

Appeal No. 1D10-1816

IN THE 1st DISTRICT FLORIDA COURT OF APPEALS

Cynthia Jones

Appellant

v.

Washington Mutual Bank

Appellee

APPEAL IN CAUSE NO. 2006-CA-6318-XXXX

IN THE CIRCUIT COURT OF DUVAL COUNTY, FLORIDA

Karen K. Cole presiding

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This appeal is taken from the decision of the Circuit Court of the Fourth Judicial District, In and For Duval County, Florida to render Summary Final Judgment against the Appellant, Cynthia Jones (hereafter, “Jones”) on November 30, 2006. 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., Florida Rules of Civil Procedure § 1.140(b) (2009) and § 702.07 Fla Stat., (2009).

The nature of the case below was the Amended Complaint of Appellee (hereafter, “Washington Mutual Bank”) to foreclose the residential real property owned and occupied by Jones. (R. p. 1 - 4) On February 6, 2001, Jones executed a Promissory Note made payable to Challenge Financial Investors in the amount of \$133,941.00. (R. page 11 & 12) The Promissory Note was indorsed by Challenge Financial Investors to Popular Mortgage Corp. (R. page 12) The Promissory Note carries a subsequent, but defective indorsement to Fleet National Bank. (R. page 12) This subsequent indorsement is defective in two respects – first, it does not carry the full name of the entity indorsing it as that name rolls off the page, and second it does not carry a signature of an indorser. (R. page 11 & 12) None of the indorsements are dated.

There are two assignments of the mortgage. The first assignment of mortgage is from Fleet Mortgage Corporation as assignor to Mortgage Electronic Registration Systems, Inc. (hereafter, "MERS") as assignee. (R. page 92) This assignment allegedly occurred on February 6, 2001 and was memorialized in writing on September 12, 2001. (R. page 92) Washington Mutual Bank offered no evidence to demonstrate that Fleet National Bank – who is the second (and defective) indorsee on the Promissory Note - is the same entity as Fleet Mortgage Corporation – who is the assignor of the first assignment of mortgage. The second assignment of mortgage was from MERS to Washington Mutual Bank. (R. page 90 & 91) This assignment occurred on October 19, 2006, forty-four days after the Complaint was filed. (R. pages 90 – 91)

Washington Mutual Bank admitted in its Amended Complaint that Jones defaulted in payment on the Promissory Note on April 1, 2006. (R. page 2, paragraph 4) Default on the Promissory Note occurred over six months prior to Washington Mutual Bank being assigned the Mortgage and Note on October 19, 2006.

On November 2, 2006, Plaintiff filed: a Motion for Summary Final Judgment of Foreclosure; a Notice of Hearing on the motion for summary final judgment; and an Affidavit of Lost Note. (R. page 61 – 62) The Circuit Court set the hearing for November 30, 2006. (R. p. 50 - 52) Washington Mutual Bank

admitted that the Promissory Note was lost when it filed an affidavit of lost Note on November 2, 2006.

On November 3, 2006, Jones filed a document which the Clerk deemed an Answer. (R. page 2 of 6 of Index; page 63) The Clerk defaulted against Jones on November 13, 2006 despite the fact that the Clerk had deemed Jones' response as an Answer. (R. page 2 of 6 of Index; page 65)

On November 30, 2006, the Circuit Court entered a Summary Final Judgment of Foreclosure against Jones in favor of Washington Mutual Bank. (R. p. 72 - 79) However, both of the assignments of mortgage were first provided to the circuit court on December 4, 2006, which was after the motion for summary judgment was decided by the court. (R. pages 72-78; 81-92)

Jones filed a bankruptcy action on or about January 5, 2007, which substantially delayed the judicial sale of the property. (R. page 96 – 97; page 110-111) Both parties stipulated to further delays of the judicial sale and agreed that no party would be prejudiced thereby. (R. page 128 – 130; 135 – 136; 138 – 139; 142 – 148; 150 – 152) The final sale date was set for April 5, 2010. (R. page 154 – 156) The property has not yet been sold.

On March 25, 2010, Jones filed an Emergency Motion to Set Aside Sale and Summary Judgment of Foreclosure as well as a request for an emergency hearing. (R. page 158). Jones challenged Washington Mutual Bank's standing, and thus

subject matter jurisdiction, for failure to own and hold the subject Promissory Note as well as fraud on the court. (R. p. 161 – 168). The Circuit Court Judge never ruled upon Jones' motion.

