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Appeal No. Case No. 2D15-2788

IN THE 2ND DISCTRICT COURT OF APPEALS

LAWRENCE STROMINGER and ADRIANA STROMINGER,

Appellant,

v.

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

Appellee.

APPEAL IN CAUSE NO. 07-CA015203

IN THE CIRCUIT COURT OF HILLSBOROUGH COUNTY, FLORIDA

Honorable Sandra Taylor presiding

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

On November 1, 2007, The Bank of New York, as Trustee for the Certificateholders of the CWABS Inc. Asset-Based Certificates, Series 2006-IMI, ("BONY"), filed a mortgage foreclosure action against Lawrence Strominger and Adriana Strominger ("Appellants") in Hillsborough County, Florida. (R. Vol. 1, pgs. 14-39). The complaint alleged that the mortgage was assigned to BONY by virtue of an assignment to be recorded and attached a copy of the recorded mortgage as an exhibit. (R. Vol. 1, pgs. 14-39). Appellants filed a motion to dismiss the complaint on July 10, 2008. (R. Vol. 1, pgs. 53-62). BONY then filed a motion for leave to file amended complaint on October 16, 2008 which was subsequently granted on August 27, 2009. (R. Vol. 1, pgs. 63-97, 100). On December 15, 2011, BONY filed the original note and mortgage. (R. Vol. 1, pgs. 124-166). On January 5, 2012, Appellants filed an amended motion to dismiss asserting that BONY failed to prove it was the owner of the note and mortgage at the time of initiating the foreclosure action. (R. Vol. 1, pgs. 169-182). The motion further alleged that Plaintiff was relying on a fraudulent assignment based on the dates of the notary commission. (R. Vol. 1, pgs. 169-182). After arguments, the court entered an order granting the Amended Motion to Dismiss without prejudice on April 9, 2015. (R. Vol. 1, pgs. 199-200). BONY filed a timely motion for rehearing on April 18, 2012. (R. Vol. 2, pgs. 207-212). The court granted BONY's motion for rehearing and granted leave to file a Second Amended Complaint. (R.

Vol. 2, pgs. 217-218). The Second Amended Complaint was filed on November 20, 2013 alleging "Plaintiff is the owner and holder of the Promissory Note, indorsed in blank." (R. Vol. 2, pgs. 227-256).

Trial was held on February 24, 2015 with The Honorable Judge Sandra Taylor presiding. (Transcript, pg. 1). BONY offered sixteen exhibits into evidence including a power of attorney, subservicing agreement, mortgage loan schedule, and bailee letter. (Transcript pg. 4, lines 3 – 21). Raisuli Ortiz testified on behalf of BONY. (Transcript pg. 6, lines 19 – 25). At the conclusion of the trial, Judge Taylor reserved ruling. (Transcript pg. 37, lines 12-15). On March 6, 2015, Final Judgment of Dismissal was electronically conformed by the Honorable Circuit Judge Cheryl Thomas. (R. Vol. 2, pg. 288). On March 26, 2015, Judge Thomas entered an Order Vacating Final Judgment of Dismissal. (R. Vol. 2, pg. 292-293). Final Judgment of Foreclosure was then entered on May 27, 2015 and was signed by Judge Taylor. (R. Vol. 5, pg. 849-853).

STANDARD OF REVIEW

To the extent that the trial court failed to follow the Rules of Civil Procedures, BONY agrees that questions of law are subject to a *de novo* standard of appellate review. *Reinish v. Clark*, 765 So.2d 197 (Fla. 1st DCA 2000). Appellants' allegations as to whether BONY had standing to bring the action at the time of filing is examining the sufficiency of the evidence, and is subject to a standard of abuse of discretion. *Carpenter v. State*, 785 So.2d 1182, 1201 (Fla.

2001). The function of the trial court is to evaluate and weigh the evidence. *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976). Subject to the appellate court's right to reject inherently incredible and improbable evidence, it is not the prerogative of an appellate court, upon a *de novo* review, to substitute its judgment for that of the trial court. *Id*.

SUMMARY OF THE ARGUMENT

The trial court had jurisdiction to vacate the Final Judgment of Dismissal filed on March 6, 2015 due to apparent clerical error. Furthermore, the trial court made the correct ruling by issuing Final Judgment of Foreclosure on behalf of BONY as BONY properly proved at trial it was the holder of the original note at the time of initiating the mortgage foreclosure action.

ARGUMENTS

1. The Order Setting Aside Final Judgment Signed March 26, 2015 is Valid

When an incorrect order is entered in a trial court, there are generally two rules to allow for corrective action to be taken. Florida Rule of Civil Procedure 1.530 allows for motions requesting rehearing and 1.540 allows for motions vacating orders under specifically stated premises. Rule 1.530 states a new trial may be granted to all or any of the parties on all or part of the issues and that a motion for new trial or for rehearing shall be served not later than 15 days after the

filing of the judgment in a non-jury action." Fla. R. Civ. P. 1.530 (2015). It further allows for the trial court to review orders on its own initiative:

> (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 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. Id.

The Order on Final Judgment of Dismissal was Electronically Conformed on March 6, 2015. (R. Vol. 2, Pg. 288). The Order Vacating Final Judgment of Dismissal was Electronically Conformed on March 26, 2015. (R. Vol 2. Pg. 292-293). Therefore, under Rule 1.530(d), the trial court no longer had jurisdiction to have granted a rehearing or new trial.

