IN THE SECOND DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

TAMARA S. CORREA,

Appellant,

v.

U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR BACF 2006-D, and JIMMY CORREA,

Appellee.
_____/

Case No.: 2D12-2209

L.T. No.: 2007-CA-014072

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

APPELLANTôS INITIAL BRIEF

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STATEMENT OF THE CASE

In 2007, Appellee, U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR BACF 2006-D (ñU.S. Bankò) sued Appellant, TAMARA S. CORREA (ñCorreaò) and Appellee, JIMMY CORREA (ñJimmy Correaò) for mortgage foreclosure.

In its original Complaint, U.S. Bank included a claim to re-establish a lost note. R. Unlike many other foreclosure cases, where such a claim was initially filed but subsequently dropped, U.S. Bank continued to prosecute its lost note claim through three amended Complaints, a contested trial, and a Final Judgment.[1] R.

No copy of the Note was attached to the original Complaint, the Third Amended Complaint (filed by leave of Court on January 4, 2012), or any pleadings in between. No original Note, or copy thereof, was ever filed in the court file. As such, U.S. Bank prosecuted a lost note claim for more than four years predicated on just one piece of paper, wherein U.S. Bank summarily listed a few of the alleged terms of the lost Note. R. Notably, U.S. Bank did not verify any of the complaints that it filed in this case, including those filed after the effective date of Fla.R.Civ.P. 1.110(b), so this one-page ñsummaryò was never verified. R.

[1] Correa represented herself in the lower court proceedings *pro se*. The undersigned made an appearance after entry of Final Judgment, for purposes of prosecuting the instant appeal.

Correa was *pro se* and this case had been pending since 2007, yet U.S. Bank never set a hearing on a Motion for Summary Judgment. In other words, the record clearly reflects that U.S. Bank took little action to prosecute this case. As such, on October 27, 2010, the lower court entered an Order, *sua sponte*, setting a Case Management Conference for December 15, 2010 and trial for January 24, 2011. R. Plaintiff failed to attend the court-ordered Case Management Conference, prompting the Court to enter an order dismissing the case without prejudice but granting leave to amend (and removing the case from the trial docket). R.

On December 17, 2010, U.S. Bank filed an Amended Complaint, but did not prosecute the case in any way in the nine months thereafter. As such, on September 13, 2011, the lower court entered a *sua sponte* Order setting a Case Management Conference for October 19, 2011. R. At that CMC, the court issued an Order indicating trial should be set in January, 2012 with a December, 2011 Pretrial. R. The Court then entered an Order setting trial for January 23, 2012 and pretrial for December 20, 2011. R.

U.S. Bank failed to attend the December 20, 2011 pretrial.[2] R. Instead, U.S.

[2] Correa asked the court to dismiss the case, as that was the second court-ordered hearing U.S. Bank had failed to attend. Oddly, presiding Judge Sandra Taylor declined to do so because, according to her, Judge Baumann, the Judge who signed the Order requiring the pretrial, may have verbally told U.S. Bank it need not

Bank successfully moved for leave to file a Third Amended Complaint. R. Thereafter, the court issued an Order setting trial for February 20, 2012 and pretrial for January 23, 2012.

As trial began on February 20, 2012, U.S. Bank did not have a witness available to testify. As such, the lower court continued trial yet again.[3] R.

On February 27, 2012, U.S. Bank served its Notice of Non Jury Trial, purporting to schedule trial for March 19, 2012. The Certificate of Service on that document reflects it was sent to Correa by Alicia Jacobs, counsel for U.S. Bank, on February 27, 2012 via U.S. Mail. R. Oddly, even though it had entered the prior Orders setting trial, the lower court did not issue any sort of Order scheduling the March 19, 2012 trial. R. Also, the Notice reflects, on its face, that Correa was given just 21 daysô notice of the trial. Of course, the actual notice provided was less than 21 days when one accounts for the fact that the notice was sent to Correa by mail only. R.

