

Appeal No. 5D09-4035

IN THE 5TH DISTRICT FLORIDA COURT OF APPEALS

Gregory Taylor
Appellant

v.

Deutsche Bank National Trust Company
as Trustee for FFMLT 2006-FF4, Mortgage Pass-Through Certificates, Series 2006-FF4
Appellee

APPEAL IN CAUSE NO. 05-2008-CA-065811

IN THE CIRCUIT COURT OF BREVARD COUNTY, FLORIDA

David E. Silverman presiding

APPELLANTS' REPLY BRIEF

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FIRST ARGUMENT

THE APPELLEE PRESENTED EVIDENCE THAT IT WAS NOT ENTITLED TO ENFORCE THE PROMISSORY NOTE IN QUESTION

Appellee Deutsche Bank National Trust Company (“Deutsche Bank”) raises a secondary issue by erroneously contending that Appellant Gregory Taylor (“Taylor”) failed to preserve issues for appeal by the late filing of his Opposition to Motion for Summary Final Judgment.¹ The affidavit attached to Taylor's Opposition to Motion for Summary Final Judgment was completely unnecessary to support his opposition because he stipulated there were no issues of fact in that the evidence of the unindorsed note fully supported Taylor's position, including his incorporated cross-motion for summary judgment.² Taylor, in his Opposition to Plaintiff's Motion for Summary Final Judgment stated:

1 Deutsche Bank also contends that Taylor failed to raise the same issues on appeal as were raised in his amended affirmative defenses. (Deutsche Bank's Answer, p. 5) That is incorrect as the first and ninth affirmative defenses challenge Deutsche Bank's standing as not being the owner and holder of the note and not being an authorized agent of the owner and holder of the note. (R. I/111–112; 117) Additionally, the amended answer incorporated a motion to dismiss which again challenged Deutsche Bank's standing due to the lack of indorsement of the note. (R. I/121-126)

2 Taylor's opposition was also styled as a cross-motion for summary judgment and Taylor was relying on the Plaintiff's evidence as support for his cross-motion for summary judgment. (R. I/174)

Plaintiff claims there are no material disputed facts. Defendant agrees. Plaintiff claims it is entitled to summary judgment as a matter of law. Defendant disagrees and contends that the evidence before the court clearly and unequivocally states that the Plaintiff is not entitled to enforce the Promissory Note and therefore is not entitled to foreclose on the Defendant or to collect a fee for payment on said mortgage loan. (R. I/175)

Fla.R.Civ.P. 1.510(c) provides for the exclusion of “evidence” at a motion for summary judgment rather than for the exclusion of arguments. Fla.R.Civ.P. 1.510(c) states:

The adverse party shall identify, by notice mailed to the movant's attorney at least 5 days prior to the day of the hearing, or delivered no later than 5:00 p.m. 2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. To the extent such summary judgment evidence has not already been filed with the court, the adverse party shall serve copies on the movant by mailing them at least 5 days prior to the day of the hearing, or by delivering them to the movant's attorney no later than 5:00 p.m. 2 business days prior to the day of hearing.

The arguments presented by way of a written memorandum are not waived, therefore, by filing them less than two days before the summary judgment hearing. Indeed, all of those arguments could be made at the hearing without Taylor having filed anything. Deutsche Bank's argument as to the preservation of objections to closing argument,³ evidence,⁴ or acceptance of a plea⁵ are inapplicable. (Answer Brief, p. 9) These decisions turn on the fact that the trial court did not have the opportunity to address the issues for which appellate review was sought. Here, Taylor's Opposition to Plaintiff's Motion for Summary Final Judgment is the very

³ Ferguson v. State, 417 So.2d 639 (Fla. 1982).

⁴ Clark v. State, 363 So.2d 331, 332 (Fla. 1978) abrogated by, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Rodriguez v. State, 609 So.2d 493, 494 (Fla. 1992).

