Appeal No. 5D09-4035

IN THE 5TH DISTRICT FLORIDA COURT OF APPEALS

Gregory Taylor

Appellant

v.

Deutsche Bank National Trust Company
as Trustee for FFMLT 2006-FF4, Mortgage Pass-Through Certificates, Series 2006-FF4

Appellee

APPEAL IN CAUSE NO. 05-2008-CA-065811

IN THE CIRCUIT COURT OF BREVARD COUNTY, FLORIDA

David E. Silverman presiding

APPELLANTS' OPENING BRIEF

George M. Gingo, FBN 879533
P.O. Box 838
Mims, Florida 32754
321-264-9624 Office
321-383-1105 Fax
ggingo@yahoo.com

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STATEMENT OF THE CASE AND FACTS

This appeal is taken from the Circuit Court's decision to render Summary Final Judgment against the Appellant. The Appellate Court of Florida has jurisdiction to consider the issues raised in this appeal under authority of the Florida Rules of Appellate Procedure, Rule 9.130 et seq.

The nature of the case below was Appellee's Complaint to foreclose the residential real property owned and occupied by the Appellant, Gregory Taylor. (R. I/2) Appellant's First Amended Answer challenged Appellee's standing in affirmative defenses and an incorporated Motion to Dismiss. (R. I/111-112, 117, 118-119, 121-124)

On October 9, 2009, a hearing on the Appellee's Motion for Summary Final Judgment was held. (R. I/166) The Appellee offered in evidence the promissory note, the mortgage instrument and an assignment of mortgage. (R. I/62-87) Appellant's Response in Opposition to Appellee's Motion for Summary Final Judgment (which was also identified as a cross-motion for summary judgment) stipulated that this evidence was not in dispute. Appellant contended that the dispute was as to what that evidence actually proved – that being that Appellee was not entitled to enforce the promissory note against Appellant.[1] (R. 174-175) This

1 The clerk's Index to Record on Appeal has this document as being filed subsequent to the Summary Final Judgment of Foreclosure. That is incorrect as

argument in the Appellant's Response in Opposition to the Motion for Summary Final Judgment was not novel. That document referenced that this argument had been previously raised in the Motion to Dismiss which was incorporated within the First Amended Answer. (R. 175) On October 9, 2009, Judge Silverman granted Summary Final Judgment of Foreclosure in Appellee's favor. (R. 166-172)

Appellee made the following three claims in it's Complaint: 1) “On or about December 21, 2005, a promissory note was executed and delivered in favor of Plaintiff, or Plaintiff's assignor, in the original principal amount of $168,000.00.” (R. I/2, para. 2 of complaint); 2) “The Plaintiff is the present owner and constructive holder of the promissory note and Mortgage.” (R. I/2, para. 2 of complaint); and, 3) “The above-described Note and Mortgage were assigned to Plaintiff. The assignment is attached as Exhibit “C”.” (R. I/3, para. 3 of complaint)

On November 26, 2008, Appellant filed an Answer which substantially denied the foreclosure allegations. (R. I/49-50) On December 9, 2008, Appellee filed a Motion for Summary Final Judgment. (R. I/51) In support of the Motion for Summary Final Judgment, the Appellee relied solely upon the promissory note, the mortgage instrument and the assignment of mortgage to support its' claim that:

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the file stamp on the document indicates it was filed at 8:27 a.m. on October 9, 2009. (R. I/174) This was prior to the hearing on the motion which was noticed as set for 8:45 a.m. on October 9, 2009. (R. I/149)

> The Note and Mortgage are in default. Moreover, Plaintiff owns and holds the Note and Mortgage and is entitled to recover its principal, interest, late charges, costs, attorney's fees, and other expenses, all of which are more fully set forth in the supporting affidavits to be filed with the court.
> (R. I/52, para. 6)

On February 23, 2009, the Appellee filed the original promissory note, mortgage instrument and the assignment of mortgage. (R. I/62-87) The promissory note states:

> 1. BORROWER'S PROMISE TO PAY
> In return for a loan that I have received, I promise to pay U.S. $168,000.00 (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is FIRST FRANKLIN A DIVISION OF NAT. CITY BANK OF IN. I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder".
> (R. I/63)

