

Appeal No. 5D10-1621

IN THE 5TH DISTRICT FLORIDA COURT OF APPEALS

RICKY D. PEACOCK and SHERRI L. PEACOCK

Appellant

v.

HSBC BANK USA, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF
THE RENAISSANCE HOME EQUITY LOAN ASSET-BACKED CERTIFICATES
SERIES 2004-4

Appellee

APPEAL IN CAUSE NO. 05-2009-CA-11962

IN THE CIRCUIT COURT OF BREVARD COUNTY, FLORIDA

John D. Moxley presiding

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This appeal is taken from the Circuit Court's decision to render Summary Final Judgment against the Appellants, Ricky Peacock and Sherri Peacock (hereafter, the "Peacocks"). The Appellate Court of Florida has jurisdiction to consider the issues raised in this appeal under authority of the Florida Rules of Appellate Procedure, Rule 9.130 et seq.

The nature of the case below was Appellee HSBC Bank USA, N.A.'s (hereafter, "HSBC Bank") Complaint to foreclose the residential real property owned and occupied by the Peacocks. (R. I/23) HSBC Bank claimed that it owned and held the Note and Mortgage. (R. I/24, para. 10) HSBC Bank claimed it lost the original Note and therefore attached what it claimed to be a substantial copy of the Note to its Complaint as an Exhibit in support of Count 1 – "Re-establish Lost Note" pursuant to § 673.3091, Fla. Stat. (2009). (R. I/23, para. 10, page 24, para's. 3 - 6)

The Note and Mortgage both stated that the lender was Fidelity Mortgage Inc., and that the mortgagee was Mortgage Electronic Registration Systems, Inc. (hereafter, "MERS"), who was acting solely as a nominee. (R. I/27 and 45) Nothing in the Mortgage or Note provided any agency authority to MERS on behalf of the lender.

The Note attached to the Complaint was not indorsed by the lender. The plaintiff never submitted to the court any assignments of mortgage or any allonges to the note.

The Note indicates that it is enforceable by anyone who takes the Note by transfer and who is entitled to receive payments under the Note, and that person is called the

Note Holder. (R. I/62, para. 1)

On March 10, 2009, the Peacocks filed a Motion to Dismiss. (R. I/48 - 60) The Peacocks attacked the plaintiff's standing and alleged that since the Note was not indorsed by the lender and there was no assignment of mortgage, HSBC Bank had no standing to foreclose. (R. I/48 - 60)

On April 16, 2009, HSBC Bank filed what it had claimed to be the original Note and Mortgage. (R. I/60 - 89) The Note now had two allonges. (R. I/67 - 68) One undated allonge was from Fidelity Mortgage, Inc. to Delta Funding Corporation while the second undated allonge was from Delta Funding Corporation to HSBC Bank USA, National Association as Trustee for Renaissance HEL Trust 2004 4. (R. I/67 - 68)

On May 22, 2009, HSBC Bank filed an Assignment of Mortgage wherein MERS assigned the Mortgage to HSBC Bank USA, N. A. as Trustee for the Registered Holders of the Renaissance Home Equity Loan Asset-Backed Certificates, Series 2004-4. (R. I/87 - 89) Thereafter, the Court denied the Appellant's Motion to Dismiss.

On June 22, 2009, Appellant's filed an Answer with Affirmative Defenses. (R. I/101 - 111)¹ In their Answer, the Peacock's admitted that a debt was incurred, but that the debt was not owed to HSBC Bank. (R. I/101, para. 3 and para. 6) The First Affirmative Defense alleged standing while the Second Affirmative Defense alleged a failure to state a claim. The Fourth Affirmative Defense alleged unclean hands and estoppel as the Plaintiff did not have the right to file this Complaint because it didn't

¹ The Answer stated that it was not responsive to Count 1 of the Complaint because HSBC Bank had filed a Notice of Dropping Count 1. (R. I/101)

own or hold the Note and Mortgage, nor did it have authority to enforce the Note and Mortgage. (R. I/103, 105)

On June 19, 2009, the Peacocks served Interrogatories and a Request for Production to HSBC Bank. (R. I/112 - 117) HSBC Bank failed to respond to the discovery requests and on January 14, 2010, the Peacock's moved the court to compel responses to its interrogatories and Request for Production. (R. I/118) On January 14, 2010, the Peacocks also filed with the clerk and served HSBC Bank with a Request for Admissions. (R.I/150 - 154)

The Peacock's motion to compel responses to the interrogatories and request for production resulted in an Agreed Order of February 24, 2010 denying the motion but requiring HSBC Bank to provide the responses to the interrogatories and request for production within 30 days. (R. I/157 - 158) The Peacock's Request for Admissions was not addressed in the Peacock's discovery motion and was not addressed in the discovery order.