On April 5, 2010, Jones filed a Notice of Filing wherein she indicated that the Court never ruled upon her motion. (R. p. 188 – 189) On April 5, 2010, Jones also filed a Notice of Appeal. (R. p. 190 – 191).

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

First Argument

Washington Mutual Bank's lack of standing equates with lack of subject matter jurisdiction with the result that the judgment rendered is void *ab initio*. Only the owner and holder of a Promissory Note and Mortgage, or an owner's agent, has authority to foreclose.

The Uniform Commercial Code applies to negotiable instruments and provides that ownership of a Note is demonstrated in very limited ways – by an indorsement making the Note payable to either bearer or to a specifically identified person. In the case of a lost Note, equity effectuates an assignment where evidence of purchase is provided.

The Note bears no indorsement either to bearer or to Washington Mutual Bank. Further, Washington Mutual Bank had no assignment of mortgage when it filed the Complaint. Washington Mutual Bank's actions were a fraud on the court.

Washington Mutual Bank lacked standing to bring the suit and therefore the Circuit Court lacked subject matter jurisdiction. The judgment was void ab initio. Jones raised this issue in her Emergency Motion to Cancel Sale and Set Aside Judgment, which the circuit court did not hear.

Second Argument

This entire debt became extinguished by operation of law when Washington Mutual Bank filed its Affidavit of Lost Note on November 2, 2006. The UCC provides that the obligation on the debt is extinguished when evidence is presented that the Note is lost, the note is a nonnegotiable instrument and the holder of the Note is not a holder in due course. The UCC and case law provides that an assignee of a defaulted note, with knowledge of default at the time of assignment, cannot be a holder in due course. Washington Mutual Bank had knowledge of the default status at the time of assigned and cannot be a holder in due course. Washington Mutual Bank took the note with knowledge of the note's defaulted status; therefore, pursuant to the UCC the note lost its status as a negotiable instrument and became a non-negotiable instrument.

Washington Mutual Bank, at best, took the Note merely as a holder and not as a holder in due course. Washington Mutual Bank's November 2, 2006 affidavit of lost note established that the note was lost or destroyed. There was no debt

owing by Cynthia Jones on that Note to Washington Mutual Bank on November 30, 2006, when summary Judgment was entered.

I.

FIRST ARGUMENT

THE JUDGMENT IS VOID AB INITIO BECAUSE WASHINGTON MUTUAL LACKED STANDING AND THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICITON

The Florida Supreme Court stated that the "determination of standing to sue concerns a court's exercise of [subject matter] jurisdiction to hear and decide the cause pled by the parties." Rogers & Ford Constr. Corp. v. Carlandia Corp., 626 So.2d 1350, 1352 (Fla.1993) The First District Court of Appeals stated "This court has the right and the obligation to remand a cause for dismissal where the party seeking relief did not have the initial right to institute the suit, even though the defending party did not notice the defect." Grand Dunes, Ltd. v. Walton County, 714 So.2d 473, 475 (Fla. App. 1 Dist., 1998) (citing Guernsey v. Haley, 107 So.2d 184, 186 (Fla. 2d DCA 1958) and Polk County v. Sofka, 702 So.2d 1243, 1245 (Fla.1997).) The jurisdictional question can be raised at any time and can never be time-barred. DeClaire v. Yohanan, 453 So. 2d 375 (Fla. 1984).

"Standing has been equated with jurisdiction of the subject matter of litigation and has been held subject to the same rules, one of which is that

jurisdiction of the subject matter (thus standing to bring suit) cannot be conferred by consent.” Askew v. Hold the Bulkhead Save Our Bays, Inc., 269 So.2d 696, 698 (Fla. 2d DCA 1972); (See also Silver Star Citizen's Committee v. City Council of Orlando, 194 So.2d 681, 682 (Fla.4th DCA1967).) Standing requires a party prosecuting the action be a real party in interest, entitled to bring the claim, and have a stake in the outcome.

