**IN THE DISTRICT COURT OF APPEAL**
**SECOND DISTRICT OF FLORIDA**

LAWRENCE STROMINGER and
ADRIANA STROMINGER,

Appellants/Defendants,

Case No. 2D15-2788

vs.

THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS INC. ASSET-BASED CERTIFICATES, SERIES 2006-IMI,

Appellee/Plaintiff. /

Lower Tribunal Case No. 07-CA-015203

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# INITIAL BRIEF OF APPELLANTS LAWRENCE STROMINGER and ADRIANA STROMINGER

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On Appeal From A Final Judgment,
Entered By The Thirteenth Judicial Circuit of Florida

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## PRELIMINARY STATEMENT

Appellants, Lawrence Strominger and Adriana Strominger**,** are referred to as "Strominger." Appellee, The Bank of New York, As Trustee, For The Certificate-holders of the CWABS Inc. Asset-Based Certificates, Series 2006-IMI, is referred to as "BONY."

The record is contained in 5 volumes, and is referred to in this brief as "Rx y," where "x" is the record volume number and "y" is the page number and/or specific identification within the referenced volume.

Plaintiff entered 15 documents into evidence; however, the court reporter identified 2 different documents as Exhibit "8," which the trial court (and the appellate record) later corrected. Thus, the documents from the second Exhibit 8 to Exhibit 14 are referred to as Exhibits 9 to 15.

Following is the bench trial exhibit list, as prepared by the Court Reporter, and as it appears in the record at R5 872, with updated exhibit numbers.

EXHIBITS

| NO. | UPD.# | DESCRIPTION | OFFERED | RECEIVED |
|---|---|---|---|---|
| 1 | 1 | Copy of the power of attorney | 9 | 9 |
| 2 | 2 | Subservicing agreement | 10 | 10 |
| 3 | 3 | Composite containing a copy of the mortgage loan schedule | 12 | 12 |
| 4 | 4 | Copies of the note and mortgage | 14 | 14 |
| 5 | 5 | Copies of the note and mortgage | 14 | 14 |

| | | | | |
|---|---|---|---|---|
| 6 | 6 | Certified copy of the assignment of mortgage | 15 | 16 |
| 7 | 7 | Copy of the acceleration letter | 18 | 18 |
| 8 | 8 | Copy of the return receipt of the breach letter | 19 | 19 |
| 8 | 9 | Copy of the credit report | 21 | 21 |
| 9 | 10 | Copy of the payment history | 22 | 22 |
| 10 | 11 | Certified copy of a mortgage on the subject property | 25 | 25 |
| 11 | 12 | Certified copy of a mortgage on the subject property | 25 | 25 |
| 12 | 13 | Certified copy of a mortgage on the subject property | 25 | 25 |
| 13 | 14 | Certified copy of one final mortgage on the property | 26 | 26 |
| 14 | 15 | Copy of the bailee letter | 31 | 31 |

All emphasis contained in quotations, from the record, or from case law, has been added unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

### A. Background

On November 1, 2007, BONY sued Strominger to foreclose a Mortgage on real estate in Hillsborough County. R1 1 ¶1. The complaint alleged the note and the mortgage were in default on June 1, 2007. R1 1 ¶7. The complaint also alleged that the mortgage was assigned to BONY "by virtue of an assignment to be recorded." R1 1 ¶4. The complaint attached a non-certified copy of a recorded mortgage and attachments, issued to Home Capital Funding, and recorded September 28, 2005. R1 17-38.

On July 10, 2008, Strominger moved to dismiss the complaint, asserting that "Defendants have never signed a note or mortgage in which [BONY] was the mortgagee." R1 53 ¶3. On October 16, 2008, BONY filed a motion for leave to file an amended complaint, which was unopposed. R1 63-97; see also R1 100.

For two years, the case remained dormant while BONY replaced its lead counsel. See R1 105; R1 107. On December 15, 2011, BONY filed the original note and mortgage in the court files. R1 124-66.

