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

REPLY BRIEF OF APPELLANTS

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Key:

- The Plaintiff/Appellee will be referred to as “the Bank.”
- The Defendants/Appellants will be referred to as “the Homeowners.”

SUMMARY OF REPLY ARGUMENT

The "evidence" the Bank points to is insufficient to support the judgment. First, the only "evidence" that the Bank complied with Paragraph 22 is rank hearsay which is not competent, substantial evidence that can support a judgment. Thus, the Bank failed to prove that it complied with conditions precedent.

Additionally, the evidence is insufficient to support a finding that the Bank had standing at inception—an issue the Homeowners did not, and could not, waive. Indeed, because a copy of the note attached to the complaint did not match the purported original introduced at trial, there was no presumption that the Bank was in possession of the original note when it filed suit and the Bank did not offer any evidence actually establishing this fact.

The Homeowners also did not waive their documentary stamp tax arguments, nor could they do so under the existing law from this Court. Furthermore, the fact that the modification was not a "future advance" did not mean that the Bank did not have to pay documentary stamp taxes on the instrument since the statute requires payment of taxes on "each advance" under the mortgage, not just future ones. Finally, the Bank's brief does not even touch on the Homeowners intangible tax argument which also requires reversal.

The judgment should be reversed with remand for an involuntary dismissal.

ARGUMENT

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

A. Paragraph 22.

The Bank did not prove it complied (substantially or otherwise) with the notice provisions of the mortgage.

In their brief, the Homeowners pointed out that the only "evidence" that the Bank complied with Paragraph 22 of the mortgage was "an addressed and dated notice was which was rank hearsay and insufficient to prove compliance with the notice provisions."[1] In response, the Bank points to this exact document as evidence that the acceleration notice "here was sent via first class mail."[2] But it is black letter law that such hearsay and speculation is insufficient evidence to support the judgment. *Klemple v. Gagliano*, 197 So. 3d 1283, 1286 (Fla. 4th DCA 2016) ("Finally, Gagliano's testimony regarding Klemple's argument with Gagliano's wife, the cut cable, and the windows on the catwalk does not constitute competent, substantial evidence under either prong of the statute because it is based on hearsay and speculation."); *Nation v. Boling*, __ So. 3d __, 2016 WL 7157085, at *2 (Fla. 1st DCA Dec. 8, 2016) ("Third, the court found that Nation receives 'annuity income' from which he could have made payments. However,

[1] Initial Brief, p. 13.

[2] Answer Brief, p. 13.

the next scheduled annuity payment is for February 2017; until then, he will not receive any funds from the annuity. Moreover, any suggestion that he should have proceeds left over from the annuity payment in February 2012 is mere speculation and not evidence.").

Furthermore, and without citation to any authority, the Bank argues that "[t]he Post Service does not consider either its certified mail or register mail service to be a separate class of mail"[3] such that delivery of the acceleration notice by certified mail is sufficient under Paragraph 15 of the mortgage. If, in fact, Paragraph 15's plain language and obvious intent does not clearly preclude the addition of a special service to first class mail—one that delays or even prevents delivery of the notice—then that is an ambiguity which must be resolved in favor of the Homeowners, the non-drafter. *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) ("An ambiguous term in a contract is to be construed against the drafter.").

Finally, the Bank points to Mr. Bowman's testimony that he could not be "a hundred percent sure" if he received "letters telling you that you're in default and there are ways to contact us if you want to try to avoid foreclosure."[4] Such

[3] Answer Brief, p. 14.

[4] Answer Brief, p. 15.

testimony is neither evidence that Mr. Bowman received the notice nor evidence that he did not receive the notice; his testimony was simply that he could not be "a hundred percent sure" if he did or did not. *Holt v. Calchas, LLC*, 155 So. 3d 499, 507 (Fla. 4th DCA 2015) ("As such, Holt's testimony was neither evidence that she did receive, nor did not receive, the notice; her testimony was simply that she did not recall if she received the notice.").

The Bank never rebutted the presumption of prejudice.

Predictably, the Bank argues that the Homeowners did not suffer any "prejudice"[5] a new buzzword foreclosing lenders often use to excuse their noncompliance with their own contract. But, and as argued in the Homeowners' brief,[6] the Bank did not file a reply to raise "prejudice" as an avoidance of the Paragraph 22 defense, and even if it had, the Bank also had the burden of proving such a claim as the Florida Supreme Court unequivocally held in the context of insurance claims. *Bankers Insurance Co. v. Macias*, 475 So. 2d 1216, 1217-1218 (Fla. 1985).