Sections 7 and 9 of the promissory note provide that payments are due to the Lender until the Lender transfers the note, at which time payments shall be made to the "Note Holder", who may enforce its rights under the note. (R. I/65) The promissory note was never *transferred*, as evidenced by the lack of an indorsement on the promissory note. (R. I/66-67)

Though the Appellee is Deutsche Bank National Trust Company, the promissory note is payable to a different person who is specifically identified in the promissory note as "First Franklin A Division of Nat. City Bank of IN"

(hereafter, “First Franklin”). The promissory note was not indorsed by anyone, including First Franklin.[2] (R. I/66) Additionally, the promissory note did not carry an allonge.[3]

The mortgage instrument provides that Mortgage Electronic Registration Systems, Inc. “MERS” is the mortgagee and that it is a separate corporation that is acting solely as a nominee for the Lender and Lender's successors and assigns. (R. I/68, para. (C) and (D)) The mortgage instrument does not identify MERS as a

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2 Florida Statutes section 673.2041 (1) provides that the term "indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument. Appellant is the “maker” of the promissory note pursuant to Florida Statutes section 673.1031(1)(e) which provides that "Maker" means a person who signs or is identified in a note as a person undertaking to pay.” The terms “drawer” and “acceptor' do not apply in this case as those terms only apply to a “draft” pursuant to Florida Statutes section 673.1031(1)(a) & (c). Florida Statutes section 673.1041(5) provides that “An instrument is a "note" if it is a promise and is a "draft" if it is an order.”

3 For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument. (§ 673.2041(1), Fla. Stat. (2009)) “An allonge is a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof." BLACK'S LAW DICTIONARY (6th ed.1990). Florida's Uniform Commercial Code does not specifically mention an allonge, but notes that "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is part of the instrument." § 673.2041(1), Fla. Stat. (1995)). Booker v. Sarasota, Inc., 707 So.2d 886 (Fla. App. 1 Dist., 1998)

payee. Instead, like the promissory note, the mortgage instrument names First Franklin as the Lender/payee. (R. I/68, para. (E); also see R. I/70)

Appellee had not filed a reply to the Appellant's Answer, so on June 1, 2009, Appellant filed his First Amended Answer. (R. I/111) Appellee did not file an objection to Appellant's First Amended Answer. (See Index to Record for lack of filing) In the First Amended Answer, Appellant:

1) denied that he delivered a promissory note in favor of the Appellee or the Appellee's assignors (R. I/110, para. 2);
2) denied that the promissory note was assigned by MERS to Appellee (R. I/111, para. 3);
3) denied that the mortgage instrument was properly assigned to the Appellee (R. I/111, para. 3);
4) denied that the promissory note and mortgage instrument are in default with Appellee (R. I/111, para. 5); and,
5) denied that Appellee is owed any sum due and owing on the promissory note and mortgage instrument (R. I/111, para. 6).

Appellant had admitted in his First Amended Answer that he is in control of the subject property and that he resides at the property. (R. I/111, para. 12) And though the Complaint neglected to specifically state that the Appellant had actually borrowed money, the Appellant admitted in his Response in Opposition to the Motion for Summary Final Judgment that he did execute a promissory note and mortgage, but that someone other than the Appellee is entitled to enforce the subject promissory note and mortgage against him and his property. (R. I/180)

Appellant made several affirmative defenses, the first and ninth of which were to challenge the standing of the Appellee as not being an owner or holder of the promissory note or an authorized agent for an identifiable owner or holder of the promissory note. (R. I/111-112; 117)

The First Amended Answer also incorporated within it a Motion to Dismiss. (R. I/119; 121-124)) The incorporated Motion to Dismiss challenged the Appellee's standing and stated the following:

> i. The Plaintiff is clearly acting as a trustee in this action for an entity not named in either the Mortgage or Note. (Complaint, Caption) The Plaintiff claims that it is the present owner of the Promissory Note and Mortgage, yet contrarily, it also claims that it is the constructive holder of the promissory note and Mortgage. (Complaint, par. 2) The Plaintiff claims that the Note and Mortgage were both assigned to the Plaintiff and that the assignment is Exhibit C to the Complaint. (Complaint, par. 3)
>
> ii. Both the Mortgage and the Note state that payment shall be made to Lender. (Complaint, Note, par. 1; Mortgage, p. 1)
>
> iii. The assignment referenced in Exhibit C is an assignment by MERS of the Mortgage to Plaintiff, it is not an assignment of the Note – there is no assignment of the note in any of the Plaintiff’s documents. (R. I/119)

