IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

CASE NO: 4D09 - 2668

ROBERT T. FROST, et. al.,

Appellant,

v.

LASALLE BANK, N.A., AS TRUSTEE FOR
WAMU MORTGAGE PASSTHROUGH
CERTIFICATES SERIES 2007-OA5 TRUST,
Appellee,
_______________________________________/

On Appeal from the Circuit Court of the
Seventeenth Judicial Circuit

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES......iv

STATEMENT OF THE CASE AND FACTS......1

SUMMARY OF THE ARGUMENT......9

ARGUMENT......12

I. The Documents Attached to the Complaint and the Motion for Summary Judgment Fail to Provide the Appellee, LaSalle Bank, with Standing......12

A. An Equitable Transfer of the Note and Mortgage Was Not Proven......12

B. The Appellant Raised the Defense of Standing in a Timely Manner......17

II. The Original Note and Assignment of Mortgage Were Never Introduced into Evidence at the Summary Judgment Hearing......18

III. Genuine Issues of Material Fact Exist Within the Record......19

A. Preliminary Requirements Which Must Be Met By the Moving Party in Order to Prevail on a Motion for Summary Judgment......19

B. A Genuine Issue of Material Fact Exists Concerning what Entity is the Holder and Owner of the Mortgage Given by Robert T. Frost......20

IV. The Original Note with a Blank Endorsement Produced for the First Time at the Summary Judgment Hearing Was Materially Altered from the Note Attached to the Complaint and Was Provided in an Untimely Manner Precluding its Use......21

V. Reasonable Inferences Within the Record Support the Conclusion that the Endorsement Signature on the Original Note is an Unauthorized Forgery and that Robert T. Frost Was denied his Constitutional Right to a Trial on the Merits......25

CONCLUSION..30

CERTIFICATE OF SERVICE...31

CERTIFICATE OF FONT COMPLIANCE...31

TABLE OF AUTHORITIES

CASES

Albelo v. Southern Bell
682 So. 2d 1126 (Fla. 4th DCA 1996)..29

BAC Funding Consortium Inc. v. Jean-Jacques
28 So. 3d 936 (Fla. 2nd DCA 2010)...16, 17

Blue Supply Corp. v. Novos Electro Mech., Inc.,
990 So. 2d 1157(Fla. 3d DCA 2008)..17

Bifulco v. State Farm Mutual Automobile Insurance Company
693 So. 2d 707 (Fla. 4th DCA 1997)..23

Booker v. Sarasota, Inc.
707 So. 2d 886 (Fla. 1st DCA 1998)...20, 21

Boulevard National Bank of Miami v. Air Metal Industries, Inc.
176 So. 2d 94 (Fla. 1965)..11, 27

Business Specialists, Inc. v. Land & Sea Petroleum, Inc.
25 So. 3rd 693 (Fla. 4th DCA 2010)...12

Cook v. Central and Southern Florida Flood Control District
114 So. 2d 691(Fla. 2nd DCA 1959)..16

Cooper City v. Sunshine Wireless Company, Inc.
654 So. 2d 283 (Fla. 4th DCA 1995)..13

Glens Falls Insurance Company v. Edgerly
155 So. 2d 649 (Fla. 1st DCA 1963)..20

Grosso v. American Telephone and Telegraph Company
691 So. 2d 604 (Fla. 4th DCA 1997)..18

Harry Pepper & Assocs., Inc. v. Lasseter
247 So. 2d 736 (Fla. 3d DCA 1971)....17

Holl v. Talcott
191 So. 2d 40 (Fla. 1966)....19, 20, 29

Hunt Ridge at Tall Pines, Inc. v. Hall
766 So. 2d 399 (Fla. 2d DCA 2000)....17

Johns v. Gillian
134 Fla. 575, 184 So. 140 (Fla. 1938)....9, 15

Mack v. Commercial Indus. Park, Inc.
541 So. 2d 800 (Fla. 4th DCA 1989)....25

Major League Baseball v Morsani
790 So. 2d 1071 (Fla. 2001)....12

Maynard v. Florida Board of Education
998 So. 2d 1201 (Fla. 2nd DCA 2009)....18

McClendon v. Key
209 So.2d 273 (Fla. 4th DCA 1968)....17, 18

McDonald v. Florida Department of Transportation
655 So. 2d 1164 (Fla. 4th DCA 1995)....20

Page v. Staley, 226 So. 2d 129
(Fla. 4th DCA 1969)....23

Progressive Express Insurance Company v McGrath
913 So. 2d 1281 (5th DCA 2005)....14, 15

Riggs v. Aurora Loan Services, LLC.
No. 4D08-4635, 2010 WL 1561873 (Fla. 4th DCA 2010)....15, 19

Rose v. Teitler
736 So. 2d 1229 (Fla. 4th DCA 1999)..26

Swift Indep. Packing Co. v. Basic Food Int'l, Inc.
461 So. 2d 1017 (Fla. 4th DCA 1984)..13

Verizzo v. Bank of New York
28 So. 3d 976 (Fla. 2nd DCA 2010)..24, 25

Voges v. Ward
98 Fla. 304, 123 So. 785 (Fla. 1929)..15

Williams v. BAC
927 So. 2d 1091 (Fla. 4th DCA 2006)..13

WM Specialty Mortgage, LLC v. Solomon
874 So. 2d 680 (Fla. 4th DCA 2004)..15, 16

STATUTES

Fla. Stat. § 671.201(21)(2009)..10

Fla. Stat. § 671.201(41)(2009)..28, 29

Fla. Stat. § 673.3081(1)(2009)...11, 28, 29

Fla. Stat. § 673.4031(1)(2009)..29

RULES

Fla.R.Civ.P. 1.510 ....9, 10, 13, 23, 25, 29

Statement of the Case and Facts

This matter comes to the appellate court from a foreclosure action brought in the circuit court of Broward County by the Appellee, Lasalle Bank, N.A., as Trustee for WAMU Mortgage Passthrough Certificates Series 2007-OA5 Trust ("Lasalle Bank"). The underlying Mortgage in this action was executed on April 20, 2007 by the Appellant, Robert T. Frost, as the borrower and states that Washington Mutual Bank, FA is the original lender. (See *Mortgage*, Vol. I, Rec., pp. 5-21).