This entitlement to prosecute a claim in Florida courts rests exclusively in those persons granted by substantive law the power to enforce the claim. Kumar Corp. v Nopal Lines, Ltd, et al, 462 So. 2d 1178, (Fla. 3d DCA 1985)¹ In Florida, substantive law provides that the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note. A plaintiff is not entitled to maintain an action in which it seeks to foreclose on a note which it does not own. Your Construction Center, Inc. v. Gross, 316 So. 2d 596 (Fla. 4th DCA 1975)

¹ Kumar Corp. v. Nopal Lines, Ltd., 462 So.2d 1178, 1183 (Fla. 3d DCA 1985) provides that the Florida “real party in interest rule” - Fla. R. Civ. P. 1.210(a) - permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest.”. Florida Rule of Civil Procedure 1.210(a) provides, in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person’s own name without joining the party for whose benefit the action is brought...

(Followed by Overseas Development, Inc. v. Krause, 323 So.2d 679 (Fla. App. 3 Dist., 1975).) (See also 37 Fla. Jur. Mortgages and Deeds of Trust '240) (One who does not have the ownership, possession, or the right to possession of the mortgage and the obligation secured by it, may not foreclose the mortgage)

In BAC Funding Consortium Inc. v. Jean-Jacques, 28 So.3d 936, 938 (Fla. 2nd DCA, 2010) the Court stated, “ The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative. See Mortgage Elec. Registration Sys., Inc. v. Azize, 965 So.2d 151, 153 (Fla. 2d DCA 2007); Troupe v. Redner, 652 So.2d 394, 395-96 (Fla. 2d DCA 1995); see also Philogene v. ABN Amro Mortgage Group, Inc., 948 So.2d 45, 46 (Fla. 4th DCA 2006) (“[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question.”)

Allegations and exhibits cancel each other out where exhibits are inconsistent with Plaintiff’s allegations of ownership and holdership. Fladell v. Palm Beach County Canvassing Board, 772 So.2d 1240 (Fla. 2000); Greenwald v. Triple D Properties, Inc., 424 So. 2d 185, 187 (Fla. 4th DCA 1983); Costa Bella Development Corp. v. Costa Development Corp., 441 So. 2d 1114 (Fla. 3rd DCA 1983). In BAC Funding, the Court stated:

While U.S. Bank alleged in its unverified complaint that it was the holder of the note and mortgage, the copy of the mortgage attached to the complaint

lists "Fremont Investment & Loan" as the "lender" and "MERS" as the "mortgagee." When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint. See, e.g., Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So.2d 399, 401 (Fla. 2d DCA 2000) ("Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and may be the basis for a motion to dismiss."); Blue Supply Corp. v. Novos Electro Mech., Inc., 990 So.2d 1157, 1159 (Fla. 3d DCA 2008); Harry Pepper & Assocs., Inc. v. Lasseter, 247 So.2d 736, 736-37 (Fla. 3d DCA 1971) (holding that when there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable"). Because the exhibit to U.S. Bank's complaint conflicts with its allegations concerning standing and the exhibit does not show that U.S. Bank has standing to foreclose the mortgage, U.S. Bank did not establish its entitlement to foreclose the mortgage as a matter of law.

The Florida Uniform Commercial Code (hereafter, "UCC") applies to "negotiable instruments". (§ 673.1021, Fla. Stat. (2009); § 673.1041, Fla. Stat. (2009))² The note in this case was claimed to be a negotiable instrument by Plaintiff in Count 2 of the Amended Complaint. (R., page 19-20) The UCC provides for transfers of an interest in negotiable instrument Promissory Notes by

² "A negotiable instrument, by definition, '[d]oes not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.' § 673.1041(1)(c)." (GMAC v. Honest Air Conditioning & Heating, 933 So.2d 34 (Fla. App., 2006))

indorsement and not by assignment.³ Although under limited circumstances an equitable assignment of a Promissory Note can occur, Washington Mutual Bank did not offer in its pleadings or affidavits any justification or evidence supporting an equitable assignment of the Note and Mortgage.

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)) Washington Mutual Bank invoked the protection of the UCC when it sought to reestablish the lost note under the UCC. (Count 2). (R. page 19 - 20) Clearly, the UCC applies.