On January 5, 2012, Strominger filed an amended motion to dismiss, asserting that none of the subsequent documents filed demonstrate BONY was the owner of the note or the mortgage on the date it filed this complaint. R1 169 ¶2-5. Strominger attached an "Assignment of Mortgage," which was provided to

Strominger by BONY at a case management conference on December 23, 2011, assigning the mortgage and note to BONY. See R1 170 ¶7. The assignment document was purportedly signed on October 5, 2007 and recorded on October 15, 2008. R1 173. Strominger asserted that the stamp of the notary, Terry Rice, who was a witness and notary to the "Assignment of Mortgage," had expired on May 19, 2012. R1 173. Therefore, Strominger asserted the purported assignment was necessarily created after May 20, 2008; it was "fraudulent on its face," and was "backdated, in a purposeful effort to mislead the Defendant and this Court." R1 170 ¶8-9. Strominger attached two similar cases, involving backdated notarized documents, both notarized by Terry Rice. R1 175-82.

On April 9, 2012, the trial court entered an order granting the Amended Motion to Dismiss without prejudice, R1 199-200, with two key factual findings:

1) "The Assignment, as an instrument of fraud intentionally perpetrated by Plaintiff, was made to appear as though it was created and notarized on October 5, 2007. However, that purported creation/notarization date was facially impossible: the stamp on the notary was dated with the expiration date of May 19, 2012. Since Notary commissions only last four years in Florida (see Fla. Stat. § 117.01(1)[2008]), the notary stamp used on this instrument did not even exist until approximately seven months after the purported date on the assignment and seven months after the complaint was filed." R1 199 ¶2.

2) "The Court specifically finds that the purported Assignment did not exist at the time of filing of this action; that the purported Assignment was subsequently created and the execution date and notarial date were fraudulently backdated, in a purposeful, intentional effort to mislead the Defendant. The Court rejects the Assignment and **finds that it is not entitled to introduction in evidence for any purpose**." R1 200 ¶3.

The Court held that "[t]he Plaintiff's complaint is dismissed **without prejudice**, based on the fraud intentionally perpetrated by the Plaintiff. . . . Plaintiff must file a new cause of action." R1 200.

On April 18, 2012, BONY filed a Motion for Rehearing. R2 207. BONY's counsel states that "the presiding Judge granted Defendant's Motion to Dismiss Without Leave to Amend." R2 207 ¶7.[1] The rehearing motion contains an entire section entitled "Dismissal without Leave To Amend is Too Harsh." R2 208-09.

BONY's counsel asserted that it "was not aware of a previously executed assignment of mortgage filed and relied upon by previous counsel." R2 209 ¶19. Plaintiff argues that it "**has no intention of relying on the allegedly fraudulent assignment of mortgage in their case**."

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[1] Apparently, BONY's counsel confused or misapprehended the terms "without prejudice" and "without leave to amend," which provide opposite results.

Based on the Plaintiff's stipulation, the trial court granted BONY's motion for rehearing, and allowed BONY to file a Second Amended Complaint. R2 217; see also R2 227-56.

**B. The Bench Trial**

A one-hour bench trial was conducted on Tuesday, February 24, 2015. R5 868. BONY entered 14 documents into evidence, including the previously-discussed fraudulent and inadmissible "Assignment of Mortgage." (Exhibit 6). BONY admitted this document into evidence to prove BONY owned the mortgage and note on Strominger's property at the time of BONY filed its complaint. See R5 881-83; R4 758.

At the close of BONY's case in chief, Strominger moved for judgment for the Defense. R5 893 (Tr. p. 26). Once again, as Strominger's counsel had repeatedly pointed out, the notary stamp was conclusive evidence that the Assignment of Mortgage was back-dated. R5 894 (Tr. p. 27). Strominger's counsel reasoned that there was no way the notary could have signed the Assignment of Mortgage on October 5, 2007 (before BONY's complaint was filed), because the notary's stamp was not issued until 2008. Id. Strominger also argued that the only piece of evidence BONY presented to prove it owned the mortgage at the time of the complaint--the Assignment of Mortgage--was fraudulently back-dated. See R5 896, 900, 902 (Tr. pp. 29, 33, 35). Strominger

pointed out that BONY "has an absolute burden of proving that it has standing to file a foreclosure case at the inception . . . and [its standing] cannot be cured later." R5 895-96 (Tr. p. 28-29). Strominger's counsel cited McLean v. JP Morgan Chase Bank Nat. Ass'n, 79 So. 3d 170, 172 (Fla. 4th DCA 2012) as authority, and moved for judgment of dismissal without prejudice. Strominger's counsel noted, however that, in this case, judgment without prejudice would be fatally defective and cannot be cured. R5 896.

