In the District Court of Appeal
Fifth District of Florida

CASE NO. 5D15-3924

(Circuit Court Case No. 12-CA-2386)

CURT A. BOWMAN and MICHELE A. BOWMAN,

Appellants,

v.

MTGLQ INVESTORS, LP, et al.,

Appellees.

ON APPEAL FROM THE FIFTH JUDICIAL
CIRCUIT IN AND FOR HERNANDO COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

I. Introduction

Curt A. Bowman and Michele A. Bowman ("the Homeowners") appeal the final judgment of foreclosure rendered in favor of MTGLQ Investors, L.P. ("the Bank") after a non-jury trial. The Homeowners present two issues for this Court's review:

- Whether there was competent evidence to support the judgment.
- Whether the loan documents were enforceable at the time of judgment.

II. Appellants' Statement of the Facts

A. The Pleadings

The Bank initiated this case when it filed its one count complaint for mortgage foreclosure.[1] The copy of the note attached to the complaint identified the "lender" as SunTrust Mortgage, Inc. ("SunTrust")[2] and included an

[1] Complaint, August 7, 2012 (R. 11-55).

[2] Copy of Note attached to Complaint, August 7, 2012 (R. 18).

endorsement by SunTrust in blank.[3] The original principal balance of the loan was $408,350.00.[4]

While the complaint referenced a "loan modification agreement" recorded on November 15, 2007,[5] the Bank actually attached a loan modification agreement dated April 1, 2010 that did not appear to be recorded in Hernando County's official records.[6] This document purported to "amend and supplement" the mortgage and the note, and increased the principal balance to $457,180.99.[7]

And according to Paragraph 22 of the mortgage attached to the complaint, the lender was required to send the Homeowners written notice of default with a thirty-day opportunity to cure prior to acceleration and foreclosure:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument … The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in

[3] Copy of Note attached to Complaint, August 7, 2012 (R. 22).

[4] Copy of Note attached to Complaint, August 7, 2012, ¶ 1 (R. 22).

[5] Complaint, August 7, 2012, ¶ 5 (R. 12).

[6] Copy of Loan Modification Agreement attached to Complaint, August 7, 2012 (R. 48-52).

[7] Copy of Loan Modification Agreement attached to Complaint, August 7, 2012 (R. 48).

> acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property….[8]

The Homeowners answered the complaint and pled that they were without knowledge and therefore denied the Bank's allegation that it owned and held the note and mortgage[9] and denied that the Bank had complied with conditions precedent to foreclosure.[10] And as an affirmative defense, the Homeowner pled that the Bank failed to comply with conditions precedent because it did not comply with Paragraph 22 of the mortgage.[11] The Bank did not file a reply seeking to avoid this defense, and the matter was set for trial.[12]

B. The Trial

The trial began with the Bank calling its first witness, Louise Plasse, to the stand.[13] Plasse was a senior loan analyst for Ocwen ("the Servicer") whose job

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[8] Copy of Mortgage attached to Complaint, August 7, 2012, ¶ 22 (R. 36).

[9] Amended Answer, November 26, 2014, ¶ 3 (R. 111). The Homeowners' motion for leave to permit this amended pleading were subsequently granted. (Order on Motion for Leave to Allow First Amended Answer, January 29, 2015 (R. 136)).

[10] Amended Answer, November 26, 2014, ¶ 9 (R. 111).

[11] Affirmative Defenses, November 26, 2014, ¶ 3 (R. 115-122).

[12] Order Continuing Trial, January 29, 2015 (R. 139); Notice of Trial, March 5, 2015 (R. 141). The "order" continuing trial does not appear to actually be an order from the trial court but a document served by the Homeowners' trial counsel. In any event, the Bank never objected to this, and actually filed its own "trial notice." (Plaintiff's Notice of Trial, March 5, 2015 (R. 140)).