On March 24, 2010, HSBC Bank mailed to the Peacock's counsel responses to their Interrogatories and Request for Production, and also a Response to the Peacock's Request for Admissions. (R. I/159) The Responses to the Request for Admissions were untimely filed and served as they were sent sixty-eight days after the Peacocks filed and mailed their Request for Admissions to HSBC Bank. HSBC Bank unequivocally admitted request numbers 1 and 2 of the Requests for Admissions and denied all the rest.

(R. II/173 - 174; and 202 - 203)²

The first and second Request for Admissions provide that the promissory Note is not payable to HSBC Bank. The third through seventh Request for Admission provide that the allonges were not authorized by the entities they were allegedly signed by, and that they were not made a physical part of the Note. The eighth Request for Admission provides that the promissory note and mortgage which were filed on 4/16/09 were not originals. The ninth Request for Admission provides that HSBC Bank did not have possession of the original Note. The tenth through twelfth Request for Admission provide that HSBC Bank is not the holder of the Note, has no authority to enforce the Note and is not the owner of the Note. (R. I/152 - 153, 196 - 198, and II/202 - 203)

On March 29, 2010, the Peacocks filed a Motion to Deem Admissions as Admitted. (R. I/161 - 163) On April 6, 2010, HSBC Bank mailed their Motion to Strike Affirmative Defenses to the Peacocks. (R. II/204 - 211) The Peacocks felt that the responses to their Interrogatories and Request for Production were not adequate; therefore, on April 7, 2010, the Peacocks sent a discovery resolution letter to HSBC Bank in order to attempt to resolve the discovery dispute. (R. II/175, para. 2, and 187 - 188) On April 7, 2010, the Peacocks also filed and mailed their opposition to HSBC Bank's motion for summary judgment. (R. II/175 - 203)

On April 13, 2010, the court heard HSBC Bank's Motion for Final Summary Judgment. The Peacocks argued that there were three reasons why summary judgment

² Admissions numbered 13, 14, 15 and 16 are not relevant to this appeal.

should not be granted. The first reason was that relevant discovery was pending (R. I/8, ln. 2 - 19). The second reason was that the Requests for Admissions were deemed admitted and defeated HSBC Banks motion because it put standing at issue (R. I/8, ln. 20 - page 10, ln. 6) Third, the affidavit in support of HSBC Bank's Motion for Summary Judgment was based on hearsay and didn't contain the documents upon which HSBC Bank was relying. (R. I/10, ln. 7 - 16) All of these reasons were delineated in the Peacock's Opposition to Motion for Summary Judgment. (R. II/175 - 203)

HSBC Bank did not have a motion pending to challenge the Peacock's Requests for Admissions and the Court did not strike them sua sponte. The Court disregarded HSBC Banks responses to the Peacock's Request for Admissions and determined that the indorsement “winds itself into HSBC”. (R. I/15, ln. 2) The court then challenged the Peacock's counsel about the originality of the Note in the Court file, which was the one filed on 04/16/09, and to which the Peacock's Requests for Admissions claimed it was not an original Note. (R. I/15, ln. 3 - 4) Whereupon counsel argued that the authenticity of the signatures were being challenged. (R. I/15, ln. 5 - 19) The court then granted the Motion for Summary Judgment. (R. I/14, ln. 25 and page 15, ln. 1 - 19)

STANDARD ON APPEAL

The standard of review for summary judgment is de novo. *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001); *Rollins v. Alvarez*, 792 So. 2d 695 (Fla. 5th DCA 2001); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000). In reviewing a summary judgment, the Court must determine whether

there is any "genuine issue as to any material fact" and whether "the moving party is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(c).

