Authority supporting claim that holder must surrender Note at SJ hearing

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rorykro...@aol.com View profile More options Apr 15, 2:01 pm

Does anyone have any authority for the proposition that the note must be surrendered at a summary judgment hearing.
2nd Mtge Plaintiff filed the note 5 days prior to first MSJ which was denied on those grounds.
The plaintiff has withdrawn the note prior to the second MSJ which is pending. Thank you.

Rory Rohan
900 Colony Point Circle
Suite 310
Pembroke Pines, Fl., 33026
561-252-4411

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Justin H Presser View profile More options Apr 15, 2:46 pm

Pursuant to the Florida rules of civil procedure the movant must have all msj evidence in the court file not later than 20 days before the hearing. The non-moving party must have their evidence in file 5 days before. If they produce the note at the hearing tell the judge it's improper to consider as it is untimely.

Justin Howard Presser
Weiss Legal Group, P.A.
698 N. Maitland Ave.
Maitland, Florida 32751
(Tel) 407.599.9036
(Fax) 407.599.3978

www.YourFamilyFirm.com

On Apr 15, 2010, at 2:01 PM, rorykro...@aol.com wrote:

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rorykro...@aol.com View profile More options Apr 15, 3:34 pm

Thank you but is there a requirement that the original be surrendered?

Rory Rohan
900 Colony Point Circle
Suite 310
Pembroke Pines, Fl., 33026
561-252-4411

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Mike Wasylik View profile More options Apr 15, 3:40 pm

Closest I've got in a 30-second review is Perry v. Fairbanks, which requires the original be "produced."

Michael Alex Wasylik
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http://ricardolaw.com
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Discussion subject changed to "Authority supporting claim that holder must

rinkerlaw View profile More options Apr 15, 5:36 pm

Does this tie into the "waiver of presentment" issue?

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Discussion subject changed to "Authority supporting claim that holder must

MATTHEW ELLROD View profile More options Apr 16, 9:50 am

If it's a negotiable instrument, by statute it must be "produced" (courts have interpreted this as being surrendered) upon entry of judgment, to take it out of circulation. Most cases have found or assumed that the note is negotiable and applied that rule without much thought. This from my Notebook on foreclosures:

.....

Do you need to file orig note at final hearing? Yes, under 673.307(2), which requires "production" to recover on negotiable instrument. Do you also

need to provide orig mortgage? Failure to file original note and mortgage with court upon entry of judgment, though it "should" be done [citing 81 So. 2d 486 and 537 So. 2d 113], is not fundamental error, where copies were filed and originals were offered to be filed when issue was raised on appeal, Braden River Partners v. Prof. Svgs. Bank, 562 So. 2d 826 (2 DCA 1990); or where originals were produced at pretrial, no defenses were raised to instruments, and no objection was made at summary judgment hearing, Rolfs v. 1st Union Nat. Bank of Florida, 604 So. 2d 1269 (4 DCA 1992). See also:

John Supply Co. v. McNeeley, 169 S0. 732 (Fla 1936) (cc as good as mortgage where ownership of mortgage not contested in pleadings); and Georgia Holding & Investment Co. v. Citizens Bank, 196 So. 808 (Fla. 1940);

90.952 (which generally requires originals of docs for evidence);

90.953 (which says that duplicates are as good as orig unless doc is negotiable instr or security, or unless genuine question raised about authenticity, or unless it would be unfair);

90.955 (which allows use of cc of docs recorded in public records);

673.307(2), UCC section which says that production of negotiable instruments entitles holder to recovery.

Cases like Emerald Plaza West v. Salter, 466 So. 2d 1129 (3 DCA 1985), Telephone Util. Terminal Co. v. EMC Industries, 404 So. 2d 183 (5 DCA 1981), and Ferris v. Nichols, 245 So. 2d 660 (4 DCA 1971), though they say that note and mortgage must be produced, cite as two reasons: (1) evidence requirement of 673.307, which applies only to note and can be satisfied as to mortgage under 90.955, and should not be required anyway if execution and ownership are admitted in pleadings; and (2) need to get note out of circulation, which doesn't apply to mortgage.

.....

BACK TO MY EMAIL: Recently the 2d DCA (in the Verizzo case?) made it sound as though you had to file the original note prior to the hearing, as part of your SJ evidence. I think that was incorrect, and said this about that in another thread:

.....

This case mostly follows ordinary SJ law, but I comment because it adds something that (as far as I know) is new: that the SJ rule (1.510) requires the plaintiff to file the original note and mortgage at least 20 days before the hearing. This has never been my experience in 26 years of litigation - as a foreclosing plaintiff I always turned the originals in at the hearing, and I did so not because I thought they were part of the documentation needed to obtain SJ, but only because of the requirement to take the note out of circulation upon entry of judgment.

I think the 2d DCA is incorrect in that part of the ruling, though all of us in the 2d DCA will need to follow this rule unless it's changed. I think this new twist arises out of the 2005 amendment to the SJ Rule which added the term "summary judgment evidence" and requires it to be served 20 days before the hearing (the rule doesn't say it needs to be filed that soon). I think the Supreme Court had a good idea in amending the rule that way, but I think using the word "evidence" in the rule has confused the 2d DCA here.

As I understand it, an SJ hearing is not an evidentiary hearing; certainly no live testimony is permitted. There is nothing actually "admitted into evidence" at an SJ hrg because it is not an evidentiary hearing or a trial.

The SJ rule requires that the entitlement to judgment be supported by the pleadings first, supplemented by "affidavits, answers to interrogs, admission, deposition and other materials" on which the movant relies. Prior to 2005 those materials didn't have a name as a whole, and the 2005 Rule amendment calls them "summary judgment evidence."