On January 13, 2009 Lasalle Bank filed its unverified Complaint to foreclose the subject mortgage. (See *Complaint*, Vol. I, Rec. p. 1-4). The Complaint alleged that "[t]he Plaintiff is the legal and/or equitable owner and holder of the Note and Mortgage and has the right to enforce the loan documents." (See *Complaint*, Vol. I, Rec. p. 2 ¶ 6). The Complaint failed to plead a single material fact substantiating that LaSalle Bank prior to filing its lawsuit acquired the subject Note and Mortgage through an equitable transfer. (See *Complaint*, Vol. I, Rec. p. 1-4). The Complaint had attached to it copies of the aforementioned Mortgage and Adjustable Rate Note both of which identified Washington Mutual Bank, FA as the original lender. (See Vol. I, *Copy of Mortgage*, Rec., pp. 5-21; and *Copy of Adjustable Rate Note*, Rec. pp. 33-38). The copy of the Note was bare with respect to the presence of an endorsement. (See *Copy of Adjustable Rate Note*, Vol. I, Rec. pp. 33-38). Notably,

the Complaint did not have attached to it an assignment of the Mortgage or Note. (See *Attachments to Complaint* Vol. I, Rec. p. 5-38).

On January 30, 2009 an Answer to the Complaint was filed by John Bristol, Esq. which denied that LaSalle Bank was the legal and/or equitable owner and holder of the Note and Mortgage. (See *Answer*, Vol. I, Rec. p. 41, ¶ 6). Thereafter, on April 29, 2009 the Appellee filed its Motion for Summary Judgment accompanied by an Affidavit in Support of Motion for Final Summary Judgment. (See *Motion for Summary Judgment*, Vol. I, Rec. pp. 51-53 and *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57). The Affidavit was signed and executed on April 2, 2009. (See *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. p. 54). It states that the **"Bank of America, National Association** as successor by merger to Lasalle Bank, N.A., as Trustee for WAMU Mortgage Passthrough Certificates Series 2007-OA5 Trust **is the holder and owner of that certain mortgage originally given by Robert T. Frost**..." (See *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. p. 55, ¶ 6). (Emphasis added). A Motion to Substitute Party Plaintiff and corresponding Order were never filed in this case nor are there any documents on file substantiating that the "Bank of America, National Association" succeeded through merger Lasalle Bank. (See Vol. I, Rec. pp. 1-53). Further, the Affidavit contains no allegations that Lasalle

Bank or any other entity is the owner or holder of the subject Note.(See *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57). Nevertheless, the Affidavit verifies that the "Note and Mortgage attached to the original complaint filed in this matter are correct copies of the Note and Mortgage which are the subject matter of this action." (See *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57, ¶¶ 1 and 6).

On June 1, 2009 the Motion for Summary Judgment was brought before the trial judge for a hearing. Jay Farrow, Esq. appeared on behalf of Robert T. Frost and initially advised the court that

> I filed a notice of appearance for this morning **along with a motion to continue the action** based on the fact my client has been unable to get a hold of Mr. Bristol. Mr. Bristol did not show up today, he did not respond to the motion for summary judgment...
>
> Judge, I prepared a stipulation for substitution of counsel, I have not been able to get a hold of Mr. Bristol, I just don't know where he is.

(See *Summary Judgment Transcript*, Vol. II, Rec. pp. 178-180)(Emphasis added).

Nevertheless, the motion for Summary Judgment proceeded. During the brief hearing the trial court focused a significant amount of its attention upon the fact that it was a "court of equity," as well as "the status of the property." (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 180-182, 188). Defense counsel advised the court that the motion for summary judgement was legally deficient, because it "didn't

attach exhibits, doesn't reference exhibits." (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 182, 183). He also advised the court that the "transfer documents" (an assignment of mortgage and original note which now contained a blank endorsement) were not supplied in a timely manner. (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 182, 183).

LaSalle Bank's counsel acknowledged these facts by stating:

> I presented him with that documentation this morning. So he had time to review it.

(See *Summary Judgment Transcript*, Vol. II, Rec. pp. 183).

Defense counsel responded:

> I had the documents for a minute, that's not going to give me the opportunity to look at these things...
>
> I'm asking for an opportunity to review those documents and make sure they're in order.

(See *Summary Judgment Transcript*, Vol. II, Rec. pp. 183, 184)

Rather than rule on the request, the trial court asked Appellee's counsel, "[d]o you have the original? (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 184).