Issues of fact are "genuine" only if a reasonable jury, considering the evidence presented, could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Generally, "[t]he party moving for summary judgment has the burden to prove conclusively the nonexistence of any genuine issue of material fact." *City of Cocoa v. Leffler*, 762 So. 2d 1052,1055 (Fla. 5thDCA 2000). The evidence contained in the record, including supporting affidavits, must be considered in the light most favorable to the non-moving party, and if the slightest doubt exists, summary judgment must be reversed. *Krol v. City of Orlando*, 778 So. 2d 490, 492 (Fla. 5th DCA 2001).

SUMMARY OF THE ARGUMENTS

The Note - and not the mortgage - is the evidence of the debt. The debt is what is secured by the mortgage. As to the right to foreclose, the Note has no competition in the mortgage. The Note was essential to this foreclosure, and without the right to enforce the Note, HSBC Bank had no authority to foreclose.

HSBC Bank's untimely response to the Peacock's Request for Admissions numbered 1 and number 2 included an unqualified admission that the Note was not payable to HSBC Bank. HSBC Bank denied the remainder of the Requests for Admissions. Those Admissions established: the allonges to the Note were not authorized by the entity that executed them; the allonges were not physically part of the

Note; HSBC Bank did not have the original promissory note; the alleged original Note in the Court file was not an original; and that HSBC Bank was not a holder of the Note, was not an owner of the Note and had no authority to enforce the Note.

By the operation of law, the entire Request for Admissions were conclusively deemed admitted. HSBC Bank's response to the Requests for Admissions were untimely filed and served and there was no motion pending for relief. Thus, the trial court erred in its failure to accept the Request for Admissions as conclusively admitted.

In light of these admissions, the Court could not look at the Note in the Court file and make an independent determination that it was in fact an original and payable to HSBC Bank. Therefore, there was a genuine issue of material fact as to the standing of HSBC Bank sufficient to defeat a motion for summary judgment.

ARGUMENT

HSBC BANK HAD NO AUTHORITY TO FORECLOSE BECAUSE IT WAS NOT ENTITLED TO ENFORCE THE NOTE

HSBC Bank's responses to the Peacock's Requests for Admissions were untimely filed and served. HSBC Bank did not file a motion for relief and the Court did not strike them - therefore, by operation of law, they are deemed conclusively admitted. *Morgan v. Thompson*, 427 So. 2d 1134, 1135 (Fla. 5th DCA 1983) ("No motion, no relief, no error.").

The first and second Request for Admission provide that the Note is not payable to HSBC Bank. The third through seventh Request for Admissions provide that the allonges were not authorized by the entities they were allegedly signed by and were not

a physical part of the Note. The eighth Request for Admission provides that the promissory note and mortgage which were filed on 4/16/09 were not originals. The ninth Request for Admission provides that HSBC Bank did not have possession of the original Note. The tenth through twelfth Request for Admissions provide that HSBC Bank is not the holder of the Note, has no authority to enforce the Note and is not the owner of the Note. (R. I/152 - 153)

In *Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 274, 21 L.Ed. 313 (1872), the U.S. Supreme Court stated “The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.” “Where the mortgagee has transferred only the mortgage, the transaction is a nullity and his assignee, having received no interest in the underlying debt or obligation, has a worthless piece of paper.” (4 RICHARD R. POWELL, *POWELL ON REAL PROPERTY*, § 37.27[2] (2000); Also see *In re Mitchell*, Case No. BK-S-07-16226-LBR (Bankr.Nev. 3/31/2009)(At page 12))

Every mortgage loan is composed of two documents - the note instrument and the mortgage instrument. No matter how much the mortgage instrument is acclaimed as the basis of the agreement, the note instrument is the essence of the debt. *Sobel v. Mutual Dev. Inc.*, 313 So. 2d 77 (Fla. 1 DCA, 1975); *Pepe v. Shepherd*, 422 So. 2d 910 (Fla. 3 DCA 1982); *Margiewicz v. Terco Prop.*, 441 So. 2d 1124 (Fla. 3 DCA 1983). The promissory note is evidence of the primary mortgage obligation. The mortgage is only a mere incident to the note. *Brown v. Snell*, 6 Fla. 741 (1856); *Tayton v. American Nat'l*

