PROOF REQUIRED TO ENFORCE PROMISSORY NOTE SPECIALLY INDORSED TO ANOTHER

In *Bank of New York Mellon Trust Company v. Dennis M. Conley*, 4D14-2430 (Fla. 4th DCA Jan. 6, 2016), Florida's Fourth District Court of Appeal clarified the methods by which a foreclosure plaintiff can seek to enforce a note indorsed to another party. Specifically, the court held that, "[w]here a bank is seeking to enforce a note which his specially indorsed to another, the bank is a nonholder in possession." The court went on to hold that **in order to prove standing as a non-holder the plaintiff must provide proof of an effective transfer, purchase of the debt, or a valid assignment.**

In *Conley*, the court held the foreclosing plaintiff did none of these things. Specifically, the court held that "there is nothing in the record connecting the indorsee, JP Morgan Chase Bank, to the Plaintiff, the Bank of New York Mellon." The only evidence proffered by the Plaintiff was an agreement that established that "JP Morgan Chase & Co." became trustee and sold its interest to Bank of New York Mellon. In a footnote, the court notes that there was an assignment of mortgage from MERS to the Plaintiff. However, the court found this evidence lacking because "according to the testimony and the PSA, MERS had no interest to assign after 2004 when the loan was placed in the trust." The exact content of this testimony is not set forth in the opinion.

This case reinforces the primacy of the note and indorsements in Florida case law regarding standing to foreclose, and the difficulties faced when the note was transferred by means other than indorsement. Lenders should be cognizant that such transfers must be well documented. Foreclosure practitioners should be aware that evidence which documents the complete chain of transfers should be used at trial when establishing standing as a non-holder.

More often than not the evidence necessary to establish standing as a non-holder will require more than just the pooling and servicing agreement. The opinion in *Conley* is the latest in a series of opinions from the Fourth DCA to find against Plaintiffs where the pooling and servicing agreement was admitted, but the document referenced predecessors to the current players acting as trustee, servicer, custodian, etc. *See also Murray v. HSBC Bank USA,* 157 So. 3d 355 (Fla. 4th DCA 2015). If such evidence cannot be located, it is best to seek to procure the necessary indorsements before filing

the foreclosure so that standing can be demonstrated by the more simple proofs necessary to establish standing as a holder.

A copy of the opinion can be found here.