BONY requested leave to reopen its case (over Strominger's objection), and submitted Exhibit 15--a "Bailee Letter," dated October 6, 2005. R5 898 (Tr. p. 31); see also R5 847. The Bailee Letter is an agreement between Countrywide Home Loans and Impac Funding, and identifies BONY as a bank where Countrywide has an account. Id. Strominger opposed the entry of this new exhibit, arguing it is a hearsay document. R5 898 (Tr. p.31). Strominger also argued that BONY did not cure the standing problem--whether BONY owned the mortgage in 2007, based solely on a 2005 Bailee Letter. R5 900 (Tr. 33). "[I]t certainly doesn't show anything associated with Bank of New York owning the loan on the date the complaint was filed." Id.

### C. The Final Judgment of Dismissal

On March 6, 2015, the trial court entered a Final Judgment of Dismissal, in favor of Strominger and against BONY, which states (in full):

> THIS CAUSE came before the Court on February 24, 2015, for non-jury trial. At the conclusion of Plaintiff's case in chief, Defendant Lawrence Strominger, moved for a judgment of dismissal without prejudice pursuant to Rule 1.420(b), Fla. R. Civ. P.
>
> Based on the evidence adduced at trial and considering the arguments of counsel for the parties with regard to Defendant's motion for judgment of dismissal, the Court finds that Plaintiff introduced a fraudulent, back dated assignment into evidence to show standing at the inception of this lawsuit, and did not prove possession of the original note at the time of the commencement of this lawsuit and therefore, lack standing to bring this foreclosure action.
>
> Accordingly, it is ORDERED and ADJUDGED that Defendant Lawrence Strominger's motion for judgment of dismissal is GRANTED and this case is dismissed without prejudice to Plaintiff to bring a new lawsuit if appropriate.

R2 288. BONY filed no post-judgment motions after the entry of this judgment.

### D. Orders Entered After the Final Judgment of Dismissal

On March 26, 2015, the trial court, without notice or hearing, entered an "Order Vacating Final Judgment of Dismissal." R2 292. On May 27, 2015, without notice or hearing, the trial court entered an "Order Denying Defendant's Motion for Involuntary Dismissal." R2 294. Without explanation, the trial court referred to the October 6, 2005 Bailee Letter, which "provides Bank of New York as the entity to remit the purchase price related to this note and mortgage." Id.

On May 28, 2015, the Court entered a "Uniform Final Judgment of Foreclosure." R5 849-53. This timely appeal followed. R5 854-60.

## SUMMARY OF THE ARGUMENT

Under rule 1.530(d), the trial court had no jurisdiction to vacate a Final Judgment **after** the 15 day period when that judgment was rendered. The trial court did not claim the March 6, 2015 Final Judgment of Dismissal was a "clerical mistake." Indeed, the March 6, 2015 Final Judgment of Dismissal expressly found that the Assignment of Mortgage document, relied on by BONY both before and during the trial, was fraudulent and inadmissible. BONY relied on this Assignment of Mortgage document at trial as the lynchpin to its presentation, blatantly ignoring its own prior stipulation on that exact point.

Even if the trial court had the authority to withdraw its March 6, 2015 Final Judgment of Dismissal (which it did not), the trial court's after-the-fact determination that BONY owned the note and mortgage on November 1, 2007 (the day the complaint was filed) is not supported by any evidence in this record. Without explanation, the trial court relied on a "Bailee Letter," executed in 2005, to demonstrate that BONY owned the mortgage at issue in 2007. That assertion makes no sense, and is without merit.

The May 28, 2015 judgment on appeal should be vacated, and the March 6, 2015 Final Judgment of Dismissal should be reinstated.

## STANDARD OF REVIEW

Appellate courts apply a de novo standard of review when the construction of a Florida Rule of Civil Procedure is at issue. Barco v. Sch. Bd. of Pinellas Cnty., 975 So. 2d 1116, 1121 (Fla. 2008). "It is well settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction." See Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 599 (Fla. 2006).

This Court held that a trial court may vacate a final judgment on its own initiative; but the trial court must do so within the time limits set forth in Florida Rule of Civil Procedure 1.530(d). Leach v. Salehpour, 19 So. 3d 342, 345 (Fla. 2d DCA 2009).

## ARGUMENT

### I. THE TRIAL COURT HAD NO JURISDICTION TO VACATE THE MARCH 6, 2015 FINAL JUDGMENT

#### A. Under Florida Rule of Civil Procedure 1.530(d), The Trial Court Had No Jurisdiction On March 26, 2015 To Withdraw A Final Judgment of Dismissal That Was Rendered On March 6, 2015

This foreclosure case has been pending for over seven years. A Final Judgment of Foreclosure was entered on March 6, 2015. The trial court attempted to vacate that order and enter a "second" final judgment. But, according to the trial court's own docket, the trial court's orders, and the rules of civil procedure, the trial court had no jurisdiction to enter the "second" Final Judgment in this case.

