IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Case No. 2D14-1906
L.T. Case No. 10-009347-CI

WELLS FARGO BANK, N.A.,

Appellant,

v.

DEBORAH GRIFFIN a/k/a DEBORAH A. LYONS,

Appellee.

APPELLANT'S INITIAL BRIEF

On Appeal from a Final Order of the Sixth Judicial Circuit,
In and For Pinellas County, Florida

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STATEMENT OF THE CASE AND FACTS

A. Introduction and Nature of the Case.

Appellant Wells Fargo Bank, N.A. ("Wells Fargo") appeals the trial court's involuntary dismissal of this foreclosure action after a nonjury trial. The trial court dismissed the action based on Appellee's argument that a loan modification agreement—admitted into evidence at trial over the objections of Appellee—was "outside the scope of the pleadings" because a copy of the agreement was not attached to the Complaint.

At the outset, a copy of the loan modification agreement was filed long before trial (and Appellee relied on the agreement in her sworn affidavit opposing Wells Fargo's motion for summary judgment). As a result, any alleged procedural defect in not attaching a copy of the loan modification agreement as an exhibit to the Complaint was cured. *See Eigen v. Fed. Deposit Ins. Corp.*, 492 So. 2d 826, 826-27 (Fla. 2d DCA 1986). The order dismissing this action should be reversed for that reason alone.

The trial court also abused its discretion in denying Wells Fargo's motion to amend the Complaint to conform with the evidence at trial. There could have been no prejudice to Appellee, as Appellee not only signed and materially benefited from modification which she executed, but she also relied on it in her sworn affidavit opposing summary judgment (which was notarized by Appellee's

counsel). The trial court admitted the loan modification agreement into evidence over Appellee's objections, and the loan modification agreement was addressed at length throughout the trial. There would have been no prejudice here in permitting the requested amendment, and the case should have been properly decided on its merits. The trial court, therefore, abused its discretion in denying Wells Fargo's motion to amend the Complaint to conform with the evidence presented and introduced at trial.

For these reasons, the order dismissing the foreclosure action should be reversed.

B. Statement of the Facts.

On June 17, 2010, Wells Fargo filed a mortgage foreclosure Complaint against Appellee Deborah Griffin a/k/a Deborah A. Lyons ("Griffin"). (R:1-29).[1] Copies of the Note and Mortgage were attached to the Complaint. (R:1-29). However, a copy of the operative Modification Agreement, executed June 3, 2009, was not attached.

On July 27, 2010, Griffin filed an Answer, raising no affirmative defenses. (R:33-34). Subsequently, on October 14, 2010, Wells Fargo filed a motion for summary judgment. (R:42-43).

[1] References to the record on appeal will be designated as follows: (R. Volume number: page number). References to the transcripts will be designated as follows: (R. Volume number: page number, T: page number).

In support of the summary judgment motion, Wells Fargo filed an Affidavit as to Amounts Due and Owing together with copies of business records associated with this loan. (R:68-107). A copy of the 2009 Modification Agreement—executed by Griffin—was attached to Wells Fargo's affidavit. (R:75). The 2009 Modification Agreement was therefore in the trial court record since September 8, 2011, when the affidavit was filed. (*Id.*). Another copy of the 2009 Modification Agreement was filed on December 6, 2012. (R:124-25). This copy was also attached to an Affidavit of Amounts Due and Owing. (R:111-55).

On January 14, 2013, Griffin filed a supplemental affidavit in opposition to the summary judgment motion. (R:198-99). In this affidavit (which was notarized by Griffin's counsel), Griffin expressly relied upon the 2009 Modification Agreement in opposition to Wells Fargo's motion for summary judgment. (R:198-99). Griffin attested that the 2009 Modification Agreement was controlling and the interest rates should be calculated based upon this agreement. (R:198-99).

On January 14, 2013, the same day she filed her supplemental affidavit, Griffin also filed a motion to amend her Answer, (R:165-79), which was granted on October 10, 2013. (R2:312). Griffin's Amended Answer asserted ten affirmative defenses, including waiver and estoppel, though none of her defenses asserted that 2009 Modification Agreement is "outside the scope of the pleadings."