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attend the pretrial notwithstanding his written Order. R. Judge Taylor gave no explanation why/how a judge could have given verbal instructions that were contrary to a written Order *ex parte* and without a hearing. Respectfully, this was a flimsy reason to not dismiss the case.

[3] There is no motion for continuance in the court file, and the record does not reflect why U.S. Bank failed to bring a witness to the duly-noticed trial. Respectfully, it seems it is the practice of Judge Taylor (the same judge who did not dismiss the case on December 20, 2011 when U.S. Bank failed to attend pretrial) to keep foreclosure cases pending even when plaintiffs are unprepared for trial and fail to attend court-ordered hearings.

Correa represented herself at trial, but she brought a court reporter. R. As trial began, Correa asked for a continuance, arguing the lawyer she had recently retained was unavailable for the trial and could not attend.[4] R. Of course, the lawyerôs unavailability was not surprising given Correa was provided less than 30 daysô notice of the trial.

In support of the requested continuance, Correa noted that U.S. Bank had been given multiple continuances, so it was only fair that she be given one as well. Correa further noted that the court had kept the case pending even though U.S. Bank did not attend the December 20, 2011 pretrial and produced no witness for the February 20, 2012 trial. The court overruled Correaôs objections and denied a continuance, offering no explanation except to say this was a 2007 case.[5]

As trial began, U.S. Bank called its first and only witness ï Alex Gomez, an employee of Indymac Mortgage Services, the servicer for U.S. Bank. R. Initially, Mr. Gomezôs testimony consisted of just four pages of transcript. During this testimony, U.S. Bankôs counsel showed Mr. Gomez four documents for identification purposes ï what were represented to be a copy of the Mortgage, copy of the Note, loan payment history, and assignment of the mortgage. R.

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[4] The lawyer to whom Correa referred was not the undersigned.

[5] The court did not explain why multiple continuances were granted for U.S. Bank despite it being a 2007 case, nor did it make any mention of how little U.S. Bank had done to prosecute its case during the years it was pending. R.

Significantly, however, U.S. Bank did not move the Note or Mortgage into evidence, nor did it file these documents in the court file.[6] This failure was particularly troubling with respect to the purported copy of the Note. After all, it was necessarily impossible for U.S. Bank to re-establish a lost Note without filing a copy thereof, moving it into evidence, or testifying regarding the terms thereof.

When counsel ended his examination of U.S. Bankôs only witness (after just four pages of transcript), the witness had not even mentioned the fact that the Note was lost, much less submitted any evidence to re-establish it. R. Instead of allowing U.S. Bank to rest on what was obviously an insufficient record, the court began helping U.S. Bank prove its case:

> Mr. Sandler: Your Honor, I have no further questions for this witness.
> The Court: Mr. Sandler, this is a lost note?
> Ms. Correa: Yes, it is.
> Mr. Sandler: According to my information, the note was -- I'm sorry, youôre absolutely right.

R.

Having been prompted by the court to continue his questioning, counsel for U.S. Bank resumed his examination of Mr. Gomez, yet asked just three questions:

> Q: Can you tell us about the lost note? Do you know how it was lost?
> A: I do not.
> Q: Do you know if it was ever assigned to anyone or sent to

[6] The Note and Mortgage are not contained in the record before this Court ï not even a copy ï and neither Correa nor the undersigned has so much as a copy.

anyone as part of an agreement?
A: I do not.
Q: Do you know whether the lost note is inclusive with the mortgage? Was it assigned at the same time, to your knowledge?
A: Yes.

R. Apparently unsure how to proceed, counsel then sought more guidance from the court:

Mr. Sandler: Judge, do you require anything else?
The Court: No explanation as to how it got lost?
The Witness: No, maôam.
Q: Do you have any explanation at all?
A: No. Iôm not aware of how it was lost, Your Honor.

R. With that, the direct examination of Mr. Gomez ended, and Correa began her cross-examination.

Candidly, Correaôs *pro se* cross-examination, though more extensive than counselôs direct, is largely irrelevant to the issues raised herein. That said, during cross, Mr. Gomez testified briefly regarding the lost Note:

Q: Do you know how the loss occurred?
A: No. You asked me that earlier. The answer is still no.
Q: Do you know when the loss occurred?
A: No.
Q: Do you know if the loss occurred when you were in possession of it?
A: Once again, I donôt know when it was lost.