Counsel responded, "[t]he original is in that package. Along with the assignment and original note, original -" (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 184). The "package" which Appellee's counsel referred to is dated June

1, 2009 and its cover page is a pleading with the title of "PLAINTIFF'S EXHIBITS TO JUDGMENT." (See *Plaintiff's Exhibits to Judgment*, Vol. I, Rec. pp. 62-101). The pleading identifies the contents of the package as:

"1. ORIGINAL NOTE

2. ORIGINAL MORTGAGE

3. ASSIGNMENT OF MORTGAGE."

(See, *Plaintiff's Exhibits to Judgment*, Vol. I, Rec. p. 62). Notwithstanding defense counsel's objection that LaSalle Bank "didn't attach any exhibits," LaSalle Bank failed to introduce the package or its contents into evidence during the course of the Summary Judgment hearing. (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 176-189). LaSalle Bank's intent not to rely upon the Assignment of Mortgage was confirmed during the Motion for Rehearing when its counsel advised the trial court that "the summary judgement motion... doesn't rely on the assignment." (See *Rehearing Transcript*, Vol. III, p. 205). At the summary judgment hearing the court stated in error that

> Mr. Frost was represented by counsel who filed an Answer. The motion for summary judgment is in good form. **The original note, original mortgage and assignment of mortgage are attached**. The copies of the note and mortgage were attached to the Complaint.
>
> There has been no payment alleged, no affidavit in opposition, and the court finds that based upon the foregoing, the motion for summary judgment is well taken...

(See *Summary Judgment Transcript*, Vol. II, Rec. p. 185)(Emphasis added).

With respect to the summary judgment motion being in good form, defense counsel also advised the court that Lasalle Bank's documents created a genuine issue of material fact, since the complaint alleges that Lasalle Bank is the holder and owner of the subject Mortgage and the Affidavit in Support of Motion for Final Summary Judgment verifies "**that Bank of America National Association... is the holder and owner of that certain mortgage.**" (See *Summary Judgment Transcript*, Vol. II, Rec. p. 187)(Emphasis added). Nevertheless, the trial court concluded that "as a court of equity, Counsel, I'm going to grant summary judgment **for failure to pay**." (See *Plaintiff's Exhibits to Judgment*, Vol. I, Rec. p. 88)(Emphasis added).

The Appellant filed a timely Motion for Rehearing. (See, *Motion for Rehearing of Order Granting Plaintiff's Motion for Summary Judgment*, Vol. I, Rec. pp. 114 - 118). The grounds asserted included that there is a material issue of fact concerning who owns the Mortgage, as well as "whom is the real party in interest," that material summary judgment evidence was not served "at least twenty (20) days prior to the... hearing" and that "standing to file a lawsuit" was not established. (See, *Motion for Rehearing of Order Granting Plaintiff's Motion for Summary Judgment*, Vol. I, Rec. pp. 114, 116, & 118).

Prior to the motion for rehearing being heard, on July 1, 2009 a Notice of

Appeal was filed. On October 29, 2009 this court relinquished its jurisdiction so that the trial court could hear the motion for rehearing. On December 2, 2009 a memorandum was submitted to the court directed to the issue of standing. (See, *Memorandum in Support of Motion for Rehearing,* Vol. I, Rec. pp. 143-174).

At the December 4, 2009 hearing, before the Assignment of Mortgage was definitively abandoned as evidence in support of the motion for summary judgment by LaSalle Bank, the trial court was advised by defense counsel,

> When we take a look at that assignment, it flat out says that it was signed and executed on January 15th and the record reflects that the case was filed on January 13th.

(See *Rehearing Transcript*, Vol. III, p. 205).

When asked at the Motion for Rehearing to respond, LaSalle Bank reiterated

that

> the summary judgement motion relies only on the note and mortgage, it doesn't rely on the assignment.
>
> Opposing counsel says that it was evidence that we relied upon in our summary judgment motion, which is not true. That was not a basis for the summary judgment motion and it wasn't a basis for the judgment that was entered...
>
> **We held** the note and mortgage, and therefore we're entitled to enforce the notes and mortgage...
>
> The note in this case had a blank endorsement...
>
> In this case, like I said, we did not cite to the assignment of mortgage...

(See *Rehearing Transcript*, Vol. III, pp. 205-208).

Shortly thereafter Lasalle Bank's counsel advised the trial judge that

> the Jeff-Ray case did not -- did not address whether an **equitable transfer** of the mortgage **occurs prior to the execution of the assignment**... [T]he WM Specialty case reiterated that and it's a much more recent case. And it's much more recent than even the Jeff-Ray case. And it says there that **when you get the physical transfer of the documents**, you're entitled to enforce them at that moment. It doesn't matter whether or not a written assignment has been executed. **And, that's what happened here**.

(See *Rehearing Transcript*, Vol. III, Rec. pp. 208, 209)(Emphasis added).

Defense counsel then interjected

> The legal objection is she's representing to the court that they were in legal possession of those documents prior to January 13th of 2009. There was no evidence before the court to that effect, and I'm objecting to her representation to that effect.

(See *Rehearing Transcript*, Vol. III, pp. 209, 210 and *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57).

The trial court ruled that

> Your objection's clear, but you -- but it's really not in the form of an evidentiary objection. Because that's an argument that there is no proof. So, I'll overrule the objection.

(See *Rehearing Transcript*, Vol. III, p. 210).

Final Summary Judgment was granted in favor of LaSalle Bank. (See *Final Summary Judgment of Foreclosure*, Vol. I, pp. 104 -111).

SUMMARY OF ARGUMENT

The trial court reversibly erred by granting summary judgment to Lasalle Bank for five reasons. First, LaSalle Bank did not have standing to file its lawsuit. Lasalle Bank claimed that it had standing as a consequence of an "equitable transfer" of the Note. However, there was no proof presented that Lasalle Bank was in possession of the original Note on or before January 13, 2009; the date the lawsuit was filed. Further, there was no allegation or proof that LaSalle Bank purchased the Note which is an indispensable element of an equitable transfer. *Johns v. Gillian,* 134 Fla. 575, 184 So. 140, 143-144 (Fla. 1938).

Second, there is a genuine issue of material fact in this case as a result of Lasalle Bank's affidavit declaring "that Bank of America National Association... is the holder and owner of that certain mortgage originally given by Robert T. Frost..." (See *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57, ¶ 6). Accordingly, the record creates a reasonable inference that the Mortgage is owned by Bank of America and that Lasalle Bank has no right to foreclose on Robert T. Frost's property.

