In the District Court of Appeal
Second District of Florida

CASE NO. 2D14-1906

(Lower Tribunal Case No. 10-009347-CI-33)

WELLS FARGO BANK, N.A.,

Appellant,

v.

DEBORAH GRIFFIN,

Appellee.

INITIAL BRIEF OF APPELLEE

Respectfully Submitted,

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PRELIMINARY STATEMENT

All references in this brief to the record on appeal are designated by the symbol "R" followed by the volume and page range (R:___). All references to the trial transcript are designated by the symbol "T" followed by the page range (R:___). Finally, all references to appellant Wells Fargo Bank, N.A. are designated "Wells Fargo" and all references to appellee Deborah Griffin are designated "Ms. Griffin."

INTRODUCTION

This is an appeal from a final order of dismissal without prejudice made after a trial on the merits. This Court has jurisdiction. *See* Fla. R. App. P. 9.030(b)(1)(A). At the onset, Ms. Griffin respectfully asserts that this Court should summarily affirm the final order under review because Wells Fargo has failed to supply this Court with an adequate record which would support reversal, including a record which actually contains the original promissory note sued upon. Additionally, the dismissal should be affirmed because the complaint failed to state a cause of action. Moreover, the trial court did not abuse its discretion in denying Wells Fargo's motion to amend since Wells Fargo was given numerous opportunities to request an amendment but failed to do so at nearly every turn. Finally, it also respectfully submitted that any argument Wells Fargo makes regarding the trial court's perceived failure to consider "prejudice" to Ms. Griffin prior to denying the motion to amend should be considered waived by this Court for failing to make that argument during its motion and for failing to assign an error to the denial of its motion for rehearing.

STATEMENT OF THE CASE AND FACTS

As admitted by Wells Fargo in its brief, Wells Fargo filed a mortgage foreclosure action against Ms. Griffin that failed to attach or incorporate into the pleading any modification agreement to the note and mortgage. (R: 1-29).

After answering and prior to trial, Ms. Griffin filed a motion to compel a better response to her first request for production. (R. 327-329). This motion was granted by order of court (R. 334). Thereafter, and on the eve of trial, Wells Fargo "produced" **3,028 pages of documents**. (R. 2:386). Included within these documents were **three** modification agreements. (R. 3:517-533). As noted above, none of the modification agreements were attached to the complaint and, notably, Wells Fargo never filed the modification agreements dated February 2008 and March 2008 with the trial court.

After receiving the 3,028 pages of documents on the eve of trial, and because Wells Fargo had engaged in discovery abuse, Ms. Griffin filed a motion for sanctions or, alternatively, a motion to continue the trial. (SR).

During the hearing on the motion, Ms. Griffin made specific reference to the modification agreements and Wells Fargo's failure to attach those documents to its complaint. (R. 2:387). The trial court directly asked Wells Fargo's counsel regarding his position on this issue and, rather than request an amendment to its pleading to incorporate the modification agreements, counsel for Wells Fargo merely stated that he was "unaware of the requirement that the modification be attached to the complaint." (R. 2:389).

The matter proceeded to trial after Ms. Griffin's pre-trial motion was denied at which time Ms. Griffin once again brought up Wells Fargo's failure to attach the

modification agreements, this time during her opening statement. (R. 3:553-554, T. 9-10). When Wells Fargo attempted to introduce the last of the three modification agreements into evidence during its case-in-chief, Ms. Griffin objected on grounds that the modification agreement was outside the scope of the pleadings. (R4:571-72, T3:28-29). Next, and after Wells Fargo closed its case-in-chief, Ms. Griffin moved for an involuntary dismissal arguing that the failure to attach the modification agreements to the complaint required dismissal. (R. 3:584-587, T. 41-44). Rather than request an amendment to its pleading at that point, Wells Fargo chose to argue the motion on its merits. (R. 3:587-589, T. 44-46).

