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

REPLY BRIEF OF APPELLANTS LAWRENCE STROMINGER and ADRIANA STROMINGER

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

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[1] **PLEASE NOTE**: THE DATE LISTED IN **ISSUE II** IN THE INITIAL BRIEF (OCTOBER 7, 2007) WAS INCORRECT. THE MORTGAGE FORCLOSURE LAWSUIT WAS FILED ON NOVEMBER 1, 2007. THE STATEMENT OF THE FACTS RELECTS THE CORRECT DATE, AND THE BALANCE OF THE ARGUMENT (OTHER THAN THAT ERROR IN THE STATEMENT OF ISSUE II), REMAINS THE SAME.

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ARGUMENT

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

BONY makes a fatal mistake by ignoring the difference between a "trial judge" and a "trial court" when interpreting Florida Rules of Civil Procedure 1.530 and 1.540. It is irrelevant which judge signs a Final Judgment on behalf of a court. A Final Judgment, issued by a trial court, is the ruling of the **entire** court, not a ruling of a specific judge. The **trial court** took the foreclosure issue under advisement, and the **trial court** issued a written Final Judgement on March 6, 2015. The fact that one judge presides over the hearing, and another judge signs the Final Judgment, does not--and cannot-- create a "clerical mistake."

Under this Court's binding precedent, the term "clerical mistake," under rule 1.540(a), cannot be used to make substantive changes to the court's rulings. See e.g., Dep't of Revenue v. Baker, 162 So. 3d 1107 (Fla. 2d DCA 2015) (changing child support payment amounts is a substantive change and cannot be modified using "clerical mistake"); Dep't of Revenue ex rel. Williams v. Annis, 159 So. 3d 263, 265 (Fla. 2d DCA 2015) (it is not appropriate to use "clerical mistake" as a basis to modify an order because of an error in computing income level when determining child support); Luzenberg v. Forand, 929 So. 2d 546 (Fla. 2d DCA 2006) (changing a final judgment for civil contempt to a final judgment for indirect criminal contempt cannot be made under clerical mistake).

"[W]hen the error is not clerical but rather is a judicial error which affects the substance of a judgment . . . it must be corrected within ten days after entry of the judgment pursuant to Florida Rule of Civil Procedure 1.530 or by appellate review." Soreide v. Vantrex Commc'ns, Inc., 902 So. 2d 872, 873 (Fla. 2d DCA 2005) (reversing a trial court order, after it ruled in favor of one party, then, outside its 10-day window, revoked its order and ruled in favor of the opposite party).

The first Final Judgment issued in this case, on March 6, 2015, stated that the **trial court** reviewed the evidence and, based on that evidence, the **trial court** ruled in favor of Strominger. To revoke that order and substitute a new ruling in favor of BONY based on different evidence cannot, as a matter of law, be considered a clerical mistake.

In this case, the trial court's change when it issued its second Final Judgment takes a new and opposite substantive position. This change could not be based on a clerical mistake. No one in this case--not any party, the trial court, or any judge within the trial court--asserted the change revoking the March 6, 2015 Final Judgment was a "clerical error," under rule 1.540. BONY has no basis for making that assertion for the first time in its Answer Brief.

II. THERE WAS NO EVIDENCE THAT THE BANK OF NEW YORK OWNED THE NOTE OR THE MORTGAGE ON NOVEMBER 1, 2007, THE DATE THIS MORTGAGE FORECLOSURE LAWSUIT WAS FILED

As a threshold matter, this Court should never reach the second issue because the first issue resolves the case--the trial court had no jurisdiction to vacate the original March 6, 2015 Final Judgment. However, even if this Court determines the trial court had jurisdiction to vacate that Final Judgment, there **still** was no evidence to demonstrate that BONY owned the Note or the Mortgage on or before November 1, 2007 (the date BONY filed its first foreclosure complaint).

On October 16, 2008, BONY filed a motion for leave to file an amended complaint. R1 63-97. The amended complaint claims the mortgage was "subsequently assigned" to BONY, and attached the assignment as Exhibit "B." See R1 65 ¶4; see also R1 97. The trial court granted that order on an agreed motion on August 27, 2009. R1 100.

The record reflects that BONY produced an Assignment of Mortgage from Countrywide Home Loans to BONY, attached to its amended complaint. R1 97. The trial court expressly ruled that attachment to the amended complaint, which was a subject of Strominger's January 5, 2012 amended motion to dismiss, was "an instrument of fraud intentionally perpetrated by the Plaintiff. . ." R1 199. The trial court held that the notary's stamp demonstrated that this fraudulent document could not have been signed before the start of litigation. R1 199-200.

This fact is a fatal flaw to BONY's obligation to prove it had standing **at the time it filed the original complaint**. Indeed, based on the notary's stamp, and BONY's stipulation that it would not rely on that document in this case, **proves** that BONY was assigned Strominger's mortgage **after** BONY filed its complaint. And, to make matters worse, BONY filed this fraudulent document at trial to prove it owned the mortgage and note on November 1, 2007. That was the basis of the Final Judgment, entered on March 6, 2015.