Third, Lasalle Bank prejudicially violated *Fla.R.Civ.P. 1.510(c)* by presenting the Appellant for the first time immediately prior to the summary judgment hearing the original Note with a bearer endorsement. The pertinent part of the rule provides

that "[t]he movant shall serve... at least 20 days before the time fixed for the hearing... any summary judgment evidence on which the movant relies that has not already been filed with the court." *Fla.R.Civ.P. 1.510(c)*. Without the endorsed note Lasalle Bank had no ability to even claim it is a holder of the Note. Fla. Stat. § 671.201(21)(2009).

Fourth, LaSalle Bank's violation of *Fla.R.Civ.P. 1.510(c)* was prejudicial to Robert T. Frost because there is a reasonable inference that the original lender, Washington Mutual Bank, FA's, endorsement upon the original Note is unauthorized and the signature is a forgery. Although Lasalle Bank did not rely upon a copy of an assignment of mortgage filed in the record, that assignment indicates that the original lender, Washington Mutual Bank, FA, relinquished all of its right to the Appellant's property on or before January 15, 2010. (See *Copy of Assignment of Mortgage*, Vol. I, p. 101). Thereafter, on April 2, 2010 Lasalle Bank executed an affidavit which verified that "[t]he Note... attached to the original complaint [which has no endorsement is a] correct cop[y] of the Note." (See *Affidavit in Support of Motion for Final Summary Judgment*, Rec. pp. 56). The reasonable inference from the Affiant's language is that the affiant had access to the original Note on April 2, 2010 and that on that date the original Note was bare with respect to the presence of an endorsement like the copy of the Note attached to the Complaint. (See *Copy of Adjustable Rate Note*, Vol. I, Rec. p. 38). Thus, there is a reasonable inference that the signature and

endorsement were placed on the original Note after April 2, 2010 at a time when Washington Mutual Bank, FA had no rights in the subject Note, thereby making the endorsement unauthorized and the signature a forgery. *Boulevard National Bank of Miami v. Air Metal Industries, Inc.* 176 So. 2d 94, 97 (Fla. 1965). The appellant was prejudiced by the last minute production of the endorsed original Note, because he was not provided with 20 days notice in which to assert a specific denial as to the authenticity of and authority to make the signature on the endorsement. Fla. Stat. § 673.3081(1) (2009).

Fifth, defense counsel objected that LaSalle Bank "didn't attach [or] reference exhibits" to the motion for summary judgment. (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 182, 183). Nevertheless, no attempt was made by Lasalle Bank prior to or at the summary judgment hearing to introduce into evidence the Original Note, the Assignment of Mortgage or the Original Mortgage. (See *Summary Judgment Hearing Transcript*, Vol. I, pp. 176-189). Instead, Lasalle Bank chose only to make the Original Note, Assignment of Mortgage and Mortgage exhibits to the Judgment. (See, *Plaintiff's Exhibits to Judgment*, Vol. I, Rec. pp. 62-101and *Final Summary Judgment of Foreclosure*, Vol. I, pp. 104 -111). For all of the above stated reasons the trial court reversibly erred in granting summary judgment to LaSalle bank.

LEGAL ARGUMENT

STANDARD OF REVIEW

"A trial court's ruling on a motion for summary judgment posing a pure question of law is subject to de novo review." *Major League Baseball v Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001); and *Business Specialists, Inc. v. Land & Sea Petroleum, Inc.*, 25 So. 3rd 693, 695 (Fla. 4th DCA 2010).

I. The Documents Attached to the Complaint and the Motion for Summary Judgment Fail to Provide the Appellee, Lasalle Bank, with Standing

(A.) An Equitable Transfer of the Note and Mortgage Was Not Proven

Within his Motion for Rehearing defense counsel raised the issue of standing, noted his desire to file an amended answer with case law in support thereof, as well as filed a Motion to Amend Answer which included the proposed Amended Answer as an exhibit stating the affirmatives defense of standing and not a real party in interest. (See, *Motion for Rehearing of Order Granting Plaintiff's Motion for Summary Judgment*, Vol. I, Rec. pp. 116, 119 and *Motion to Amend the Defendant's Answer to the Plaintiff's Complaint* with proposed *Amended Answer*, Vol. I, Rec, pp 131- 135, 138, ¶¶ 22 and 23). At the rehearing the court was advised "that standing can be raised, as long as it's raised in the trial proceedings." (See *Rehearing Transcript*, Vol. III, p. 204). Additionally, the court was notified that

> the Defendant's motion to amend his Complaint, which specifically requests permission to file an Answer, and that's in the court file, raising the Affirmative Defense of standing.

(See *Rehearing Transcript*, Vol. III, p. 215).

When LaSalle Bank was confronted with the standing issue at the rehearing, it raised for the first time the theory of equitable transfer as a basis for standing and the granting of summary judgment. (See *Complaint*, Vol. I, Rec. p. 1-4; *Motion for Summary Judgment*, Vol. I, Rec. pp. 51-53 and *Rehearing Transcript*, Vol. III, p. 208, 209). It was improper for the Appellee to raise the rationale of equitable transfer to justify summary judgment when it had failed to raise that rationale in its Motion for Summary Judgment. *Cooper City v. Sunshine Wireless Company, Inc.*, 654 So. 2d 283 (Fla. 4th DCA 1995). Therein, the court noted

> *Florida Rule of Civil Procedure 1.510(c)* requires a party seeking summary judgment to "**state with particularity the grounds upon which [the motion] is based and the substantial matters of law to be argued**." This rule is designed to prevent "ambush" by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing. *Swift Indep. Packing Co. v. Basic Food Int'l, Inc., 461 So. 2d 1017, 1018 (Fla. 4th DCA 1984).*

Cooper City, 654 So. 2d at 284 (Emphasis added); *Williams v. BAC*, 927 So. 2d 1091 (Fla. 4th DCA 2006)("It is reversible error to enter summary judgment on a ground not raised with particularity in the motion.")