Florida Rule of Civil Procedure 1.530(d), states that:

> **(d) On Initiative of Court.** Not later than 15 days after entry of judgment or within the time of ruling on a timely motion for a rehearing or a new trial made by a party, the court of its own initiative may order a rehearing or a new trial for any reason for which it might have granted a rehearing or a new trial on motion of a party.

Fla. R. Civ. P. 1.530(d) (2015).[2]

[2] In the 2013 Amendments to the Florida Rules of Civil Procedure, subdivisions (b) and (g) of rule 1.530 were amended to change the deadlines for service of certain motions from 10 to 15 days after the specified event. Subdivision (d) was also amended to change the deadline for a Court to act of its own initiative to "[n]ot later than 15 days after the entry of judgment.". See In re Amendments to Florida Rules of Civil Procedure, 131 So. 3d 643, 651 (Fla. 2013).

Because there were no pending motions, and because the Court, on its own initiative, failed to act within 15 days pursuant to that rule, the trial court had no jurisdiction to enter the "Order Vacating Final Judgment of Dismissal." In Leach v. Salehpour, 19 So. 3d 342, 345 (Fla. 2d DCA 2009), this Court held that Florida Rule of Civil Procedure 1.530(d) does provide a method by which a trial court may vacate a final judgment and order a new trial on "its own initiative." The trial court must act "[n]ot later than 10 days after entry of judgment or within the time of ruling on a timely motion for a rehearing or a new trial made by a party." Id.; see also Initial Brief at n.2, supra.

In this case, the trial court had no jurisdiction to "withdraw" the first Final Judgment of Dismissal and enter a second Final Judgment of Foreclosure. Cf. Kippy Corp. v. Colburn, 177 So. 2d 193, 197 (Fla. 1965) (holding the jurisdiction of appellate courts to correct error in an order is likewise limited by statute and rule; an appellate court has no power whatsoever to act in a cause unless the application for review is brought within the time and in the manner provided.). On those facts, controlling case law, and binding legal conclusions, this Court should vacate the "second" Final Judgment, dated May 28, 2015, and direct the trial court to reinstate its Final Judgment of Dismissal, dated March 6, 2015.

### B. The Trial Court's March 26, 2015 Order, Vacating The March 6, 2015 Final Judgment of Dismissal, Did Not--And Could Not--Assert The Existing Final Judgment of Dismissal Was A "Clerical Error"

As this Court held in Malone v. Percival, 875 So. 2d 1286 (Fla. 2d DCA 2004), "[a] trial court may correct a clerical error 'at any time on its own initiative' pursuant to Florida Rule of Civil Procedure 1.540(a), but judicial errors, which include errors that affect the substance of a judgment, must be corrected within ten days pursuant to Florida Rule of Civil Procedure 1.530, or by appellate review." Id. at 1288 (quoting Bolton v. Bolton, 787 So. 2d 237, 238-39 (Fla. 2d DCA 2001)).

The trial court did not assert (nor could it have asserted) that the March 6, 2015 Final Judgment of Dismissal was a "clerical error." See Malone, 875 So. 2d at 1288; see also Corvette Country, Inc. v. Leonardo, 997 So. 2d 1272, 1273 (Fla. 4th DCA 2009). The second Final Judgment completely reversed the trial court's first written Final Judgment, entered after the bench trial. The second Final Judgment also ignores the trial court's previous rulings (and BONY's stipulation) that it would **not** rely on the fraudulent and inadmissible "Assignment of Mortgage." Simply put, there was no evidence linking BONY to this mortgage accept this fraudulent, inadmissible Assignment of Mortgage document.

Paragraph (a) of rule 1.540 is for "clerical errors," and there is no assertion by the trial court or any party that the first Final Judgment was a "clerical error."

Paragraph (b) of rule 1.540 does not apply because that rule requires a motion. See Shelby Mut. Ins. Co. of Shelby, Ohio v. Pearson, 236 So. 2d 1, 3 (Fla. 1970) ("[e]xcept as provided by Rules 1.530 and 1.540, Florida Rules of Civil Procedure, the trial court has no authority to alter, modify or vacate an order or judgment.")