On October 14, 2013, the case was referred to a magistrate for the scheduling of a case management conference. (R2:313-15). The magistrate recommended a non-jury trial be held on March 3, 2014. (R2:319-21). On December 12, 2013, the trial court approved the magistrate's recommendation. (R2:317).

On March 2, 2014, Griffin filed a Motion to Dismiss Action; Motion for Sanctions; Motion in Limine; and Motion to Continue Trial. (SR).[2] In this motion, Griffin argued that Wells Fargo's response to her request for production "revealed for the first time on the eve of trial that the underlying contract sued upon has been modified at least twice." (SR:3). Griffin requested that the case be dismissed without prejudice due to this purported failure to disclose the modification agreements earlier. (SR:4). In her motion, however, Griffin failed to recognize that the 2009 Modification Agreement had been in the court record since 2011, and that Griffin had previously sworn that the agreement was operative and relied on it to oppose Wells Fargo's motion for summary judgment.

On March 3, 2014, Wells Fargo filed a response in opposition to the motion to dismiss. (R2:335-39). In this motion, Wells Fargo explained that its attempts to contact opposing counsel were unsuccessful and that as a result—in an effort to

[2] An unopposed motion to supplement the record on appeal with Griffin's Motion to Dismiss Action; Motion for Sanctions; Motion in Limine; and Motion to Continue Trial is being filed contemporaneously with this brief.

comply with the open-ended discovery requests—it was forced to deliver the majority of the loan file. (R2:335-39).

Prior to the beginning of trial, held on March 3, 2014, the motion judge heard Griffin's motion.[3] Griffin argued that on the Thursday or Friday before trial an abundance of discovery was sent to her. (R2:384, T:6). Griffin asserted that it was not until the night before trial, for the first time, that she was made aware of two modification agreements, including the operative 2009 Modification Agreement. (R2:386, T:8).

Griffin contended that these modification agreements should have been attached to the Complaint and that, without such attachment, the action should be dismissed because Wells Fargo had purportedly violated a court order by failing to produce requested discovery. (R2:386-87, T:8-9). Wells Fargo responded, explaining that the case had been pending since 2010, and Griffin had not propounded any discovery until after a trial was set on December 12, 2013. (R2:392-93, T:14-15).

Ultimately, the motion judge continued the motion to dismiss, allowing Griffin's counsel to depose Wells Fargo's trial witness. (R2:401-03, T:23-25). In

[3] The Sixth Judicial Circuit created a Section dedicated exclusively to foreclosure actions and, pursuant to that Section's Instructions and Judicial Practice Preferences, Judge Minkoff has divided the judicial labor so that he hears motions while other, retired, judges, such as Judge Ulmer, preside over trials. *See* http://www.jud6.org/legalcommunity/MortgageForeclosures/SECTION33INSTRUCTIONS_061014.pdf.

doing so, the court noted that Griffin was not entitled to a continuance, as all the discovery requests were last-minute, extensive requests. (R2:401-03, T:23-25).

Later that day, after the deposition had been taken, Griffin argued that the deposition did not lead to additional information regarding the produced discovery. (R3:417-19, T2:4-6). Wells Fargo's counsel explained that Griffin questioned the witness only as to privileged documents. (R3:420, T:7). Griffin did not ask a single question concerning the trial exhibits, including the 2009 Modification Agreement, all of which had been identified and provided to Griffin prior to the deposition. (R3:420, T:7). The trial court denied the continuance and ordered the parties to proceed to trial, (R3:429, T:16), specifically noting that the deposition was an opportunity for Griffin to discover what prejudice resulted from how discovery was produced, and Griffin failed to do so. (R3:429, T:16).

After delivering an opening statement, Wells Fargo asked that the original Note and Mortgage be admitted into evidence. (R4:551-52, T3:8-9). Griffin then offered an opening statement, where her counsel presented three modification agreements and objected to any consideration of the original Note and Mortgage. (R4:552, T3:9). Griffin went on to explain that the first two modification agreements were executed in February and March of 2008. (R4:553; T3:10). Griffin then drew the court's attention to the 2009 Modification Agreement.

(R4:553; T3:10). As the final modification agreement executed between the parties, the 2009 Modification Agreement was the operative agreement.

Griffin argued that the original Mortgage and Note should not be considered as they purportedly lacked authenticity and documentary stamps were purportedly not paid on the increased amount owed pursuant to these modification agreements. (R4:552-53, T3:9-10). The trial court overruled the objections and admitted the original Note and Mortgage into evidence. (R4:552, T3:9).

