

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

SUNTRUST MORTGAGE, INC.,

CASE NO. 09-019041-CI-07

PLAINTIFF,

v.

POLLY ROBERTS,

DEFENDANT.

**DEFENDANT'S ANSWER, AFFIRMATIVE DEFENSES, AND MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT**

COMES NOW, the Defendant POLLY ROBERTS (hereinafter "Defendant") by and through the undersigned counsel MATTHEW D. WEIDNER and respectfully files this Court to ANSWER, AFFIRMATIVE DEFENSES, AND MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT the above entitled civil action, pursuant to Rules 1.190, 1.140(b)(6), and 1.110(b) Fla. R. Civ. P., and precedent case law, and in support thereof states:

**DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S
AMENDED COMPLAINT**

1. Admitted.
2. Denied.
3. Admitted.
4. Without knowledge and therefore denied.
5. Admitted.
6. Without knowledge and therefore denied.
7. Without knowledge and therefore denied.
8. Without knowledge and therefore denied.

9. Without knowledge and therefore denied.
10. Without knowledge and therefore denied.
11. Without knowledge and therefore denied.
12. Without knowledge and therefore denied.
13. Without knowledge and therefore denied.
14. Without knowledge and therefore denied.
15. Without knowledge and therefore denied.
16. Admitted.
17. Admitted or denied as plead above.
18. Without knowledge and therefore denied.
19. Without knowledge and therefore denied.
20. Without knowledge and therefore denied.
21. Without knowledge and therefore denied.
22. Without knowledge and therefore denied.

DEFENDANT'S AFFIRMATIVE DEFENSE I

With regard to all counts of the Amended Complaint, the Plaintiff's claims are barred in whole or in part, because the alleged Promissory Note attached to the Plaintiff's Amended Complaint is not a negotiable instrument within meaning of Fla. Stat. §673.1041(1)(c) (2006). Specifically, the Note: (1) provides for late fees in Section 7, subsection (A); (2) obligated the Defendant to re-execute the loan document in the form of an amendment; and (3) is an adjustable rate note, meaning that there is no promise to pay a fixed sum certain. Consequently, the law governing negotiable instruments, as set forth in Fla. Stat. §673 *et seq.* (2006), does not apply to this Note. *See* General Motors Acceptance Corp. v. Honest Air Conditioning & Heating, Inc., et

al., 933 So. 2d 34 (Fla. 2d DCA 2006); Wells Fargo Bank, NA v. Christopher J. Chesney, et al., Case No. 51-2009-CA-6509-WS/G (6thJud.Cir.Pasco.Cty. 02/22/2010 Stanley R. Mills, Judge).

DEFENDANT'S AFFIRMATIVE DEFENSE II

With regard to all counts of the Amended Complaint, the Plaintiff's claims are barred in whole or in part, because the Plaintiff's Amended Complaint, which was filed on or about March 10, 2010, is unverified and does not include an oath, affirmation, or the following statement: under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief. This is in violation of the revised Fla. R. Civ. Pro. 1.110(b) which requires that all complaints which plead foreclosure of residential real property filed after February 11, 2010 be verified.

DEFENDANT'S AFFIRMATIVE DEFENSE III

With regard to all counts of the Amended Complaint, the Plaintiff's claims are barred in whole or in part, because the Plaintiff failed to comply with the forbearance, mortgage modification, and other foreclosure prevention loan servicing requirements of either State or Federal law.

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

STANDARD OF REVIEW

1. In ruling on a defendant's motion to dismiss, a trial court is limited to the four corners of the Complaint, and it must accept all the allegations in the Complaint as true. *See Lutz Lake Fern Rd. Neighborhood Groups, Inc. v. Hillsborough County*, 779 So.2d 380, 383 (Fla. 2d DCA 2000). However, exhibits attached to a Complaint are a part of the Complaint. *See Bott v. City of Marathon*, 949 So.2d 295 (Fla 3rd DCA 2007) ("when considering a motion to dismiss, a trial court is required to consider any exhibit attached to, or incorporated in the

