

FLA APP COURT REVERSES FORECLOSURE DUE TO NO EVIDENCE  
LOAN WAS INCLUDED IN TRUST CORPUS

The District Court of Appeal of the State of Florida, Second District, recently reversed a final judgment of foreclosure in favor of the trustee of a mortgage-backed securities trust, holding that the mortgagee failed to prove that it had standing when the complaint was filed because there was no evidence that the loan was included in the trust.

A copy of the opinion in Powers v. HSBC Bank USA, N.A. is available at: [Link to Opinion](#).

A mortgagee sued to foreclose a mortgage as trustee under a pooling and servicing agreement, alleging that it was the holder of the note, a copy of which was not attached to the complaint. The borrowers raised as an affirmative defense that the mortgagee was neither the holder nor owner of the note and thus could not enforce it.

At trial, the mortgagee's sole witness, an employee of the loan servicer, testified about the identity of the original lender, which was reflected on the original note. She further testified that the original lender was also the sponsor, originator and initial servicer under the pooling and servicing agreement dated Sept. 1, 2006 and that the agreement closed on Sept. 7, 2006. The loan had been transferred for servicing by the original lender to another servicer, who in turn transferred it for servicing to the current servicer.

The mortgagee's witness did not, however, know the date that the borrowers' loan was transferred into the trust and could not find it listed in the pooling and servicing agreement. The original note introduced into evidence did not contain any dated indorsement, special or "blank."

The trial court entered a final judgment of foreclosure against the borrowers and they appealed.

On appeal, the Appellate Court noted that "[a] party suing to foreclose a mortgage must establish that it had standing at the time the complaint was filed ... [and] [a] substituted plaintiff acquires only the standing of the original plaintiff."

The Court then cited its 2015 ruling in St. Clair v. U.S. Bank Nat'l Assn, which reasoned that under section 673.3011 of the Florida Uniform Commercial Code, "a person entitled to enforce a negotiable instrument must be either: (1) the holder of

the instrument, (2) a 'nonholder in possession of the instrument who has the rights of a holder,' or (3) a person not in possession but who has the right to enforce a lost, destroyed, or stolen instrument or an instrument paid by mistake. A holder is a person in possession of the negotiable instrument that is payable either to bearer or to the holder. § 679.201(21)(a), Fla. Stat. (2014). A person in possession of the instrument but who is not the original lender can still be a holder, but only if the instrument bears a special indorsement in his or her favor or a blank indorsement. ... Absent a special or blank indorsement, 'the mere delivery of a note and mortgage, with intention to pass the title, upon a proper consideration, will vest the equitable interest in the person to whom it is so delivered.'" The Court explained that although the trustee "was the holder of the note at the time of trial, it did not prove that it was the holder at the time of the filing of the original complaint" in 2008.

Because the parties agreed that any blank endorsement on the note was not dated and the trustee had not proven that it 'possessed the note with a blank endorsement at the time the complaint was filed,' the Court concluded that the trustee failed to prove that the note had been equitably transferred into the pooling and servicing agreement "because there was no evidence that the [borrowers'] loan was included in the agreement."

Accordingly, the final judgment of foreclosure was reversed and the case remanded with instructions to enter judgment for the borrowers.