Additionally, Lasalle Bank's counsel erred in representing to the court that "an

equitable transfer of the mortgage occurr[ed] prior to the execution of the assignment... And, that's what happened here," as well as that there had been a timely "physical transfer of the documents" for purposes of standing, since there was no evidence to support this proposition. (See *Rehearing Transcript*, Vol. III, p. 208, 209). First, Lasalle Bank's Affidavit provides no information as to when the Appellee obtained possession of the original Note and the Original Mortgage. (See *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57). Second, the copy of the Note attached to the Complaint lacks the blank endorsement which appears on the Note submitted as an exhibit to the Final Judgment. (See *Copy of Adjustable Rate Note*, Vol. I, Rec. pp. 33-38).

In order to have standing in this matter on January 13, 2009 it was incumbent upon the Appellee to allege and prove that on that date it either had: 1.) a valid timely assignment while in possession of the Original Mortgage and Note; or 2.) was in possession of the Original Mortgage and Note with a valid endorsement or 3.) had obtained an equitable transfer of the Note and Mortgage. In *Progressive Express Insurance Company v McGrath*, 913 So. 2d 1281 (5th DCA 2005) the court had the opportunity to comment upon the importance of possessing original promissory notes at the commencement of a civil action which are the subject of litigation. Therein, the court explained that

> A claimant's standing to bring an action is distinct from questions arising from the claimant's noncompliance with one or more conditions precedent to maintaining the action. For example, in *Voges v. Ward, 98 Fla. 304, 123 So. 785 (Fla. 1929)*, **the plaintiff held only one of twelve notes** necessary to the replevin of the collateral under a conditional sales contract **when the action... was filed**. Although the plaintiff acquired all of the notes before the suit was tried, the trial court ruled that the suit was prematurely brought. The supreme court affirmed the trial court's ruling on this point, explaining that "**the general rule in actions at law is that the right of a plaintiff to recover must be measured by the facts as they exist [sic] when the suit was instituted**." *Id. at 793* (citing *2 on Replevin* § 257 (2d ed. 1900); 1 C.J. 1149).

Id. at 1284, 1285 (Emphasis added). Herein, not only is there an absence of proof that the Appellee held the original Note with a valid endorsement on January 13, 2009, there is an absence of allegations and proof concerning another critical element of an equitable transfer. More specifically, in *Johns v. Gillian,* 134 Fla. 575, 184 So. 140, 143-144 (Fla. 1938) the court concluded that "Gillian would be entitled to foreclose in equity **upon proof of his purchase of the debt**. *(Citations omitted*) *Gillian,* 184 So. at 143, 144 (Emphasis added). The court then observed that

> In the foreclosure proceedings appellee Gillian gave the following testimony in regard to the transfer of the debt owed by the Browns to Everglade Lumber Company:..
>
> "MR. DAVIS: Q. **How did you acquire the note?** A. **Bought it from the Everglade Lumber Co.**

Gillian, 184 So. at 144 (Emphasis added). Also see *Riggs v. Aurora Loan Services, LLC.*, No. 4D08-4635, 2010 WL 1561873, at 2 (Fla. 4th DCA 2010) and *WM*

Specialty Mortgage, LLC v. Solomon, 874 So. 2d 680, 682 (Fla. 4th DCA 2004).

In the matter currently being reviewed the Complaint and Affidavit do not provide the trial court with any allegations or evidence that the Appellee purchased the note or the mortgage. (See *Complaint*, Vol. I, Rec. p. 1-4 and *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57). As noted in *Cook v. Central and Southern Florida Flood Control District*, 114 So. 2d 691,694(Fla. 2nd DCA 1959) "[i]n order to invoke equitable jurisdiction, it is required that every material fact essential to establish the right to equitable relief must be clearly and definitely pleaded." Accordingly, the Appellee was in error to assert that it had standing as a consequence of an equitable transfer of the Mortgage and Note occurring prior to the filing of its lawsuit.

Recently, in *BAC Funding Consortium Inc. v. Jean-Jacques*, 28 So. 3d 936 (Fla. 2nd DCA 2010) the court noted

> The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage... (*Citations omitted*). While U.S. Bank alleged in its unverified complaint that it was the holder of the note and mortgage, the copy of the mortgage attached to the complaint lists "Fremont Investment & Loan" as the "lender" and "MERS" as the "mortgagee.' When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint. *See, e.g., Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So. 2d 399, 401 (Fla. 2d DCA 2000)* ("Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and may be the basis for a motion to dismiss."); *Blue Supply Corp. v.*

> *Novos Electro Mech., Inc., 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008)*; *Harry Pepper & Assocs., Inc. v. Lasseter, 247 So. 2d 736, 736-37 (Fla. 3d DCA 1971)* (holding that when there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable"). **Because the exhibit to U.S. Bank's complaint conflicts with its allegations concerning standing and the exhibit does not show that U.S. Bank has standing to foreclose the mortgage, U.S. Bank did not establish its entitlement to foreclose the mortgage as a matter of law**.

(Emphasis added). So too, "because the exhibit[s] to [Lasalle Bank's] complaint conflict[] with its allegations concerning standing and the exhibit[s] do[] not show that [LaSalle Bank] has standing to foreclose the mortgage, [LaSalle Bank] did not establish its entitlement to foreclose the mortgage as a matter of law." *Id.* at 6.