R. On re-direct, Mr. Gomez clarified that testimony somewhat, as follows:

Q: Mr. Gomez, can you tell us when this note was lost that One West was entitled to enforce the note?

A: Yes.
Q: What leads you to that belief, sir?
A: As a servicer of the note, it is endorsed in blank. All the assignments and mortgage are in place.

R. Then, after moving the payment history into evidence (but submitting no other documents into evidence and calling no other witnesses), U.S. Bank rested its case. R.

After direct examination by Correa (which is irrelevant to the issues in this appeal), Correa and counsel for U.S. Bank made their closing arguments. During her closing, Correa argued that U.S. Bank failed to introduce the default letter into evidence. U.S. Bank interjected, asserting it ñdid not have toò because the default letter was ñnot statutory.ò R. During this brief argument between counsel and Correa, it seemed clear that U.S. Bank was standing behind its position that the default letter need not be admitted into evidence. Nonetheless, the lower court began helping U.S. Bank for a third time, suggesting that it re-open its case to admit the letter:

The Court: Since Ms. Correa has raised the issue of the default letter?
Mr. Sandler: Yes, maôam.
The Court: Do you have it with you?
Mr. Sandler: I do.
The Court: May I see it, please?
Mr. Sandler: Yes, Your Honor.
The Court: Do you wish to re-open the case to admit the letter?
Mr. Sandler: Yes. Quite frankly, because itôs not statutory, Iôm not sure itôs necessary, but I certainly would be glad to do that.

R. U.S. Bank then re-opened its case, Mr. Gomez authenticated the default letter, and it was admitted into evidence. The evidence was then re-closed, each side then finished their arguments, and the court took the matter under advisement before issuing the Final Judgment of Foreclosure which precipitated this appeal.

Correa has attempted to show, in detail, what happened at trial, yet what transpired at trial is perhaps less important than what did *not* happen. To wit, even after four-plus years of litigation (with little opposition from a *pro se* homeowner), multiple continuances of trial, and repeated hints from the lower court (including suggestions on what questions to ask and advice to re-open its case), U.S. Bank offered no evidence whatsoever on several key issues. Most significantly, U.S. Bank offered no testimony whatsoever about the terms of the lost Note.

By failing to file the Note, submit it into evidence, or testify regarding its terms, U.S. Bank presented no evidence whatsoever as to: (i) the identity of the original lender; (ii) the identity of the parties who signed the Note[7]; (iii) the monthly payment amount; (iv) the events constituting a default; (v) the interest rate (including whether the interest rate was fixed or variable); (vi) the principal balance owed; (vii) the address of the property used as security for the Note, if any;

[7] Just because Correa and Jimmy Correa were sued for foreclosure obviously does not mean that they executed the Note. To illustrate, the undersigned has many foreclosure cases where just one spouse signed the note or where none of the persons currently on title executed the note.

(viii) the balloon date, if any; (ix) the existence of any prevailing party fee provision; or any other such terms. R.

Likewise, there was no testimony whatsoever that: (i) the loss of possession was not the result of a transfer or lawful seizure; (ii) U.S. Bank cannot reasonably obtain possession of the instrument; or (iii) Correa would be indemnified or otherwise protected in the event of a claim from another party. In fact, the word ñindemnifyò was never mentioned at trial, even once. R.

Despite the absence of any evidence on these key points, the court entered a Final Judgment re-establishing the lost Note and foreclosing on Correa.

On these facts, Correa timely appeals.

