

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

MOTION FOR REHEARING EN BANC

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MOTION FOR REHEARING EN BANC

Appellant Gregory Taylor, by and through his undersigned attorney, per Florida Rule of Appellate Procedure 9.331, files this Motion for Rehearing En Banc as this case is of exceptional importance because there are approximately 400,000 mortgage foreclosure cases filed in Florida annually, a substantial number of which throughout the state will be effected by the panel's opinion which creates a new theory of transferring notes. In support thereof the Appellant states:

- I. The Court's Rationale to Affirm Fails to Take into Consideration that the Agreements Expressed Within the Mortgage Constitute a Contract in Which the Language Supporting this Panel's Initial Opinion is at Best Ambiguous Since the Supreme Court of Maine This Month has Reviewed the Same Relevant Language and Reached A Different Interpretation Thereby Creating an Issue of Fact Precluding Summary Judgment

In its opinion the court's panel quoted what it thought was the relevant "explicit" language in the Mortgage to support the rationale of its affirmance, but in the process overlooked¹ the fact that clauses of a contract should not be read in

¹ The panel's opinion represents an application of the Topsy Coachman rule. See *Butler v. Yusem*, 3 So.3d 1185, 1186 (Fla. 2009). That is, the rationale provided for the panel's affirmance of the trial court is different from any argument presented by either party at the trial or appellate level. Based upon counsel's research the panel's rationale, at the time of the released opinion, presented a line of reasoning never before examined by any State or Federal court. Further, the rationale was not briefed by the parties and amicus were not provided an opportunity to comment upon the panel's line of reasoning. Additionally, the panel itself appeared to recognize that its decision did not have the benefit of being fully tested as evident by its language that "1[i]t appears, consequently, that the mortgage document, reciting the explicit agreement of Mr. Taylor, grants to MERS the status of a nonholder in

isolation and must be read taking into consideration the context of the entire agreement. *Hand v. Grow Construction, Inc.*, 983 So.2d 684, 687 (Fla. 1st DCA 2008). Six days after the panel's opinion was released the Supreme Court of Maine in *Mortgage Electronic Registration Systems, Inc. v. Saunders*, No. 09-640, 2010 WL 3168374, (Me. August 12, 2010) has provided prima facie proof that when not viewed in an isolated manner and within the context of the entire Mortgage *in pari materia* with the Note the critical language which served as the lynchpin of the panel's opinion is at best ambiguous. More specifically, the panel's opinion noted from the mortgage that

MERS is specifically described (in bold print) as the "mortgagee under the Security Instrument..."

Mr. Taylor, "does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property. . ."

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, *MERS* (as nominee for Lender and Lender's successors and assigns) *has the right* to exercise any and all of those interests, including, but not limited to, the right to foreclose and sell the Property, and *to take any action required of Lender including, but not limited to, releasing and canceling the Security Instrument.*

possession as that position is defined by section 673.3011." Therefore, it is understandable how the oversight discussed above could take place. *Taylor v. Deutsche Bank National Trust Company*, No. 5 D09-403, 2010 LEXIS 11431, at *4. (Emphasis added).

Id. at *4. Other pertinent language from the Mortgage includes Section 16 which provides in pertinent part,

Governing Law... This Security Instrument shall be governed by federal law *and the law of the jurisdiction in which the property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law.*

(R. I/page 76, paragraph 16 of mortgage)(Emphasis added).

Additionally, it is important to emphasize that the Adjustable Rate Note states in Section 1 that “I *understand that the Lender may transfer this Note.*” (R. I/page 1)(Emphasis added). One year before *MERSCORP, Inc. v. Romaine*, 8 N.Y. 3d 90, 101; 861 N.E.2d 81; 828 N.Y.S.2d 266 (N.Y. 2006) the Supreme Court of Nebraska provided additional contextual background information for MERS in *Mortgage Electronic Registration Systems, Inc., v. Nebraska Department of Banking and Finance*, 270 Neb. 529, 704 N.W.2d 784 (2005). Therein the court notes that:

MERS agrees not to assert any rights (other than rights specified in the Governing Documents) *with respect to such mortgage loans or mortgaged properties;*...