During her case-in-chief, Ms. Griffin called Wells Fargo's representative to the stand who testified that he had in fact advised his attorneys that the modification agreements existed. (R 4:602, T. 58). After concluding this testimony, Ms. Griffin rested her case and once again asked the Court to dismiss the case because the complaint failed to state a cause of action. (R 4:611-6122, T. 68-69). Initially, counsel for Wells Fargo argued against the motion on the merits and then, **for the first time ever**, requested that the trial court amend the complaint to conform to the evidence and only "if your Honor is inclined to grant [Ms. Griffin's] motion." (R. 4:612, T. 69). At no time during its motion to amend did Wells Fargo argue that the trial court had to consider prejudice to Ms. Griffin prior to rendering a decision on this motion. (R. 4:612, T. 69).

The trial court denied Wells Fargo's motion and granted Ms. Griffin's motion. (R. 4:613, T. 70). Wells Fargo thereafter moved for rehearing where it argued, for the first time, that the trial court committed error in failing to consider "prejudice" to Ms. Griffin prior to denying its motion to amend. (R. 3:439-454). Wells Fargo's motion for rehearing was also denied by the trial court. (R. 3:539). This appeal follows. (R3: 540-543).

STANDARD OF REVIEW

"Whether a complaint is sufficient to state a cause of action is an issue of law. Consequently, the ruling on a motion to dismiss for failure to state a cause of action is subject to de novo standard of review." *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001).

On the other hand, "it is well settled that in the absence of an abuse of discretion, a trial court's decision to permit or refuse amendments to pleadings will not be disturbed on appeal." *Ohio Cas. Ins. Co. v. MRK Const., Inc.*, 602 So. 2d 976, 978 (Fla. 2d DCA 1992).

SUMMARY OF ARGUMENT

At the onset, the trial court's order of dismissal should be summarily affirmed because Wells Fargo has failed to provide this Court with a record which would warrant reversal. Specifically, Wells Fargo failed to provide this Court with the payment history, the original mortgage, and, most importantly, the original note

purportedly considered by the trial court at trial. Without these documents in the record, a reversal of the dismissal order cannot occur.

Further, the trial court correctly granted Ms. Griffin's motion to dismiss made at the end of the trial because the modification agreements sued upon were not attached to, or incorporated into, its complaint. The trial transcript also reveals that this was a conscious decision made by Wells Fargo and not the result of some sort of clerical error or inadvertence.

The trial court also did not abuse its discretion in denying Wells Fargo's motion to amend made after the close of the evidence. Ms. Griffin made repeated references to Wells Fargo's failure to attach the operative documents sued upon to its complaint and Wells Fargo failed to request an amendment at every turn. Consequently, Wells Fargo's request simply came too late. Additionally, and contrary to Wells Fargo's assertion, the trial court did consider prejudice to Ms. Griffin before denying the motion where it provided that the motion would have to be denied due to Ms. Griffin's repeated objections. Finally, the prejudice to Ms. Griffin is self-evident from the record.

Wells Fargo has also waived any argument it may make to the trial court's failure to consider "prejudice" prior to denying its motion to amend. This argument was not a specific contention made by Wells Fargo when it made its motion and therefore it cannot be cognizable on appeal. Further, Wells Fargo has

failed to assign any error to the trial court's denial of its motion for rehearing and has consequently abandoned any perceived error there.

ARGUMENT

I. WELLS FARGO HAS FAILED TO PROVIDE THIS COURT WITH A RECORD WHICH WOULD WARRANT REVERSAL

It is axiomatic that "[i]n appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). Because Wells Fargo has failed to furnish this Court with a record necessary to overcome this presumption, the trial court's order of dismissal must be affirmed.

As this Court has held "[t]o establish their entitlement to foreclose it was incumbent upon the plaintiffs to prove their agreement, a default by the defendants, that plaintiffs properly accelerated the debt to maturity, and the amount due." *Ernest v. Carter*, 368 So. 2d 428, 429 (Fla. 2d DCA 1978). More recently, appellate courts have held that to establish a prima facie for mortgage foreclosure at trial, a foreclosing lender "needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the [borrower's] outstanding debt on the note." *Kelsey v. Suntrust Mortg., Inc.*, 131 So. 3d 825, 826 (Fla. 3d DCA 2014). The record which Wells Fargo has supplied the Court with in this case fails to contain these necessary documents.

