

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA

SUNTRUST BANK,

Plaintiff,

Case No. 2011-012089-CI

v.

Division: 019

MICHAEL F. WILLIAMS and  
DONNA A. WILLIAMS, et al.,

Defendants,

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**MEMORANDUM OF LAW REGARDING SUBSTITUTION OF PARTY PLAINTIFF**

Defendants, MICHAEL F. WILLIAMS and DONNA A. WILLIAMS, by and through undersigned counsel, hereby submit this Memorandum of Law on the issue of the substitution of a party plaintiff in foreclosure cases, and would show:

1. At the March 25, 2013 hearing in this case, this Court expressed surprise at the undersigned's procedure of objecting to *ex parte* Orders substituting party plaintiffs in foreclosure cases. This memo serves to apprise the Court of the reasons for the undersigned's position on this issue.

2. The undersigned has three concerns pertaining hereto – procedural, substantive, and pragmatic.

3. As a matter of procedure, a “notice of hearing” is expressly required under Rule 1.260(c) (following the same procedure as 1.260(a), which requires service of a notice of hearing). See Metcalfe v. Lee, 952 So. 2d 624, 629 (Fla. 4th DCA 2007); Schaeffler v. Deych, 38 So. 3d 796 (Fla. 4th DCA 2010). Hence, all parties are entitled to be heard before the Court rules.

4. Substantively, the undersigned's concern is with the content of these Orders. In the undersigned's experience, Orders substituting party plaintiff are sometimes submitted in a

manner which suggests that the new Plaintiff is the “correct” or “proper” Plaintiff. This language might seem innocent to the Court, as it seems obvious to all involved that the intent is merely to allow the new Plaintiff to assert claims. Incredibly, however, the Third District recently issued a 2-1 decision which prevented the homeowner from challenging the new plaintiff’s standing at trial because of an interlocutory order substituting party plaintiff. See Bank of N.Y. Trust Co., N.A. v. Rodgers, 79 So. 3d 108 (Fla. 3d DCA 2012). Candidly, those in the industry all know that said Order was entered *ex parte* and was merely intended to allow the new plaintiff to proceed with the claims, but the Third District seemed to think the language of the Order prevented the homeowner from asserting defenses *vis a vis* standing. Respectfully, it would be terrible to have substantive rights – particularly standing, perhaps the biggest issue in a foreclosure case – adjudicated *ex parte* and without a hearing. Hence, the undersigned is careful to ensure that such Orders, if entered, do not contain any language which might be deemed to prevent a homeowner from challenging that new plaintiff’s standing later in the case.

5. Another substantive concern with the entry of *ex parte* Orders substituting the party plaintiff is that such operates as an end-around of the verification requirements in Rule 1.110(b). Where the purpose of the Rule is to ensure all plaintiffs verify their pleadings before proceeding on the merits (including the allegation that plaintiff is the “owner and holder”), shouldn’t new plaintiffs be forced to sign a pleading in this same manner? Unfortunately, *ex parte* Orders substituting the plaintiff are a convenient way for plaintiffs to shirk this obligation.

6. The undersigned’s other concerns with these *ex parte* Orders are what the undersigned characterizes as pragmatic concerns. For instance, suppose the homeowner has not yet filed an Answer and has a motion to dismiss pending. If the homeowner is asserting that the original Plaintiff did not state a cause of action, how can a new plaintiff enter the case, *ex parte*, without filing an Amended Complaint? If that happens, is the Motion to Dismiss moot? One would think not, as the defect in the Complaint still exists. In fact, the pleading problem is now

even worse, as there are no allegations by that new Plaintiff that it is the “owner and holder.” Instead, there are allegations that an entirely different entity – not the plaintiff – is the “owner and holder.” Candidly, the undersigned struggles to see how a new Plaintiff can state a cause of action when the Complaint says, on its face, that the old Plaintiff is the “owner and holder” of the Note and Mortgage. While there is no case law or procedural rules on point, that is precisely the problem. The Rules do not contemplate these sorts of actions. That is why, in this circumstance, i.e. when a motion to dismiss is outstanding and the plaintiff wants to substitute, the undersigned respectfully submits that the appropriate approach is for that new Plaintiff to file an Amended Complaint. That way, the homeowner can respond anew, there is one set of pleadings directed to allegations by that Plaintiff, with a verified Complaint.

7. If a homeowner has already filed an Answer, yet the Plaintiff is permitted to substitute *ex parte*, that fundamentally alters the case yet does so without any change to the pleadings. The Complaint will still say the original Plaintiff is the “owner and holder,” and the Answer will admit or deny same, yet a new Plaintiff will exist without any pleading, allegation, or verification as to its status as “owner and holder.” Again, the undersigned struggles to see how the new plaintiff could state a cause of action, much less prevail, when the operative complaint alleges an entirely different entity is the “owner and holder.”

8. Other problems arise in this same context. For instance, is the case still at issue under 1.440 once the new Plaintiff has substituted *ex parte*? Can trial be set? From a defense perspective, it would be fundamentally unfair to allow a Plaintiff to so fundamentally change the case, particularly *ex parte*, yet immediately proceed to trial. Unfortunately, in the undersigned’s experience, that is often what happens, as plaintiffs’ counsel, when faced with the prospect of trial, suddenly try to change the plaintiff *ex parte*.

9. The undersigned respectfully submits that the appropriate way to deal with these problems – at least in contested cases – is to have hearings on motions to substitute party

plaintiffs and to compel the filing of an amended, verified complaint. On uncontested cases, the dynamic may differ, but the problems caused by acting *ex parte* without a new pleading in contested files seem too great to overlook.

10. In light hereof, Defendants and their undersigned counsel respectfully submit that this Court should exercise restraint in entering substitutions of plaintiffs in foreclosure cases, particularly on an *ex parte* basis, and that the Order entered in this case should be vacated.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to [eservice@lenderlegal.com](mailto:eservice@lenderlegal.com), Lender Legal Services, LLC, on this 27th day of March, 2013.

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