(B.) The Appellant Raised the Defense of Standing in a Timely Manner

Although the trial judge's only stated basis for granting LaSalle Bank's Motion for Summary Judgment was " for failure to pay," the court questioned whether the Appellant had brought up the issue of standing in a timely manner. (See *Rehearing Transcript*, Vol. III, p. 203). In *McClendon v. Key*, 209 So.2d 273, 277 (Fla. 4th DCA 1968) this court stated

> Where on motion for a summary judgment matters presented indicate the unsuccessful party may have a... **defense not pleaded**, **which would justify an amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment**. Under such

> circumstances summary judgment should be denied and leave to amend should be granted. (*Citations omitted*).

Also see *Grosso v. American Telephone and Telegraph Company*, 691 So. 2d 604, 605 (Fla. 4th DCA 1997).

Additionally, in *Maynard v. Florida Board of Education*, 998 So. 2d 1201 (Fla. 2nd DCA 2009) the defendant raised the issue of standing for the first time after final judgment had been entered in a post judgment motion and the court concluded that the issue is raised in a timely manner, so long as it is raised at the trial level. The court first isolated the critical issue before it to be "whether Maynard waived this argument by failing to raise it as an affirmative defense in the trial court proceeding." *Id.* at 1205. The court concluded that the law "does not necessarily require that standing be raised only by means of an affirmative defense" and that "the issue ha[d] not been waived." *Id.* at 1206. So too, by raising the issue of standing in his Motion for Rehearing and his Motion to Amend Answer the Appellant, Robert T. Frost, did not waive the matter.

II. The Original Note and Assignment of Mortgage Were Never Introduced into Evidence at the Summary Judgment Hearing

The record also reflects that no attempt was made by Lasalle Bank prior to or at the summary judgment hearing to introduce into evidence the Original Note, the Assignment of Mortgage or the Original Mortgage. (See *Summary Judgment*

Hearing Transcript, Vol. I, pp. 176-189). This, notwithstanding defense counsel's objection that LaSalle Bank "didn't attach [or] reference exhibits." (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 182, 183). Moreover, the pleading to which the subject exhibits were attached is not identified by title as being evidence to be used during the hearing of the Summary Judgment Motion nor was the Note ever accompanied by an affidavit to authenticate it as required by law. *Riggs v. Aurora* 2010 WL 1561873, at 2. Instead, the exhibits are attached to the pleading entitled "PLAINTIFF'S EXHIBITS TO JUDGMENT" dated June 1, 2009, the same date that the Judgment was signed by the trial judge. (See, *Plaintiff's Exhibits to Judgment*, Vol. I, Rec. pp. 62-101and *Final Summary Judgment of Foreclosure*, Vol. I, pp. 104 -111). Accordingly, based upon the fact that a proper objection was made and that these documents were never moved into evidence, the trial court was also in error to conclude that "[t]he motion for summary judgment is in good form" and to grant summary judgment. (See *Summary Judgment Transcript*, Vol. II, Rec. p. 185).

III. Genuine Issues of Material Fact Exist Within the Record

(A.) Preliminary Requirements Which Must Be Met By the Moving Party in Order to Prevail on a Motion for Summary Judgment

In the seminal case of *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966) the court articulated the matters which a court must initially consider in reviewing a movant's

motion for summary judgment. Therein, the court explained that

> [I]t 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. (*Citation omitted*). He must prove this negative conclusively.

Id. at 43, 44; *McDonald v. Florida Department of Transportation*, 655 So. 2d 1164, 1168 (Fla. 4th DCA 1995)("If... **it [the evidence] is conflicting, if it will permit different reasonable inferences**... it should be submitted to the jury as a question of fact...") In those situations where a jury trial is not available as a matter of right such as "in equity cases... a full hearing on the merits" is required. *Glens Falls Insurance Company v. Edgerly*, 155 So. 2d 649 (Fla. 1st DCA 1963).

(B.) A Genuine Issue of Material Fact Exists Concerning what Entity is the Holder and Owner of the Mortgage Given by Robert T. Frost

The Appellant's Answer denied that LaSalle Bank was the legal and/or equitable owner and holder Note and Mortgage. (See *Answer*, Rec. p. 41, ¶ 6). In *Booker v. Sarasota, Inc.* 707 So. 2d 886 (Fla. 1st DCA 1998) the issue was whether the Plaintiff could prove it was the owner and holder of the note. The court ruled that "Booker's answer indicating a lack of knowledge concerning ownership of the note acted as a denial under the Florida Rules of Civil Procedure," **thereby requiring proper proof of the matter**. *Id.* at 889 (Emphasis added).

Herein, LaSalle Bank's Affidavit stated under oath that "Bank of America,

National Association... is the **holder and owner** of that certain mortgage originally given by Robert T. Frost...," thereby creating the reasonable inference that the Mortgage is owned by an entity other than the LaSalle Bank. (See *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57, ¶ 6)(Emphasis added). Although the affidavit indicates the Bank of America is the successor by merger to Lasalle Bank, a motion to substitute party plaintiff was never filed in this case nor are there any documents on file substantiating that the Bank of America succeeded through merger Lasalle Bank. It is improper for a trial court to "simply assume" a fact which is not part of the record. *Booker v. Sarasota, Inc.* 707 So. 2d 886, 889 (Fla. 1st DCA 1998). With ownership to the Mortgage resting with the Bank of America, National Association, Lasalle Bank has no right to foreclose on the subject Mortgage. Thus, from an evidentiary standpoint, a genuine issue of material fact exists concerning whether the subject Mortgage is owned by LaSalle Bank.