MERS... is contractually *prohibited from exercising any rights* with respect to the mortgages (i.e., foreclosure) *without the authorization of the members;*...

MERS explains that *it merely “immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur;*...” and

the lender retains the note and servicing right. The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files.

Id. 532, 533 and 534 (Emphasis added).

One of the “limitations of Applicable Law” which is the binding “law of the jurisdiction in which the [Appellant’s] property is located” and which the Mortgage is “subject to” is this court’s succinctly stated opinion released five years ago as *Langford v. Paravant, Inc.*, 912 So.2d 359 (Fla. 5th DCA 2005). Therein, this court vacated the granting of summary judgment because a contract required interpretation and explained in its motion for clarification that

Contract interpretation is generally a question of law for the court, rather than a question of fact. *E.g., DEC Electric, Inc. v. Raphael Constr. Corp.*, 558 So. 2d 427 (Fla. 1990). Unless ambiguous, contract language must be given its plain meaning. *E.g., Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999). However, *when the content of an agreement is ambiguous and the parties present different interpretations, the issue of proper interpretation becomes one of fact, precluding summary judgment. E.g., Ieracitano v. Shaw*, 815 So. 2d 787 (Fla. 4th DCA 2002). Further, where the language of the contract is ambiguous, *its provisions should be construed against the drafter. E.g., Ellsworth v. Insurance Co. of North America*, 508 So. 2d 395, 400 (Fla. 1st DCA 1987).

Id. at 360, 361 (Emphasis added).

The Appellant respectfully submits that under the panel’s current interpretation MERS is improperly being given the authority to act prematurely on behalf of the alleged successors and assigns of the Lender. That is, until such time as an en-

tity such as Deutsche Bank comes into possession of an unendorsed note and a *lawful assignment* of the Note from the original lender *it does not hold the status of being a successor or assign of the Lender*. The twice quoted phrase “as *nominee for Lender and Lender’s successors and assigns*” plain meaning is that the contract calls for the Lender to have and retain the power to create its own “successors and assigns.” (Emphasis added). “MERS and its successor’s and assigns” are not given the power to literally create the “*Lender’s successors and assigns*.” (Emphasis added).

The state of Maine’s Uniform Commercial Code at all material times has included the same language which the Florida Legislature adopted regarding variations by agreement of parties.³ In *Saunders*, the court examined the same isolated language which this court’s panel examined in an effort to ascertain what rights that language provided to MERS and whether those rights, if any, under UCC 3-301 provided MERS with the status of a “nonholder in possession of the instrument who has the rights of a holder.” *Saunders*, at *10. That is, prior to reaching its decision the Supreme Court of Maine specifically considered the following language:

³ 11 M.R.S. § 1-1302. Variation by agreement

(1). Except as otherwise provided in subsection (2) or elsewhere in the Uniform Commercial Code, the effect of provisions of the Uniform Commercial Code may be varied by agreement.

MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any and all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of Lender including, but not limited to, releasing and canceling the Security Instrument.

Id. at *7. After consideration it concluded that “*MERS does not qualify under any subsection of section 3-1301 because, on this record, there is no evidence it held the note, [or] was in possession of the note...*” Id. at *10 (Emphasis added).