Specifically, the record on appeal of the exhibits offered into evidence at trial consists of only three things: a certification of federal savings association title change (R. 2:350-351); a certification of federal savings association title change (R. 2:352-354); and a certificate of authenticity (R. 2:355-357). Conspicuously absent is the payment history, which would be considered evidence regarding the alleged outstanding debt on the note; the purported original mortgage; and, most importantly, the original note. Nor does Wells Fargo offered any explanation for its failure to provide this Court with a complete record which would support reversal of the trial court's order. Indeed, the failure to surrender the original note prior to rendition of judgment alone should require that the dismissal order be affirmed. *See Deutsche Bank National Trust Company v. Hubel*, ____ So. 3d ____, Slip Op. at 2 (Fla. 4th DCA April 23, 2014).

In sum, Wells has failed to supply this Court with the requisite record evidence necessary to predicate a judgment in its favor. Therefore, there can be no basis for a reversal and the trial court's order of dismissal should be summarily affirmed.

II. THE TRIAL COURT CORRECTLY DISMISSED THE CASE BECAUSE THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION

Getting to the merits of the matter, the trial court properly dismissed the action because Wells Fargo failed to attach or incorporate any of the modification

agreements into its complaint and therefore the complaint failed to state a cause of action. *See* Fla. R. Civ. P. 1.130(a); *Contractors Unlimited, Inc. v. Nortax Equipment*, 833 So. 2d 286, 288 (Fla. 1st DCA 2002) (holding that "complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint.").

Moreover, Ms. Griffin was expressly authorized to make this motion at trial after the conclusion of the evidence since

> Rule 1.140(b)(6) authorizes the motion to dismiss for failure to state a cause of action. **Rule 1.140(h)(2), expressly permits the opponent of a claim to wait until trial to move for dismissal on the grounds that the claim has been defectively pleaded**. Contrary to the trial court's ruling, t**here is nothing in the rule that requires the motion to be made at the commencement of trial and before the presentation of any evidence**. We are unable to agree that we should read such a requirement into the rule. Although it might seem "efficient" and ostensibly "just" in the eyes of the claimant for the opponent to make the motion earlier rather than later, these considerations are hardly dispositive. There is the defendant's equal right to efficiency and justice.

Schopler v. Smilovits, 689 So. 2d 1189, 1189 (Fla. 4th DCA 1997). Bold emphasis added.

Further, the cases Wells Fargo relies on in support of its argument that its "procedural" error was cured once the modification agreement was "filed and served" (IB at 11-12) are all inapposite to the facts at hand. For example, in *Eigen v. Federal Deposit Insurance Corporation*, 492 So. 2d 826 (Fla. 2d DCA 1986),

the foreclosing bank expressly alleged in its "Notice of Filing Exhibits to Amended Complaint" "that the exhibits had inadvertently not been attached to the amended complaint at the time of filing." *Id.* at 826. Likewise in *Deutsche Bank National Trust Company v. Taperi*, 89 So. 3d 996 (Fla. 4th DCA 2012), the Court found that a "clerical error" occurred when the bank attached the wrong mortgage to its complaint. *Id.* at 997.

Here, however, Wells Fargo **deliberately** did not attach the modification agreement to its complaint as shown by the following exchange between counsel for Ms. Griffin and its witness at trial:

> Q Were you aware of these agreements prior to coming to court?
>
> A I became aware of them as part of my review of the file.
>
> Q And did you advise Counsel that these modification agreements existed?
>
> MR. SMART: Objection. To the extent it calls for attorney/client privilege.
>
> THE COURT: Objection be overruled.
>
> A I noted the modification -- I asked my attorney to -- I advised him to make sure that he was aware that they existed.

(R 4:602, T. 58).