The Bank's suggested inference is that the Homeowners could not or would not cure even if they had received the notice. But the entire point of a final

[5] Answer Brief, pp. 16-17.

[6] Initial Brief, pp. 22-23.

warning is that it provides the incentive for extraordinary measures that might not otherwise be taken—the entreaties to family and friends, the selling of other, more liquid assets, etc. The failure to make individual payments can never be taken as an admission that the money to cure the default could not have been raised on an emergency basis had the notice been sent and received. Stated differently, the only logical inference to be drawn from a borrower's inaction in the face of imminent foreclosure is that the Homeowners never received the notice threatening acceleration.

B. Standing

The Homeowners did not, and could not, waive their standing argument.

As a preliminary matter, the Bank argues that the Homeowners waived their standing arguments.[7] But it is undisputed that the Homeowners pled that they were without knowledge and therefore denied Bank's allegation that it was the owner and holder of the note and mortgage.[8] Thus, this became a fact that the Servicer had to prove. *Gee v. US Bank Nat. Ass'n*, 72 So. 3d 211, 214 (Fla. 5th DCA 2011) ("When Ms. Gee denied that U.S. Bank had an interest in the Mortgage, ownership became an issue that U.S. Bank, as the plaintiff, was required to prove."). *See also*

[7] Answer Brief, pp. 18-21.

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

Berg v. Bridle Path Homeowners Association, Inc., 809 So. 2d 32, 34 (Fla. 4th DCA 2002) ("It is well-settled in Florida law that the plaintiff is required to prove every material allegation of its complaint which is denied by the party defending against the claim.").

And even if the Homeowners did not raise standing as an affirmative defense, standing is an element of the plaintiff's claim (*Kelsey v. Suntrust Mortg., Inc.*, 131 So. 3d 825 (Fla. 3d DCA 2014))—hence the Bank's allegation that it was the owner and holder of the note. The sufficiency of the evidence to support the judgment on that claim may be raised for the first time on appeal in a non-jury case. Fla. R. Civ. P. 1.530(e); *Colson v. State Farm Bank, F.S.B.*, 183 So. 3d 1038, 1040 (Fla. 2d DCA 2015).

In this sense, Rule 1.530(e) is the functional equivalent of a motion for judgment notwithstanding the verdict—except that the trial court plays the role of a jury and the appellate court plays the role of the trial judge reviewing the jury's verdict. It would simply be redundant to argue to the trial court that the evidence is insufficient, because, in the factfinding capacity, the trial judge has already found it sufficient. For that reason, the oversight role goes to the appellate court. *Cf. U.S. v. Grace*, 367 F.3d 29, 34 (1st Cir. 2004) (discussing that, in federal criminal context, a defendant need not make a Rule 29 motion in a bench trial to preserve the usual

standard for review for a sufficiency of the evidence claim on appeal because the evaluation of the motion is the same as the adjudication of the not guilty plea).

There was no presumption that the Bank was in possession of the original note at the inception of the lawsuit.

In essence, the Bank argues that because a copy of the note with a blank endorsement was attached to its complaint, the Court must assume that it had possession of the instrument when it filed suit.[9] But not only that, the Bank asks this Court to make this one-sided assumption despite the fact that a copy of the note attached to the complaint contained a blank endorsement[10] while the purported original note did not have this endorsement, but instead, had a specific endorsement to the Bank.[11]

When the opposite is true—where the note endorsement produced at trial matches the copy that was attached to the complaint—the law presumes that a foreclosing plaintiff was in possession of the properly endorsed original note prior to filing. *Ortiz v. PNC Bank, Nat. Ass'n*, 188 So. 3d 923 (Fla. 4th DCA 2016). The other side of that same coin requires that, where (as here) the copy of the note attached to the complaint does not contain a proper endorsement, the plaintiff must

[9] Answer Brief, pp. 18-20.