The *Saunders* court explains that

The only rights conveyed to MERS in either the Saunderses' mortgage or the corresponding promissory note are bare legal title to the property for the sole purpose of recording the mortgage and the corresponding right to record the mortgage with the Registry of Deeds. This comports with the limited role of a nominee. A nominee is a “person designated to act in place of another, usu[ally] in a very limited way,” or a “party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.” Black's Law Dictionary 1149 (9th ed. 2009); see also E. Milling Co. v. Flanagan, 152 Me. 380, 382-83, 130 A.2d 925, 926 (1957) (demonstrating the limited role of a nominee in a contract case). The remaining, beneficial rights in the mortgage and note are vested solely in the lender Accredited and its successors and assigns. The mortgage clearly provides that, by signing the instrument, the Saunderses were “giving [the] Lender those rights that are stated in this Security Instrument and also those rights that Applicable Law gives to Lenders who hold mortgages on real property.” (Emphasis added.) Not one of the mortgage covenants in the document, including the Saunderses' obligations to make timely payments on the note, pay property taxes, obtain property insurance, and maintain and protect the property, is made to MERS or in favor of MERS. Each promise and covenant gives rights to the lender and its successors and assigns, whereas MERS's rights are limited solely to acting as a nominee...

Id. at *8 (Emphasis added).

Accordingly, the “apparently” unlimited, broad language which the panel has cited as authority to allow MERS to become a nonholder in possession of the note was interpreted differently by the state of Maine and determined to be insufficient when viewed within the context of the entire contract to allow MERS to become a non-holder in possession of the note. So too, this court *en banc* has an obligation to interpret the isolated clause within the context of the entire agreement. *Grow Construction*, 983 So. 2d at 687.

Since the interpretation presented to this court *en banc* by the Appellant is not only reasonable, but has been approved by the Supreme Court of Maine, at a minimum, this court is obligated pursuant to Section 16 of the Mortgage and its *Langford* opinion to remand this case to the trial court for a jury determination of the correct meaning of the relevant ambiguous language. Alternatively, since the contract was drafted by MERS whose interests are completely interwoven and interconnected with the Lender and the Lender’s successors and assigns, this court *en banc* is obligated to construe the ambiguities against MERS and the interconnected Lenders. *Langford*, 912 So.2d at 360, 361. Accordingly, the summary judgment should be vacated and if the court believes that parole evidence is warranted for resolution, as it did in *Langford*, the court should remand for the purpose of obtaining testimony pertaining to the contract. *Id.* at 362

II. The Court Overlooked the Fact That There Was No Evidence Presented That MERS Actually Possessed the Promissory Note and That the Uniform Commercial Code Requires That a Negotiable Instrument Be Indorsed When Presentment Is Demanded.

The promissory note was made payable to First Franklin and did not contain an indorsement, allonge or a specific assignment.³ This Court found that the assignment of mortgage from MERS to Deutsche Bank was an assignment of the note and mortgage. (Taylor Opinion, page 7) These are the same factual elements as reviewed by the Second District Court of Appeals in *Verizzo v. Bank of New York*, 28 So.3d 976 (Fla. App., 2010), which came to a contrary conclusion and determined that an indorsement of the note *was* required to foreclose on a promissory note. The *Verizzo* Court 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. (At page 978)

Though section 673.3011(2), Fla. Stat. (2009) was never pled or proved by Deutsche Bank, this Court considered it as providing the basis for Deutsche Bank to foreclose against Mr. Taylor's promissory Note. (Taylor Opinion, page 6) This

³ This Court found the promissory note to be a negotiable instrument. (Taylor Opinion, page 6)

Court determined that “The statute allows a nonholder with certain specific characteristics to foreclose as well.” (Taylor Opinion, page 7) This Court recited language from the mortgage that indicated that “MERS has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property, . . .” (Taylor Opinion, page 7) This Court stated “It appears, consequently, that the mortgage document, reciting the explicit agreement of Mr. Taylor, grants to MERS the status of a nonholder in possession as that position is defined by section 673.3011.” (Taylor Opinion, page 7)