pleading”). *See also* Harry Pepper & Assoc., Inc. v. Lasseter, 247 So.2d 736 (Fla. 3rd DCA 1971) (stating “[i]n considering a motion to dismiss the trial court was required to consider the exhibit . . . attached to and incorporated in the amended complaint” and quoting Florida Rule of Civil Procedure 1.130(b), providing that “[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes”). As such, an exhibit attached to a Complaint is a part of the Complaint and may be considered when ruling on a motion to dismiss. Considering exhibits attached to a Complaint does not violate the “four corners” rule. Further, exhibits attached to a Complaint must agree with the allegations of the Complaint, and where to two do not agree, the exhibits control. *See also*, Geico Gen. Ins. Co. V. Graci, 849 So.2d 1196 (Fla. 4th DCA 2003) and Ginsberg v. Lennar Fla. Holdings, Inc. 645 So.2d 490, 494 (Fla. 3rd DCA 1994) (where exhibits contradict complaint allegations, plain meaning of exhibits control). Harry Pepper & Associates V. Lasseter, 247 So.2d 736 (Fla. 3rd DCA 1971) and *see* Hlt Application Sys. V. Hartford Life, 381 So.2d 294 (Fla. 1st DCA 1980).

LEGAL MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION

I. The Plaintiff’s Complaint Should be Dismissed for Failure to State a Cause of Action Because the Alleged Note in Question is Not a Negotiable Instrument

a. Legal Standards

Fla. R. Civ. P. 1.140(b)(6) provides, in pertinent part, that “the following defenses may be made by motion at the option of the pleader...failure to state a cause of action.” In ruling on a motion to dismiss for failure to state a cause of action, the trial court must assume that all allegations in the complaint are true and decide whether the Plaintiff would be entitled to relief. Carmona v. McKinley, Ittersagen, Gunderson & Berntsson, P.A., 952 So.2d 1273 (Fla. 2d DCA 2007). Nevertheless, as indicated in the Standard of Review discussion, *supra*, exhibits attached

to the Plaintiff's complaint are part of the complaint, and where the allegations made in the complaint do not agree with the exhibits attached, the exhibits control.

2. Every mortgage loan is composed of two documents – the note instrument and the mortgage instrument. No matter how much the mortgage instrument is acclaimed as the basis of the agreement, the note instrument is the essence of the debt. Sobel v. Mutual Dev. Inc., 313 So. 2d 77 (Fla. 1 DCA, 1975); Pepe v. Shepherd, 422 So. 2d 910 (Fla. 3 DCA 1982); Margiewicz v. Terco Prop., 441 So. 2d 1124 (Fla. 3 DCA 1983); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 (1997). The promissory note is evidence of the primary mortgage obligation. The mortgage is only a mere incident to the note. Brown v. Snell, 6 Fla. 741 (1856); Tayton v. American Nat'l Bank, 57 So. 678 (Fla. 1912); Scott v. Taylor, 58 So. 30 (Fla. 1912); Young v. Victory, 150 So. 624 (Fla. 1933); Thomas v. Hartman, 553 So. 2d 1256 (Fla. 5 DCA 1989); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 1.01 (1997) The mortgage instrument is only the security for the indebtedness. Grier v. M.H.C. Realty Co., 274 So. 2d 21 (Fla. 4 DCA 1973); Mellor v. Goldberg, 658 So. 2d 1162 (Fla. 2 DCA 1995); Century Group Inc. v. Premier Fin. Services East L. P., 724 So. 2d 661 (Fla. 2 DCA 1999). Finally, in a mortgage foreclosure action, a lender is required to either present the original promissory note or give a satisfactory explanation for the lender's failure to present it prior to it being enforced. *See* Downing v. First National Bank of Lake City, 81 So. 2d 486 (Fla. 1955); Figueredo v. Bank Espirito Santo, 537 So. 2d 1113 (Fla. 3d DCA 1989); Pastore-Borroto Development, Inc. v. Marevista Apartments, M.B., Inc., 596 So. 2d 526 (Fla. 3d DCA 1992); National Loan Investors, L.P. v. Joymar Associates, 767 So. 2d 549, 551 (Fla. 3d DCA 2000); State Street Bank and Trust Co. v. Lord, 851 So.2d 790, 791 (Fla. 4th DCA 2003).