[13] Transcript of Trial Before the Honorable Daniel B. Merritt, Sr., April 14, 2015 (R. Vol. II; "T. ___") at 3.

required her to "prepare" for trials by "reviewing" business records and "prepare" for mediation and depositions.[14] Through Plasse, and without objection, the Bank introduced the following documents which composed the entirety of its case:

- The note which, unlike the copy of the note attached to the complaint, bore a specific endorsement from SunTrust to the Bank;[15]
- The mortgage;[16]
- The modification agreement;[17]
- A payment history;[18]
- The Homeowners' bankruptcy docket;[19]
- A power of attorney from the Bank to the Servicer;[20]
- An "acquisition screenshot";[21]
- An escrow breakdown;[22]

[14] T. 3-4.

[15] Exhibit 1.

[16] Exhibit 2.

[17] Exhibit 3.

[18] Exhibit 4.

[19] Exhibit 5.

[20] Exhibit 6.

[21] Exhibit 7.

[22] Exhibit 8.

- A hello/goodbye letter;[23]
- AS judgment figures document;[24] and
- Two purported acceleration notices.[25]

While Plasse testified that the note contained the specific endorsement to the Bank,[26] she never testified when the Bank's name was handwritten into the endorsement or even when the Bank took possession of the note. In fact, she testified that "this trust" was "the plaintiff"[27] and that "the trust" was the owner of the mortgage before the lawsuit was filed[28] despite the fact that no trust was named in the complaint. Plasse learned this information by reviewing a pooling and servicing agreement ("PSA") and certain "amendments" found in the Bank's business records and which apparently also "public knowledge."[29] In any event, the Bank never introduced the PSA or the amendments into evidence.

[23] Exhibit 9.

[24] Exhibit 10.

[25] Exhibit 11.

[26] T. 6.

[27] T. 5.

[28] T. 7.

[29] T. 5.

Furthermore, Plasse testified that the first acceleration notice (Exhibit 11) "would have gone with the Complaint."[30] And while she testified that her records "indicate an address which is the same as the property address"[31] she never testified that the notices were sent to this address or, if they were, how they were sent.

And while she initially testified that no payments were received after May 1, 2011 (the date of the alleged default[32]), Plasse admitted during cross-examination that her records indicated a "payment required equals amount received in the amount of $2,652.81."[33] She also admitted that nothing in the loan modification agreement (Exhibit 3) indicated that the document had been recorded.[34]

Next, the Bank called Mr. Bowman to the stand.[35] Mr. Bowman testified that he could not be 100% sure whether he had received the acceleration notices.[36]

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[30] T. 16.

[31] T. 17.

[32] T. 10.

[33] T. 22.

[34] T. 23-24.

[35] Transcript of Trial Before the Honorable Daniel B. Merritt, Sr., June 9, 2015 (R. Vol. III; "T2. ___") at 3.

[36] T2. 14.

After the Bank rested, the Homeowners moved for an involuntary dismissal, in part, because the Bank failed to prove compliance with Paragraph 22 of the mortgage.[37] The trial court denied this motion.[38]

The Homeowners case consisted of testimony from Ms. Bowman who testified that during the Homeowners' Chapter 13 bankruptcy, the prior loan servicer received $29,180.91 in payments.[39] Ms. Bowman also testified that the Homeowners made payments for May 2011, June 2011, and July 2011 while in bankruptcy.[40] And while Ms. Bowman did introduce an assignment of mortgage during the Homeowners' case which predated the lawsuit, this document only purported to assign the mortgage without any reference to the note.[41]

C. The Verdict, Judgment, and Motion for Rehearing

At the close of evidence, trial court issued a written "verdict" finding for the Bank but which also found that "[t]he payment history for the prior servicer…reflects multiple bankruptcy payments between November 2010 and

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[37] T2. 18-19.

[38] T2. 26.

[39] Transcript of Trial Before the Honorable Daniel B. Merritt, Sr., July 23, 2015 (R. Vol. IV; "T3. ___") at 45.

[40] T3. 47.

[41] Defendants' Exhibit 17.