⁵ Harrell v. State, 894 So.2d 935, 940 (Fla. 2005).

document that proves the trial court had been presented with the very issues that were raised and which are now the subject of this appeal. Fla.R.Civ.P. 1.510 does not operate as an absolute ban on late-filed evidence because subsections (e) and (f) are available for the trial court as “tools for firming up the issues in the case”. Nard Inc. v. Devito Contracting, 769 So.2d 1138, 1141 (Fla. 2d DCA 2000)⁶

At a motion for summary judgment, initially there is no burden on the non-moving party and any error as to the determination of the non-existence of a genuine issue of material fact is preserved simply by filing a timely appeal. After an answer is filed, as in this case, the party moving for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the affirmative defenses are insufficient as a matter of law. Stop & Shoppe Mart, Inc. v. Mehdi, 854 So. 2d 784 (Fla. 5th DCA 2003); Manassas Inv., Inc. v. O’Hanrahan, 817 So. 2d 1080 (Fla. 2D DCA 2002)). The affirmative defenses in the amended answer alleged that the unindorsed promissory note, which is a

6 Fla.R.Civ.P. 1.510 states in part:

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

(f) When Affidavits Are Unavailable. If it appears from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

negotiable instrument, was evidence that Deutsche Bank did not own the note or have authority to enforce it. Deutsche Bank's motion failed to address Taylor's affirmative defenses. In Holl v. Talcott, 191 So. 2d 40 (Fla. 1966) the Court stated:

As this court and other appellate courts have repeatedly held, the burden of proving the absence of a genuine issue of material fact is upon the moving party. Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that issues do remain to be tried. *Humphrys v. Jarrell*, supra; *Matarese v. Leesburg Elks Club*, supra; and *Harvey Building, Inc. v. Haley*, Fla. 1965, 175 So.2d 780.

This means that before it becomes necessary to determine the legal sufficiency of the affidavits or other evidence submitted by the party moved against, it must first be determined that the movant has successfully met his burden of proving a negative, i.e., the non-existence of a genuine issue of material fact. *Matarese v. Leesburg Elks Club*, supra. He must prove this negative conclusively. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party. *Harvey Building, Inc. v. Haley*, supra.

As to the primary issue before this Court, Deutsche Bank stated:

In the present case, the plaintiff was not a nominee, but was instead the true owner and holder of the note and mortgage by way of a valid assignment of mortgage and note. There is simply no record evidence to the contrary that would indicate otherwise. (Answer Brief, p. 15)

Deutsche Bank's interests flow from MERS interests. Deutsche Bank ignores the plain language of the mortgage that names MERS as a nominee:

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. (R. I/68)

Since the Note was not indorsed to Deutsche Bank, Deutsche Bank didn't take the Note pursuant to negotiation under the UCC. That left Deutsche Bank with taking whatever rights MERS had by the Assignment of Mortgage from MERS to Deutsche Bank. MERS could not assign any greater rights to Deutsche Bank than MERS had.^{7 8}

Holding only the mortgage and not the Note means you hold nothing of value. “The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.” Carpenter v. Longan, 83 U.S. 271, 21 L.Ed. 313, 16 Wall. 271 (1872); Vance v. Fields, 172 So.2d 613 (Fla. 1965); Landmark National Bank v. Kesler, 216 P.3D 158 (Kansas, 2009) (also see Landmark National Bank v. Kesler, 192 P.3d 177 (Kansas App. Ct. 2008)) Neither Mortgage Electronic Registration Systems, Inc. v. Azize, 965 So.2d 151 (Fla. 2d DCA 2007) or Mortgage Electronic Registration Systems, Inc. v. Revoredo, 955 So. 2d 33 (Fla. 3d DCA 2007) alter this precedent.

7 Deutsche Bank states that Taylor affirmatively stated at both the trial and appellate levels that the assignment filed with the court transferred ownership of both instruments, and that Taylor thereby waived any right to maintain that a valid transfer failed to occur. (Deutsche Bank's Answer, p. 7) Deutsche Bank here is referencing the Answer to Complaint. However, the Answer had been amended and did not make any such claims and in fact said exactly the opposite – that Deutsche Bank had no standing for lack of a proper assignment and lack of transfer of the note. (R. I/112, para. B & C; I/125-126)

8 Deutsche Bank contends that “On or about August 1, 2008, First Franklin assigned its interest to Deutsche Bank and memorialized same.” (Deutsche Bank's Answer, p. 4)(referencing the record at pages 27-28 which is the Assignment of Mortgage attached to Deutsche Bank's Complaint) It must be noted that the Assignment of Mortgage was not executed by First Franklin, but rather it was executed by Mortgage Electronic Registration Systems, Inc. as nominee for First Franklin.