3. In a mortgage foreclosure action, a lender is required to either present the original

promissory note or give a satisfactory explanation for the lender's failure to present it prior to it being enforced. *See* Downing v. First National Bank of Lake City, 81 So. 2d 486 (Fla. 1955); Figueredo v. Bank Espirito Santo, 537 So. 2d 1113 (Fla. 3d DCA 1989); Pastore-Borroto Development, Inc. v. Marevista Apartments, M.B., Inc., 596 So. 2d 526 (Fla. 3d DCA 1992); National Loan Investors, L.P. v. Joymar Associates, 767 So. 2d 549, 551 (Fla. 3d DCA 2000); State Street Bank and Trust Co. v. Lord, 851 So.2d 790, 791 (Fla. 4th DCA 2003). When the lender is unable to present the original promissory note because the note has been lost or destroyed, it may attempt to "restore" the note using certain statutory provisions such as Fla. Stat. §673.3091. However, the enforcement mechanism under Fla. Stat. §673.3091 is expressly reserved for the limited class of instruments known as negotiable instruments. More exactly, §673.3091 provides that a "person not in possession of an instrument is entitled to enforce the instrument for the enforcement" under certain specified circumstances; by statute, however, "instrument" is defined as a "negotiable instrument" pursuant to Fla. Stat. §673.1041(1). Thus, in order for the Plaintiff to invoke the enforcement powers of §673.3091, it must be the holder of a negotiable instrument.

With respect to negotiable instruments, Florida has codified the definition of same at Fla. Stat. §673.1041 (2006), which provides, in pertinent part:

the term "negotiable instrument" means an unconditional promise or order to pay **a fixed amount of money**, with or without interest or other charges described in the promise or order, if it:

- (c) **Does 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**, but the promise or order may contain:
1. An undertaking or power to give, maintain, or protect collateral to secure payment;
 2. An authorization or power to the holder to confess judgment or realize on or dispose of collateral; or

3. A waiver of the benefit of any law intended for the advantage or protection of the obligor. *Bold emphasis added.*

4. Furthermore, recent case law in the Second District has articulated a long-held notion that a negotiable instrument should be “simple, certain, unconditional, and subject to no contingencies. As some writers have said, ‘it must be a courier without luggage.’” General Motors Acceptance Corp. v. Honest Air Conditioning & Heating, Inc., 933 So. 2d 34, 37 (Fla. 2d DCA 2006) (quoting Mason v. Flowers, 107 So. 334, 335 (1926)). In the General Motors case, an automobile financing company sued an automobile buyer for damages resulting from the alleged breach of an automobile retail installment sale contract (hereinafter “RISC”). The court ruled that the RISC was not a negotiable instrument because the RISC created a series of obligations by both the “person promising” payment and the creditor “ordering payment” thus circumventing the definition of negotiable instrument as defined by §673.1041(1)(c) above. Specifically, the Note in that case did not qualify as a negotiable instrument because the Note provided for an NSF fee and late charges.

5. In addition to this older appellate case, there is a growing body of circuit court opinions across the state, **and in this circuit**, which have held that a purported Mortgage Note is not a negotiable instrument when it contains NSF charges, late fees, or an obligation by the borrower to re-execute loan documents under certain specified conditions. In Wells Fargo Bank, NA v. Christopher J. Chesney, et al., Case No. 51-2009-CA-6509-WS/G (6thJud.Cir.Pasco.Cty. 02/22/2010 Stanley R. Mills, Judge), Judge Mills **GRANTED** the Defendant’s Motion to Dismiss the Plaintiff’s Foreclosure Complaint because “[a]s in General Motors Acceptance Corp., the Note in this case provides for NSF fee and late charges. In addition, there are provisions obligating the borrower to re-execute loan documents under certain specified conditions.