November 2011, including payments in May, June and July 2011, for a total amount of $29,620.23."[42]

And after the court entered judgment in the Bank's favor,[43] the Homeowners timely moved for rehearing arguing that there was insufficient evidence to support a finding that the Bank complied with Paragraph 22 because there was insufficient evidence of mailing,[44] and that the note and mortgage were unenforceable because the Bank failed to pay documentary stamp taxes and intangible taxes on the modification.[45] The trial court denied the motion, finding that the Homeowners Paragraph 22 argument "reargues matters that were previously argued"[46] and that their enforceability argument was not previously raised and could not be raised for the first time on rehearing.[47]

The Homeowners timely appealed.[48]

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[42] Verdict, September 17, 2015 (R. 264).

[43] Final Judgment, September 30, 2015 (R. 269-274).

[44] Motion for Rehearing, October 15, 2015, ¶¶ 16-23.

[45] Motion for Rehearing, October 15, 2015, ¶¶ 24-35.

[46] Order Denying Motion for Rehearing, November 6, 2015 (R. 305).

[47] Order Denying Motion for Rehearing, November 6, 2015 (R. 306).

[48] Notice of Appeal, October 30, 2015 (R. 298).

SUMMARY OF THE ARGUMENT

The sufficiency of the evidence, an issue which may be raised for the first time on appeal, does not support the final judgment and therefore the case should be dismissed. First, the Bank failed to prove that it complied with conditions precedent to foreclosure. Specifically, it failed to produce competent evidence that it mailed the acceleration notices by first class mail and therefore it was not entitled to the presumption that the notice was deemed "delivered" when "sent."

Furthermore, there is insufficient evidence to support a finding that the Bank had standing at inception. There was no evidence or testimony at trial proving that the Bank or its agent was in physical possession of the properly endorsed note on the day the lawsuit was filed and the remaining evidence fails to establish the Bank's standing.

Finally, the note and mortgage are unenforceable because the Bank failed to pay documentary stamp taxes and intangible taxes on the modification. Their motion for rehearing was well-taken and the trial court should have involuntarily dismissed the action without prejudice.

Consequently, this Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

STANDARD OF REVIEW

A trial court's ruling of a motion for involuntary dismissal is also reviewed *de novo*. *Deutsche Bank Nat'l Trust Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012). Likewise, a party's standing to sue is reviewed *de novo*. *Dixon v. Express Equity Lending Grp., LLLP*, 125 So. 3d 965 (Fla. 4th DCA 2013).

Additionally, in a non-jury case, sufficiency of the evidence may be raised for the first time on appeal. Fla. R. Civ. P. 1.530(e). Findings of fact by the trial court must be set aside when totally unsupported by competent, substantial evidence. *See Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1019 (Fla. 2d DCA 2012). If a trial court's decision is manifestly against the weight of the evidence or totally without evidentiary support, it becomes the duty of the appellate court to reverse. *Randy Intern., Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987).

Finally, construction of a contract is reviewed *de novo*. *Inter-Active Services, Inc. v. Heathrow Master Ass'n, Inc.*, 721 So.2d 433 (Fla. 5th DCA 1998).

ARGUMENT

I. The evidence is insufficient to support the judgment and therefore the case must be remanded for dismissal.

A. The Bank presented insufficient evidence that it complied with Paragraph 22 of the mortgage.

There was no evidence that the notice of acceleration was mailed first class mail to the property address.

Prior to filing the foreclosure action, the Bank was required to send the Homeowners a notice of acceleration and opportunity to cure which complied with Paragraph 22 of the mortgage. The Bank, however, failed to present any competent evidence—much less substantial evidence—that it actual mailed this notice in the manner required by the mortgage. There is therefore insufficient evidence to support a finding that the Bank complied with conditions precedent to foreclosure.

The Bank would normally rely on the legal fiction in Paragraph 15 which allows the court to "deem" that the Homeowners receive notice:

> 15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means.[49]

[49] Mortgage, Exhibit 2, ¶ 15 (R. Exh. 769).

Thus, in order to be entitled to this presumption of delivery the Bank needed to prove that the notice was mailed first class mail. *Martins v. PNC Bank, Nat. Ass'n*, 170 So. 3d 932 (Fla. 5th DCA 2015).