The First Amended Answer's incorporated Motion to Dismiss made the following argument:

> The Plaintiff alleges that it is all things – a trustee acting on behalf of another entity who owns the Note and Mortgage, and that it is the owner of the Note and Mortgage. The Mortgage provides that there can be multiple

> owners of fractional interests of the Note and Mortgage. (Complaint, Mortgage, par. 20) However, that is not what the Plaintiff alleges. The Plaintiff alleges that there is only one owner of the Note and Mortgage – it may be the Plaintiff, or it may be the beneficiary of a trust that the Plaintiff is trustee of – we can't possibly know because the Plaintiff pled it both ways. The proof the Plaintiff provides of its ownership interest is insignificant. The Plaintiff provides an assignment of the Mortgage but not an assignment of the Note.
> (R. I/123)

On October 9, 2009, at 8:27 a.m., which was prior to the hearing on the Appellee's Motion for Summary Final Judgment, the Appellant filed an opposition to the Motion for Summary Final Judgment and Cross-Motion for Summary Final Judgment. (R. I/174) In this document the Appellant stipulated that Appellee's evidence was authentic, uncontested and that there were no genuine issues of material fact. (R. I/174-175) In the document, Appellant argued that there were solely legal issues pending before the Court, those being: 1) that because the promissory note was made payable to a specifically identified person who was not the Plaintiff or the Plaintiff's principal, that before Appellee could enforce it against Appellant, the promissory note had to carry either an indorsement or an allonge making it payable to the Appellant or to Appellant's principal; (R. I/175) and, 2) that MERS could not pass an enforceable interest to Appellee. (R. I/177)

The Appellee's Motion for Summary Final Judgment was heard on October 9, 2009, at 8:45 a.m. (R. I/149; R. I/166) After oral argument in the absence of a

court reporter, the Circuit court granted Summary Final Judgment to the Appellee after argument. (R. I/166)

STANDARD ON APPEAL

The standard of review for summary judgment is *de novo*. Major League Baseball v.Morsani, 790 So. 2d 1071 (Fla. 2001); Rollins v. Alvarez, 792 So. 2d 695 (Fla. 5th DCA 2001); Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000). In reviewing a summary judgment, the Court must determine whether there is any "genuine issue as to any material fact" and whether "the moving party is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(c).

Issues of fact are "genuine" only if a reasonable jury, considering the evidence presented, could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Generally, "[t]he party moving for summary judgment has the burden to prove conclusively the nonexistence of any genuine issue of material fact." City of Cocoa v. Leffler, 762 So. 2d 1052,1055 (Fla. 5thDCA 2000). The evidence contained in the record, including supporting affidavits, must be considered in the light most favorable to the non-moving party, and if the slightest doubt exists, summary judgment must be reversed. Krol v. City of Orlando, 778 So. 2d 490, 492 (Fla. 5th DCA 2001).

SUMMARY OF THE ARGUMENTS

Ownership of the promissory note and the mortgage instrument were bifurcated. The unindorsed promissory note was not a bearer instrument. Rather, it was made payable to the lender who is a specifically identified person - First Franklin – and the mortgage instrument named MERS as the mortgagee, solely as a nominee. Neither the promissory note nor the mortgage instrument granted MERS an interest in the promissory note, instead, First Franklin retained ownership in the promissory note.

The right to foreclose is dependent upon there being an enforceable promissory note. An assignment of mortgage from MERS to Appellee granted Appellee all of the interests that MERS had in the promissory note and the mortgage instrument. By the assignment of mortgage, MERS could not convey a greater interest to Appellee than that which it already held. Since MERS had no enforceable interest in the promissory note, it conveyed no enforceable interest in the promissory note to the Appellee. Even if MERS was an agent of First Franklin with authority to enforce the promissory note, no evidence of such authority was presented to the Circuit Court. Without an interest in the promissory note, or without evidence of authority to enforce the promissory note against Appellant, Appellee had no standing to foreclose and summary judgment was improper.