Consequently, the law concerning the transfer of negotiable instruments...does not apply to this Note. *Bold emphasis added.*

6. The appellate courts have also ruled that where a Mortgage Note does not contain an unconditional promise to pay a fixed sum, the Note is not a negotiable instrument. In Nagel v. Cronebaugh, 782 So. 2d 436 (Fla. 5th DCA 2001), the Fifth District held that in order for an instrument to be negotiable under the UCC, it must contain an unconditional promise to pay a sum certain (quoting United Nat'l Bank of Miami v. Airport Plaza Ltd. P'ship, 537 So. 2d 608, 609 (Fla. 3d DCA 1988)). Because the mortgage note there did not provide for a fixed principal amount, the court ruled that the note is not a negotiable instrument and that §673 *et seq.* does not apply. Id at 439. Moreover, in Holly Hill Acres, Ltd. v. Charter Bank of Gainesville, 314 So. 2d 209, 211 (Fla. 2d DCA 1975), the Second District held that since the mortgage note in question incorporated the terms of the purchase-money mortgage it did not contain an unconditional promise to pay as required by §673 *et seq.* and therefore was not a negotiable instrument.

b. Argument

7. Here, while the Plaintiff attempted to invoke the enforcement power of §673.3091, the purported Promissory Note in question is not a negotiable instrument. More precisely, Promissory Note attached to the Plaintiff's Amended Complaint: (1) provides for late fees in Section 7, subsection (A); (2) obligated the Defendant to re-execute the loan document in the form of an amendment; and (3) is an adjustable rate note, meaning that there is no promise to pay a fixed sum certain.

8. Section 7, subsection (A), entitled "Late Charges for Overdue Payments" provides that "[i]f the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, **[the Defendant] will pay a late charge to the Note**

Holder. The amount of the charge will be 5.000% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.” *Bold emphasis added.* The inclusion of this late charge fee is in direct conflict with the definition of “negotiable instrument” under §673.1041(1)(c). Moreover, the inclusion of a late fee has excluded promissory notes from the definition of negotiable instruments in controlling cases in both this District and this Circuit.

9. The Defendant was obligated to re-execute the loan documents through her endorsement on the “Amendment to Adjustable Rate Note” attached to the Plaintiff’s Amended Complaint. This amendment materially altered and changed the second paragraph of Section 5, entitled “Borrower’s Right to Prepay”. This re-execution of loan documents is facially and factually similar to the re-execution obligations which were present in the Promissory Note in the Wells Fargo case before Judge Mills, Circuit Judge Pasco County. The Court should follow Judge Mills lead and hold that the presence of this re-execution disqualifies the purported Note in question from negotiable instrument status.

10. The purported Note in question is an “Adjustable Rate Note”, which means that the interest rate of the note is subject to change. This possible change is incorporated into the Note in Section 4, entitled Interest Rate and Monthly Payment Changes. Subsection (A) of this section reads “[t]he interest rate I will pay **may change** on the 1st day of May, 2010 and on that day every 12th month thereafter. Each day on which my interest rate could change is called a “Change Date.” *Bold emphasis added.* The effect of an interest rate change is clear and definite: it significantly alters the amount in which the borrower is required to pay. Because the Note is subject to change, it is not a promise to pay a fixed sum certain as required by §673.1041 and is therefore not a negotiable instrument as articulated by both the Second District in Holly Acres

and the Fifth Circuit in Nagel. Finally, because the Plaintiff is precluded from the enforcement power of §673.3091, Count I of the Complaint, which pleads foreclosure of the Defendant's real property, cannot move forward as the Mortgage and the Note run together. Here, the Plaintiff does not have original Note nor has it offered a satisfactory explanation for the failure to produce the Note. Therefore, the Plaintiff is precluded from relief of foreclosure of the Defendant's real property.

WHEREFORE, because the Plaintiff failed to state a cause of action upon which relief can be granted within the four corners of the Complaint or in any other Pleading or Filing, the instant case must be dismissed.

II. The Plaintiff's Complaint Should be Dismissed for Failure to Attach a Verified Complaint

a. Legal Standards

11. Fla. R. Civ. Pro. 1.420(b) provides, in pertinent part, that "[a]ny party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court." Thus, any judgment which is not in compliance with the Florida Rules of Civil Procedure is null and void.