But the Bank presented absolutely no testimonial or documentary evidence identifying when, or even if, the acceleration notices were mailed by first class mail. First, Plasse admitted that the first acceleration notice "would have gone with the Complaint."[50] And to be sure, a copy of this notice was attached to the complaint.[51] But this letter could never suffice for a Paragraph 22 notice because it was sent along with the complaint rather than 30 days prior to acceleration.

Furthermore, Plasse never testified that the second acceleration notice purportedly created by the Servicer was sent by first class mail to the property address. In fact, when asked whether her records indicated whether the letter had been "sent," all she testified was that the address listed on the notice was the same as the addressed listed in the Servicer's records:[52]

> Q: Do your records indicate whether or not the default letter was sent to Mr. Bowman at the property address?

[50] T. 16.

[51] Complaint, August 7, 2012, ¶ 5 (R. 15).

[52] T. 17.

> A: They indicate an address which is the same as the property address, 13790 Rudi Loop, Spring Hill, Florida, as well as the Ocwen ones also indicate the same information.

Moreover, the Servicer's acceleration notice indicates that if it was mailed at all, it was mailed by certified mail.[53] However, use of use of certified mail rather than normal first class mail is not a permitted form of delivery in Paragraph 15 of the mortgage. Certified mail is a special service offered on first class mail which requires the recipient to be at home to sign for the letter before it is actually delivered.[54] If the notice was actually sent by certified mail, this would have added delay to the delivery—and the risk of non-delivery (if, for example, the recipient is not home when the letter carrier stops by)—problems for which the Homeowners never bargained.[55]

Thus, the Bank is left merely with an addressed and dated notice which was rank hearsay and insufficient to prove compliance with the notice provisions. *Webster v. Chase Home Fin., LLC*, 155 So. 3d 1219 (Fla. 5th DCA 2015) (reversing final judgment of foreclosure after bench trial because trial court

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[53] Supp. R. 466.

[54] Certified mail is "first class mail for which proof of delivery is secured but no indemnity value is claimed." Merriam-Webster online dictionary, available at: http://www.merriam-webster.com/dictionary/certifiedmail.

[55] If the Servicer's use of this unauthorized form of delivery was intended to provide evidence that the notice was delivered, it is telling that the Bank adduced no such evidence.

permitted impermissible hearsay testimony regarding lender's compliance with notice provisions of the mortgage). *See also Doyle v. CitiMortgage, Inc.*, 162 So. 3d 340, 342 (Fla. 2d DCA 2015) (testimonial evidence was inadmissible hearsay such that judgment was not supported by competent, substantial evidence); *Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Gonzalez*, 98 So. 3d 1198, 1203 (Fla. 3d DCA 2012) (no finding may be based on hearsay alone).

Therefore, the Bank failed to establish that it mailed the notice first class mail. It was, therefore, not entitled to the presumption of delivery under Paragraph 15 and was required to prove that the Homeowners actually received the notice. Not only did the Bank fail to proffer such evidence, Mr. Bowman testified that he could not be certain one way or the other whether he actually received the notice.[56]

The proper remedy of remand is involuntary dismissal.

Failure to comply with Paragraph 22 warrants dismissal on remand. *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA 2015); *Blum v. Deutsche Bank Trust Co.*, 159 So. 3d 920 (Fla. 4th DCA 2015).

The difference between this case and the Second District's decision in *Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7 (Fla. 2d DCA 2015) is instructive. In that case, there was "no dispute that National City delivered a paragraph twenty-

[56] T2. 14.

two notice or that the notice provided thirty days to respond." *Id*. at 12. Thus, it never addressed whether the failure to send a notice was "material" or "substantial compliance" with the mortgage. In fact, in *Milam*, the Second District noted (with apparent approval) that the Fifth District had rejected a "substantial compliance" argument in *Samaroo v. Wells Fargo Bank, N.A.*, 137 So. 3d 1127 (Fla. 5th 2014) because the notice at issue there failed to inform the borrowers of the right to reinstate—a violation of Paragraph 22's explicit requirements. *Milam*, at 13. If a lender does not substantially comply with Paragraph 22 when it fails to include a requisite element in a notice that was sent, then it also does not substantially comply if it never sent a notice at all. Failure to adduce evidence of mailing of any notice, therefore, can never be swept away as an unnecessary technicality.

