FLORIDA'S THIRD DISTRICT COURT OF APPEAL OVERTURNS BUSET CASE

A unanimous three-judge panel for Florida's Third District Court of Appeal recently issued an opinion that will have a significant impact on the scope of certain defenses that are routinely asserted by defense counsel in foreclosure litigation.

The case, *HSBC Bank USA, National Association v. Buset*, No. 3D16-1383, 2018 WL 735265 (Fla. 3d DCA Feb. 7, 2018) ("Buset"), stems from a foreclosure action initiated in October 2012 by HSBC Bank USA, National Association, as Trustee For Freemont Home Loan Trust 2005-B, Mortgaged-Backed Certificates, Series 2005-B (the "Trustee") against Margaret Buset and Joseph T. Buset (collectively, the "Borrowers").

The Borrowers admitted their default under the Note and Mortgage and the Trustee demonstrated its right of enforcement from the action's inception, attaching a copy of the Note, specially indorsed to it, to the Complaint and later filing the original Note in the same condition with the trial court. Hoping to, nonetheless, avoid foreclosure, Borrowers aggressively defended the action based on multiple defenses asserting, among other things, unclean hands, and lack of standing.

In reversing the trial court's involuntary dismissal, Florida's Third District Court of Appeal reaffirmed many core principles of foreclosure law, including issues related to standing, negotiability, unclean hands, and the requirements for the admissibility of a prior loan servicers' business records.

History of the Loan

On February 16, 2005, Ms. Buset executed and delivered an Adjustable Rate Note ("Note") to Fremont Investment & Loan ("Fremont") in the amount of $192,000. The Note was secured by a Mortgage contemporaneously executed by the Borrowers on a residential condominium located in Miami. The Mortgage specifically named Mortgage Electronic Registration Systems, Inc. ("MERS") as the "mortgagee," with MERS acting solely as a nominee for Fremont and Fremont's successors and assigns. Under the terms of the Mortgage, MERS only held legal title to the interests granted by the Borrowers in the Mortgage, and the Mortgage could be sold without prior notice to the Borrowers.

Approximately two months after the Note and Mortgage were executed, Fremont entered into a Mortgage Loan Purchase Agreement with Fremont Mortgage Securities Corporation ("Fremont Mortgage"), to sell a pool of loans, including the Borrowers' loan, to Fremont Mortgage. Those loans were then sold by Fremont Mortgage, as depositor, to the Trustee pursuant to a Pooling and Servicing Agreement dated May 1, 2005 (the "2005 PSA"). The parties to the 2005 PSA were: (1) Fremont Mortgage, as the depositor; (2) Fremont, as the originator and servicer; (3) Wells Fargo Bank, N.A., as the master servicer and trust administrator; and (4) the Trustee.

The 2005 PSA required, among other things, that: (1) all of Fremont Mortgage's "right, title, and interest" in and to the pool of loans were to be transferred to the Trustee; and (2) assignments of mortgage were to be delivered to the Trustee, unless, as here, MERS was listed as the mortgagee, in which case Fremont was to cause the Trustee to be shown as the owner of the related Mortgage Loan on MERS's records; and (3) at the same time, Fremont Mortgage was to indorse the notes in blank and subsequently deliver the original notes and mortgages to the Trustee.

In June 2008, Litton Loan Servicing LP ("Litton") replaced Fremont as the servicer of the loans governed by the 2005 PSA. Litton was subsequently acquired by Ocwen Loan Servicing, LLC ("Ocwen"). A Limited Power of Attorney was executed in November 2011, wherein the Trustee designated Ocwen as its attorney-in-fact with respect to the loans governed by the 2005 PSA and was authorized to, among other things, execute assignments of mortgage and other recorded documents, indorse any checks or other instruments payable to the Trustee, and "do any other act or complete any other document that arises in the normal course of servicing."

In 2012, after the Borrowers defaulted on the Note, but prior to the filing of the Trustee's Complaint, MERS executed and recorded an Assignment of Mortgage ("Assignment"), which assigned all of MERS's rights, title, and interest in and to the Mortgage to the Trustee. The Assignment was executed by MERS as nominee for Freemont, and its successors and assigns, and was recorded in the public records of Miami-Dade County, Florida.

The Trustee's Foreclosure Action is Involuntarily Dismissed Following a Non-Jury Trial.

On October 2, 2012, the Trustee filed a Complaint against the Borrowers in the Circuit Court for Miami-Dade County, Florida, seeking to enforce the Note and foreclose the Mortgage. The Trustee alleged in its Complaint that it owns and holds the Note and Mortgage, and a copy of the original Note, specially indorsed to the Trustee, and Mortgage were attached to the Complaint.

In response to the Complaint, Borrowers asserted several affirmative defenses, including, among others, that: (1) the Note was a non-negotiable instrument; (2) the Trustee lacked standing to bring the action; and (3) the action was barred by unclean hands because the Trustee had purportedly fabricated a false mortgage assignment.

Extensive pre-trial discovery was conducted during which Borrowers repeatedly sought documents related to the securitization process to prove that the Trustee, or its servicer, Ocwen, had engaged in improper conduct in executing the indorsement to the Note and the Assignment and had otherwise violated the 2005 PSA.