Bank, 57 So. 678 (Fla. 1912); *Scott v. Taylor*, 58 So. 30 (Fla. 1912); *Young v. Victory*, 150 So. 624 (Fla. 1933); *Thomas v. Hartman*, 553 So. 2d 1256 (Fla. 5 DCA 1989). The mortgage instrument is only the security for the indebtedness. *Grier v. M.H.C. Realty Co.*, 274 So. 2d 21 (Fla. 4 DCA 1973); *Mellor v. Goldberg*, 658 So. 2d 1162 (Fla. 2 DCA 1995); *Century Group Inc. v. Premier Fin. Services East L. P.*, 724 So. 2d 661 (Fla. 2 DCA 1999)³

Transfer of a Mortgage differs from the transfer of a Note. Transfer of a mortgage is done by an assignment. § 701.01, Fla. Stat. (2009) An assignee of a mortgage may take and pursue the same means and remedies which the mortgagee may lawfully have, take or pursue for the foreclosure of a mortgage and for the recovery of the money secured thereby. § 701.01, Fla. Stat. (2009) This statute, however, does not create an independent grant of authority to foreclose in the absence of an entitlement to enforce the note.⁴

Florida Statutes § 673.2031(1) provides that an instrument is transferred when it

³ These concepts are embodied in statute. § 702.09, Fla. Stat. (2009) provides that a mortgage shall mean any written instrument securing the payment of money and the word "debt" shall include promissory notes, bonds, and all other written obligations given for the payment of money. § 697.02, Fla. Stat. (2009) states "A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession."

⁴ The earliest predecessor to Florida Statutes § 701.01 was drafted by the Twelfth Session of the Legislative Council in 1834 in response to a bank having failed due to unscrupulous bankers. Wm P Duval stated "The Executive has regarded these Banking corporations founded upon credit, established too often for speculating purposes – to use the language of a distinguished statesman of one of the middle States, as "a brood of sickly vipers spawned forth o'er the land to eat out the farmer's substance." (University of Central Florida, microfilm F 311 .U5 (reel 2, 1834))

is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument. The obligation of an issuer of a note owes that obligation to a person entitled to enforce the instrument or to an indorser who paid the instrument under Florida Statutes § 673.4151. (§ 673.4121, Fla. Stat. (2009))⁵ Further, the Note in this case states that a person other than the Lender may enforce it when two requirements are met. First, the person enforcing the note must have taken it by transfer. Second, the person must be entitled to receive payments under the Note. (R. I/62, para. 1)

Where, as here, an instrument is payable to a specifically identified person, transfer of possession of the instrument along with an indorsement is necessary. (§ 673.2011(2), Fla. Stat. (2009), § 673.2014(1), Fla. Stat. (2009), and § 673.2031(3), Fla. Stat. (2009)) Without that necessary indorsement, the transferee still receives an enforceable interest, however, it is not enforceable against the issuer; rather, the enforceable interest is the specifically enforceable right to the unqualified indorsement of the transferor.⁶ (§ 673.2031(3), Fla. Stat. (2009))

⁵ An "indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, made on an instrument for the purpose of negotiating the instrument. (§ 673.2014(1), Fla. Stat. (2009))

⁶ Addressing the same issue, the Court in the case of *In re Kang Jin Hwang*, 396 B.R. 757, 763 (Bankr.C.D.Cal., 2008) stated "The transfer of a negotiable instrument has an additional requirement: the transferor must indorse the instrument to make it payable to the transferee." In the case of *In re Wilhelm*, Case No. 08-20577-TLM (Bankr.Idaho, 2009) the Court recognized that if the note instrument, by its terms, is not payable to the transferee, then before the transferee can enforce it the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. (At page 18) The Court in *In re Carlyle*, 242 B.R. 881 (Bankr. E.D.Va., 1999) came to the same conclusion at page 887 of the

Here, the unqualified admissions of HSBC Bank are that it was not the payee of the Note. Therefore, HSBC Bank had to prove by clear and convincing evidence that the Note was transferred to HSBC Bank by indorsement and delivery. HSBC Bank's admissions made this impossible.