The Fourth District recently reached this exact conclusion when it reversed a foreclosure judgment because there was no admissible evidence to prove that the bank actually sent the notice:

> Paragraph twenty-two of the mortgage required that notice of breach and opportunity to cure be sent to Ensler as a condition precedent to filing suit. However, the only indication the notice was actually sent comes from inadmissible hearsay, *i.e.*, Aurora's records. Because Nationstar has failed to present any admissible evidence that the notice was actually sent, we reverse the final judgment of foreclosure and remand for further proceedings.

Ensler v. Aurora Loan Services, LLC, 178 So. 3d 95, 98 (Fla. 4th DCA 2015). Therefore, on remand the case must be dismissed.

To the extent that this Court is persuaded that its decisions in *Gorel v. Bank of New York*, 165 So. 3d 44 (Fla. 5th DCA 2015) and *Vasilevskiy v. Wachovia Bank, Nat. Ass'n*, 171 So. 3d 192 (Fla. 5th DCA 2015) hold otherwise, those decisions should be distinguished. First, "prejudice," or the idea that a breach must be material, is an affirmative defense. And when a plaintiff seeks to avoid an affirmative defense (like the Bank did at trial when it presented the acceleration notices), it must file a reply asserting that avoidance. Fla. R. Civ. P. 1.100(a). Failure to assert an avoidance in a reply waives this "affirmative defense to the affirmative defense." *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). This rule logically arises from the due process consideration that the Homeowners must be put on notice that prejudice is an issue to be tried.

Second, even if it had filed a reply to raise "prejudice" as an avoidance of the Paragraph 22 defense, the Bank also had the burden of proving such a claim. *See Bankers Insurance Co. v. Macias*, 475 So. 2d 1216, 1217-1218 (Fla. 1985). The Bank adduced no evidence that the Homeowners suffered no prejudice.

Moreover, the Bank's failure to comply with the notice provision raises the presumption that the Homeowners were, in fact, prejudiced. *Macias*, 475 So. 2d at

1217 ("The issue here is whether a presumption of prejudice to an insurer arises where an insured fails to give timely notice of an accident to the insurer. We hold that such presumption does arise…"). This presumption affected the burden of proof and "imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact." § 90.302(2), Fla. Stat. In other words, the presumption that the Homeowners were prejudiced is not overcome until the trier of fact believed it had been overcome by the preponderance of the evidence. *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 59 n. 20 (Fla. 2001). Since the Bank provided no evidence on the issue of prejudice, the presumption that the Homeowners were prejudiced by the Bank's failure to comply with Paragraph 22 carries the day.

B. The Bank presented insufficient evidence that it had standing at inception.

A plaintiff must acquire standing before filing suit. *Boyd v. Wells Fargo Bank, N.A.*, 143 So. 3d 1128 (Fla. 4th DCA 2014) (reversing summary judgment of foreclosure because foreclosing lender failed to produce documentation establishing that it had standing at the time it filed the foreclosure complaint); *LaFrance v. U.S. Bank Nat. Ass'n*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking

foreclosure must demonstrate that it has standing to foreclose…Standing to foreclose is determined at the time the lawsuit is filed.") (Citations omitted).

Importantly, "[w]here as here, the defendant asserts a lack of standing as a defense to foreclosure, it is incumbent upon the plaintiff to prove its standing at trial." *Dickson v. Roseville Properties, LLC*, __ So. 3d __, 2015 WL 6777155, * 2 (Fla. 2d DCA November 6, 2015). Therefore, because the Homeowners denied the Bank's allegation that it was the owner and holder of the note and mortgage,[57] this became something the Bank had to prove during its case in chief. Such proof was sorely lacking.