Michael Dolan, a research and mediation manager for Wells Fargo, then testified regarding the loan history. (R4:570-71, T3:27-28). Specifically, he testified that the loan history, which had been admitted as Plaintiff's Exhibit 5, indicated that the loan was subject to a modification. (R4:570-71, T3:27-28). Wells Fargo asked that the witness review the operative 2009 Modification Agreement. (R4:571, T3:28). Griffin objected and argued that it was outside of the scope of the pleadings as it was not attached to the Complaint. (R4:571-72, T3:28-29). Wells Fargo noted that Griffin's counsel raised the 2009 Modification Agreement in his opening. (R4:571-72, T3:28-29). The trial court overruled the objection and admitted the 2009 Modification Agreement into evidence over Griffin's objection. (R4:573, T3:30).

Mr. Dolan thereafter confirmed that the payment history and the 2009 Modification Agreement are consistent and the total principal due on the loan was

$168,719.82, which reflected a reduction from the pre-modified principal balance of $210,899.78. (R4:573-74, T3:30-31). Mr. Dolan then stated that the interest due on the modified loan amounted to $26,713.97. (R4:575, T3:32).

Griffin questioned Mr. Dolan regarding the amended 2008 Modification Agreement between the parties, (R4:579-82, T3:36-39), asking that this agreement be admitted into evidence. (R4:582, 596; T3:39, 53). The trial court granted Griffin's request and admitted the 2008 Modification into evidence. (*Id.*).

After the close of Wells Fargo's case-in-chief, Griffin moved for an involuntary dismissal on three grounds, (R4:585-57, T3:42-44), including that the 2009 Modification Agreement was outside the scope of the pleadings as it was not attached to the Complaint. (R4:585-87, T3:42-44).

Wells Fargo noted that Griffin herself introduced the 2008 Modification Agreement into evidence. (R4:587-88, T3:44-45). Wells Fargo introduced the subsequent, operative 2009 Modification Agreement. (R4:587, T3:44). The trial court denied Griffin's motion, and Griffin continued with her case-in-chief. (R4:588, T3:45).

As her only witness, Griffin re-called Michael Dolan, questioning him extensively about the 2009 Modification Agreement and the amended 2008 Modification Agreement. (R4:591-94, T3:48-51). Griffin even asked that the amended 2008 Modification Agreement be admitted as evidence. (R4:592-93,

T3:49-50). The trial court noted that it had already been admitted as evidence. (R4:596, T3:53). At the close of all evidence, Griffin moved for a directed verdict (involuntary dismissal), arguing that the case was tried outside of the scope of the pleadings as the operative 2009 Modification Agreement was not attached to the Complaint. (R4:611-12, T3:68-69).

Wells Fargo responded and moved for judgment of foreclosure. In an abundance of caution, Wells Fargo also moved for leave to amend the Complaint to conform to the evidence presented at trial regarding the 2009 Modification Agreement. (R4:612, T3:69). The trial court granted Griffin's motion for a directed verdict (involuntary dismissal) and denied Wells Fargo's motion to amend, stating that there was an objection at each stage. The trial court did not address or take evidence as to whether Griffin would have been prejudiced by the amendment. (R4:613, T3:70).

On March 10, 2014, the trial court entered a written order dismissing the case without prejudice and denying Wells Fargo's motion to amend the Complaint to conform to the evidence at trial. (R2:358).

Wells Fargo timely moved for rehearing, arguing the trial court had erred in denying Wells Fargo's motion for leave to amend without considering whether Griffin would have been prejudiced. (R3:439-54). The trial court denied Wells

Fargo's motion without hearing. (R3: 539). Thereafter, Wells Fargo timely filed a notice of appeal. (R3: 540-43).

SUMMARY OF THE ARGUMENT

The trial court dismissed this case because a copy of the operative modification agreement was not attached to the Complaint. This was error. At the outset, any perceived procedural error in failing to attach a copy of the 2009 Modification Agreement to the Complaint was cured when Wells Fargo filed a copy of the Modification Agreement **two and a half years before trial**. This result is even more appropriate where Griffin herself acknowledged the operative 2009 Modification Agreement months before trial and asserted that the agreement was controlling. This alone warrants reversal.