In Revoredo, supra, the Court held that MERS “does not lack standing to foreclose to the facts of this case, in which it is clear that . . . MERS was only the holder (by delivery) of the note.” *Id.* At 34, fn. 2. Deutsche Bank claims that its right to the Note flows from MERS. Therefore, if it is going to demonstrate an equitable assignment of the note, it must first show that MERS had rights to the unindorsed Note which it could assign to Deutsche Bank. However, the terms and provisions of the MERS mortgage expressly refute the notion that MERS owned or held the note at inception. The mortgage was not countersigned by the original note holder/lender (First Franklin) such as to give MERS any rights or interests in the note. As well the Note itself admits of no rights or interests in MERS. Only the defendant signed the mortgage and it is indisputable that he cannot award, grant or otherwise deign to transfer the rights of his obligee, the note holder, to another. Indeed, the mortgage granted no power or authority to MERS (a mere nominee holding only the lien, not the note) to sell or transfer the note or mortgage or to assign its duties as nominee.

In Azize, supra, the Court merely held that an allegation that MERS was the owner and holder of the note was a sufficient allegation of standing to survive a motion to dismiss. *Id.* At 153. MERS would still have to prove those allegations to prevail on the foreclosure action. *Id.* The trial court is not permitted to simply assume that the plaintiff was the holder of the note in the absence of record evidence of such. BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, Case No. 2D08-3553 (Fla. App. 2/12/2010) (Fla. App., 2010) Here, Deutsche Bank did not even allege that MERS was ever the owner and holder of the Note, much less provided prima facie evidence of such an allegation.

SECOND ISSUE

MERS DID NOT PASS AN ENFORCEABLE INTEREST IN THE PROMISSORY NOTE TO THE APPELLEE

Deutsche Bank claims that “By filing the original Note, Mortgage and Assignment of Mortgage, Deutsche Bank demonstrated that it was the owner and holder of the note and mortgage.” (Answer Brief, p. 12)⁹ ¹⁰ That statement is not true as held by the Second District Court of Appeal in Verizzo v. Bank of New York, 35 Fla. L. Weekly D494a (Fla. 2d DCA March 3, 2010), which stated:

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

⁹ Deutsche Bank states that Taylor “recognizes this in his Initial Brief. (I.B. 19)” (Answer Brief, p. 12) Taylor's Initial Brief just doesn't state this. Taylor's Initial Brief goes to great length to explain that enforcement of a negotiable instrument made payable to a specifically identified person requires a “transfer” and that transfer requires both an indorsement and possession of the note.

¹⁰ Deutsche Bank now argues that it is the “holder” of the note when in its' complaint Deutsche Bank stated “The Plaintiff is the present owner and *constructive* holder of the promissory note and Mortgage.” (R. I/2, para. 2 of complaint) (*emphasis mine*)

the plaintiff “had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question”).

Similarly, in this case there is a genuine issue of material fact as to whether Appellee owns and holds the note.

Deutsche Bank relies upon Moses v. Woodward, 109 Fla. 348 (Fla. 1933) and Johns v. Gillian, 134 Fla. 575, 581 (Fla. 1938) for the position that an indorsement on a note is not necessary to transfer the note, but rather that mere delivery of a note and mortgage with the intention to pass title will vest equitable interests in the person to whom it is delivered. (Answer Brief, p. 12 and 13)¹¹ The Moses and Gillian cases arose prior to the creation of the Uniform Commercial Code (“UCC”) in 1952,¹² when interests in notes were transferred by assignment. Thus the principles espoused in those pre-UCC cases regarding enforcement requirements must of necessity be subordinate to the enforcement requirements of the UCC. The principle of equitable assignment is applicable today “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. . . .”. WM Specialty Mortgage, LLC v. Salomon,

¹¹ Deutsche Bank's cite to the Moses opinion is slightly misplaced. There appear to be three Moses v. Woodward opinions with that citation. The one relied upon by Deutsche Bank - to the effect that a note can be transferred by assignment rather than indorsement – was in the March 1, 1932 opinion (140 So. 651). A rehearing was granted on April 13, 1932 (141 So. 117), and a new opinion reversing the foreclosure was issued on April 8, 1933 (147 So. 690). The new opinion mentions nothing about unindorsed notes.