The UCC provides that a Promissory Note is transferred when it 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. § 673.2031(1), Fla. Stat. (2009) A

³ The cases of Moses v. Woodward, 109 Fla. 348 (Fla. 1933) and Johns v. Gillian, 134 Fla. 575, 581 (Fla. 1938) stand for the position that an indorsement on a note is not necessary to transfer the note, but rather that mere delivery of a note and mortgage with the intention to pass title will vest equitable interests in the person to whom it is delivered. The Moses and Gillian cases arose prior to the creation of the Uniform Commercial Code (“UCC”) in 1952, when interests in notes were transferred by assignment. Thus the principles espoused in those pre-UCC cases regarding enforcement requirements must of necessity be subordinate to the enforcement requirements of the UCC. The principle of equitable assignment is applicable today “If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt, unless there be some plain and clear agreement to the contrary, if that be the intention of the parties. . . .”. WM Specialty Mortgage, LLC v. Salomon, Case No. 4D03-3318 (FL 5/26/2004) (Fl, 2004)

transfer of possession of a bearer instrument is sufficient to transfer enforceable rights in the instrument. (§ 673.2011(2), Fla. Stat. (2009)) That stands in stark contrast to a promise or order that is payable to order, which means that it is payable to the identified person. (§ 673.1091(2), Fla. Stat. (2009)) In the case of an instrument payable to a specifically identified person, transfer of possession of the instrument along with an indorsement is necessary.⁴ (§ 673.2011(2), Fla. Stat. (2009) & § 673.2031(3), Fla. Stat. (2009)) Without the necessary indorsement, the transferee receives **only** an enforceable interest to the unqualified indorsement of the transferor.^{5 6} (§ 673.2031(3), Fla. Stat. (2009)) Unless and until the

4 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. (§ 673.2041(1), Fla. Stat. (2009))

5 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 Opinion.

6 In the case of In Re Hayes, 393 B.R. 259, 266-268 (Bankr. D. Mass. 2008), the movant seeking relief from stay failed to show that it ever had any interest in the note at issue. In that case the court found the movant lacked standing altogether because it failed to show that the note was ever *transferred* to it, and thus had no rights of its own to assert.

indorsement is obtained, the transferee has no standing to sue on the unindorsed promissory note.

Washington Mutual Bank claimed in its Amended Complaint that it owned and held the Note and Mortgage. (R. page 16 – 20, paragraph 2) Nowhere in its Amended Complaint does Washington Mutual Bank claim it was acting on behalf of another person or entity. Contrary to Washington Mutual Bank's assertion that it owned and held the Note and Mortgage, the Note was not made payable to Washington Mutual Bank because it was not indorsed to Washington Mutual Bank. (R. page 11-12 and 82 - 83) Washington Mutual Bank's only possible claim to own the Note and Mortgage presumably derives from the fatally defective indorsements and assignments.

On the note, an attempt was made to indorse the note to Fleet National Bank while the first assignment of mortgage was between Fleet Mortgage Corporation to MERS. A key to the chain of ownership is missing.⁷

⁷ In WM Specialty Mortgage, LLC v. Salomon, 874 So. 2D 680 (4th DCA 2004), the trial court dismissed the complaint as *void ab initio* on nearly similar facts. On appeal, the appellate Court overturned the trial court based upon the specific facts of that case. The Court held that, although the assignment was memorialized after the initiation of the foreclosure action, the assignment documentation indicated the predecessor owner of the mortgage had physically transferred the note to the plaintiff prior to the filing of the case. The difference between WM Specialty and the case at hand is that Washington Mutual Bank's evidence is that it obtained an interest in the Note only *after* the complaint was filed.

The Note carries two indorsements. (R. page 11-12 and 82 – 83) The first indorsement was properly made by the lender, Challenge Financial Investors to Popular Mortgage Corp. The second indorsement purports to assign the Note to Fleet National Bank. That second indorsement is defective in three ways: the assigning entity is not identifiable as the entity's name runs off the page; there is no signature of the assignor; there is no indication of the signator's authority to dispose of the entity's assets. This indorsement is not valid.

Assuming arguendo that the second indorsement is valid, then Popular Mortgage Corporation indorsed the note to Fleet National Bank. Fleet National Bank did not assign the note to Washington Mutual Bank. There is no evidence Fleet National Bank assigned the note to any other entity. Fleet National Bank appears to be the only owner of this note.