ARGUMENTS

FIRST ARGUMENT

THE APPELLEE PRESENTED EVIDENCE THAT IT WAS NOT ENTITLED TO ENFORCE THE PROMISSORY NOTE IN QUESTION

Every mortgage loan is composed of two documents – the note instrument and the mortgage instrument. No matter how much the mortgage instrument is acclaimed as the basis of the agreement, the note instrument is the essence of the debt. Sobel v. Mutual Dev. Inc., 313 So. 2d 77 (Fla. 1 DCA, 1975); Pepe v. Shepherd, 422 So. 2d 910 (Fla. 3 DCA 1982); Margiewicz v. Terco Prop., 441 So. 2d 1124 (Fla. 3 DCA 1983).

The promissory note is evidence of the primary mortgage obligation. The mortgage is only a mere incident to the note. Brown v. Snell, 6 Fla. 741 (1856); Tayton v. American Nat'l Bank, 57 So. 678 (Fla. 1912); Scott v. Taylor, 58 So. 30 (Fla. 1912); Young v. Victory, 150 So. 624 (Fla. 1933); Thomas v. Hartman, 553 So. 2d 1256 (Fla. 5 DCA 1989). The mortgage instrument is only the security for the indebtedness. Grier v. M.H.C. Realty Co, 274 So. 2d 21 (Fla. 4 DCA 1973); Mellor v. Goldberg, 658 So. 2d 1162 (Fla. 2 DCA 1995); Century Group Inc. v. Premier Fin. Services East L. P., 724 So. 2d 661 (Fla. 2 DCA 1999)

On December 21, 2005, Appellant issued a promissory note. (§673.1051(1), Fla. Stat. (2009), and § 673.1051(3), Fla. Stat. (2009)) The subject promissory note is a "negotiable instrument" because it is an unconditional promise to pay a fixed amount of money and it was payable to the order of First Franklin at the time it was first issued. (§ 673.1041(1), Fla. Stat. (2009); § 673.1041(2), Fla. Stat. (2009); § 673.1041(5),Fla. Stat. (2009); and § 673.1091(2), Fla. Stat. (2009)) The promissory note clearly states the intent of the Appellant to make the Lender, First Franklin, the Payee. (§ 673.1101(1), Fla. Stat. (2009)) That's because the document specifically identifies First Franklin as the Payee.[4]

Florida law defines those who are entitled to enforce a negotiable instrument as either a "holder" of the instrument, a non-holder in possession who has the rights of a holder or a person not in possession who is entitled to enforce it as a lost instrument. (§ 673.3011, Fla. Stat. (2009)) Florida law goes so far as to permit a person to be entitled to enforce an instrument even though that person is not the owner of the instrument or is in wrongful possession of the instrument.

However, the subject promissory note is more restrictive in its'

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4 In a mortgage loan, there is only one negotiable instrument, and that is the promissory note. Neither the mortgage instrument nor the assignment of mortgage are "negotiable instruments" as the term "instrument" as used in § 673, Fla. Stat. (2009), et. seq., only means a "negotiable instrument". (§ 673.1041(2), FLA. STAT. (2009))

characterization of who may enforce it because the subject promissory note and the subject mortgage instrument together were designed to have been sold in fractional interests on the secondary market. The subject mortgage instrument provides "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (R. I/77, para. 20)

Having multiple parties attempting to enforce a single promissory note could destroy the entire secondary market system in mortgages. In order to prevent that from happening, the subject promissory note does not make a mere possessor of it a "holder", rather, one becomes a "holder" of the subject promissory note only upon "transfer" of the promissory note along with the right to enforce it. The subject promissory note provides "The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder". (R. I/63, para. 1) This is consistent with Florida Statutes § 673.2031(1) which provides that an instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

At the hearing on the Appellee's Motion for Summary Final Judgment, there was no evidence presented as to whether First Franklin actually delivered the

subject promissory note either to MERS or to the Appellee. That evidence was necessary to demonstrate that First Franklin transferred the promissory note with the purpose of giving the Appellee the right to enforce it. In the case of In Re Hayes, 393 B.R. 259, 266-268 (Bankr. D. Mass. 2008), the movant seeking relief from stay failed to show that it ever had any interest in the note at issue. In that case the court found the movant lacked standing altogether because it failed to show that the note was ever *transferred* to it, and thus had no rights of its own to assert. Having a note in one's possession is not synonymous with "transfer".