Rule 1.540(a) allows for a Court to correct clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission at any time on its own initiative. Fla. R. Civ. P. (2015). This rule allows for the correction of clerical errors, but not judicial errors, which include errors that affect the substance of the litigation. *Bolton v. Bolton*, 787 So. 2d 237, 238-239 (Fla. 2nd DCA 2001). Whether an order resulted from a mere accident or judicial error, is determined by a test of whether the pronouncement reflects a deliberate choice on the part of the court. *Pompano Atlantis Condominium Assoc. v. Merlino*,

415 So. 2d 153, 154 (Fla. 4th DCA 1982). Citing *In re Estate of Beeman*, 391 So. 2d 276, 281 (Fla. 4th DCA 1980). The Order Vacating Final Judgment of Dismissal states "The Final Judgment of Dismissal entered on March 6, 2015 was entered in error and is null and void." (R. Vol. 2, pg. 292-293). The court indicates on the fact of the document that the order was entered in error and is null and void. After Judge Taylor reserved ruling at trial, a different judge entered a Final Judgment of Dismissal on the case. Judge Thomas then vacated that same order and Judge Taylor entered the final judgment. Judge Thomas' own admission was the order was entered in error. Therefore, it was proper for her to take action under Fla. R. Civ. P. 1.540(a) to correct said order.

2. BONY Proved Standing at the Time of Initiating the Mortgage Foreclosure

BONY asserts the trial court ruled correctly by entered a Final Judgment of Foreclosure against appellants. The United States Supreme Court has held that "promissory notes payable to order may be transferred by indorsement , or when indorsed in blank or made payable to bearer they are transferable by mere delivery, and the possession of such an instrument indorsed in blank or made payable to bearer is prima facie evidence that the holder is the proper owner and lawful possessor of the same and nothing short of fraud, not even gross negligence, if attended with mala fides, is sufficient to overcome the effect that evidence or to invalidate the title of the holder, supported by that evidence." *Brown v. Spofford,* 95 U.S. 474, 478 (1877).

This has been the law and has been followed by the Florida Supreme Court which also held "an action on a bill or note payable to bearer or endorsed in blank, may be maintained in the name of the nominal holder who is not the owner by the owner's consent; and that possession by such nominal holder is prima facie sufficient evidence of his right to sue and cannot be rebutted by proof that he has no beneficial interest or by anything else but proof of mala fides." *City of Lakeland v. Select Tenures, Inc.*, 129 Fla. 338, 344 (Fla. 1937). The "holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. FL Stat. § 671.201(21) (2015). "An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to s. 673.2051(2)." FL Stat. § 673.1091(3) (2015). A "holder" has the right to enforce the Mortgage Note under both FL Stat. § 673.3011(1) (2015). The court will not look beyond the holder of the Note to identify a proper plaintiff. *Booker v. Sarasota, Inc.*, 707 So.2d 886 (Fla. 1st DCA 1998). The Supreme Court of Florida has stated that standing "accords with negotiable instrument laws" and "courts do not generally inquire into the right of the plaintiff to sue in his own right or in that of a trustee, but the one holding possession is accorded the right to foreclose." *Munck v. Manatee River Bank & Trust Co.*, 122 Fla. 193, 198 (Fla. 1935). Being holder of the Mortgage Note also allows the Plaintiff to enforce the Mortgage. A mortgage securing a note passes as an incident upon the transfer of

the note. *McClure v. American National Bank of Pensacola*, 64 So.2d 427 (Fla. 1914). Here, the original note was filed with the court on December 15, 2011 and contains a blank endorsement made by Impac Funding Corp. who received an endorsement from Home Capital Funding, the original lender. (Vol. 1, pgs. 124-166). Therefore, there is prima facia evidence of BONY having been holder of the note as BONY submitted the original documents to the court with an endorsement in blank.

A crucial element in foreclosure is for the party to demonstrate it has standing. *McLean v. JP Morgan Chase Bank*, 79 So. 3d 170 (Fla. 4th DCA 2011). Standing is determined at the time the lawsuit is filed and not a defect that can be cured by acquiring standing after the case is filed. *Id.* Here, the mortgage loan schedule was entered into evidence without objection and shows that appellants' loan exists in the Plaintiff trust. (Transcript pgs. 10-13 and Exhibit 3). The power of attorney was entered into evidence without objection indicating BONY authorized the servicer to bring this action. (Transcript pg. 8 and Exhibit 1). Testimony was also taken regarding Bayview Loan Servicing, LLC is sub-servicing the loan on behalf of Bank of America, N.A. and the sub-servicing agreement was entered into evidence without objection. (Transcript pg. 9 and Exhibit 2). Bank of America, N.A. is successor by merger to Countrywide Home Loans. (Transcript pg. 16, lines 20-25). The original note indicates the chain of title goes from the original lender, Home Capital Funding, to Impac Funding Corp.

where it was endorsed in blank. (R. Vol. 1, pgs. 124-166). Here, the bailee letter adequately proves Plaintiff was holder of the note prior to the initiating the foreclosure action. The bailee letter was addressed to Impac Funding Corp., a prior servicer, on October 6, 2005. (Exhibit 15). This is two years prior to the foreclosure action being filed. Testimony indicates the bailee letter's purpose is to "hold a collateral as bailee for the benefit of the lender and Countrywide subject to the terms of the bailee agreement." (Transcript pg. 31, lines 4-6). In the instant case, the collateral in question is the original note. Therefore, two years before the foreclosure was initiated, Impac was holding the originals as custodian for the benefit of Countrywide and the Plaintiff trust. As the court will not look beyond the holder of the Note to identify a proper plaintiff, *Booker v. Sarasota, Inc.*, 707 So.2d 886 (Fla. 1st DCA 1998), BONY has successfully shown standing at the time of initiating the complaint by virtue of being in possession of the original note.

CONCLUSION

For the reasons stated herein, BONY respectfully requests that this Court affirm the final judgment.

Respectfully Submitted,

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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 Florida rule of Appellate Procedure 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 14th day of December, 2015.

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