Equally dispositive, the trial court's denial of the motion to amend the pleadings to conform to the evidence was an abuse of discretion. As the record demonstrates, the 2009 Modification Agreement was operative—and therefore if admitted (it was), the cause would be more effectually presented—and Griffin was in no way prejudiced by the admission of an agreement that she had knowledge of, that she agreed was operative, and that she actually litigated both before and at trial.

STANDARD OF REVIEW

A trial court's application of the law to the facts is reviewed de novo. *Output, Inc. v. Danka Bus. Sys., Inc.*, 991 So. 2d 941, 943 (Fla. 4th DCA 2008). A trial court's denial of a motion to amend a pleading to conform to the evidence is reviewed for an abuse of discretion. *Three Palms Associates v. U.S. No. 1 Fitness Centers Inc.*, 984 So. 2d 540, 542 (Fla. 4th DCA 2008).

ARGUMENT

I. Any Alleged Procedural Defect In Failing To Attach The Modification Agreement To The Complaint Was Cured.

The basis for the dismissal here—that the case was tried outside of the pleadings because a copy of the 2009 Modification Agreement was not attached to the Complaint—is contrary to Florida law.

Several decisions—including by this Court—hold that any procedural error in failing to attach an operative document to a complaint is cured once that document is filed and served. *Eigen*, 492 So. 2d at 826-27 (noting that plaintiff cured defect in complaint by serving the omitted loan documents after a motion to dismiss was filed); *Hughes v. Home Sav. of Am., F.S.B.*, 675 So. 2d 649, 650 (Fla. 2d DCA 1996) (holding that a Notice of Filing Original Documents has the same curative effect as the filings in *Eigen* if served on the opposing party); *Deutsche Bank Nat. Trust Co. v. Taperi*, 89 So. 3d 996, 997 (Fla. 4th DCA 2012) (reversing summary judgment and stating, "The bank had cured its clerical error in failing to

file the mortgage that both Taperis signed by its notice of filing a copy of that mortgage, which was served on the Taperis' lawyer."). That is precisely what occurred here.

On September 8, 2011—two and a half years before trial—Wells Fargo filed an affidavit with a copy of the 2009 Modification Agreement attached. (R:75). Another copy of the 2009 Modification Agreement was filed on December 6, 2012. (R:124-25). On January 14, 2013—over a year before trial—Griffin filed an affidavit expressly recognizing the 2009 Modification Agreement. (R:197-99). In fact, Griffin specifically attested that the 2009 Modification Agreement was controlling. (R:197-99).

Based on these facts, any procedural error in failing to attach a copy of the Modification Agreement to the Complaint was cured. *Eigen*, 492 So. 2d at 826-27; *Hughes*, 675 So. 2d at 650; *Taperi*, 89 So. 3d at 997. The trial court therefore erred in dismissing this action.

II. The Trial Court Abused Its Discretion In Denying Wells Fargo's Motion To Amend The Pleadings To Conform To The Evidence.

Equally dispositive, the trial court abused its discretion in denying Wells Fargo's motion to amend the pleadings to conform to the evidence. The 2009 Modification Agreement was admitted evidence, which permitted the cause to be more effectually presented, and Griffin was neither prejudiced nor surprised. Denial of an amendment in such circumstances constituted an abuse of the trial

court's discretion.

Rule 1.190(b) provides:

> If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.

Fla. R. Civ. P. 1.190(b); *see also Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3d DCA 2012).

This rule is liberally construed, as the purpose of pleadings and trial is to "arrive at truth, rather than engage in a game in which technique of the maneuver captures the prize." *Arch Specialty Ins. Co. v. Kubicki Draper, LLP*, 137 So. 3d 487, 490 (Fla. 4th DCA 2014); *see also Lasar Mfg. Co., Inc. v. Bachanov*, 436 So. 2d 236, 237 (Fla. 3d DCA 1983) ("Amendments to pleadings and amendments to conform with the evidence should be freely granted by the trial court unless by doing so, the opposing party will be prejudiced in maintaining his action or defense upon the merits.").

Here, the trial court abused its discretion by denying Wells Fargo's motion for leave to amend the pleadings to conform to the evidence.

(a) Griffin Failed to Demonstrate Prejudice or Surprise.