SUMMARY OF ARGUMENT

Under well-established Florida law, a plaintiff in a mortgage foreclosure case must file the original Note or re-establish the lost Note pursuant to Fla. Stat. 673.3091. In the case at bar, U.S. Bank failed to satisfy its burden in this regard. The Note was admittedly lost, yet U.S. Bank did not file a copy of the Note, attach it to its pleadings, introduce it into evidence, or prove the terms thereof. U.S. Bank plainly failed to satisfy the other requirements under 673.3091, either, including: (i) that Correa was reasonably protected from claims by other persons to enforce the Note; or (ii) loss of possession was not the result of a transfer or lawful seizure. As such, there was no basis for the lower court to re-establish the lost Note or enter the Final Judgment of Foreclosure.

U.S. Bank had ample opportunity to prove its case at trial. It failed to do so. Under established precedent, the remedy for its failure is reversal and remand with instructions to enter an involuntary dismissal, not a new trial. Quite simply, the facts at bar do not justify U.S. Bank receiving a second bite at the apple. This case was pending for more than four years with little opposition from a *pro se* homeowner. U.S. Bank had the benefit of multiple continuances, three amendments to its pleadings, ñhintsò from the trial judge, and was allowed to re-open its case at trial. Despite these perks, U.S. Bank did not come close to

presenting sufficient evidence to prove its case. Respectfully, it is time that foreclosing plaintiffs realize the apathy they exhibit in the prosecution of their own cases (and the resulting burden placed on court personnel) cannot go unpunished. U.S. Bank failed to prove its case at trial, and it should suffer an involuntary dismissal.

Even if this Court disagrees with Correaôs first issue on appeal, the Final Judgment of Foreclosure must be reversed given the lower courtôs failure to comply with Fla.R.Civ.P. 1.440. Quite simply, Correa was entitled to at least 30 daysô notice prior to trial, and the Notice of Non Jury Trial served by counsel for U.S. Bank 21 days before trial plainly failed to satisfy this requirement.

ARGUMENT

ñThe standard of review on appeal of the trial courtôs ruling on a motion for directed verdict is *de novo*.ò Martin County v. Polivka Paving, Inc., 44 So. 3d 126, 131 (Fla. 4th DCA 2010); see also Andrews v. Direct Mail Express, Inc., 1 So. 3d 1192 (Fla. 5th DCA 2009); Banco Espirito Santo, Ltd. v. BBO Intôl, B.V., 979 So. 2d 1030 (Fla. 3d DCA 2008). A challenge to the sufficiency of the evidence in a nonjury trial under Rule 1.530(e) is the equivalent of a motion for directed verdict in a jury trial, so it seems clear the standard of review for the first issue in this appeal is *de novo*.[8] Hence, this Court should apply a *de novo* standard of review in evaluating whether U.S. Bank presented sufficient evidence to re-establish the lost Note under Fla. Stat. 673.3091.

Likewise, the requirement in Fla.R.Civ.P. 1.440 that an Order setting trial be entered by the court and afford all litigants at least 30 daysô notice is a matter of law for which *de novo* review applies. See Mourning v. Ballast Nedam Constr., Inc., 964 So. 2d 889 (Fla. 4th DCA 2007) (*de novo* review applied to the notice requirements under Rule 1.440).

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[8] Candidly, the undersigned has not located any cases which specify the standard of review under 1.530(e). It stands to reason it would be the same as that used in assessing a motion for directed verdict.

I. THE LOWER COURT REVERSIBLY ERRED WHEN IT ENTERED A FINAL JUDGMENT OF FORECLOSURE.

Despite four-plus years of litigation against a *pro se* homeowner, three amendments to its pleadings, multiple continuances of trial, and significant help from the lower court judge at trial, U.S. Bank failed to present sufficient evidence to re-establish the lost Note. U.S. Bank did not file the Note, move it into evidence, or prove the terms thereof. This Court should reverse and remand with instructions to enter an involuntary dismissal.

Additionally, reversal is also required given the insufficient notice of trial.

A. U.S. Bank presented none of the evidence necessary to re-establish a lost note.

Many Florida cases have set forth the requirement that a foreclosing plaintiff prove it owns and holds the note and mortgage by tendering the original note to the court or re-establishing the lost note under Fla. Stat. 673.3091. For instance, in Servedio v. U.S. Bank, N.A., the Fourth District reversed a final judgment of foreclosure where the original note had not been filed, explaining:

> The party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action. A plaintiff must tender the original promissory note to the trial court or seek to reestablish the lost note under section 673.3091.