Plasse never established that the Bank possessed the original note when it filed the case.

The Bank's burden at trial was to prove not only that the note was properly endorsed, but that it (or its agent) was in physical possession of the instrument. *Kiefert v. Nationstar Mortgage, LLC*, 153 So. 3d 351, 352 (Fla. 1st DCA 2014). This comports with the requirements under Article 3 of the Uniform Commercial Code ("UCC") that in order for an instrument to be negotiated, it must be both endorsed and delivered to the transferee. § 673.2011(2) Fla. Stat.

[57] Amended Answer, November 26, 2014, ¶ 3 (R. 111).

The Bank will argue that because a copy of the note attached to the complaint had a blank endorsement, the Bank had standing. Leaving aside the fact that attachments to complaints are not evidence,[58] the Bank is asking this Court to leap over a gaping lacuna in its logic—to simply assume that it (or its agent) made the copy from an original in its possession. But there are many ways that the Bank could come by a photocopy without having the original, which is the very reason that a transfer of an original instrument is required for the recipient to be entitled to enforce its terms. This Court should therefore reject the Bank's proffer of a photocopy of a note as evidence—just as the Bank itself would reject an attempt to pay this debt with a photocopy of a check.

Furthermore, this argument would necessarily ignore that the note introduced at trial contained a specific endorsement from SunTrust to the Bank.[59] So the inference that attaching a photocopy to the complaint means that the Bank had possession of the original requires another preliminary inference: that somewhere along the line the Bank simply decided to specifically endorse the original note it had in its possession to itself. Such inference stacking is impermissible. *Stanley v. Marceaux*, 991 So. 2d 938, 940 (Fla. 4th DCA 2008)

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[58] *See Coggan v. Coggan*, 239 So. 2d 17, 19 (Fla. 1970); *Turtle Lake Associates, Ltd. V. Third Federal Services, Inc.*, 518 So. 2d 959, 961 (Fla. 1st DCA 1988).

[59] Supp. R. 347.

("The rule that an inference may not be stacked on another inference is designed to protect litigants from verdicts based upon conjecture and speculation.").[60]

Finally, the acquisition screenshot (Exhibit 7) did not establish when the Bank took possession of the note. In fact, Plasse specifically testified that the only thing this document showed was the date the Servicer acquired the servicing of the loan.[61]

The remaining evidence does not establish the Bank's standing.

Nor did any of the remaining evidence establish the Bank's standing. First, the hello/goodbye letter (Exhibit 9), the acceleration letters (Exhibit 11) do not to establish the Bank's right to enforce the note. *Seffar v. Residential Credit Solutions, Inc.*, 160 So.3d 122, 126-127 (Fla. 4th DCA 2015) (holding that service transfer letter was insufficient to establish standing because it did not inform the borrower of the plaintiff's specific right to enforce the instrument). And while the Fourth District has indicated in *dicta* that expenses incurred in a payment history are a "noteworthy factor" in determining standing, *Peuguero v. Bank of America, N.A.*, 169 So. 3d 1198, 1202 (Fla. 4th DCA 2015), the Court need not reach that

[60] For these reasons, this Court should reject the Fourth District's conclusion otherwise in *Ortiz v. PNC Bank, Nat. Ass'n*, __ So. 3d __, 2016 WL 1239760 (Fla. 4th DCA March 30, 2016).

[61] T. 13.

question in this case because there is no evidence that the Bank (as opposed to the Servicer or the prior servicers) incurred any expenses at all.[62]

Further, all the limited power of attorney (Exhibit 6) established was that the Servicer could act on behalf of the Bank in a limited number of circumstances, not that the Bank had any interest in the Homeowners' loan. This too is therefore insufficient evidence of the Bank's standing. *Russell v. Aurora Loan Services, LLC*, 163 So. 3d 639, 643 (Fla. 2d DCA 2015) (power of attorney executed after foreclosure lawsuit was filed and which merely references agreements that do not correlate to borrower's loan insufficient to prove standing).