Therefore, rather than inadvertently failing to attach it as the bank in *Eigen* did or incorrectly attaching the wrong mortgage as the foreclosing plaintiff in *Taperi* had, Wells Fargo made the **conscious** decision to not attach the modification agreement into its complaint or otherwise incorporate it into its pleading. Even more compelling is the fact that there was not just one modification, **but three separate modifications**. (R. 3:517-533, R.3:553, T. 10). Wells Fargo, however, did not alert the court to two of the three modification agreements and treat these agreements with indifference on appeal.

Further, the principle of law Wells Fargo urges this Court to adopt is contradictory to this Court's decision in *Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375, 376 (Fla. 2d DCA 2012) where the Court held

> U.S. Bank's reply of June 4, 2010, was the only pleading in which it alleged that the note was no longer lost, and it was the only pleading to which a copy of the alleged original note was attached. **The reply could not serve as an amended complaint because U.S. Bank had not secured leave of court or Feltus's written consent to amend its complaint after Feltus filed her answer and affirmative defenses**. **A pleading filed in violation of rule 1.190(a) is a nullity, and the controversy should be determined based on the properly filed pleadings**.

Id. at 376. Bold emphasis added and citations omitted. The purported "filing" of the third (and final) loan modification agreement (without, of course, the filing of the first and second modifications) could not have been construed to "amend"

Wells Fargo's complaint to properly include this document since it never secured leave of Court or Ms. Griffin's written consent.

The complaint consequently failed to state a cause of action and the case was properly dismissed by the trial court.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WELLS FARGO'S MOTION TO AMEND

a. Wells Fargo waited too long to request an amendment to conform to the evidence.

The record is replete with instances where Wells Fargo could have requested an amendment to its complaint but failed to do so. Since Wells Fargo failed at every turn to request this amendment until the close of evidence and arguments on Ms. Griffin's renewed motion to dismiss, it simply waited too long and its motion was properly denied.

Initially, Ms. Griffin made specific reference to the modification agreements and Wells Fargo's failure to attach those documents to its complaint **hours before the trial even began** during the hearing on her motion for continuance. (R. 2:387). Wells Fargo made no effort to request an amendment to its pleading at that juncture. In fact, when the trial court specifically asked Wells Fargo's counsel whether the modification agreement needed to be attached to the complaint, he replied that he was "unaware of the requirement that the modification be attached to the complaint." (R. 2:389). If anything, Wells Fargo's statements at this early

stage on a direct question posed by the trial court should act as a waiver of any subsequent right to "amend" its pleading.

Ms. Griffin again raised the failure to attach the modification agreements to the complaint during her opening statement. (R. 3:553-554, T. 9-10). This gave Wells Fargo a second opportunity to request an amendment before the trial even began, but it once again failed to do so.

Next, and as Wells Fargo concedes in its brief, Ms. Griffin objected to introduction of the modification agreement itself as evidence outside the scope of the pleadings. (R4:571-72, T3:28-29). This objection clearly put Wells Fargo on notice that Ms. Griffin was not trying the modification agreement by consent. *See Arky, Freed v. Bowmar Instrument Corporation*, 537 So. 2d 561, 563 (Fla. 1988) ("We cannot see the difference between objecting to the introduction of the evidence pertaining to an unpled claim at trial or by a motion in limine immediately prior to the trial. The effect is the same — calling the court's attention to the fact that an unpled claim is not being tried by consent, since consent would permit Bowmar to amend its pleadings to conform to the proof.") At this point, it was absolutely incumbent on Wells Fargo to request leave to amend to conform its pleading to the evidence. This it did not do.

At the close of Wells Fargo's case-in-chief, Ms. Griffin moved for an involuntary dismissal arguing, in great part, that dismissal was warranted due to

the failure to attach the modification agreement to the complaint. (R. 3:584-587, T. 41-44). Once again, Wells Fargo failed to request an amendment and instead chose to argue the motion on its merits. (R. 3:587-589, T. 44-46).