At the non-jury trial, the Borrowers' primary witness was Ms. Kathleen Cully, an out-of-state lawyer who represented herself as an expert under Article 9 of the UCC. Ms. Cully opined that the Note was non-negotiable and the Trustee's purported violations of the terms of the 2005 PSA destroyed its standing to foreclose. Specifically, on the issue of standing, Ms. Cully testified, among other things, that the 2005 PSA required an indorsement from Fremont to Fremont Mortgage, the depositor, and Freemont Mortgage should also have been a party to the Assignment.

On May 4, 2016, the trial court entered a 16-page order involuntarily dismissing the action (the "Order") finding that (1) the Note was not a negotiable instrument; (2) the Trustee lacked standing due to the purported violations of the 2005 PSA; (3) Ocwen's business records were inadmissible; and (4) because of the purported violations of the 2005 PSA in the execution of the indorsement to the Note and the Assignment, the Trustee had unclean hands. The trial court entered judgment in favor of the Borrowers, involuntarily dismissed the action, and ordered post-judgment discovery, to be followed by an evidentiary hearing, to determine if the Trustee should be sanctioned for violating a discovery order and fraud on the court.

Florida's Third District Court of Appeal Reverses The Order of Involuntary Dismissal and Directs That a Final Judgment of Foreclosure be Entered in The Trustee's Favor.

On February 7, 2018, Florida's Third District Court of Appeal (the "Court"), in a 18-page Opinion, reversed the Order in its entirety and further directed the trial court to enter a final judgment of foreclosure in favor of the Trustee. In so doing, the Court rejected each of the trial court's findings and explained, in detail, why the trial court's rulings were unsupported.

First, the Court held that the trial court reversibly erred in allowing Ms. Cully to testify on legal issues central to the case and, as a result, the admission of her testimony was an abuse of discretion. The Court specifically noted that the trial court emphasized in its Order that its legal conclusions were based on Ms. Cully's testimony. *Buset*, 2018 WL 735265, at *2.

Second, the Court rejected the trial court's finding that the Note was non-negotiable. As a threshold matter, the Court stated that **THE FLORIDA SUPREME COURT HAS HELD "FOR OVER A CENTURY" THAT SUCH NOTES ARE NEGOTIABLE INSTRUMENTS AND THAT THE APPELLATE COURTS HAVE REPEATEDLY AFFIRMED THIS PRINCIPLE.** The Court further expressly held that "a note's negotiability may be destroyed . . . if the note expressly incorporates the terms of the mortgage." *Id.* at *3. Here, however, the Note simply mentioned the Mortgage and did not expressly incorporate it. Finally, the Court held that negotiability was not destroyed by the Note's definition of "note holder." The Note defined "note holder" as "anyone who takes this Note by transfer and who is entitled to receive payments under this Note." *Id*. The Court held that it "cannot find any intent in this language to limit the transferability of the note in a manner that indicates an intent by the parties to destroy its negotiability." *Id.*

Third, the Court re-affirmed the well-established principle that **standing in a foreclosure case is not based upon ownership of a note; it is based, instead, on whether the plaintiff is a person entitled to enforce it**, such as an entity who is a holder of a note. The Court specifically noted that "because a plaintiff asserting standing based on its status as a holder of the note does not have to prove ownership, a plaintiff does not normally have to establish a 'chain of indorsements' or a 'chain of title.'" *Id*. at *4. Instead,

standing is demonstrated based on evidence establishing, as it was in this case, that the plaintiff had possession of the indorsed Note when the Complaint was filed and was, thus, the "holder" of the Note. *Id.*

The Court also held that the Borrowers cannot raise purported violations of the 2005 PSA to defeat standing because they are not parties or third-party beneficiaries to the agreement. *Id*. at *5. In addition, the Court found nothing improper with the language used in the Assignment and further noted that **"the assignment of the mortgage was superfluous . . . because Florida law has always held that the mortgage follows the note."** *Id.* at *6.

Fourth, the Court concluded that the Trustee's witness laid the proper foundation for the admissibility of the records from the prior servicer by providing substantial testimony regarding: (1) Ocwen's business records; (2) her training on how the records were created and stored; and (3) the loan boarding process. The Court also noted that it was significant that the Borrowers did not present any evidence challenging the accuracy of the records. *Id.*

Finally, the Court held that there was no evidence supporting the trial court's finding that the Trustee had unclean hands by "trying to defraud the court." *Id*. at *7. In particular, the Court stated—despite Borrowers' arguments—that there was no evidence that the Trustee engaged in any improper conduct or made any misrepresentations to the trial court regarding the Assignment. *Id*.

Effects of *Buset*.

The *Buset* opinion provides clear direction on defenses often asserted by borrowers to prevent foreclosure and further clarifies the burden that must be established to demonstrate admissibility of prior servicer records under the business records exception to the hearsay rule. Perhaps, most importantly, the Opinion should serve as a deterrent to borrowers to engage in efforts to unnecessarily confuse and complicate foreclosure actions with expert testimony related to violations of pooling and servicing agreements and unsupported claims of unclean hands.

Borrowers filed a Motion for Rehearing and/or Rehearing *En Banc*, which is currently pending before the Court.