And perhaps most importantly, Plasse's testimony actually tends to <u>disprove</u> the Bank's standing. Indeed, she repeatedly testified about a "trust" was the "plaintiff"[63] and the "owner" of the loan.[64] But the Bank never claimed to act as a trust in its complaint and Plasse did not introduce any evidence of a trust agreement. In fact, her testimony was purportedly based on PSA with certain "amendments"[65] she did not even bother to bring to court with her.[66]

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[62] In any event, the Homeowners squarely oppose such a holding since it would suggest that <u>anyone</u> making <u>any</u> payments on a delinquent loan has the right to enforce the note and foreclose the mortgage.

[63] T. 5.

[64] T. 7.

[65] T. 5.

The proper remedy on remand is involuntary dismissal.

Where a foreclosing plaintiff fails to establish its standing, reversal of the final judgment and entry of an involuntary dismissal on remand is appropriate. *See Schmidt v. Deutsche Bank*, 170 So. 3d 938 (Fla. 5th DCA 2015). *See also Balch v. LaSalle Bank N.A.*, 171 So. 3d 207 (Fla. 4th DCA 2015); *Joseph v. BAC Home Loans Servicing, LP*, 155 So. 3d 444 (Fla. 4th DCA 2015); *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So. 3d 152 (Fla. 1st DCA 2014); *Correa v. U.S. Bank, N.A.*, 118 So. 3d 952, 955 (Fla. 2d DCA 2013); *cf. Guerrero v. Chase Home Fin., LLC*, 83 So. 3d 970, 973 (Fla. 3d DCA 2012) (remanding with specific directions to allow the plaintiff to properly reestablish the note upon a proper pleading—but only because the evidence "confirmed the current owner/holder's entitlement to foreclose the mortgage attached to the complaint").

[66] While the Homeowners did introduce an assignment of mortgage that predates the lawsuit (Defendant's Exhibit 17) during their case in chief, this document was also insufficient to prove the Bank's standing because it purported to assign only the mortgage without assignment of the note. *Tilus v. AS Michai, LLC*, 161 So. 3d 1284, 1284 (Fla. 4th DCA 2015) ("[A]n assignment of mortgage, even if executed before the foreclosure action commenced, is insufficient to prove standing where the assignment reflects transfer of only the mortgage, not the note."); *Bristol v. Wells Fargo Bank, Nat'l Ass'n*, 137 So.3d 1130, 1132 (Fla. 4th DCA 2014) (assignment purporting to transfer only the mortgage without an assignment of the note insufficient to prove standing).

II. The loan documents were unenforceable because the Bank did not pay taxes on the modification.

A. The Bank did not pay documentary stamp taxes on the modification.

It is black letter law that documentary stamp taxes owed on a mortgage, trust deed, security agreement, or other evidence of indebtedness filed or recorded in this State, and for each renewal of same, is 35 cents on each $100.00 of indebtedness. § 201.08(1)(b), Fla. Stat. And adding a borrower to or increasing the principal balance of the mortgage or the other evidence of indebtedness is a "renewal" within meaning of the statue because

> a renewal shall only include modifications of an original document which change the terms of the indebtedness evidenced by the original document by adding one or more obligors, increasing the principal balance, or changing the interest rate, maturity date, or payment terms.

§ 201.08(5), Fla. Stat. (Emphasis added).

And while a statutory exemption allows a taxpayer to only pay taxes on difference in the increase in principal, this exemption only applies if the renewal is executed by the original obligor. § 201.09(1) and (2), Fla. Stat. Further, the taxpayer seeking to shelter itself under this exemption has the burden of establishing its entitlement to the exemption. *Green v. Pederson*, 99 So. 2d 292, 296 (Fla. 1957) ("It is well settled that he who would shelter himself under an exemption clause in a tax statute must show clearly that he is entitled under the law

to exemption; and the law is to be strictly construed as against the person claiming the exemption and in favor of the taxing power.").