12. The Florida Constitution gives the Florida Supreme Court complete authority to promulgate or rescind the Florida Rules of Civil Procedure. Specifically, Article V, Section 2(a) of the Florida Constitution provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought." *See also Ser-Nestler, Inc. v. General Finance Loan Co. of Miami Northwest*, 167 So.2d 230 (3d DCA 1964) ("Supreme Court

is vested with sole authority to promulgate, rescind and modify the Florida Rules of Civil Procedure, which remain inviolate until changed by Supreme Court”), *appeal dismissed* 174 So.2d 35; State v. Battle, 302 So.2d 782 (3d DCA1974) (“language of the rules promulgated by the Supreme Court of Florida are binding upon the trial and appellate courts”); State v. Lyons, 293 So.2d 391 (2d DCA 1974) (“Supreme Court has right to adopt a rule at variance from its own precedents”).

13. On February 11, 2010 by the Florida Supreme Court amended Fla. R. Civ. Pro. 1.110(b) to read

[w]hen filing an action for foreclosure of a mortgage on residential real property **the complaint shall be verified**. When verification of a document is required, the document shall include an oath, affirmation, or the following statement: Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief. *Emphasis added.*

Thus, any mortgage foreclosure action filed after February 11, 2010 must be verified. The Supreme Court noted that

[t]he primary purposes of this amendment are: (1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded “lost note” counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by plaintiffs not entitled to enforce the note; and (4) to give trial courts greater authority to sanction plaintiffs who make false allegations. In re: Amendments to the Florida Rules of Civil Procedure, No. SC09-1579, (Feb. 11, 2010).

Furthermore, Fla. Stat. §92.525 provides that

(1) When it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:

(a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; or

(b) By the signing of the written declaration prescribed in subsection (2).

(2) A written declaration means the following statement: “Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true,” followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words “to the best of my knowledge and belief” may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

See also Muss v. Lennar Florida Partners I, L.P., 673 So. 2d 84 (Fla. 4th DCA 1996).

13. Finally, while changes to the Rules of Civil Procedure are prospective unless the Rule specifically provides otherwise. Mendez-Perez v. Perez-Perez, 656 So.2d 458, 460 (Fla.1995). Furthermore, Fla. R. Civ. Pro. 1.190(c) provides that “[w]hen 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.” Nevertheless, an amended complaint “relates back” to the date a motion to amend is filed. *See* Totura & Co., Inc. v. Williams, 754 So.2d 671 (Fla. 2000). In Totura, the Florida Supreme Court noted that while “rule 1.190(c) allows the relation back of an amended complaint to the date of the original complaint when the claim in the amended complaint arose out of the same conduct, transaction, or occurrence set out in the original pleading, the relation back concept under these circumstances has been utilized to relate a subsequent amended complaint back to an original pleading, **with the “original pleading” being the motion to amend.**” *Id* at 680. *Bold emphasis added.* Thus, if a motion to amend has been filed after a revision to the Rules of Civil Procedure has been enacted, then the amended complaint relates back to the date of the motion to amend and is subject to the revised provisions of the Rule of Civil Procedure in question.


b. Argument

14. Here, the Plaintiff has failed to file a verified complaint. The instant action is one for foreclosure of residential real property which was initiated when the Plaintiff filed its Amended Complaint on or about March 10, 2010 and therefore squarely comes within the authority of the revised Florida Rule of Civil Procedure. Nevertheless, the Plaintiff's Amended Complaint does not contain an oath, affirmation, or the verification statement as required by Fla. R. Civ. Pro. 1.110(b). Because the Plaintiff's Complaint fails to contain any of these things, the Plaintiff's Complaint frustrates the purposes given by the Florida Supreme Court for the amendment to Rule 1.110(b). Furthermore, the Plaintiff cannot seek refuge within the "relation back" rule because its Amended Complaint relates back to its Motion to Amend, which was also filed on or about March 10, 2010. Since the Plaintiff's Motion to Amend was filed subsequent to the Florida Supreme Court's revision to Fla. R. Civ. Pro. 1.110(b), the Plaintiff's Amended Complaint is subject to the revised provision which requires complaints requesting foreclosure of residential real property be verified.

WHEREFORE, because the Plaintiff has failed to file a verified complaint, the instant case must be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 31st day of March, 2010 to JULIE ANTHOUSIS, BRIAN HUMMEL, AND RONALD E. PEREIRA, Florida Default Law Group, P.L., P.O. Box 25018, Tampa, FL 33622-5018.

By: 
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