46 So. 3d 1105, 1107 (Fla. 4th DCA 2010). In Gee v. U.S. Bank, N.A., this Court

ruled similarly. 72 So. 3d 211 (Fla. 2d DCA 2011). See also Emerald Plaza West v. Salter, 466 So. 2d 1129, 1130 (Fla. 3d DCA 1985) (ñthe trial court erred in granting foreclosure of a mortgage without requiring either production of the original promissory note and assignment of mortgage or reestablishment of those documents.ò).

In the case at bar, the record plainly reflects that U.S. Bank did not tender the original Note to the lower court. R. As such, the only way U.S. Bank could foreclose was by re-establishing the lost Note pursuant to Fla. Stat. 673.3091. See Servedio Gee, and Salter.

Though the obligation to re-establish the lost Note is clear, there are few Florida cases which analyze the quantum of proof necessary to do so. In one recent case, the Third District reversed a final judgment of foreclosure where the foreclosing plaintiff tried to re-establish a lost note but presented no evidence that the mortgagor would be adequately protected from loss that might occur by reason of a claim by another person to enforce the Note. See Guerrero v. Chase Home Finance, LLC, 37 Fla. L. Weekly D 692 (Fla. 3d DCA 2012). In another case, the Fourth District affirmed a summary judgment for a homeowner where the bank was unable to re-establish a lost Note, see State St. Bank & Trust Co. v. Lord, 851 So. 2d 970 (Fla. 4th DCA 2003), though, admittedly, the version of 673.3091 in

existence at the time is different from the current version of the statute.

The relative absence of case law aside, the terms of Fla. Stat. 673.3091 are clear. The statute provides:

> 673.3091 Enforcement of lost, destroyed, or stolen instrument.ð
>
> (1) A person not in possession of an instrument is entitled to enforce the instrument if:
> (a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
> (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
> (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> (2) A person seeking enforcement of an instrument under subsection (1) must prove the terms of the instrument and the personôs right to enforce the instrument. If that proof is made, s. 673.3081 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

The most significant aspect of the statute in the case at bar is the first sentence of subsection (2), which required U.S. Bank to ñprove the terms of the instrument.ò

The trial transcript plainly reflects that U.S. Bank did not prove the terms of the lost Note. Quite simply, U.S. Bank presented no evidence whatsoever as to any of the terms of the Note, including: (i) the identity of the original lender; (ii) the identity of the parties who signed the Note; (iii) the monthly payment amount; (iv) the events constituting a default; (v) the interest rate (including whether the interest rate was fixed or variable); (vi) the principal balance owed; (vii) the address of the property used as security for the Note, if any; (viii) the balloon date, if any; (ix) the existence of any prevailing party fee provision; or any other such terms. R. U.S. Bank offered no testimony on these issues, did not file the Note, and did not introduce the Note into evidence. R.

It is axiomatic that U.S. Bank was not entitled to a Final Judgment re-establishing the lost Note where U.S. Bank did not prove the terms of that Note. Quite simply, there was nothing to re-establish, as the terms of the Note were not proven. As such, and for this reason alone, the lower court reversibly erred.

U.S. Bankôs lack of evidence went far beyond its failure to prove the terms of the Note. For instance, U.S. Bank offered no evidence whatsoever that the loss of possession was not the result of a transfer or lawful seizure. This is a required element of Fla. Stat. 673.3091, yet U.S. Bank offered nothing at all to prove this obligation. R.

Likewise, U.S. Bank offered no evidence that it could not reasonably obtain possession of the Note because it was destroyed, its whereabouts could not be determined, or it is in the wrongful possession of an unknown person ï another required element under Fla. Stat. 673.3091. Although U.S. Bank testified at length that the Note was lost, there was no testimony or other evidence that the Note was destroyed, that its whereabouts could not be determined, or that the Note was in the wrongful possession of an unknown person. Rather, as Mr. Gomez repeatedly made clear, all U.S. Bank could establish was that the Note was ñlost.ò R.

