Third District Court of Appeal

State of Florida, January Term, A.D. 2012

Opinion filed January 18, 2012.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-1852
Lower Tribunal No. 05-426

The Bank of New York Trust Company, N.A., as successor to JPMorgan Chase Bank, N.A., as trustee,
Appellant,

vs.

George H. Rodgers and Caroline J. Rodgers,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Margarita Esquiroz, Judge.

Florida Default Law Group and Erin M. Berger, for appellant.

Mortimer M. Kass and Roberta Kohn, for appellee Caroline J. Rodgers.

Before SHEPHERD and EMAS, JJ., and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

The plaintiff, designated as the Bank of New York Trust Company, N.A., as successor to JPMorgan Chase Bank, N.A., as trustee, the alleged holder of a note and mortgage, seeks review of a final judgment in favor of the defendants mortgagors borrowers in an action to re-establish the note (which was lost, having disappeared in the bowels of the clerk's office after being filed in a prior proceeding) and to foreclose the mortgage. The judgment was entered upon granting a defense motion for involuntary dismissal at the conclusion of the plaintiff's case in a non-jury trial. It specifically stated that it was required "as a result of Plaintiff's failure to establish its status as the owner and holder of the applicable Note and Mortgage with standing to bring suit." We disagree and reverse:

1. In the first place, the decision is directly contrary to an earlier, previously unopposed and subsequently unchallenged order, which substituted the present appellant as the party-plaintiff and provided that:

> The Bank of New York Trust Company, N.A., as successor to JPMorgan Chase Bank, N.A., as trustee, is the real party in interest and proper Plaintiff in this action, and;
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> The Bank of New York Trust Company, N.A., as successor to JPMorgan Chase Bank, N.A., as trustee, is hereby substituted for JPMorgan Chase Bank, formerly known as Chase Manhattan, as trustee, residential funding corporation, as attorney in fact, as the proper Plaintiff in this action and the style is amended as reflected on this order.

Compare Mazine v. M&I Bank, Case No. 1D10-2127, n.1 (Fla. 1st DCA July 22, 2011), where the court pointed out that "[a]lthough M&I Bank filed a motion to substitute a party by which M&I Marshall and Isley Bank was to be substituted for M&I Bank, the trial court never acted upon this motion." [e.s.]. Because there was no denial or defense raised in defendants' pleadings concerning this finding, the judgment under review cannot be permitted to stand for that reason alone. See Fla. R. Civ. P. 1.140 (h)(1); Mutchnik, Inc. Constr. v. Dimmerman, 23 So. 3d 809 (Fla. 3d DCA 2009) (concluding that the trial court erred in basing its judgment on issue not raised in the pleadings); Kissman v. Panizzi, 891 So. 2d 1147 (Fla. 4th DCA 2005) (lack of standing is waivable affirmative defense); Krivanek v. Take Back Tampa Political Committee, 625 So. 2d 840 (Fla. 1993) (same); Sobel v. Jefferson Stores, Inc., 459 So. 2d 433, 434 n.1 (Fla. 3d DCA 1984) (quoting Florida Rule of Civil Procedure Rule 1.110(c)).

2. In addition, the record adequately independently demonstrates the capacity of the appellant to maintain the action (a) as the owner of the note as established by an uncontradicted chain of self-authenticating assignments, see Riggs v. Aurora Loan Servs., LLC, 36 So. 3d 932 (Fla. 4th DCA 2010), and if, arguendo, this is not the case (b) as the real party in interest or (c) its agent. See Fla. R. Civ. Pro. 1.210(a); Juega ex rel. Estate of Davidson v. Davidson, 8 So. 3d

488 (Fla. 3d DCA 2009); Mortgage Elec. Registration Sys., Inc. v. Revoredo, 955 So. 2d 33 (Fla. 3d DCA 2007).

There is also no question that the legal prerequisites of establishing a lost note were fully met below. See Gutierrez v. Bermudez, 540 So. 2d 888 (Fla. 5th DCA 1989); Young v. Charnack, 295 So. 2d 665 (Fla. 3d DCA 1967).

The judgment under review is therefore reversed for a new trial.

Reversed and remanded.

EMAS, J., concurs.

SHEPHERD, J., dissenting.

This case is illustrative of the consequences of a breakdown of a property transfer system. Because of the breakdown in this case, I would affirm the involuntary dismissal of the Bank of New York's (the Bank) attempted foreclosure action in this case.

The Bank's action is based upon a standard FNMA/FHLMC promissory note and mortgage executed on June 25, 1999, by George H. Rodgers and Caroline J. Rodgers to Metropolitan Mortgage Co., in its capacity as the originating lender on the Rodgers' residential property. The action was initiated on January 5, 2005, by JP Morgan Chase Bank, formerly known as Chase Manhattan, as Trustee, Residential Funding Corporation, as Attorney in Fact (JP Morgan Chase). The sole witness offered by the Bank to prove the Bank's ownership of the promissory note and mortgage, and the default on the loan, was Annassa Blackman, Business Relationship Manager for Litton Loan Services, the servicing agent for the loan since January 30, 2002.[1] Ms. Blackman testified from a file she brought with her to trial, but it is clear she was not the custodian of those records, and Bank counsel did not attempt to prove otherwise. Despite vigorous objection by counsel for the

[1] The Bank also called Caroline Rodgers as an adverse witness. Needless to say, she was unable to offer any evidence pertinent to the central issues to the case. She contended in her testimony that the Bank (through its servicer) was at fault in the matter by improperly refusing to accept payments tendered on the mortgage loan.

