

FLORIDA APPELLATE COURT PROVIDES GUIDANCE ON PROOF REQUIRED TO ENFORCE LOST NEGOTIABLE INSTRUMENTS

As Florida works through its foreclosure backlog, many of the cases remaining are those with complications, for example a lost promissory note. Such issues are not insurmountable, but do require an attention to detail. For example, in *Boumarate v. HSBC Bank USA, N.A.*, 5D14-1379, 40 Fla. L. Weekly D1899a (Fla. 5th DCA August 14, 2015), Florida's Fifth District Court of Appeal provided guidance on the proof required by Florida's UCC provision for enforcing lost promissory notes. Specifically, Florida Statutes section 673.3091 provides that:

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 person's 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.

In *Boumarate*, the defendants argued that HSBC failed to tender the proof required by section 673.3091 because: 1) HSBC failed to explain the precise circumstances surrounding the loss of the note, and 2) HSBC failed to prove it was entitled to enforce the note when it was lost.

The Fifth DCA's holding on the first issue was favorable to the lender. The Court held there is no requirement under Fla. Stat. 673.3081 to prove exactly how a lost note became lost. This holding is helpful because the details of exactly how a note became lost are often something of a mystery. Often times all that is known is that the note is not where it should be and a diligent search has failed to turn it up. The holding in *Boumarate* ensures that this reality does not preclude enforcing those lost instruments.

The Fifth DCA did find, however, that HSBC failed to prove it was entitled to enforce the note when the loss of possession occurred. As a result, the Court reversed the trial court's entry of final judgment. The only evidence HSBC presented on this issue at trial was a copy of the lost unendorsed note, which showed it was payable to a party other than HSBC, and HSBC's testimony that the note was in HSBC's possession when it was lost. The Court held that HSBC's mere possession of a note which remained payable to another party was not sufficient to show that HSBC was entitled to enforce the note. Presumably, HSBC's evidence would have been sufficient if it was coupled with proof of an endorsement in blank at the time the note was lost. The Fifth DCA did offer examples of other evidence a litigant might use to show it was entitled to enforce a lost negotiable instrument, including an assignment or affidavit of ownership. The opinion in *Boumarate* shows that when proceeding Section 673.3081, it is important to be mindful of proving how and why the plaintiff was entitled to enforce the note when the loss of possession occurred, so that any judgment obtained can survive appeal.