The obligation of an issuer of a note owes that obligation to a person entitled to enforce the instrument or to an indorser who paid the instrument under Florida Statutes § 673.4151. (§ 673.4121, Fla. Stat. (2009)) A transfer of possession of a bearer instrument is sufficient to transfer enforceable rights in the instrument. (§ 673.2011(2), Fla. Stat. (2009)) That stands in stark contrast to a promise or order that is payable to order, which means that it is payable to the identified person. (§ 673.1091(2), Fla. Stat. (2009)) In the case of an instrument payable to a specifically identified person, transfer of possession of the instrument along with an indorsement is necessary.[5] (§ 673.2011(2), Fla. Stat. (2009) & § 673.2031(3), Fla. Stat. (2009)) Without that necessary indorsement, the transferee still receives

5 An "indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, made on an instrument for the purpose of negotiating the instrument. (§ 673.2014(1), Fla. Stat. (2009))

an enforceable interest – however, it's not enforceable against the issuer, rather, the enforceable interest is the specifically enforceable right to the unqualified indorsement of the transferor.[6] (§ 673.2031(3), Fla. Stat. (2009)) Appellant admitted in his Response in Opposition to the Motion for Summary Final Judgment that he executed a promissory note, which someone is entitled to enforce against him – just not the Appellee. (R. I/180)

In the case at hand, if the subject promissory note were delivered to the Appellee by First Franklin with the purpose of giving Appellee rights to enforce it against the Appellant, before Appellee could enforce the promissory note against the Appellant it had to either obtain an indorsement from First Franklin or get an Order from a court of competent jurisdiction enforcing it's right to the unqualified indorsement of First Franklin – the end result either way is that the promissory note still must be indorsed. Absent that evidence, there is a material factual dispute.

6 Addressing the same issue, the Court in the case of In re Kang Jin Hwang, 396 B.R. 757, 763 (Bankr.C.D.Cal., 2008) stated "The transfer of a negotiable instrument has an additional requirement: the transferor must indorse the instrument to make it payable to the transferee." In the case of In re Wilhelm, Case No. 08-20577-TLM (Bankr.Idaho, 2009) the Court recognized that if the note instrument, by its terms, is not payable to the transferee, then before the transferee can enforce it the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. (At page 18) The Court in In re Carlyle, 242 B.R. 881 (Bankr. E.D.Va., 1999) came to the same conclusion at page 887 of the Opinion.

From the evidence admitted in Court, it is impossible to know whether Appellee was ever a "holder" of the promissory note – as that term is defined by the subject promissory note. Additionally, since this promissory note was payable to a specifically identifiable person, before it could be enforced against the Appellant it had to be indorsed. There was no evidence presented of an indorsement, either by First Franklin or on Order of a court. Therefore, the evidence presented proved that Appellee was not entitled to enforce the promissory note against Appellant.

SECOND ARGUMENT

MERS DID NOT PASS AN ENFORCEABLE INTEREST IN THE PROMISSORY NOTE TO APPELLEE

The note is the instrument of concern in all assignment situations. There is an old maxim "the mortgage follows the note". Evins v. Gainsville Nat'l Bank, 85 So. 659 (Fla. 1920); Case v. Smith, 200 So. 917 (Fla. 1941) The note is evidence of the primary mortgage obligations or the debt. The assignment of the note carries with it the mortgage and its rights, even though the mortgage instrument has not been assigned either orally or in writing. Collins v. Briggs, 123 So. 833 (Fla. 1929); Miami Mtge. & Guar. Co. v. Drawdy, 127 So. 323 (Fla. 1930); So. Colonial Mtge. Co. v. Medeiros, 347 So. 2d 736 (Fla. 4 DCA 1977)

The mortgage, as evidenced by the mortgage instrument, is only a mere incident to the debt. Therefore, the mortgage instrument is of lesser significance. Because the assignment of the note is an imperative act as to the transferring of the mortgagee's right, the assignment of the mortgage instrument without the note is an ineffective assignment. Vance v. Fields, 172 So. 2d 613 (Fla. 1 DCA 1965); Sobel v. Mutual Dev. Inc., 313 So. 2d 77 (Fla. 1 DCA 1975); Amacher v. Keel, 358 So. 2d 889 (Fla. 2 DCA 1975)