Finally, it was not until the close of all evidence and argument on Ms. Griffin's renewed motion to dismiss did Wells Fargo finally request leave to amend, and only "if your Honor is inclined to grant that motion." (R. 4:612, T. 69). Wells Fargo's motion was properly denied, however, because "waiting until the close of all the evidence and the argument on motions to dismiss and for directed verdict [was] too late for [Wells Fargo] to request that the pleadings be conformed to the evidence." *Schopler,* 689 So. 2d at 1190. *See also Arky, Freed*, 537 So. 2d at 563 (providing that "Had Arky, Freed waited to object until the presentation of evidence and then moved for a directed verdict, Bowmar would not have been entitled to amend its pleadings and start the case anew.")

Since Wells Fargo was given multiple opportunities to amend and refused to do so at each turn, "reasonable men could differ as to the propriety of the action taken by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). Therefore, the trial court did not abuse its discretion in denying Wells Fargo's motion to amend.

b. The trial court did considered prejudice to Ms. Griffin and the record plainly reveals how she was prejudiced.

Wells Fargo argues that the trial court failed to consider "prejudice" to Ms. Griffin before denying its motion to amend but the record clearly provides otherwise. Specifically, the trial court explicitly provided that "there was an objection at each stage by Defense with respect to the matters which you wish to have the amendment addressed." (R. 4:613, T. 70). The trial court therefore plainly considered how the amendment would prejudice Ms. Griffin and denied the motion based upon the repeated objections Ms. Griffin made.

Additionally, the prejudice to Ms. Griffin is self-evident from the record. Wells Fargo bombarded Ms. Griffin with **3,028 pages** of documents on the eve of trial. (R. 2:386). These documents only came after Ms. Griffin filed a motion to compel (R. 327-329), which motion was granted by order of court (R. 334). Further, the documents included, **for the first time**, the first two modification agreements which were never attached to the complaint or otherwise filed with the trial court. Ms. Griffin, plainly frustrated with Wells Fargo's attempts to obfuscate the discovery process, filed a motion for sanctions or, in the alternative, motion to continue trial. (SR). When both avenues of relief were denied to Ms. Griffin, she had no choice but to go to trial and try the case as pled in Wells Fargo's complaint. Permitting Wells Fargo to change the course of the litigation and therefore defeat a real defense Ms. Griffin had after numerous opportunities to request an amendment came and went without a request inherently prejudiced Ms. Griffin.

Therefore, the trial court did not abuse its discretion in denying Wells Fargo's motion to amend.

IV. IN THE ALTERNATIVE TO ARGUMENT III, WELLS FARGO HAS WAIVED ANY ARGUMENT REGARDING PREJUDICE

In addition to, or in the alternative of, the arguments set forth in Argument III, Wells Fargo has waived any argument regarding the trial court's alleged failure to consider "prejudice" because: (1) it failed to argue this point when it made its motion to amend; and (2) it failed to assign any error as to the trial court's denial of its motion for rehearing in its initial brief.

Initially, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Since Wells Fargo failed to argue that the trial court must consider prejudice to Ms. Griffin before rendering a decision on its motion to amend when it made its motion, this argument cannot be cognizable on appeal of that decision.

Additionally, "an issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief." *J.A.B. Enterprises v. Gibbons, Sr.*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992). Since Wells Fargo failed to raise the issue of the trial court's denial of its motion for rehearing in its initial brief, and because this motion was the first time its "prejudice" argument was raised, this

issue is deemed abandoned and may not be raised for the first time in its reply brief.

Consequently, and because Wells Fargo has abandoned or otherwise waived any argument it may make as to the perceived failure to consider "prejudice."

CONCLUSION

For the reasons and legal authorities set forth herein, it is respectfully submitted that this Honorable Court should affirm the final order of dismissal without prejudice under review.

Dated October 8, 2014.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email on this 8th day of October, 2014 to **MaryEllen M. Farrell, Esq.**, at mfarrell@cfbjlaw.com and kcasazza@cfjblaw.com; and **Dean A.**

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By:___s/Michael P. Fuino
Michael P. Fuino, Esq.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this petition complies with the font requirements set forth in Rule 9.210(a)(2), Fla. R. App. P.

By:___s/Michael P. Fuino
Michael P. Fuino, Esq.