaintiff's documents in evidence and the undisputed testimony at trial conclusively established that the original Plaintiff had standing to enforce the Note and Mortgage at the filing of the Complaint.

II. THE TRIAL COURT FAILED TO PROPERLY CREDIT THE TESTIMONY OF MS. KEARSE IN ESTABLISHING PLAINTIFF'S ENTITLEMENT TO FORECLOSE BY FAILING TO CONSIDER THIS EVIDENCE IN A LIGHT MOST FAVORABLE TO THE PLAINTIFF.

In a non-jury trial, "[a]n involuntary dismissal is properly entered only where the evidence considered in the light most favorable to the non-moving party fails to establish a prima facie case." Wright v. Emory, 41 So.3d 290, 292 (Fla. 4th Dist. App. 2010). This is especially true, whereas here, the defendant fails to provide any evidence to the contrary. *Id.*; 3618 Lantana Road Partners, LLC v. Palm Beach Pain Management, Inc., 57 So.3d 966, 968 (Fla. 4th Dist. App. 2011)(citing Tillman v. Baskin, 260 So.2d 509, 511-12 [Fla. 1972]).

Plaintiff was the only party in this trial that put forth documents and testimony. Bednarek utterly failed to provide any contrary testimony. Under these circumstances, the lower court was required to view Ms. Kearse's testimony in a light most favorable to the Plaintiff. The lower court did not. As explained in Point I above, Ms. Kearse's testimony established that the original Plaintiff, American Home – Maryland, had possession of the original Note and Mortgage prior to the filing of the original Complaint. Moreover, Ms. Kearse's testimony was based upon a thorough understanding of the current Plaintiff's servicing and business records as well as the prior servicer's records, to wit American Home – Delaware. [T. 9-50; 56-63, 85-88].

Glarum v. LaSalle Bank National Association, 2011 WL 3903161 (Fla. 4th Dist. App. 2011), has set the standard for determining if a witness is competent in foreclosure cases. In order to overcome a hearsay objection to "would be admissible evidence," the witness must be able to demonstrate the following through a record's custodian:

1. The record was made at or near the time of the event;
2. The record has made by or from information transmitted by a person with knowledge;
3. The record was kept in the ordinary course of a regularly conducted business activity; and
4. It was a regular practice of that business to make such a record. Yisrael v. State, 993 So.2d 952, 956 (Fla. 2008). (As cited in Glarum).

In Glarum, the Court noted that the bank's witness "...did not know who, how, or when the data entries were made into the [Servicer's] system." Glarum at *1.

Unlike Glarum, Kearse established she worked for Plaintiff as foreclosure special assets specialist, for 1 year. [T. 8 at 11-23]. She also established that part of her duties is to be familiar with the business records of Plaintiff. [T. 9 at 17-25, 10 at 1]. Ms. Kearse was aware of the history of the loan, including wherefrom and whereto the loan existed, both electronically and physically. [T. 23 at 4-23]. Ms. Kearse was then able to trace the physical history of the note, as it went from BB&T (the records custodian) to American Home – Maryland and then to Plaintiff

and counsel for the Plaintiff prior to the filing of the documents with the lower court. [T. 25 at 16- T. 27 at 22].

Ms. Kearse also made clear that she knows how the transfer was completed, and the sequence of events leading up to the filing of the original documents with the court. [T. 28 at 2 - T. 31 at 1]. Thus, Plaintiff's witness had the ability to properly characterize the documents as business records, which are exceptions to the evidentiary hearsay rule, under the Glarum and Yisrael standards. Given the lack of any evidence or testimony by Bednarek, Ms. Kearse's testimony should have been given greater weight and cast in a light most favorable to the Plaintiff on the issue on which the lower court dismissed this matter at trial.

Ms. Kearse's testimony was more than sufficient to establish that American Home – Maryland, the original Plaintiff, had possession of the original Note and the authority to act on behalf of Deutsche Bank during foreclosure, prior to the filing of the Complaint in September 2007.

III. THE TRIAL COURT IMPROPERLY DENIED PLAINTIFF'S MOTION TO CONFORM THE PLEADINGS TO THE EVIDENCE.

Plaintiff moved the lower court to conform the pleadings to the evidence. [T. 92-94]. Plaintiff requested that the lower court conform the pleadings to reflect that the original and current Plaintiff were the holders of the Note for purposes of foreclosure. *Ibid.* The Court denied this motion. [T. 94]. This is reversible error.

Florida Rule of Civil Procedure 1.190(b) provides that:

> **"(b) Amendments to Conform with the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits."

As the court stated in Frenz Enterprises, Inc. v. Port Everglades, 746 So.2d 498 (Fla. 4th Dist. App. 1999), 1.190(b), where a proposed amendment would change the basic issue in the case or materially vary the originally asserted grounds for relief, rule 1.190(b) would not apply.

Here, the merits of this case *would* have warranted amendment of the pleadings to conform with the evidence presented through the testimony of Ms. Kearse. While Defendant did object during trial to such an amendment, there were no real grounds posited therefore. There was no prejudice shown or argued, and the amendment would not have changed the basic issue in the case or materially vary the originally asserted grounds for relief. As such, the lower court should have granted the motion and then granted judgment in favor of Plaintiff.

CONCLUSION

For the reasons expressed above, Plaintiff requests this Court reverse the trial court's order granting involuntary dismissal of their case in favor of Lucy Bednarek.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of rule 9.210(a) (2) of the Florida Rules of Appellate Procedure.

_____, Esq.

for Albert A. Zakarian, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 19th day of June, 2012 to all parties listed on the attached service list.

Law Offices of Daniel C. Consuegra, P.L.
Albert A. Zakarian/Florida Bar #395218
Aaron W. Saoud/ Florida Bar #96124
9204 King Palm Drive
Tampa, Florida 33619-1328
Tel (813) 915-8660
Fax (813) 915-0559

MASTER CIVIL SERVICE LIST

LUCY BEDNAREK
C/O MATTHEW WEIDNER, ESQUIRE
MATTHEW D. WEIDNER, P.A.
1229 CENTRAL AVENUE
ST. PETERSBURG, FL 33705-1652

LUCY BEDNAREK, AS TRUSTEE OF THE LUCY BEDNAREK TRUST DATED JUNE 11, 1997
C/O MATTHEW D. WEIDNER, ESQUIRE
1229 CENTRAL AVENUE
ST. PETERSBURG, FL 33705-

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR AMERICAN BROKERS CONDUIT
C/O ELECTRONIC DATA SYSTEMS CORPORATION, R.A.
1901 E. VOORHEES STREET, SUITE C
DANVILLE, IL 61834

UNKNOWN TENANT #1 N/K/A RONALD BEDNAREK
4363 38TH WAY SOUTH
SAINT PETERSBURG, FL 33711