In the instant case, the assignment of mortgage claims that it assigns the beneficial interest in both the note instrument and the mortgage instrument to Appellee. However, the note instrument was bifurcated from the mortgage instrument and MERS did not have an interest in the Note that it could assign. MERS act of assigning the mortgage instrument was invalid as it held no beneficial interest in the mortgage instrument for two reasons: 1) a security instrument, apart from the promissory note giving rise to the debt has no value because there is no debt by which it secures payment; and 2) MERS had no beneficial interest in the mortgage instrument that it could assign.

In Carpenter v. Longan, 16 Wall. 271, 83 U.S. 271, 274, 21 L.Ed. 313 (1872), the U.S. Supreme Court stated "The note and mortgage are inseparable; the

former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."

"Where the mortgagee has 'transferred' only the mortgage, the transaction is a nullity and his 'assignee,' having received no interest in the underlying debt or obligation, has a worthless piece of paper." (4 RICHARD R. POWELL, POWELL ON REAL PROPERTY, § 37.27[2] (2000); In re Mitchell, Case No. BK-S-07-16226-LBR (Bankr.Nev. 3/31/2009)(At page 12))

As previously stated in Argument 1, the Uniform Commercial Code makes a distinction between a promissory note that is a bearer instrument and one that is payable to a specifically identified person – the former not requiring an indorsement to be enforceable, the latter requiring an indorsement to be enforceable. (§ 673.2011(2), Fla. Stat. (2009); § 673.2031(3), Fla. Stat. (2009))

Additionally, the subject mortgage instrument states that it can only be transferred with the sale of the note – and not the other way around where the sale of the mortgage instrument would include the note. (R. I/77, para. 20) The subject mortgage instrument provides "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (R. I/77, para. 20) In this case, the only relevant transfer that could occur is a transfer of the promissory note, which would include a transfer of the

mortgage instrument if ownership of that instrument were not bifurcated from the ownership of the promissory note. So an assignment of the mortgage instrument from MERS to Appellee would not transfer the promissory note to Appellee.

Appellant's Opposition to the Appellee's Motion for Summary Final Judgment included an affidavit of the contents of the MERS website. The Opposition stated in relevant part:

> MERS has nothing to transfer by an assignment. MERS own website listed "MERS Recommended Foreclosure Procedures for FLORIDA".[7] In this document MERS states that it is not the beneficial owner of the promissory note. This document states:
>
> > MERS stands in the same shoes as the servicer to the extent that it is not the beneficial owner of the promissory note. An investor, typically a secondary market investor, will be the ultimate owner of the note. (fn 8)
> >
> > Foot Note 8:
> >
> > Even though the servicer has physical custody of the note, custom in the mortgage industry is that the investor (Fannie Mae, Freddie Mac, Ginnie Mae or a private investor) owns the beneficial rights to the promissory note.
> > (R. I/177-178)

In the consolidated cases of In re Foreclosure Cases, 521 F. Supp. 2D 650, 653 (S.D. Oh. 2007), a standing challenge was made and the Court found that there was no evidence of record that New Century ever assigned to MERS the

[7] www.mersinc.org/filedownload.aspx?id=176&table=ProductFile

promissory note or otherwise gave MERS the authority to assign the note. Beginning with this case, courts around the country started to recognize that MERS had no ownership in the notes and could not transfer an interest in a mortgage upon which foreclosure could be based.

In LaSalle Bank NA v. Lamy, 824 N.Y.S.2d 769 (N.Y. Supp. 2006), the Court denied a foreclosure action by an assignee of MERS on the grounds that MERS itself had no ownership interest in the underlying note and mortgage.

