<u>CONSTRUCTIVE POSSESSION REQUIRES PROOF OF AGENCY RELATIONSHIP</u>

In a recent opinion, the Second District Court of Appeal explained its approval of agency relationship to establish that a plaintiff is entitled to foreclose as “holder” of the original note under Florida Statute Section 673.3011(1). *Phan v. Deutsche Bank Nat’l Trust Co.*, Case No. 2D14-3364, 2016 WL 746400 (Fla. 2d DCA Feb. 26, 2016).

Recounting the relevant facts of this case, Deutsche Bank initiated a foreclosure action against Ms. Ngoc Phan on April 28, 2009, alleging she failed to make the loan payments on her Pinellas County home since January 1, 2009. Ms. Phan denied the Bank’s allegations and raised, as an affirmative defense, that Deutsche Bank did not have standing at the time it filed its lawsuit.

At trial, the testimony presented by a Wells Fargo representative, Deborah Kavalary, confirmed that Wells Fargo had possession of Ms. Phan’s original note at the time Deutsche Bank filed its lawsuit. Ms. Kavalary testified that Wells Fargo was the authorized servicer of Ms. Phan’s loan. According to Ms. Phan, this evidence demonstrated Deutsche Bank’s lack of standing because Deutsche Bank did not have physical possession of her note at the time the foreclosure action commenced. Final judgment was entered in favor of Deutsche Bank. Ms. Phan appealed the final judgment of foreclosure.

On appeal, the court affirmed final judgment in favor of Deutsche Bank finding that an “agency relationship between Wells Fargo and Deutsche Bank could expand the reach of Deutsche Bank’s possession of Ms. Phan’s note to include its agent, Wells Fargo’s, possession.” *Id*. at *1.

The *Phan* court explained that Florida’s Uniform Commercial Code defines “holder” as the person in possession of a negotiable instrument that is payable to either the bearer or to an identified person. *Id.* (citing Fla. Stat. § 671.201(21)(a)) (quotation marks omitted). Reiterating its ruling in *Fotch*, the court reasoned that “‘in order for a plaintiff to claim standing based upon a note indorsed in blank, the plaintiff must show that it had lawful *possession* of the original note indorsed in blank at the time the lawsuit was filed.'” *Id.* (quoting *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310 (Fla. 2d DCA 2013)).

Applying the conception of “possession” within the context of agency relationship, the court further reasoned that while Deutsche Bank never had direct possession of the note, it did have constructive possession by virtue of its agent’s possession. Though it is not uncommon for the servicer to act on behalf of the plaintiff, this is the first opinion to clearly state that a plaintiff is still the “holder” of the original note under Florida’s Uniform Commercial Code, if it has constructive possession through its authorized agent. *Id*. at *2 (citing Fla. Stat. § 673.3011(1)).

However, there is one caveat to establishing standing through constructive possession of the note. The *Phan* court noted that an agency relationship must be proven or demonstrated through competent substantial evidence. *See id.* at *4 (citing *McCabe v. Howard*, 281 So. 2d 362, 363 (Fla. 2d DCA 1973) (“The existence of an agency [relationship] may be shown by any substantial evidence, either direct or circumstantial.”). In that regard, the opinion warns that had Ms. Phan objected to Wells Fargo’s lack of evidence to prove it is the authorized servicer, Deutsche Bank might have “fallen short” to prove standing through constructive possession. Absent this objection, the court collected enough evidence in the record to support a finding that an agency relationship exists between Wells Fargo and Deutsche Bank.

The takeaway from this case is that even if a plaintiff has standing as the holder of the note via constructive possession, the court still requires documentary evidence to prove the existence of an agency relationship. *See Bellaire Sec. Corp. v. Brown*, 168 So. 625, 636 (Fla. 1936) (“[T]he authority of an agent cannot be established merely by proof of its own declarations made to a third party, in the absence of the principal.”) This requirement is easily met if various business records are offered to demonstrate this relationship. In most standard mortgages, the document contains verbiage in which the borrower has already agreed that the servicer can act on behalf of the note holder. Additional business records from the servicer can substantiate this relationship. For example, a power of attorney, servicing agreements, or even a validation of debt notification sent to the borrower are sufficient proof. So long as the business records corroborating the agency relationship are *first* admitted into evidence, the witness is free to testify about its contents to prove standing through constructive possession.

A copy of the *Phan* opinion can be found here.