Finally, U.S. Bank presented no evidence that Correa would be indemnified or otherwise protected in the event of a claim from another party. The Guerrero court reversed for this failure alone, so clearly this failure, combined with all of the other deficiencies in the evidence, require reversal in this case.

In addition to the foregoing, Correa can credibly argue that U.S. Bank did not present evidence of its right to enforce the Note or that it acquired ownership from a person entitled to enforce the Note when loss of possession occurred ï two more required elements under Fla. Stat. 673.3091. After all, U.S. Bank did not submit any assignments of mortgage into evidence (or, of course, the Note), and though U.S. Bank testified ñwhen this note was lost that One West was entitled to enforce the note,ò U.S. Bank did not establish how it had standing to foreclose

merely because One West allegedly had standing (at some unspecified point in time). Moreover, the transcript does not reflect how Mr. Gomez, an employee of Indymac Mortgage Services, had any knowledge of One Westôs right to enforce the Note at the time it was lost (particularly since it was very clear from Mr. Gomezôs testimony that he knew nothing about the Note except that it was lost). That said, Correa trusts that the point has been made. Indisputably, U.S. Bank presented no evidence as to most, if not all, of the elements necessary to re-establish a lost Note under Fla. Stat. 673.3091.

Correa, acting *pro se*, may not have articulated all of these arguments at trial in the same way the undersigned has done so in this brief. However, that is irrelevant. As this case was tried non-jury, Correa is permitted to raise the sufficiency of the evidence supporting the Final Judgment of Foreclosure for the first time in this appeal. See Fla.R.Civ.P. 1.530(e).

Once this Court concludes that reversal is required, the question becomes whether the Court should remand for a new trial or remand with instructions to enter an involuntary dismissal. For two reasons, Correa respectfully submits that this Court should do the latter.

First, Florida has seen many cases where a plaintiff fails to prove its case at trial, the lower court entered judgment for the plaintiff anyway, and a Florida

district court reversed. Invariably, when this happens, the remedy is reversal and remand with instructions to enter a directed verdict / involuntarily dismissal ï not a new trial.

For example, in Teca, Inc. v. WM-Tab, Inc., it was clear to an *en banc* Fourth District that the underlying judgment for the plaintiff had to be reversed because the plaintiff failed to prove its breach of contract claim at trial. 726 So. 2d 828 (Fla. 4th DCA 1999) (*en banc*). The issue that prompted *en banc* review was whether a new trial was justified or judgment should be entered in favor of the defendant on remand. Id. Finding a plaintiff is not entitled to ña second bite at the appleò where there was no proof at trial of the correct measure of damages, the Fourth District reversed and remanded with instructions to enter judgment in favor of the defendant. Id.

Many other courts have followed the rationale of Teca. For instance, in Bayley Prods., Inc. v. Cole, the lower court entered judgment for the plaintiff arising from a claim for tortious interference. 720 So. 2d 550 (Fla. 4th DCA 1998). The Fourth District reversed that judgment and remanded for a directed verdict for the defendant because the plaintiff failed to prove the tortious interference resulted in damages. Id. Clearly, the Fourth District could have chosen to give the plaintiff a second bite at the apple, i.e. a second trial, to prove

damages, but it declined to do so. Id.

Likewise, in Church of Scientology v. Blackman, the Fourth District reversed a final judgment for damages arising from a defamation claim. Concluding there was no evidence on the element of domination, the Blackman court did not grant a new trial, but remanded with instructions to enter judgment for the defendant. 446 So. 2d 190 (Fla. 4th DCA 1994).