In the case of In re Mitchell, Case No. BK-S-07-16226-LBR (Bankr.Nev., 2009), the Court stated "In order to foreclose, MERS must establish there has been a sufficient transfer of both the note and deed of trust, or that it has authority under state law to act for the note's holder." (At page 9) The Court found that MERS has no ownership interest in the promissory note. The Court found that though MERS attempts to make it appear as though it is a beneficiary of the mortgage, it in fact is not a beneficiary. The Court stated "But it is obvious from the MERS' "Terms and Conditions" that MERS is not a beneficiary as it has no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans. To reverse an old adage, if it doesn't walk like a duck, talk like a duck, and quack like a duck, then it's not a duck." (At page 7) MERS Terms and Conditions say this:

> MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgage loans or mortgaged properties. References herein to "mortgage(s)" and "mortgagee of record" shall include deed(s) of trust and beneficiary under a deed of trust and any other form of security instrument under applicable state law.

In the case of In re Vargas, 396 B.R. 511, 520 (Bankr.C.D.Cal., 2008) , the Court stated:

> MERS is not in the business of holding promissory notes. (fn 10: MERS, Inc. is an entity whose sole purpose is to act as mortgagee of record for mortgage loans that are registered on the MERS System. This system is a national electronic registry of mortgage loans, itself owned and operated by MERS, Inc.'s parent company, MERSCORP, Inc.)

In the case of In re Sheridan, Case No. 08-20381-TLM (Bankr.Idaho, 2009) MERS moved for relief from the stay. The Court stated that MERS "Counsel conceded that MERS is not an economic "beneficiary" under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid." The Court stated "Further, the Deed of Trust's designation of MERS as "beneficiary" is coupled with an explanation that "MERS is . . . acting *solely* as nominee for Lender and Lender's successors and assigns." The Court

stated "Even if the proposition is accepted that the Deed of Trust provisions give MERS the ability to act as an agent ("nominee") for another, it acts not on its own account. Its capacity is representative."

In Landmark National Bank v. Kesler, 216 P.3D 158 (Kansas, 2009), the Kansas Supreme Court extensively analyzed the position of MERS in relation to the facts in that case and other non-binding court cases and concluded that MERS is only a digital mortgage tracking service. (At page 168) The Court recited that MERS never held the promissory note, did not own the mortgage instrument (though the documents identified it as "mortgagee"), that it did not lend money, did not extend credit, is not owed any money by the mortgage debtors, did not receive any payments from the borrower, suffered no direct, ascertainable monetary loss as a consequence of the litigation and consequently, has no constitutionally protected interest in the mortgage loan.

Appellant's Opposition to the Appellee's Motion for Summary Final Judgment included reference to professor Christopher L. Peterson's writings on MERS and the secondary market as a source for the court to understand what MERS is and how it operates. (R. I/179) Christopher L. Peterson, Associate Professor of Law, University of Florida, testified at a hearing before the U.S.

Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on Securities, Insurance, and Investment and stated:[8]

> MERS is merely a document custodian. . . . The system itself electronically tracks ownership and servicing rights of mortgages. . . . The parties obtain two principal benefits from attempting to use MERS as a "mortgagee of record in nominee capacity." First, under state secured credit laws, when a mortgage is assigned, the assignee must record the assignment with the county recording office, or risk losing priority vis-à-vis other creditors, buyers, or lienors. Most counties charge a fee to record the assignment, and use these fees to cover the cost of maintaining the real property records. Some counties also use recording fees to fund their court systems, legal aid organizations, or schools. In this respect, MERS' role in acting as a mortgagee of record in nominee capacity is simply a tax evasion tool. By paying MERS a fee, the parties to a securitization lower their operating costs. The second advantage MERS offers its customers comes later when homeowners fall behind on their monthly payments. In addition to its document custodial role, and its tax evasive role, MERS also frequently attempts to bring home foreclosure proceedings in its own name. This eliminates the need for the trust—which actually owns the loan—to foreclose in its own name, or to reassign the loan to a servicer or the originator to bring the foreclosure.

R.K. Arnold, Senior Vice President, General Counsel and Secretary of Mortgage Electronic Registration Systems, Inc., stated:

> MERS® will act as mortgagee of record for any mortgage loan registered on the computer system MERS® maintains, called the MERS® System. It will then track servicing rights and beneficial ownership interests in those loans and provide a platform for mortgage servicing rights to be traded electronically among its members without the need to record a mortgage

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8 Subprime Mortgage Market Turmoil: Examining the Role of Securitization, http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=4f40e1b9-ec5b-4752-ba8f-0c14afc44884. (At page 6 -8)