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

[11] R. 347.

overcome a presumption that the note was not in the plaintiff's possession prior to filing.[12]

Nor is there any precedent for the Bank's outrageous argument that the Homeowners cannot challenge the sufficiency of the evidence to support the judgment because they did not offer any "testimony or evidence at trial to establish any other party was in possession of the note at the commencement of the action."[13] Again, the sufficiency of the evidence to support the judgment after a non-jury trial may be raised for the first time on appeal. The no-waiver provision incorporated into Rule 1.530(e) means the Bank, as the party bearing the burden of proof and persuasion, must be sure to adduce competent evidence of the allegations the Homeowners denied. If, as in this case, it fails to do so, it bears the risk of reversal on appeal.

There was therefore no competent, substantial evidence to support a finding that the Bank had standing at inception. The case should be remanded for dismissal. *Knowles v. Bank of New York Mellon*, 186 So. 3d 1147 (Fla. 4th DCA 2016).

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[12] Since the relevant evidence is much more accessible to a plaintiff note holder than a borrower, this presumption is far less onerous than the newly-minted *Ortiz* presumption.

[13] Answer Brief, p. 21.

II. The loan documents were unenforceable.

A. The Bank's failure to pay documentary stamp taxes bars enforcement.

Failure to pay documentary stamp taxes is also not an issue the Homeowners could raise.

Despite the fact that the Homeowners brought the tax issue to the trial court's attention in their motion for rehearing,[14] the Bank still argues that the Homeowners waived the issue.[15] This argument is meritless because this Court has unequivocally held that failure to pay documentary stamp taxes acts as an injunction barring any court (including this Court) from enforcing a promissory note:

> Section 201.08(1), Florida Statute (1997), clearly states that in an action to enforce a promissory note the plaintiff must establish, as a condition precedent to pursuing the action, that the taxes due on the note have been paid. The prohibition against actions to enforce promissory notes until the required documentary taxes have been paid applies to "any court" including ours. The obvious purpose of this statute is to ensure payment of statutorily mandated taxes. This statutory provision is concerned primarily with enforcement of the taxing statutes and collecting monies due the state for documentary stamps on designated instruments. To this end, section 201.08(1) constitutes an injunction prohibiting courts from enforcing rights created by instruments upon which required taxes have not been paid. Accordingly, since no evidence was submitted at trial to prove that Mr. Somma had paid the taxes due on the note, this lawsuit should have been dismissed.

[14] Motion for Rehearing, October 15, 2015, ¶¶ 24-30 (R. 288-290).

[15] Answer Brief, pp. 22-24.

Somma v. Metra Electronics Corp., 727 So. 2d 302, 304 (Fla. 5th DCA 1999) (emphasis added and citations omitted). *See also Nikooie v. JPMorgan Chase Bank, N.A.*, 183 So. 3d 424, 431 (Fla. 3d DCA 2014) (*Sua sponte* raising the issue of documentary stamp taxes and reversing foreclosure judgment, concluding that "we should not ignore the non-payment when it comes to our attention.").

The increased principal need not be a "future advance" in order for documentary stamps to be owed on it.

Alternatively, the Bank argues that documentary stamp taxes are not owed on the increased principal because the modification was not a "future advance" citing to the Fourth District's decision in *Glenn Wright Homes (Delray) LLC v. Lowy*, 18 So. 3d 693 (Fla. 4th DCA 2009).[16] The Third District recently rejected this exact argument "because [*Glenn Wright Homes*] did not address the distinction between 'each advance' under a mortgage and 'any such future advance' in the last two sentences of section 201.08(1)." *Nikooie*, 183 So. 3d at 431.

Indeed, as the Third District explained in its decision, the unenforceability provision of the statute applies to all sums secured by the mortgage—regardless of whether it was a "future advance" or, as in *Nikooie* and here, a modification of the original loan:

[16] Answer Brief, pp. 24-26.

> "Each advance" includes both the initial disbursement of a mortgage loan and any subsequent advances, while "future advance" refers to subsequent disbursements described in section 697.04, Florida Statutes. The unenforceability provision—precluding enforcement until the documentary stamp taxes are paid on "each advance" under the mortgage—applies to all sums secured by the mortgage lien, not just to "future advances." We do not see, and evidently the First and Fifth District Courts also have not seen, any reason or legislative intention to limit the unenforceability rule to future advances, while declining to apply it to the original mortgage loan. Our reiteration of unenforceability in *Solis*, n. 11 *supra* was issued three years after the Fourth District's analysis in *Glenn Wright Homes*.
>
> *Nikooie*, 183 So. 3d at 431, n. 12 (emphasis added).