Correa does not want to beat a dead horse, but the examples go on and on. See Blanton v. Baltuskouis, 20 So. 3d 881 (Fla. 4th DCA 2009); Hosp. Corp. of America v. Assocs. in Adolescent Psychiatry, S.C., 605 So. 2d 556 (Fla. 4th DCA 1992) (ñThe trial court erred in denying the motion for a directed verdict. We therefore reverse and remand for entry of a judgment in favor of appellant.ò); Seibert v. Bayport Beach and Tennis Club Assôn, Inc., 573 So. 2d 889 (Fla. 2d DCA 1990) (ñWe find that the trial court erred by failing to grant Seibertôs motion for a directed verdict. We, accordingly, reverse and remand for the entry of a judgment in favor of Seibert.ò); Gerlach v. Trepanier, 440 So. 2d 73 (Fla. 5th DCA 1983).[9]

[9] In the interests of candor, Correa must note that Guerrero court reversed and remanded for a new trial. The facts in Guerrero, however, are clearly distinguishable. In that case, the foreclosing plaintiff asserted it had the original note in the lawyerôs safe but, the day before trial, was surprised to find the note was missing. As the note was not lost until one day before trial, no claim to re-establish the lost note was pled. The lower court re-instated the lost Note and

Under this precedent, U.S. Bank should not get a new trial where it failed so miserably to prove its case at the first trial.

The second reason this Court should remand with instructions for entry of an involuntary dismissal (as opposed to a new trial) is the complete and utter failure of U.S. Bank to prove its case despite countless opportunities to do so. This is not intended to sound harsh, but, respectfully, there is no way around it. U.S. Bankôs prosecution of this case, or lack thereof, was an abomination ï a mockery of the court system and an abuse of the court and its personnel.

U.S. Bank allowed this case to remain pending from October, 2007 until 2012 even though Correa was, at all times, a *pro se* homeowner. The record reflects Correa put up little opposition to the lawsuit, yet U.S. Bank never set a hearing on a motion for summary judgment. In fact, the only reason the case *finally* went to trial is because the lower court, *sua sponte*, kept ordering such. R. Even then, U.S. Bank repeatedly sought (and obtained) continuances of trial, failed on more than one occasion to show up for a court-ordered hearing, and, in

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granted final judgment and the Third District reversed - solely because the plaintiff did not prove the mortgagor would be protected in the event of a claim by a third party. 37 Fla. L. Weekly D 692. In the case at bar, by contrast, U.S. Bank knew the Note was lost from the inception of the case, yet introduced virtually no evidence to re-establish it at trial. Unlike Guerrero, this case was not a pleading issue that arose one day before trial ï this case was a plaintiffôs complete and utter failure to prove the elements of its case despite years of litigation, multiple continuances, and help from the judge at trial.

February of 2012, failed to even bring a witness to trial. R.

When trial finally proceeded in March, 2012, U.S. Bank was so unprepared it did not even realize it was obligated to prove its entitlement to re-establish the lost Note until the lower court reminded it to do so.[10] R. Then, even with the trial court judge helping it along, U.S. Bank did not offer the Note into evidence, did not file a copy of the Note in the court file, and offered no proof whatsoever on almost (if not every) element necessary to re-establish a lost Note under Fla. Stat. 673.3091. Tellingly, it took the courtôs *sua sponte* suggestion that U.S. Bank re-open its case for U.S. Bank to prove it sent the requisite pre-suit default letter. R.

Respectfully, enough is enough. On these facts, U.S. Bank should not be entitled to a new trial. By ruling accordingly (and stating so in a written opinion), perhaps this Court will make foreclosing plaintiffs realize they cannot get away with prosecuting their cases in such a dilatory, haphazard, cavalier fashion (not to mention constantly putting trial courts in the position of having to *sua sponte* prosecute stale lawsuits, *sua sponte* order trials in four-year-old cases, and deal

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[10] The undersigned is not trying to sound critical of the lower court judge. That said, Florida law prohibits a judge from helping a plaintiff prove its case at trial. See Blackpool Assocs., Ltd. V. SM-106, Ltd., 839 So. 2d 837 (Fla. 4th DCA 2003); Evans v. State, 831 So. 2d 808 (Fla. 4th DCA 2002); Lee v. State, 789 So. 2d 1105 (Fla. 4th DCA 2001); Asbury v. State, 765 So. 2d 965 (Fla. 4th DCA 2000). Although Correa did not seek judicial disqualification (the issue in these cases), her point is that U.S. Bank received more help from the judge than it should have received ï yet it still failed to prove its case.

with one continuance after another merely because the plaintiff decides not to show up for hearings or trials in its own case).[11] This Court should reverse and remand with instructions to enter an involuntary dismissal.