¹² http://www.ali.org/doc/past_present_ALIprojects.pdf

Case No. 4D03-3318 (FL 5/26/2004) (Fl, 2004) But Deutsche Bank offered no justification for an equitable assignment as no evidence was offered that First Franklin was unable to indorse the note to Deutsche Bank or that First Franklin had transferred it to Deutsche Bank with the intention of passing title to Deutsche Bank. An assignment could also result in the transfer of a note as long as that note is not a negotiable instrument. The UCC applies to “negotiable instruments”, and the note in this case is a negotiable instrument. (§ 673.1021, Fla. Stat. (2009); § 673.1041, Fla. Stat. (2009))¹³

Deutsche Bank correctly states the law – that the holder of the note has standing to seek enforcement of the note. (Answer Brief, p. 13, citing Mortgage Electronic Registration Systems, Inc. v. Azize, 965 So.2d 151 (Fla. 2d DCA 2007) (reversed and remanded because the issue of the ownership and holding of the note and mortgage were not properly before the trial court) Deutsche Bank acknowledges that the UCC provides the definition of a “holder”, but ignores the obvious and plain meaning of the statute:

§ 671.201, Fla. Stat. (2009) states in part:

- (21) "Holder" means:
- (a) The person in possession of a negotiable instrument that is payable either to bearer or *to an identified person that is the person in possession*; or
(*Emphasis mine*)

¹³ “A negotiable instrument, by definition, '[d]oes not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.' § 673.1041(1)(c).” (GMAC v. Honest Air Conditioning & Heating, 933 So.2d 34 (Fla. App., 2006)

The Note in this case is not payable to bearer, but instead is payable to an identified person - First Franklin. Since Deutsche Bank has possession of the Note, Deutsche Bank can only be its holder if Deutsche Bank is First Franklin – which it is not. In Ederer v. Fisher, 183 So.2d 39 (Fla. 2d DCA 1965), the Court stated:

We agree with this statement of the law, as well as the proposition that a holder in due course is immune from the defense of failure of consideration. Fla.Stat., Sec. 674.31, F.S.A. But to be accorded the status of a holder, and entitled to the presumption of being a holder in due course as provided by Fla.Stat., Sec. 674.61, F.S.A., a party must have acquired the instrument through 'negotiation.' Fla.Stat., Secs . 674.33 and 674.01, F.S.A. *Paper payable to order, as was the note here, is negotiated by the endorsement of the holder, plus delivery. Fla.Stat., Sec. 674.33, F.S.A. (Emphasis mine)*

Deutsche Bank states “Paragraph 1 of the note states “[t]he Lender or anyone who takes the Note by transfer and who is entitled to receive payments under the Note is called the “Note Holder”. (Answer Brief, p. 12) “Transfer” of a note payable to a specifically identified person is accomplished by an indorsement. (§ 673.2011(2), Fla. Stat. (2009)) The only possible right that Deutsche Bank has regarding that unindorsed note is the specifically enforceable right to the indorsement of First Franklin. (§ 673.2031(3), Fla. Stat. (2009)) Had Deutsche Bank sued First Franklin and obtained an Order to enforce the right to First Franklin's indorsement of the note, it could then bring that note into court and foreclose upon it.

Deutsche Bank hung its hat on mere possession of the note and an invalid assignment of the mortgage to assert holder status. But holder status is only the

beginning of the inquiry – the end of the inquiry rests with the rights of the presentee under § 673.5011, Fla. Stat. (2009), which states in part:

- (c) Without dishonoring the instrument, the party to whom presentment is made may:
 1. Return the instrument for lack of a necessary indorsement; or
 2. Refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

The presentee is Taylor and he demanded a necessary indorsement which was not provided by Deutsche Bank, which gave him the right to refuse payment or acceptance.

CONCLUSION

WHEREFORE, the Circuit Court's judgment should be set aside and the matter remanded.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on Jonathan J.A. Paul, Butler & Hosch, P.A., 3185 S. Conway Road, Suite E, Orlando, Florida 32812 on this 17th day of March, 2010.

George M. Gingo, FBN 879533

CERTIFICATE OF FONT COMPLIANCE

I certify that the lettering in this brief is Times New Roman 14-point font and complies with the font requirements of the Florida Rule of Appellate Procedure 9.210(a)(2).

By: _____
George M. Gingo, FBN 879533