VI. The Original Note with a Blank Endorsement Produced for the First Time at the Summary Judgment Hearing Was Materially Altered from the Note Attached to the Complaint and Was Provided in an Untimely Manner Precluding its Use

Based upon the documents "on file" immediately prior to the June 1st summary judgment hearing defense counsel had no reason to believe that LaSalle Bank could

meet its burden of proving that there was no genuine issue of fact as to who owned and held the Original Note, since none of the admissible evidence "on file" proved that the Note was owned by LaSalle Bank. The chronology of relevant events concerning the original Note allegedly becoming a transfer document are as follows:

1.) on January 13, 2009 a copy of the original note without endorsement is filed as an exhibit to the Complaint;

2.) on April 2, 2009 an Affidavit is executed on behalf of the Appellee which verifies that the Note attached to the complaint is correct, but does not address whether the Note is what it purports to be or entitlement to enforce the Note;

3.) on April 29, 2009 the Affidavit is filed with the court and served on the Appellant along with the Motion for Summary Judgment; and

4.) on June 1, 2009 for the first time the Appellant is shown the original note allegedly signed and endorsed by Washington Mutual Bank, FA. as part of the Appellee's exhibits to judgment. (See *Copy of Adjustable Rate Note*, Vol. I, Rec. pp. 33-38 and *Affidavit in Support of Motion for Final Summary Judgment*, Vol. I, Rec. pp. 54-57 and *Original Note*, Vol. I, Rec. p. 68).

The sequence of events described above led Defense Counsel to object to the endorsed original note being used as evidence at the hearing. (See *Summary Judgment Transcript*, Vol. II, Rec. pp. 183, 184). Further, counsel advised the court

that, "the rule is very clear with respect to serving these type of documents**,** all summary judgment evidence prior to the hearing." (See *Summary Judgment Transcript*, Vol. II, Rec. p. 186). Counsel was referring to *Fla. R. Civ. P. 1.510(c) & (e)* which in pertinent part provides that

> The movant shall serve the motion **at least 20 days before the time fixed for the hearing**, and shall also serve at that time copies of **any summary judgment evidence on which the movant relies that has not already been filed with the court**.
>
> Sworn or certified copies of all papers or parts thereof referred to in an affidavit **shall be attached thereto or served therewith**.

(Emphasis added). Succinctly stated, defense counsel's preliminary objection was that the blank endorsement which LaSalle Bank relied upon as evidencing a transfer of the Note to itself constituted evidence that had not previously been filed with the court or provided to the Appellant.

In *Bifulco v. State Farm Mutual Automobile Insurance Company*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997) this court elaborated on the importance of the procedural strictures of the rule by stating

> [C]aution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment **must be observed.** *Page v. Staley, 226 So. 2d 129, 132 (Fla. 4th DCA 1969)*. **The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities**.

(Emphasis added).

In the recent case of *Verizzo v. Bank of New York*, 28 So. 3d 976 (Fla. 2nd DCA 2010) "[t]he attachments to the complaint did not include copies of the note or any assignment of the note and mortgage to the Bank." Eleven days before the summary judgment hearing "the Bank served by mail a notice of filing the original promissory note, the original recorded mortgage, and the original recorded assignment of mortgage" while waiting until the hearing date to file them. *Id.* at 2. Similar to the Appellant herein, Verizzo objected on the basis

> that the Bank **did not timely file the documents on which it relied in support of its motion for summary judgment**, and that the documents were insufficient to establish that the Bank was the owner and holder of the note and mortgage.

Id. at 2, 3. (Emphasis added).

The court's analysis noted that

> *Rule 1.510(c)* requires that the movant "serve the motion at least 20 days before the time fixed for the hearing[] and shall also serve at that time **copies of any summary judgment evidence on which the movant relies that has not already been filed with the court**."

Id. at 4 (Emphasis added). The court also noted that the

> documents reflect that at least one genuine issue of material fact exists...
>
> Therefore, based on the late service and filing of the summary judgment evidence and the existence of a genuine issue of material fact, we reverse the final summary judgment...

Id. at 5.

In *Mack v. Commercial Indus. Park, Inc.,* 541 So. 2d 800, (Fla. 4th DCA 1989) exhibits were attached to a motion for summary judgment, but "were not accompanied by an affidavit in support of the motion which might have authenticated them..." In reversing the matter this court ruled that "[i]n our opinion the exhibits, unsupported by affidavits, or the record, were *not* 'on file' at the time the motion was made." *Id.* at 800. (Italics and internal quotation marks emphasis of the court). Accordingly, based upon the violation of the procedural strictures of *Fla.R.Civ.P. 1.510* it was improper for the court to consider the Original Note at the summary judgment hearing.

V. Reasonable Inferences Within the Record Support the Conclusion that the Endorsement Signature on the Original Note is an Unauthorized Forgery and that Robert T. Frost Was denied his Constitutional Right to a Trial on the Merits

The copy of the Assignment of Mortgage attached to LaSalle Bank's pleading "Plaintiff's Exhibits to Judgment" is signed on January 15, 2010 by Eric Tate under a line which states "JP Morgan Chase Bank, National Association." (See *Copy of Assignment of Mortgage*, Vol. I, p. 101). The Assignment also states that "JP Morgan Chase Bank, National Association" is the "'Assignor.'" (See *Copy of Assignment of Mortgage*, Vol. I, p. 100). Further, the Assignment reflects that it is in reference to

the Mortgage executed by "Robert T. Frost" on "April 20, 2007 "together with the note of obligation described in said Mortgage(s)." (See *Copy of Assignment of Mortgage*, Vol. I, p. 100). The reasonable inference created by the copy of the JP Morgan Assignment of Mortgage is that prior to January 15, 2010 Washington Mutual Bank, FA through assignment or otherwise relinquished all of its rights to the Note and Mortgage which are the subject of this action.[1] As this court stated in *Rose v. Teitler*, 736 So. 2d 1229 (Fla. 4th DCA 1999) "it is well established that an 'assignment transfers to the assignee all the interests and rights of the assignor in and to the thing assigned.'" (*Citation Omitted*).