A key missing link to this chain of ownership is an indorsement on the note or an assignment of mortgage from Fleet National Bank to Fleet Mortgage Corporation. Fleet Mortgage Corp. is a different entity than Fleet National Bank. No indorsement or assignment exists transferring ownership of the note from Fleet National Bank to Fleet Mortgage Corporation. The first assignment of mortgage is from Fleet Mortgage Corp., to MERS. (R. page 92) This assignment of mortgage transferred no interest in the note or mortgage as Fleet Mortgage Corporation had no interest to transfer. The assignment from Fleet Mortgage Corp. to MERS is a nullity.

In summation, Popular Mortgage Corp. still owns the note and is the only entity entitled to enforce the note. The indorsement to Fleet National Bank is not a valid indorsement. Fleet National Bank never indorsed the note or assigned the note to any other entity. The assignment of mortgage from Fleet Mortgage Corp. transferred no ownership interest to MERS as Fleet Mortgage Corp. had no ownership interest in the note. MERS had no interest in the note to transfer to Washington Mutual Bank.

It is startling that both assignments of mortgage were not presented to the court until after the summary judgment was granted. (R. page 72 – 92) In the wake of Jeff-Ray Corporation v. Jacobson, 566 So.2d 885 (Fla. 4th DCA, 1990), the information contained within assignment of mortgage from MERS to Washington Mutual clearly evidences the fact that Washington Mutual had no ownership interest in the note and mortgage at the time of filing the complaint and thereby had no standing.

The second assignment of mortgage – from MERS to Washington Mutual Bank – was made on October 19, 2006, a period of forty-four days after the Complaint was filed. This assignment of mortgage was first presented to the Court *after* the summary judgment was granted. (R. page 72 – 92)

There are two kinds of fraud – extrinsic and intrinsic. Although there is a one year time limit to set aside judgments, extrinsic fraud extends beyond this limit as provided in Florida Rule of Civil Procedure 1.540(b). DeClaire v. Yohanan, 453

So.2d 375 (Fla., 1984) In short, extrinsic fraud is that which prevents the other party from participating in the cause.

Withholding the assignments from the court until after summary judgment is utterly reprehensible conduct and is extrinsic fraud because there is no way Jones would have – could have – known that Washington Mutual Bank had no interest in the case. In Jeff-Ray, the Court dismissed the Complaint for lack of a cause of action at the time it was filed because the document upon which the action rested was not created until after the Complaint was filed. Jeff-Ray Corporation v. Jacobson, 566 So.2d 885 (Fla. 4th DCA, 1990).

When Jones brought her Emergency Motion to Cancel the Sale and Set Aside the Foreclosure pursuant to Florida Rules of Civil Procedure section 1.540 (b), she alleged that the judgment was both fraudulent and void for lack of standing. Rule 1.540(b) states in relevant part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: . . . (4) *that the judgment or decree is void*; . . . The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. *This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.* (R. page 182)(Emphasis added)

Jones advised the Circuit Court that §702.07, Fla. Stat. (2009) provides:

The circuit courts of this state, and the judges thereof at chambers, shall have jurisdiction, power, and authority to rescind, vacate, and set aside a decree of foreclosure of a mortgage of property ***at any time before the sale thereof*** has been actually made pursuant to the terms of such decree, and to dismiss the foreclosure proceeding upon the payment of all court costs.

(R. page 182)(Emphasis added)

In Sterling Factors v. U.S. Bank Nat. Ass'n, 968 So.2d 658, 662, 663 (Fla. 2nd DCA, 2007), the Court stated:⁸

Section 702.07 states:

The circuit courts of this state, and the judges thereof at chambers, shall have jurisdiction, power, and authority to rescind, vacate, and set aside a decree of foreclosure of a mortgage of property at any time before the sale thereof has been actually made pursuant to the terms of such decree, and to dismiss the foreclosure proceeding upon the payment of all court costs.

This statute was enacted in 1927 and has remained unchanged since that time. Ch. 11881, § 1, Laws of Fla. (1927).⁵ This statute has been cited in case law a total of nine times. Otherwise, it appears to have been largely overlooked.