Therefore, the Court should reject the Bank's argument and, in accordance with its prior decision in *Somma* and the Third District's decision in *Nikooie*, hold that documentary stamp taxes are due on "each advance" made under the mortgage regardless of whether such an advance is a "future advance" or not.

Dismissal is appropriate on remand.

Commendably, the Bank does not deny that documentary stamps were not paid on the modification. Instead, it argues that "[t]he statute only limits the enforceability of instruments to the extent that documentary stamp taxes have not been paid,"[17] an argument which does find some support in *Nikooie* (although the Bank does not cite this case for that proposition).

[17] Answer Brief, p. 26.

But there are several important distinctions between this case and *Nikooie* which warrant reversal with remand for an involuntary dismissal. First is the obvious: none of the parties in *Nikooie* raised the tax issue and therefore remand for dismissal would have been inappropriate in that case. Here, the Homeowners not only raised the Bank's failure to pay the taxes in their rehearing motion, but specifically argued that the failure to do so required dismissal.[18]

The second reason is more nuanced. In its complaint, the Bank alleged that it was owed $452,050.75 in principal[19]—nearly $50,000.00 more than the stated principal amount on the note. And the trial court did, in fact, award the Bank this exact amount it the judgment.[20] As such, to reverse the judgment but allow the Bank to recover on a different, unpled amount of principal mocks the system of finality inherent in the system. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 562 (Fla. 1988) ("It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings

[18] Motion for Rehearing, October 15, 2015, ¶ 30 (R. 290) ("But since there is insufficient evidence to support a finding that [the Bank] actually [paid the documentary stamp taxes], the note and mortgage are unenforceable and therefore the action should be dismissed.") (emphasis added).

[19] Complaint, August 7, 2012, ¶ 8 (R. 12).

[20] Final Judgment, September 30, 2015, ¶ 1 (R. 269).

to assert matters not previously raised renders a mockery of the 'finality' concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure.").

Finally, and contrary the Bank's claim in its brief,[21] nowhere in the Homeowners' brief did they argue that documentary taxes were only owed on the increased principal. Indeed, this would be contrary to the statute since such a statutory exemption only applies when the renewal is signed by the original obligor:

> …In order to be exempt from taxation under this section, a renewal note evidencing a term obligation shall not be executed by any person other than the original obligor and must renew and extend only the unpaid balance of the original contract and obligation… A renewal note evidencing a term obligation which increases the unpaid balance of the original contract and obligation but which otherwise meets the exemption criteria of this section is taxable only on the face amount of the increase…
>
> § 201.09(1), Fla. Stat.

Here, however, it is undisputed that while Mr. Bowman was the only person who signed the note,[22] but that both Mr. Bowman and Ms. Bowman were identified as the "Borrower" under the modification who promised to make

[21] Answer Brief, p. 24.

[22] R. 347.

monthly installment payments on principal and interest under the agreement.[23] Since the modification agreement added an additional obligor, the Bank as required to pay documentary stamp taxes on the full amount of principal ($457,180.99) reflected on the document. *See* Fla. Admin. Code Rule 12B-4.053(19) ("Person assuming a mortgage (Note or written obligation to pay money) effectively renews or modifies the original note or mortgage, and would not be exempt from tax under Section 201.09, F.S., because it includes a person other than the original obligor. Therefore, an assumption of any note and mortgage, whether incorporated in a conveyance which is accepted by the purchaser, or assumed in a separate document, is a taxable renewal under Section 201.08(1), F.S., and not exempt under Section 201.09(1), (2), F.S.").

As such, the Court should reverse the judgment and remand for an involuntary dismissal.

B. The Bank did not make any argument that its failure to pay intangible taxes barred enforcement as well.

Finally, the Homeowners also argued that the Bank was required to pay intangible taxes on the modification and that its failure to do so also precluded

[23] Modification Agreement, Exhibit 3, ¶ 2(A) (R. 376). Additionally, both Mr. Bowman and Ms. Bowman executed the agreement (R. 378).

enforcement of the loan documents.[24] The Bank's brief, however, does not even remotely touch on this issue. The failure to do so should be construed as an implicit confession of error on this point which also requires reversal and dismissal on remand.

CONCLUSION

The Court should reverse the judgment and remand for an involuntary dismissal.

Dated: January 16, 2017

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[24] Initial Brief, pp. 26-27.

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 January 16, 2017 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 January 16, 2017.

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