Even where a party objects to amendment of a pleading pursuant to rule

1.190(b), as Griffin did below, the requested amendment should have been freely granted unless Griffin showed that "the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits." Fla. R. Civ. P. 1.190(b); *see also Buday v. Ayer*, 754 So. 2d 771, 772 (Fla. 2d DCA 2000) (party opposing amendment "must satisfy the trial court that admission of the evidence will cause it to suffer prejudice"). Griffin has not and cannot demonstrate prejudice.

The indisputable evidence here shows:

- Griffin had knowledge of the 2009 Modification Agreement from its inception because she signed it and benefitted by its terms. (R:75).
- Griffin knew (or should have known) the 2009 Modification Agreement was the subject of this litigation because it was in the court record for years before trial, having been filed by Wells Fargo in 2011 and again in 2012. (R:75, 124-25).
- Over a year before trial, Griffin filed an affidavit (notarized by her counsel) in which she agreed the 2009 Modification Agreement was operative. (R:198-99).
- Griffin was provided with an opportunity to depose Wells Fargo's witness on the 2009 Modification Agreement. (R3:401, T:23).
- Griffin referred to the 2009 Modification Agreement in her opening

statement. (R4:552-53, T3:9-10).

- The 2009 Modification Agreement was admitted into evidence, over Griffin's objection. (R4:573, T3:30).
- Extensive testimony regarding the 2009 Modification Agreement was adduced during trial, including during Griffin's case-in-chief. (R4:570-76, 581, 591-92, 598-99; T3:27-33, 38, 48-49, 55-56

There would have been no prejudice in amending the Complaint to include the 2009 Modification Agreement in accordance with the evidence at trial.

Griffin's only attempt at suggesting she was prejudiced was her argument to the hearing judge. According to Griffin, she was prejudiced by the last-minute disclosure of the 2009 Modification Agreement. (R2:386-87, 397-98; T:8-9, 19-20). Any such assertion is contrary to her own sworn statements and the record evidence. As noted above, Griffin signed and materially benefited from the 2009 Modification Agreement, and it was filed with the court on September 8, 2011—two and a half years before trial—and again in 2012. It was **not** disclosed for the first time the day before trial as was argued by Griffin's counsel. (R:75).

Moreover, Griffin relied on the 2009 Modification Agreement in her sworn affidavit filed on January 14, 2013—two months before trial—in order to oppose Wells Fargo's motion for summary judgment. (R2:198-99). Notably, this affidavit was notarized by Griffin's counsel of record at trial and in this appeal so, not only

was Griffin aware of this document, but her counsel was as well. (*Id.*).

(b) The Amendment Would Have Been Proper To Resolve The Merits Of This Cause.

Griffin cannot credibly argue that amendment of the Complaint to include the 2009 Modification Agreement—which she agreed was operative—would do anything other than permit the merits of the cause to be more effectually presented.

Where the admission of a trial exhibit would result in the cause being more effectually presented, amendment of a pleading should be permitted. *See Viscito v. Fred S. Carbon Co., Inc.*, 636 So. 2d 194, 196 (Fla. 4th DCA 1994) ("[T]he merits would be more effectually presented at bar by allowing the amendment, as there was testimony throughout the trial that the exclusive distributorship agreement was breached.").

Given the record described in the bullet points above, there can be no question that amending the Complaint to include the 2009 Modification Agreement would have permitted the effective resolution of this cause on the merits. *See Arch Specialty Ins. Co.*, 137 So. 3d at 490 (noting the purpose of Rule 1.190(b)).

In short, the record demonstrates that the requested amendment would result in the cause being more effectually presented and Griffin would not be prejudiced by amending the Complaint to conform to the evidence at trial. The trial court abused its discretion in denying Wells Fargo's motion and dismissing this action.

CONCLUSION

For the reasons stated herein, Wells Fargo respectfully requests that this Court reverse the trial court's order dismissing this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail this **18th** day of September, 2014, to: Michael P. Fuino, service@mattweidnerlaw.com, mfuino@mattweidnerlaw.com, Matthew D. Weidner, P.A., 250 Mirror Lake Drive North, St. Petersburg, FL 33701.

/s/ MaryEllen M. Farrell

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/ MaryEllen M. Farrell
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