Facially, the statute grants circuit courts the power to set aside foreclosure decrees ***at any time before the sale***. (Emphasis added)

In fact, the District Court in Sterling Factors held that “section 702.07 cannot be interpreted as depriving a circuit court of jurisdiction to set aside or reconsider a foreclosure judgment upon a proper motion once a foreclosure sale

⁸ Followed by the Court in Nobani v. Barcelona Development Corp., 655 So.2d 250 (Fla. App. 5 Dist., 1995).

has been held. Id. This means that the motion can be brought even in the absence of any allegations of fraud, mistake or excusable neglect as required by Florida Rules of Civil Procedure 1.540(b). Jones' Emergency Motion to Cancel Sale and Set Aside Judgment was brought pursuant to this statute. Unfortunately, the Court did not rule on Jones' motion.

Washington Mutual Bank had no standing to bring this action as it did not own and hold the Note and Mortgage, nor did it represent anyone who did own and hold the Note and Mortgage. That lack of standing was jurisdictional and the judgment entered was void. Additionally, Washington Mutual Bank committed fraud upon the court when it filed a Complaint without any ownership interest in the Note and Mortgage. That fraud was concealed from the Court and Jones until after the summary judgment hearing. This kind of fraud is extrinsic fraud for which there is no time limit in which to bring a challenge.

II.

SECOND ARGUMENT

FORECLOSURE WAS IMPROPER AS THE OBLIGATION UNDER THE NOTE WAS EXTINGUISHED BY OPERATION OF LAW

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))

“The assignee of defaulted negotiable paper occupies the status of the holder of a **nonnegotiable** instrument. As to those occupying this status, the rule appears to be: There cannot be a holder in due course of a nonnegotiable instrument, and the doctrine of protecting a bona fide holder for value without notice and before maturity does not apply, no matter how widely or how narrowly the instrument may miss being negotiable or how the parties themselves may have regarded the instrument.” Guaranty Mortg. & Ins. Co., v. Harris, 182 So. 2d 450, 453 (1st DCA 1966) (emphasis added). This concept is codified in § 673.3021(1)(b)(3) which defines a Holder in Due Course as one who takes an instrument “Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;”.

The Note in this case was defaulted on April 1, 2006. Washington Mutual Bank filed its Complaint on September 5, 2006, in which it claimed the debt was in default and then forty-four days later it claims to have acquired the Note through the defective assignment of mortgage. The Note was defaulted when Washington Mutual Bank took it, therefore the Note is a non-negotiable instrument and Washington Mutual Bank is not a Holder in Due Course.

Florida law provides:

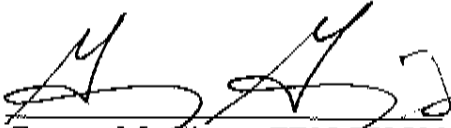
An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.”
§ 673.3051(3), Fla. Stat. (2009)

The Amended Complaint alleged the note was lost or destroyed and on November 2, 2006, Washington Mutual Bank presented proof that the Note was lost via an Affidavit of Lost Note. (R. page 19 – 20, paragraph 21; page 61-62). Washington Mutual Bank took the defaulted non-negotiable Note and lost it. Pursuant to § 673.3051(3), the debt was extinguished on November 2, 2006, which is a date prior to summary judgment.

III CONCLUSION

WHEREFORE, the Circuit Court's judgment should be set aside and the matter remanded with directions to dismiss with prejudice.

Respectfully Submitted,



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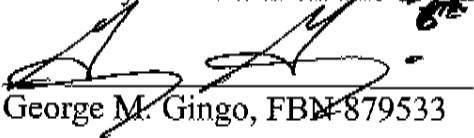
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on this ~~6th~~^{5th} day of ~~June~~^{July}, 2010.

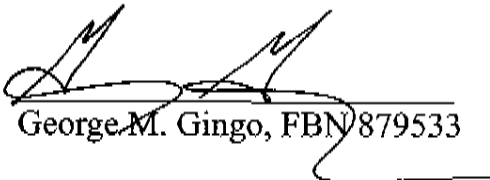


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CERTIFICATE OF FONT COMPLIANCE

I certify that the lettering in this brief is Times New Roman 14-point font and complies with the font requirements of the Florida Rule of Appellate Procedure 9.210(a)(2).

By:



George M. Gingo, FBN 879533