Therefore, under Florida Rules of Civil Procedure, the trial court had no jurisdiction or authority to substantively "correct" a Final Judgment that had been entered by "withdrawing" of the judgment twenty (20) days after it was entered.

## II. THERE WAS NO EVIDENCE THAT THE BANK OF NEW YORK OWNED THE NOTE OR THE MORTGAGE ON OCTOBER 7, 2007, THE DATE THIS MORTGAGE FORECLOSURE LAWSUIT WAS FILED

### A. The Undisputed Evidence Demonstrated That The Assignment Of Mortgage, Notarized By Terry Rice, Was A Fraudulent, Back-Dated Assignment

Strominger asserts that, even if the trial court had jurisdiction to vacate the first Final Judgment (which it did not), the evidence presented at trial demonstrated that the trial court's findings in the first Final Judgement were correct.

The only evidence BONY presented to support its standing in filing its complaint of foreclosure against Strominger was a back-dated Assignment of Mortgage, as evidenced by the notary stamp. This was evidence that BONY's counsel stipulated it would not enter into evidence at trial. The trial court's Final Judgment of Dismissal found that back-dated Assignment of Mortgage was fraudulent and inadmissible. This fraudulent, inadmissible document does not

establish that BONY owned or held the mortgage and note at the time of the complaint. Without any other evidence, BONY has no standing to foreclose on Strominger's property.

This exact result was demonstrated in this Court's recent decision in Tomlinso v. GMAC Mortg., LLC, 2015 WL 5124763, Case No. 2D13–6030 (Fla. 2d DCA Sept. 2, 2015) (Appellate Decision is Final; Mandate issued Sept. 24, 2015). This Court reversed a lower court's final judgment in favor of GMAC because the only evidence establishing when GMAC possessed the note was an assignment of mortgage, which was dated more than a year after the date of the complaint.

Those are the same facts in this case. The only evidence that the Plaintiff presented to demonstrate its ownership of the note and mortgage is the inadmissible, back-dated Assignment of Mortgage. The March 6, 2015 Final Judgment of Dismissal should be reinstated, and the later May 28, 2015 Final Judgment of Foreclosure should be vacated.

### B. The Trial Court Misconstrued The Bailee Letter As "Proof" That The Bank Of New York Owned The Note And Mortgage On The Date The Lawsuit Was Filed

Strominger also asserts that, even if the trial court had jurisdiction to vacate the first Final Judgment (which it did not), the trial court's relying on the Bailee Letter (Exhibit 15), as "proof" that BONY owned the note and mortgage on

November 1, 2007 (the date it filed this lawsuit) is without merit. The trial court never explained why a bailee contract, entered in 2005 between Impac Funding Corp. and Countrywide Home Loans, Inc., has anything to do with when Countrywide assigned this mortgage to the Plaintiff, which is defined as "The Bank of New York, As Trustee For The Certificateholders of the CWABS Inc. Asset-Based Certificates, Series 2006-IMI."

The Bailee Letter has absolutely nothing to do with BONY--accept that Countrywide Home Loans, Inc. had an account at that bank. That bailee letter mentions **nothing** about BONY **as trustee for certain certificate holders**.

Just as in Tomlinso, the only evidence establishing when BONY owned the note and the mortgage was an assignment dated more than a year after the date of the mortgage foreclosure complaint. And, as in Tomlinso, BONY had no standing to foreclose on Strominger's property on November 1, 2007--when it filed this complaint.

## CONCLUSION

This Court should enforce rule 1.530(d), and rely on its prior rulings in Leach v. Salehpour, 19 So. 3d 342, 345 (Fla. 2d DCA 2009), Malone v. Percival, 875 So. 2d 1286 (Fla. 2d DCA 2004), and Tomlinso v. GMAC Mortg., LLC, 2015 WL 5124763, Case No. 2D13–6030 (Fla. 2d DCA Sept. 2, 2015), and: a) vacate the May 28, 2015 Uniform Final Judgment of Foreclosure, and b) reinstate the March 6, 2015 Final Judgment of Dismissal.

Respectfully submitted,

/s/ Robert E. Biasotti

_____

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Initial Brief was furnished electronically on this 9th day of October, 2015, to the parties on the attached list.

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## CERTIFICATE OF TYPE SIZE AND STYLE

**I HEREBY FURTHER CERTIFY** that the type size and style used throughout this brief is 14-point Times New Roman, double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Robert E. Biasotti

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