

FLA APP CT HOLDS EVIDENCE OF LOST NOTE AND PRIOR SERVICER'S RECORDS SUFFICIENT

The Third District Court of Appeal, State of Florida, recently reversed a trial court's dismissal of foreclosure proceedings due to a ruling that a lost note was not properly re-established, holding that the trial court should have entered judgment for the plaintiff mortgagee because the plaintiff mortgagee met the statutory requirements for re-establishing the lost note, and because the trial court admitted business records without objection into evidence showing the note was in default.

A copy of the opinion is available at: [Link to Opinion](#)

The borrower signed a note and mortgage in 2007 in favor of lender's nominee. The borrower defaulted in May of 2008, and in September of 2008, the nominee assigned the note and mortgage to a loan servicer. The loan servicer sued to foreclose the mortgage in 2009 and the borrower moved to dismiss for lack of standing, answered and counterclaimed. The note and mortgage were assigned and the new holder was substituted as plaintiff.

The case went to trial in 2013. At trial, the plaintiff mortgagee called its employee as a witness, who authenticated the business records of the plaintiff mortgagee's predecessor in interest. The witness also testified that, although he did not know how the note was lost, it was in the original lender's possession when the loss occurred, the loss was not the result of a transfer by the bank or lawful seizure, and no one else tried to enforce the note. A copy of the note with a blank endorsement from the original lender, along with copies of the mortgage, default letter and payment history, were admitted into evidence.

As the plaintiff mortgagee's case in chief was coming to a close, a colloquy between the judge and all counsel ensued regarding the 2013 amendment to section 702.015, Florida Statutes, and the Fourth District Court of Appeal's decision in *Yang v Sebastian Lakes Condominium Association, Inc.*, which resulted in the entry of final judgment in the borrower's favor.

On appeal by the plaintiff mortgagee, the Third District began its analysis by discussing the requirements for standing and re-establishing a lost note contained in section 674.3091, Florida Statutes. The Court found that the

plaintiff mortgagee had proven that it had standing to foreclose by documentary evidence and its witness' testimony.

Specifically, the witness identified copies of the note and mortgage and they were admitted into evidence without objection. The trial court also admitted into evidence the default letter and, although borrower's counsel objected, it was based only on lack of proof the borrower ever received the letter. The payment history was also admitted without objection, which showed the last payment on the account was made in April of 2008.

The Third District also pointed out that the plaintiff mortgagee's witness testified that the note was lost while in the possession of the original lender and not because it was transferred or lawfully seized. The Court also pointed out that the borrower's counsel failed to move for involuntary dismissal.

The Court held that the trial court incorrectly relied upon the recent amendment to section 702.015, Florida Statutes, which requires that an affidavit be attached to the foreclosure complaint. The Court also held that the trial court incorrectly relied upon *Yang v Sebastian Lakes Condominium Association, Inc.*, 123 So. 3d 617 (Fla. 4th DCA 2013), in which the Fourth District held that a foreclosing homeowners association failed to prove the authenticity of the assessment account ledgers showing the default and amount due for assessments because the new management company plaintiff simply carried over the balance from a prior management company, and its witness could not testify as to the accuracy of that balance.

First, the Third District held, the amendment to section 702.015 only applies to cases filed after July 1, 2013 and the case at bar was filed in 2009.

Second, the *Yang* case was distinguishable because it involved the foreclosure of a homeowners association lien, the homeowners challenged the accuracy of the management company's business records, and the court refused to admit the account ledgers into evidence because the association's new management company could not verify the accuracy of the carried-over balance. By contrast, in the case at bar, the plaintiff's witness testified that he was familiar with the borrower's account, which had been kept in the ordinary course of business by the predecessor in interest, and, crucially, the account records were admitted without objection as to their accuracy and the borrower voluntarily withdrew her affirmative defenses and counterclaim before trial.

Because the plaintiff mortgagee met the statutory requirements for re-establishing a lost note, and because the business records in evidence showed nonpayment of the note, the Third District concluded that the trial court should have entered judgment in plaintiff mortgagee's favor and against the borrower. Accordingly, the Court reversed the final judgment in favor of the borrower and remanded for further proceedings.