The trial court held that the BONY must keep this assignment out of evidence because it was, on its face, fraudulent. See R199-200. Irrespective of that ruling, during the bench trial, BONY **still** presented this fraudulent assignment as Exhibit 6 in support of its claim against Strominger. R4 758; see also R5 881 (transcript, p.14). Strominger later requested a motion for a judgment of dismissal, and presented this document as Defense Exhibit 1. R2 279; see also R5 893-94. BONY attempted to cure the lack of evidence that this Note and Mortgage were ever transferred to BONY prior to November 1, 2007.

BONY claims it presented other exhibits as well, including a Bailee Letter, that it believes "adequately proves [BONY] was holder of the note prior to [] initiating the foreclosure action." AB at 8. That is simply not true.

Under Florida law, "[i]f an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement.' When

indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." § 673.2051(2), Fla. Stat. (1992). Therefore, in regards to blank indorsements, one is not a bearer or has the position to demand payment on the note until the note is in the bearer's possession.

The original Note between Home Capital Funding and Strominger, which was filed in this foreclosure case **two years after** BONY filed its original complaint, contains two indorsements. See R1 124-66. The one on the top is a special indorsement from Home Capital Funding to Impac Funding Corp. R1 130. The second one on the bottom is a blank indorsement signed by Impac Funding Corp. and payable to "blank," who bears the note, without recourse. R1 130. Neither indorsements are dated; thus, assuming the blank indorsement was the last one, it is only payable (and evidence of standing) to BONY if BONY presents this Note **at the time it filed the original complaint--November 1, 2007.**

The Bailee Letter is dated October 6, 2005, and is addressed to Impac Funding Corp. from Countrywide Home Loans. R5 847-48. Countrywide Home Loans explained, in reference to their 2001 agreement, it attached Strominger's Note (a.k.a collateral) to its Bailee Letter, in exchange for the purchase price of the Note to be wired to Countrywide's Payoff Account, an account the Countrywide held at BONY. Id. This letter proves Impac Funding Corp. was holder of the Note after October 6, 2005, and proves that Countrywide Home Loans was holder of the

Note before October 6, 2005. It certainly does **not** prove BONY was holder of the Note at the time it filed its complaint on November 1, 2007. Id.

The Bailee Letter does not even, as BONY purports, establish BONY as Trustee for Countrywide. It merely establishes that Countrywide held an account at BONY, an account in which the purchase price of the Note was presumably deposited for consideration by Impac Funding Corp. A bank, if at all, is a trustee for the money deposited in a customer's (in this case, Countrywide) bank account. The bank is **not** trustee of the Countrywide's mortgage, or Countrywide's note. Indeed, the documents do not prove that BONY had any rights **at all** to enforce Strominger's mortgage when it filed its complaint.

BONY's references to a mortgage loan schedule, power of attorney, and sub-servicing agreement do not help its case. Assuming the loan number matches that of Strominger's, the mortgage loan schedule does not prove that BONY had standing to file its foreclosure complaint on November 1, 2007. R4 713-33. Likewise, the power of attorney, recorded on August 7, 2013, describes BONY as "seller and purchaser," dated June 28, 2011. That power of attorney does not say anything about BONY's standing to foreclose on Strominger in 2007. R2 300. Finally, the subservicing agreement dated August 1, 2012, between Bank of America, N.A. and Bayview Loan Servicing, LLC, does not include BONY as a party to the agreement. R2 314 - R4 712. The agreement only mentions BONY

once in Exhibit D, which is an undated and unsigned limited power of attorney, that references a June 28, 2011 settlement agreement and shows BONY as trustee. This attachment, and the entire subservicing agreement, does not demonstrate BONY had standing to initiate foreclosure proceedings on Strominger's mortgage on November 1, 2007.

"A plaintiff who is not the original lender may establish standing to foreclose a mortgage loan by submitting a note with a blank or special endorsement, an assignment of the note, or an affidavit otherwise proving the plaintiff's status as the holder of the note." Focht v. Wells Fargo Bank, N.A., 124 So. 3d 308, 310 (Fla. 2d DCA 2013). "But standing must be established as of the time of filing the foreclosure complaint." Id. BONY failed to establish it had standing at the time the original complaint was filed on November 1, 2007.

"[T]he 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." Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) (citing Voges v. Ward, 98 Fla. 304, 123 So. 785, 793 (Fla. 1929)). "[T]he plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." Progressive, 913 So. 2d at 1285. Despite BONY's attempts to show evidence it has standing now, BONY never established it had standing on November 1, 2007--

at the time of the complaint; and the only document entered into evidence **after** Strominger's motion for judgment of dismissal was the Bailee Letter--dated **before** the complaint. As such, that evidence did not, and could not, establish BONY was the holder of the Note before November 1, 2007.

CONCLUSION

This Court should enforce rule 1.530(d) or, alternatively, determine that BONY did not establish it owned the note or mortgage on November 1, 2007, when BONY filed this foreclosure action.

This Court should: 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 Reply Brief was furnished electronically on this 25th day of January, 2015, to the parties on the attached list.

/s/ Robert E. Biasotti
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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).

By: /s/ Robert E. Biasotti
_____
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