

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

THE BANK OF NEW YORK MELLON F/K/A
THE BANK OF NEW YORK, AS TRUSTEE FOR
THE BELLAVISTA FUNDING CORPORATION,
BELLAVISTA MORTGAGE TRUST, 2005-1
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2005-1

Plaintiff

CASE NO. 09-12922-CI-08

vs.

JEREMIAH L. KOPCHAK, et al,

Defendants.

ORDER GRANTING DEFEDANT'S MOTION TO DISMISS

THIS CAUSE, came before the court on February 26, 2010 on Defendant's Motion to Dismiss the Plaintiff's Complaint.

Defendant argued that while the Plaintiff in this case is "The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Bellavista Funding Corporation, Bellavista Mortgage Trust, 2005-1 Mortgage Pass-Through Certificates, Series 2005-1" the copy of the promissory note attached to the complaint indicates the lender as "E-Loan, Inc., a Delaware corporation ("E-Loan"), and the copy of the note contains no indorsement to the plaintiff; no allonge attached to the note indicating a transfer to the plaintiff; or any other document attached to the complaint showing any interest in the note by the plaintiff whatsoever. Additionally, the copy of the mortgage attached to the complaint while indicating E-Loan as the "lender", shows Mortgage Electronic Registrations Systems, Inc. ("MERS") as the mortgagee, but nothing is attached to the

complaint showing any ownership interest in the mortgage by the Plaintiff.

Plaintiff argued that for purposes of passing a motion to dismiss, the Court must assume that all facts alleged in the complaint are true, and in analyzing this motion to dismiss the court must confine itself strictly to the allegations within the four corners of the complaint. Plaintiff further argued that because it has alleged that it is the “owner and holder of the note”, the court must assume that allegation is true, and the Defendant’s argument relative to a conflict between the allegations in the complaint and the exhibits attached is an argument based on “Standing” which should be raised as an affirmative defense and is not a proper argument in support of a motion to dismiss.

Defendant rebutted Plaintiff’s argument citing to the recent Second District Court of Appeal decision in *BAC Funding Consortium, Inc. v. Ginelle Jean-Jacques, et al.* Case No. 2D08-355 (Fla. App. 2/12/2010) (Fla. App., 2010), wherein the court, citing to its previous decision in *Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So.2d 399, 401 (Fla. 2d DCA 2000), clearly states that “[w]hen exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint.” Defendant argued that because the exhibits control over the Plaintiff’s allegations in the complaint, and because the note and mortgage attached to the complaint specifically identify other entities as the “Lender” and “Mortgagee”, that the Plaintiff has failed to establish itself as a real party in interest in this case and accordingly has failed to state a cause of action.

The Court finds that while Plaintiff has in fact alleged that it “owns and holds” the note and mortgage, and has attached a copy of the note and mortgage to the complaint, both of those exhibits to the complaint facially conflict with Plaintiff’s allegations of being the owner and holder. As required by the District Court of Appeal of Florida,

Second District's rulings in *Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So.2d 399, 401 (Fla. 2d DCA 2000), and most recently *BAC Funding Consortium, Inc. v. Ginelle Jean-Jacques, et al.* Case No. 2D08-355 (Fla. App. 2/12/2010) (Fla. App., 2010), "[w]hen exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint."

THEREFORE, it is ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED. Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint alleging sufficient facts, supported by exhibits which do not conflict with the allegations of fact in the Complaint, showing that Plaintiff is a real party in interest with standing to pursue this matter before this suit was filed.

DONE AND ORDERED in St. Petersburg, Pinellas County, Florida, this _____ day of _____, 2010.

ORIGINAL SIGNED
TRUE COPY

APR 01 2010

DAVID A. DEMERS
Circuit Judge

CIRCUIT JUDGE DAVID A. DEMERS

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