Rodgers, the trial court nevertheless permitted Ms. Blackman to testify as to the contents of the file.

The file contained neither the original note nor the original mortgage. Ms. Blackman admitted in her testimony she "[had] no knowledge of the last [entity] who had it or anything else about the original note." She thought the note was lost by counsel during the course of a prior foreclosure action filed by JP Morgan Chase in January 2003, but upon being shown a copy of the complaint filed in the 2003 foreclosure action, acknowledged that action, like the present one, also contained a claim for re-establishment of lost note.[2, 3] Thus, it cannot be said, as

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[2] A full sense of Ms. Blackman's cluelessness concerning the facts of this case can be gleaned from the following exchange between her and the Rodgers' counsel on cross-examination:

> Q. Okay, as far as the copy of the note is concerned, to your knowledge do you know anybody who held the note whether or not any of the people named in this action ever held a note to your knowledge?
>
> [Objection sustained. Counsel nonetheless continuing . . . .]
>
> Q. Whether Fairbanks Capital Corporation, Residential Funding Corporation[,] J.P. Morgan, New York Bank of New York [sic] ever held the original note?
>
> A. I do not have personal knowledge of the original note.
>
> . . . .

the majority asserts, that the note "disappeared in the bowels of the clerk's office after being filed in a prior proceeding."

Nor do the copies of the transfer documentation in the file brought by Ms. Blackman to the trial conclusively resolve the central issue in this case. The Rodgers executed the promissory note and mortgage on June 25, 1999. There can be no question but that Metropolitan Mortgage Co. had the original documents at that time. The copy of the original note, admitted into evidence by the trial court over the Rodgers' objection, reflects it was endorsed on a date unknown by Metropolitan Mortgage Co. to Fairbanks Capital Corporation, and then on May 14, 2001, Fairbanks Capital executed an Assignment of Deed of Trust, purporting to assign both the note and mortgage to JP Morgan Chase. A copy of an allonge, purportedly attached to the promissory note, indicates that on some unknown date the promissory note was endorsed by Fairbanks Capital Corporation to Residential Funding Corporation, and on some later date from Residential Funding to JP Morgan Chase, as Trustee. Absent testimony from a witness with knowledge, it

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> Q. Okay. So you have no knowledge [who] was the last who had it or anything else with regard to the original note? You have no knowledge about the original note, is that correct?
>
> A. That's correct.

[3] According to Ms. Blackman, the Rodgers brought the loan current sometime in 2004, upon which JP Morgan Chase voluntarily dismissed the 2003 action. The present foreclosure action was filed in 2005.

cannot be determined exactly when, between June 25, 1999, and the date of the filing of the foreclosure complaint in this case, the promissory note was lost or by what entity.

Section 673.3091 of the Florida Statutes (2004), titled "Enforcement of lost, destroyed, or stolen instrument," provides as follows:

> (1) A person not in possession of an instrument is entitled to enforce the instrument if:
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> (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.

As has been the case in many recent foreclosure actions—see, e.g., Mazine v. M & I Bank, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (reversing final judgment of foreclosure where the bank failed to prove it holds the note and mortgage in question); Gee v. U.S. Bank Nat'l Ass'n, 72 So. 3d 211, 214 (Fla. 5th DCA 2011) (reversing final summary judgment of foreclosure where U.S. Bank neither tendered original note nor offered any evidence of its whereabouts at summary

judgment hearing); Servedio v. U.S. Bank Nat'l Ass'n, 46 So. 3d 1105, 1107 (Fla. 4th DCA 2010) (reversing final summary judgment of foreclosure where record on appeal contained neither original note nor any other evidence that U.S. Bank owned or held the note); U.S. Bank Nat'l Ass'n v. Kimball, 27 A. 3d 1087, 1092 (Vt. 2011) (dismissing foreclosure complaint on basis trial court properly concluded U.S. Bank lacked standing to show it was holder of note at time complaint filed); Kondaur Capital Corp. v. Hankins, 25 A. 3d 960, 962 (Me. 2011) (reversing summary judgment where party did not hold note or mortgage at time complaint was filed)—the Bank failed to prove, and may be unable to prove, who owns the promissory note and mortgage in this case. Nor is this the first time in recent memory the Bank of New York has found itself in this predicament in our appellate courts. See Verizzo v. Bank of N.Y., 28 So. 3d 976, 978 (Fla. 2d DCA 2010) (reversing summary judgment of foreclosure in favor of the Bank of New York just last year where, as is equally true in the case before us, "[n]othing in the record reflects assignment or endorsement of the note by JP Morgan Chase Bank to the Bank of New York . . ."). The Bank should receive the same result in this district court of appeal this year as it did on nearly identical facts in our sister Second District Court of Appeal last year.

It is apodictic there can be no cause of action to foreclose a mortgage unless we know where the paper is and that it actually represents something. There is

much “sand in the gears” of our property transfer system in these times. However, we cannot bend the rules. A person seeking to enforce an instrument conveying an interest in real property must demonstrate he has directly or indirectly acquired ownership of the instrument. The majority errs by not insisting upon this fundamental precept in this case.

I would affirm the decision of the trial court.