B. The Notice of Non Jury Trial was not signed by the court and gave Correa less than 30 daysô notice of trial.

Fla.R.Civ.P. 1.440 sets forth the procedure in which trial courts shall set a case for trial. Subsection (c) provides:

> If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial.

In Bennett v. Continental Chemicals, Inc., an *en banc* First District reversed a final judgment where the lower court had not complied with Rule 1.440. Concluding ñstrict compliance with rule 1.440 is mandatory,ò the court explained:

> There is no excuse for failing to follow the rule. Some judges are equally careless about requiring an order setting the action for trial. Apparently they believe the rule is directory, rather than mandatory. Such is not the case. The Rules Committee on two occasions asked the Supreme Court to make the rule directory in nonjury actions so that a notice of trial could be served by the attorneys. The court refused to do so, saying from the bench that trial courts should take charge of their calendars and administer them rather than permitting the attorneys to do so.
>
> [Rule 1.440] is absolutely unambiguous in its requirement that

[11] The undersigned assures this Court that such a ruling would be applauded by virtually every circuit court judge in Florida. That might sound inappropriate or misplaced, but the extent to which foreclosing plaintiffs refuse to prosecute the cases they have filed, and the frustration this causes on overburdened court personnel, is, in the undersignedôs experience, difficult to overstate.

> the setting of trial be done by *order of the court* properly served on the defendants. That rule contains no authority for setting trial without prior notice to opposing counsel at least thirty days prior to the trial date. The rule does not sanction the setting of trial by an opposing party through mere service of a notice in fewer than thirty days.

492 So. 2d 724, 727-728 (Fla. 1st DCA 1986) (*en banc*).

Many other decisions have followed the bright-line approach set forth in Bennett. For instance, in 1987, the Fifth District reversed a final judgment and explained:

> The notice was defective because the order was sent by the opposing attorney rather than the court and did not give the requisite thirty-days notice of trial.

Lauxmont Farms, Inc. v. Flavin, 514 So. 2d 1133, 1134 (Fla. 5th DCA 1987); see also S.W.T. v. C.A.P., 595 So. 2d 1084, (Fla. 4th DCA 1992) (ñ[Rule 1.440(c)] provides that trial shall be set not less than thirty days from service of the notice for trial. The trial courtôs failure to comply with the mandatory language of rule 1.440(c) requires us to reverse and remand this case for a new trial.ò).

Bennett, Lauxmont Farms, and S.W.T. are directly on point. Here, as in those cases, the lower court failed to give Correa thirty daysô notice of the trial. In fact, the trial court did not even sign an Order setting the trial, leaving that up to counsel for U.S. Bank.

The Notice of Non Jury Trial was signed by counsel, and served on February

27, 2012, just 21 days before the March 19, 2012 trial. Established precedent requires that the Final Judgment of Foreclosure be reversed.

The courtôs failure to comply with Rule 1.440 is not subject to any sort of ñharmless errorò standard. See cases, supra. Even if it were, the prejudice to Correa was overwhelming. As the trial transcript reflects, Correa had retained an attorney to defend her interests at trial. However, given the short notice, that attorney was unavailable due to a scheduling conflict. Undoubtedly, this is the sort of problem that Rule 1.440 was designed to prevent. Reversal is required.

CONCLUSION

In light of the foregoing, this Court should reverse the Order on review and remand with instructions to involuntarily dismiss this case. Alternatively, this Court should reverse and remand for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Alan Sandler, Esq., Morris, Hardwick & Schneider, 5110 Eisenhower Blvd., Suite 120, Tampa, FL 33634 on this ____ day of May, 2012.

_____

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant Initial Brief complies with the font requirements of Fla.R.App.P. 9.210(a).

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Mark P. Stopa, Esquire