On April 29, 2010 LaSalle Bank placed "on file" with the trial court its Affidavit based "on personal knowledge" which verified that "[t]he Note... attached to the original complaint filed in this matter [is a] correct cop[y] of the Note." (See *Affidavit in Support of Motion for Final Summary Judgment*, Rec. pp. 56). The reasonable inference from this language is that the affiant had access to the original Note on April 2, 2010 and that on that date the original Note was bare with respect to the presence of an endorsement like the copy of the Note attached to the

[1] Regardless of whether or not the copy of the Assignment of Mortgage was introduced into evidence, the copy was made a part of the "Exhibits to Judgment." "[T]he denial [of a signature] may be on information and belief..." Fla. Stat. § 673.3081, Official Comment (2009).

Complaint,. (See *Copy of Adjustable Rate Note*, Vol. I, Rec. p. 38). Accordingly, the documents on file create a reasonable inference that the signed endorsement in blank or "bearer" endorsement allegedly made by "WASHINGTON MUTUAL BANK, FA By CYNTHIA RILEY VICE PRESIDENT" was placed upon the original note at some point in time after April 2, 2010. (See *Original Note*, Vol. I, Rec. p. 68). However, as noted above the copy of the JP Morgan Assignment of Mortgage creates the reasonable inference that Washington Mutual Bank, FA relinquished all of its rights to the Note and Mortgage prior to January 15, 2010. "[W]hen such assignment is made the property rights become vested in the assignee so that the assignor no longer has any interest in the account or chose which he may subsequently assign to another." *Boulevard National Bank of Miami v. Air Metal Industries, Inc.* 176 So. 2d 94, 97 (Fla. 1965). Thus, there is a reasonable inference that Washington Mutual Bank, FA's endorsement is unauthorized and Vice President, Cynthia Riley's, signature on the original Note is unauthorized and a forgery.

At the summary judgment hearing defense counsel advised the trial judge

> I'm asking for an opportunity to review those documents and make sure they're in order, and if necessary do some discovery...
>
> [W]e were not served with the transfer papers...
>
> I have not had the opportunity to review them and to see if they're accurate, or to see if there is any defenses...

(See *Summary Judgment Transcript*, Vol. II, Rec. pp. 184, 186).

The last minute production of the Original Note containing a transfer endorsement prejudiced the Appellant in that he did not have 20 days prior to the hearing to ascertain and assert the unauthorized signature defense. Although the Appellant had denied in his answer that LaSalle Bank was the owner and holder of the note, Florida's adaptation of the Uniform Commercial Code provides that

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings.

Fla. Stat. § 673.3081(1) (2009). The Official Comment to this section advises that

> Nothing in this section is intended, however, to prevent amendment of the pleading in a proper case...
>
> The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized... "Presumed" is defined in Section 1-201 and means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid.
>
> The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence.

Fla. Stat. § 673.3081, Official Comment 1 (2009). Florida's adaptation of the code also provides that "'[u]nauthorized signature' means a signature made without actual, implied, or apparent authority. The term includes a forgery." Fla. Stat. § 671.201(41)

(2009). Further, Florida's adaptation of the code provides that "an unauthorized signature is ineffective..." Fla. Stat. § 673.4031(1) (2009). However, the Appellant was not put on notice as to the need and applicability to raise the "unauthorized signature" defense until he was ambushed by the untimely production of the endorsed note at the summary judgment hearing.

Accordingly, the granting of the summary judgment should also be reversed on the basis that LaSalle Bank has failed to "overcome all reasonable inferences which may be drawn in favor of the opposing party" surrounding the validity of the endorsement on the original note. *Holl v. Talcott*, 191 So. 2d at 43 or 44. As noted above "[n]othing in this section is intended... to prevent amendment of the pleading in a proper case..." Fla. Stat. § 673.3081, Official Comment 1 (2009). Based upon the violation of *Fla. R. Civ. P. 1.510(c)* and as a result of the last minute production of the endorsed original note, the Appellant maintains that this is "a proper case" to be reversed and remanded for the amendment of his pleadings to include a specific denial of the authenticity of and authority to make the signature of Cynthia Riley on the endorsement. Not "[t]o do so would simply deprive [Robert T. Frost] of [his] constitutional right to a trial on the merits and would violate the basic principles of law which govern the use of summary judgment." *Albelo v. Southern Bell*, 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996) (*Citation omitted*).

CONCLUSION

The record indicates that there is no proof to substantiate Lasalle Bank's claim of standing based upon an equitable transfer of the Note and Mortgage prior to the filing of this case. It also demonstrates a genuine issue of material fact exists as to what entity owns the Appellant's Mortgage and that the procedural strictures of *Fla.R.Civ.P.* 1.510(c) were violated by the production for the first time of the endorsed original Note immediately before the summary judgment hearing. The late production prejudiced Robert T. Frost by precluding him from contesting the validity of and having sufficient time to investigate whether the endorsement and signature were properly authorized. Further, the Appellee never sought to have the original Note entered into evidence prior to or at the summary judgment hearing. Accordingly, this Court should reverse the trial court's granting of final summary judgment and remand this case for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by Federal Express to Heidi Weinzetl c/o Shapiro and Fishman, LLP 2424 North Federal Hwy, Suite 360, Boca Raton, FL 33431 and Jay Farrow, 4801 S. University Drive, Suite 265, Davie FL 33328 this 22nd day of May, 2010.

____

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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the font requirements of Fla. R. App. P.9.210(a)(2) have been complied with.

By:_____________________
Michael Wrubel