> assignment in the public land records each time. . . . Members pay annual fees to belong and transaction fees to execute electronic transactions on the MERS® System. . . . A mortgage note holder can sell a mortgage note to another in what has become a gigantic secondary market. . . . For these servicing companies to perform their duties satisfactorily, the note and mortgage were bifurcated. The investor or its designee held the note and named the servicing company as mortgagee, a structure that became standard. . . . When a mortgage loan is registered on the MERS® System, it receives a mortgage identification number (MIN). The borrower executes a traditional paper mortgage naming the lender as mortgagee, and the lender executes an assignment of the mortgage to MERS®. Both documents are executed according to state law and recorded in the public land records, making MERS® the mortgagee of record. From that point on, no additional mortgage assignments will be recorded because MERS® will remain the mortgagee of record throughout the life of the loan. . . . MERS® keeps track of the new servicer electronically and acts as nominee for the servicing companies and investors. Because MERS® remains the mortgagee of record in the public land records throughout the life of a loan, it eliminates the need to record later assignments in the public land records. Usually, legal title to the property is not affected again until the loan is paid and the mortgage is released.
> (R.K. Arnold, *Yes, There is Life on MERS,* Prob.& Prop., Aug. 1997, at p.16; http://www.abanet.org/genpractice/magazine/1998/spring-bos/arnold.html)

Courts around this country are clearly recognizing that MERS is not an owner of the promissory note and that it is also only a mortgagee in name alone and has no beneficial interest in the mortgage instrument. Landmark National Bank v. Kesler, 216 P.3D 158 (Kansas, 2009); Mortgage Electronic Registration System, Inc. v. Southwest Homes of Arkansas, 08-1299 (Ark. 3/19/2009) (Ark., 2009) MERS own website says as much. Therefore, the assignment of mortgage from MERS to Appellee could not transfer an interest in the promissory

note; it could not even transfer an enforceable interest in the mortgage instrument.

One hundred and thirty-eight years ago, the U.S. Supreme Court recognized that the mortgage instrument is inseparable from the promissory note. Carpenter v. Longan, 16 Wall. 271, 83 U.S. 271, 21 L.Ed. 313 (1872) That was necessary to ensure that title to property could be deraigned. However, MERS is a product of the past two decades and was designed to privatize recorded mortgages in order to avoid the payment of taxes upon the recording of assignments of mortgage. The design of bifurcating the mortgage instrument from the promissory note is not based on law and it impairs the historical ability to deraign title. The logical conclusion of bifurcating the mortgage instrument to MERS is that it renders a foreclosure impossible as the promissory note is no longer secured by that mortgage instrument. What they have sown, they should reap.

In Stuyvesant Corp. v. Stahl, 62 So.2d 18, 20 (Fla., 1952), the Florida Supreme Court stated:

> The rule is settled in this State that a principal is bound by the acts of his agent. The authority of the agent may be real or it may be apparent and the public may rely on either unless in the case of apparent authority the circumstances are such as to put one on inquiry. The agent's authority may be conferred by writing, by parol, or it may be inferred from the related facts of the case. (Cites omitted)

There was no evidence presented that MERS had any authority to act as an agent for First Franklin. The Arkansas Supreme Court came to the same

conclusion in Mortgage Electronic Registration System, Inc. v. Southwest Homes of Arkansas, 08-1299 (Ark. 3/19/2009) (Ark., 2009)(At page 7) By all appearances, it seems contrary to the interests of First Franklin that the Appellee would attempt to collect on a promissory note that was payable to First Franklin.

CONCLUSION

WHEREFORE, the Circuit Court's judgment should be set aside and the matter remanded.

Respectfully Submitted,

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George M. Gingo, FBN 879533
Counsel for Appellant
P.O. Box 838
Mims, FL 32754
321-264-9624 Office
321-383-1105 Fax
ggingo@yahoo.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on Jonathan J.A. Paul, Butler & Hosch, P.A., 3185 S. Conway Road, Suite E, Orlando, Florida 32812 on this 15th day of January, 2010.

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George M. Gingo, FBN 879533

CERTIFICATE OF FONT COMPLIANCE

I certify that the lettering in this brief is Times New Roman 14-point font and complies with the font requirements of the Florida Rule of Appellate Procedure 9.210(a)(2).

By: ___________________________
George M. Gingo, FBN 879533