MERS was not the lender, and was not entitled to payments under the Note.⁷ MERS was mortgagee solely as a nominee for the Lender. Nothing in the Mortgage provided that the payments due to the Lender under the Note would transfer with an assignment of the mortgage. Nothing in the mortgage provided any agency authority on behalf of MERS to transfer either the mortgage or the Note.⁸ There was a specific limitation at paragraph 20 of the mortgage that stated that the Note could be sold only if

Opinion.

⁷ In the case of *In re Vargas*, 396 B.R. 511, 520 (Bankr.C.D.Cal., 2008), the Court stated "MERS is not in the business of holding promissory notes." (Also see *Landmark National Bank v. Kesler*, 216 P.3D 158 (Kansas, 2009)) In the case of *In re Sheridan*, Case No. 08-20381-TLM (Bankr.Idaho, 2009), MERS moved for relief from the stay. The Court stated that MERS "Counsel conceded that MERS is not an economic "beneficiary" under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid."

⁸ In *LaSalle Bank NA v. Lamy*, 824 N.Y.S.2d 769 (N.Y. Supp. 2006), the Court denied a foreclosure action by an assignee of MERS on the grounds that MERS itself had no ownership interest in the underlying note and mortgage. In the case of *In re Mitchell*, Case No. BK-S-07-16226-LBR (Bankr.Nev., 2009), the Court stated "In order to foreclose, MERS must establish there has been a sufficient transfer of both the note and deed of trust, or that it has authority under state law to act for the note's holder." (At page 9) The Court found that MERS has no ownership interest in the promissory note. The Court found that though MERS attempts to make it appear as though it is a beneficiary of the mortgage, it in fact is not a beneficiary. The Court stated "But it is obvious from the MERS' "Terms and Conditions" that MERS is not a beneficiary as it has no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans. To reverse an old adage, if it doesn't walk like a duck, talk like a duck, and quack like a duck, then it's not a duck."

the security interest (mortgage) were transferred with the Note – not vice versa. (R. I/81) The transfer of the mortgage from MERS to HSBC Bank was without authority and did not transfer the Note.

Florida law defines those who are entitled to enforce a negotiable instrument as a “holder” of the instrument, a non-holder in possession who has the rights of a holder or a person not in possession who is entitled to enforce it as a lost instrument. (§ 673.3011, Fla. Stat. (2009)) A “holder” is defined as “The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;”. § 671.201, Fla. Stat. (2009)

Pursuant to HSBC Bank’s admissions, it was not a holder of the Note and was not in possession of the original note. Thus, HSBC Bank admitted the Note was not transferred to HSBC Bank. This precluded HSBC Bank from having any holder status.

HSBC Bank dropped count 1 which was the count to re-establish the lost promissory note. When HSBC Bank dropped the lost note count, it precluded any possibility of claiming the statute of a person not in possession who is entitled to enforce it as a lost note.

In the case of *State Street Bank and Trust Co. v. Lord*, 851 So.2d 790 (Fla. App., 2003) , the Court found that an assignment failed where there was no entitlement to enforce the Note. The Court stated that “To maintain a mortgage foreclosure, the plaintiff must either present the original promissory note or give a satisfactory explanation for its failure to do so.”

HSBC Bank admitted that it did not have the original promissory note. Further, HSBC Bank offered no explanation for its failure to submit the original note. Therefore, the trial court could not have unilaterally made a finding of fact that the note submitted to the court was the original note.

HSBC Bank admitted that the indorsements on the allonges were never authorized by the entities that allegedly signed them. In conclusion, HSBC Bank's admissions established the Note was not transferred to HSBC Bank, it did not own the Note and it had no authority to enforce the Note.

CONCLUSION

The Court could not substitute its judgment as to the authenticity of the Note and the enforceability of the Note in light of HSBC Bank's admissions that the Note was not payable to HSBC Bank and was not enforceable by HSBC Bank.

WHEREFORE, the Circuit Court's judgment should be set aside and the matter remanded.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on Van Ness Law Firm, P.A., 1239 E. Newport Center Drive, Suite 110, Deerfield Beach, FL 33442, on this ____th day of August, 2010.

George M. Gingo, FBN 879533

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 the Florida Rule of Appellate Procedure 9.210(a) (2).

By: _____
George M. Gingo, FBN 879533