

IN THE CIRCUIT COURT IN AND FOR BREVARD COUNTY, FLORIDA

CASE # 05-20 10 -CA- 12191 -XXXX-XX
MORTGAGE FORECLOSURE DIVISION

NATIONSTAR MORTGAGE

Plaintiff(s),

v.

TAWNY PRENTICE, et al.

Defendant(s).

NOTICE OF HEARING

The Motion To Dismiss filed in this action will be heard on the 5th day of November, 2010, along with many others, at the Moore Justice Center, 2825 Judge Fran Jamieson Way, Viera, Florida 32940, in [REDACTED] Courtroom 3G, starting at 1:30 pm. The cases will be heard by Senior Mortgage Foreclosure Judge, Charles M. Holcomb. Personal appearance is **Required** as the telephone system will not accommodate the volume of cases scheduled.

Many of the motions attack standing of Plaintiff to bring the action. A brief overview of the law follows. When a motion to dismiss is heard, all well pled allegations of the complaint are taken as true. Therefore, an allegation that Plaintiff owns or holds the mortgage and note and has the right to enforce it is taken as true unless there are conflicting exhibits. The fact that an endorsement is not shown on the copy of the note does not create a standing issue as the note copy is usually taken from the closing file before it is transferred to another lender, etc. Other than the originator, no "proof" is shown in the complaint- proof is for trial.

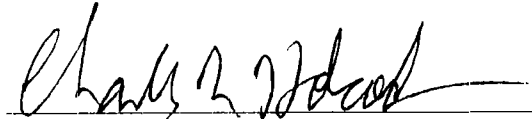
The Plaintiff must prove that it was the owner, holder or had the right to enforce the note as of the date of filing the Complaint. *Jeff-Ray Corp. v. Jacobson*, 566 So.2d 885 (Fla. 4th DCA 1990). The holder of a negotiable instrument means the person in possession of the instrument payable to bearer (blank endorsement) or to an identified person or entity. §671.201(21) Fla. Statutes (2010) and *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010). The holder may be the owner or a nominee, such as a servicer, assignee or a collection or litigation agent. Rule 1.210(a), Fla. R. Civ. P. (2010) provides that an action may be prosecuted in the name of an authorized person without joinder of the party for whose benefit the action is brought. See also, *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So.2d 1178, 1184 (Fla. 3rd DCA 1985). Plaintiff's nominee has standing to maintain foreclosure based on the real party in interest rule. *Mortgage Electronic Registration Systems, Inc. v. Revoredo*, 955 So.2d 33

Exhibit "A"

(Fla. 3rd DCA 2007); *Mortgage Electronic Registration Systems, Inc. v. Azize*, 965 So.2d 151 (Fla. 2nd DCA 2007); *Philogene v. ABN AMRO Mortgage Group, Inc.*, 948 So. 2d 45 (Fla. 4th DCA 2006).

It is better practice to plead assignment of the note and mortgage but absent formal assignment of the mortgage or delivery, the mortgage in equity passes as an incident of the debt. *Perry v. Fairbanks Capital Corp.*, 888 So.2d 725 (Fla.5th DCA 2004); *Johns v. Gillian*, 134 Fla. 575, 579 (Fla. 1938). There is no requirement of a written and recorded assignment of the mortgage to maintain a foreclosure action where the evidence establishes Plaintiff as owner and holder of the note on the date the action was filed. See *Perry supra* and *WM Specialty Mortgage, LLC v. Salomon*, 874 So.2d 681 at 682 (Fla. 4th DCA 2004); *Chemical Residential Mortgage v. Rector*, 742 So.2d 300 (Fla. 1st DCA 1998). However, if an assignment is attached as an exhibit and it has defects, standing may be challenged. *BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean Jacques*, 28 So.3d 936 (Fla. 2nd DCA 2010).

If this brief overview of the law causes you to believe the Motion To Dismiss is premature or that the issues should be raised by affirmative defenses instead, the Defendant may withdraw the Motion in writing with a copy to the Plaintiff's Counsel, at least seven (7) days before the hearing. If not withdrawn, counsel must appear in person for the hearing scheduled for the Motion.



Charles M. Holcomb
Senior Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Notice of Hearing was sent to the Parties names on the attached list by deposit in the U.S. Mail, this 30 day of September, 2010.



Trish Matarazzo
Executive Secretary/Judicial Assistant

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator at Court Administration, 2825 Judge Fran Jamieson Way, 3rd floor, Viera, Florida, 32940-8006, (321) 633-2171 ext. 2 at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

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