Here, the modification agreement (Exhibit 3) increased the principal balance owed under the note and mortgage from $408,350.00 to $457,180.99. It was therefore a renewal within meaning of the statute and documentary stamp taxes were required to be paid prior to enforcement of the mortgage:

> The mortgage, trust deed, or other instrument shall not be enforceable in any court of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid.
>
> § 201.08(1)(b) (emphasis added).

And this is because "Section 201.08(1)(b), Florida Statutes (2007), precludes judicial enforcement of a mortgage "unless and until the tax due thereon...has been paid." *One 79th Street Estates v. American Investment Services*, 47 So. 3d 886, 890 n. 1 (Fla. 3d DCA 2010). *See also Nikooie v. JPMorgan Chase Bank, N.A.*, 183 So. 3d 424, 430 (Fla. 3d DCA 2014) ("The Fifth District has addressed the particular question presented in the instant case, holding that 'any court,' including an appellate court, should refuse enforcement of a promissory note under section 201.08(1) if there is no evidence that the required documentary stamp taxes have been paid."); *Silber v. Cn'R Industries of Jacksonville, Inc.*, 526 So.2d 974 (Fla. 1st DCA 1988) (holding that where documentary stamp taxes have not been

attached to a note, the note is unenforceable and therefore in a suit to enforce same, the note holder should not be entitled to attorney's fees). *But see Glenn Wright Homes (Delray) LLC v. Lowy*, 18 So. 3d 693 (Fla. 4th DCA 2009) (holding that § 201.08(1) does not prohibit enforcement of an unsecured promissory note).

Thus, since the Bank failed to produce any evidence that it paid the requisite documentary stamp taxes or move for abatement once the Homeowners brought this to its attention, the trial court was obligated to dismiss the action without prejudice. *Somma v. Metra Electronics Corp.*, 727 So. 2d 302, 305 (Fla. 5th DCA 1999) ("[O]nce the court discovers that the documentary taxes have not been paid, the court must dismiss the action without prejudice.").

The trial court did not reach on the merits of the Homeowners' argument in its order denying rehearing. Rather, it provided that this argument may not be raised for the first time on rehearing.[67] But the purpose of rehearing is to give the trial court a second opportunity to rule if it is convinced it erred in the first place. *Balmoral Condominium Assoc. v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013) (explaining that the purpose of rehearing is "to give the trial court an opportunity to consider matters which it overlooked or failed to consider.")

[67] Order Denying Motion for Rehearing, November 6, 2015 (R. 306).

(citations omitted). Therefore, rehearing was a proper vehicle to argue the unenforceability of the loan documents.

And to the extent the trial court's reference to "any pleading" in its order denying rehearing meant that the Homeowners waived the issue by failing to raise it as an affirmative defense, this too was a mistaken view of the law. *Somma*, 727 So. 2d at 604 ("[A] defendant's failure to plead a plaintiff's noncompliance with section 201.08 does not waive the state's right to receive payment of the requisite taxes nor does such noncompliance excuse the court from complying with the prohibition contained in the statute.").

B. The Bank did not pay intangible taxes on the modification.

In addition to documentary stamp taxes, the Bank was also required to pay intangible taxes on the modification agreement since the principal of the new obligation exceeded the principal of the initial note and mortgage. § 199.145(4)(b), Fla. Stat. And it is black letter law that failure to pay appropriate intangible taxes prevents enforcement of the mortgage. § § 199.282(4), Fla. Stat. ("No mortgage, deed of trust, or other lien upon real property situated in this state shall be enforceable in any Florida court…until the nonrecurring tax imposed by this chapter, including any taxes due on future advances, has been paid and the clerk of circuit court collecting the tax has noted its payment on the instrument or given

other receipt for it."). *See also Nookie*, 183 So. 3d at 431 ("The failure to pay intangible tax on the increased principal amount also precludes enforcement.").

CONCLUSION

The Court should reverse the judgment with instructions that the trial court enter an order of involuntary dismissal on remand.

Dated: May 16, 2016

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this May 16, 2016 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this May 16, 2016.

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