This Court did not delineate whether the legislature intended that “possession” of the note merely be a legal fiction as in constructive possession, or in fact, whether the note must have actually have been possessed in order to foreclose. Though nothing in the note and mortgage explicitly stated that MERS had physical possession of the note, this Court interpreted the mortgage as being an agreement from Mr. Taylor that MERS had possession of the note as required pursuant to 673.3011(2), Fla. Stat. (2009).⁴

This Court's Opinion effectively provides that constructive possession is all that is required for “possession” under 673.3011(2), Fla. Stat. (2009). This has the direct effect of causing the note to follow the mortgage, upsetting the long-standing

⁴ The mortgage indicates on its face that it is a standard Fannie Mae/Freddie Mac Uniform Instrument. (R. I/ 68 – 79, see bottom of mortgage.) This language is found in virtually every mortgage in the state of Florida.

law of the State of Florida that the mortgage follows the note. *Evins v. Gainesville Nat'l Bank*, 85 So. 659 (Fla. 1920); *Case v. Smith*, 200 So. 917 (Fla. 1941); *Collins v. Briggs*, 123 So. 833 (Fla. 1929); *Miami Mtge. & Guar. Co. v. Drawdy*, 127 So. 323 (Fla. 1930); *So. Colonial Mtge. Co. v. Medeiros*, 347 So. 2d 736 (Fla. 4 DCA 1977); *Vance v. Fields*, 172 So. 2d 613 (Fla. 1 DCA 1965); *Sobel v. Mutual Dev. Inc.*, 313 So. 2d 77 (Fla. 1 DCA 1975). (Also see, *Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 274, 21 L.Ed. 313 (1872))

MERS was not a signatory to the note or mortgage and there was no evidence presented that it was present at the closing table. At the time that Mr. Taylor executed the note and the mortgage, the clear impression presented by First Franklin through the note and mortgage were that the note was possessed by First Franklin, and not MERS. Interpreting section 673.3011(2), Fla. Stat. (2009) to permit constructive possession of the note eviscerates the rule that the mortgage follows the note. Section 673.3011(2), Fla. Stat. (2009) requires that "possession" be actual, physical possession. There was no evidence presented that MERS ever physically possessed a promissory note, which is an issue of material fact. Because MERS never possessed the promissory note, its assignment of the note is invalid.

This Courts opinion also conflicts with section 673.5011, Fla. Stat. (2009), which requires endorsement on the physical note itself before payment is due from the maker. This section provides in relevant part:

Presentment.--

(1) The term "presentment" means a demand made by or on behalf of a person entitled to enforce an instrument:

(a) To pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank; or

....

(b) Upon demand of the person to whom presentment is made, the person making presentment must:

1. Exhibit the instrument;

2. Give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so; and

3. Sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(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.

(Emphasis added)

The Court's opinion renders this section void.⁵ No longer is an obligor entitled to demand that the presenter of the note be required to present reasonable evidence of authority to foreclose, reasonable identification and demand an indorsement of the note.

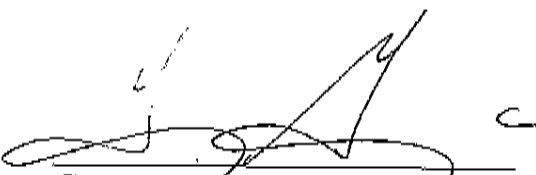
The assumption that a holder of an unindorsed promissory note can become a non-holder in possession with the right to enforce is in direct conflict with the Uniform Commercial Code of Florida and all legal precedent based thereon. The consequence is that this new interpretation of the Uniform Commercial Code will permit vast numbers of foreclosures to occur without presentation of actual proof of standing, jeopardizing the legitimacy of the beneficial ownership of the debt and the obligation of the borrower to pay the correct obligee.

CONCLUSION

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

⁵ An "instrument" is a note – not a mortgage. (Section 673.1041(5), Fla. Stat. (2009))

I express a belief, based on a reasoned and studied professional judgment,
that the panel decision is of exceptional importance.



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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 23rd day of August, 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).



George M. Gingo, FBN 879533