The supporting materials have to be in a form that "would be admissible in evidence" to be properly considered in support of the motion. Rule 1.510(e). The language I have emphasized is the distinction I am making. The materials are not actually "admitted into evidence" at the SJ hrg; they just have to be in such a form that they "would be" admissible if they were being tendered at an evidentiary hearring or trial. In other words, they have to be authenticated and free from hearsay, etc. I think we all have known this - I have never been at an SJ hearing where the judge said, "Well, I have the original supporting affidavit of the bank's employee here, and I hereby admit it into evidence."

So, if I were king, I would say that the "summary judgment evidence" would need to include a copy of the note and mortgage, as exhibits to an affidavit that properly authenticates them (for example, attaching a copy of the mortgage certified by the recording clerk would authenticate that copy under 90.902). Note that simply filing even the original note or mortgage doesn't make it something that "would be admissible" for SJ purposes if there is no affidavit authenticating the document.

So, I think the 2d DCA has been misled by the word "evidence" in the Rule term "summary judgment evidence" and is almost unconsciously treating the SJ hearing as an evidentiary hearing, and saying that the "evidence" (including the original note and mortgage) needs to be served 20 days before the hearing. I noticed a leaning in that direction in the 2d DCA's terminology in the BAC Funding case too, but in this Verizzo case the error (as I see it, anyway), has resulted in a new judicial addition to Rule 1.510).

Matt Ellrod

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MATTHEW ELLROD View profile More options Apr 16, 10:03 am

As I mentioned in my response in this thread, I think there should be no duty to file the original note until the hearing. The SJ evidence shouldn't be the original note itself (because merely filing an original document doesn't authenticate it), but an affidavit with a copy of the note attached. A requirement of filing the original note prior to the hearing has never been the law or practice that I've ever seen over the last 25 years. As I've said elsewhere, I think this is a new twist added by the 2nd DCA in Verizzo, and I think it's wrong. However, those of us who practice in the 2nd DCA are bound to follow it for now at least (or argue that it's dicta?), so I guess an owner's attorney could cite Verizzo and claim that if the original note isn't filed 20 days before the hearing then SJ should be denied. Personally, I'm not going to do that, because if that's what Verizzo means I think it's incorrect.

Matt Ellrod

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Discussion subject changed to "Authority supporting claim that holder must

MATTHEW ELLROD View profile More options Apr 16, 10:16 am

No, if presentment were required it would be a pre-suit requirement (condition precedent).

Matt Ellrod

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Steve Albee View profile More options Apr 16, 2:51 pm

I have argued that the original note must be presented and surrendered to the court in a MSJ.

"The original document that is generally required to be filed with the court in a mortgage foreclosure proceeding is the promissory note, NOT the mortgage." Perry v. Fairbanks Capital Corp. 888 So.2d 725, 726 (Fla.5th DCA 2004) (emphasis added).

The Courts have frequently held that a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the debt. WM Specialty Mortg., LLC v. Salomon, 874 So.2d 680, 682 (Fla. 4th DCA 2004).

Because promissory notes are generally considered negotiable instruments, the note must be surrendered in a foreclosure proceeding so that it does not remain in the stream of commerce. See Perry, 888 So.2d at 727; See also Figueredo v. Bank Espirito Santo, 537 So.2d 1113, 1113 (Fla. 3d DCA 1989) (finding that a bank's failure to produce for admission into evidence the original copy of a negotiable promissory instrument precluded a judgment of foreclosure).

Providing an original note endorsed to the plaintiff demonstrates the Plaintiff's right to payment and precludes the possibility that the instrument has already been negotiated. See Pennsylvania Blue Shield v. Wolfe, 575 So.2d 1361, 1363 (Fla.3d DCA 1991).

Hope this helps.

Steve Albee

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Victoria McNair View profile More options Apr 16, 3:32 pm

Steve,

In regard to paragraph 3 of your e-mail, are you saying that written assignments of the mortgage are unnecessary? That Bank A, the original lender, transfers both the note and the mortgage to bank B just by endorsing
the original of the Note to Bank B?

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Greg Seven View profile More options Apr 17, 6:31 pm

The key to demanding production of the note for physical inspection and surrender is 673.5011. I used this recently against Chase to force them to produce the note so my client could pay it off. After threat, they flew it down to Tampa. Then I told them that when I came over to see it I would pay it off with a cashiers check (which I faxed to them a day ahead of time to verify) and that they would have to immediately surrender it to me upon payment. They at first said no that they would only let me see the note, take my check, then process the check for some indeterminate time return the note later. I said Bullsh*t. I told them that if they refused to tender the note as I tendered payment that I would walk with the check and the debt would be considered discharged under the UCC. They caved and surrendered the note. Also, since I served them with a 701.04 (1) demand that they failed to complied with, they coughed up $1,000.00 for my fees.

JEDTI
G.
www.gregorydclarklaw.com

--- On Fri, 4/16/10, MATTHEW ELLROD <mattell...@verizon.net> wrote:

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Subject: Re: Authority supporting claim that holder must surrender Note at SJhearing
To: foreclosure-defense@googlegroups.com
Date: Friday, April 16, 2010, 10:16 AM

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Matt Ellrod

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Muriel Certo View profile More options Apr 17, 6:55 pm

what about the waiver of presentment in the mortgage

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Muriel E. Certo
California Bar Number 219109

Date: Sat, 17 Apr 2010 15:31:46 -0700
From: greg_s...@yahoo.com
Subject: Re: Authority supporting claim that holder must surrender Note at SJhearing
To: foreclosure-defense@googlegroups.com

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Muriel Certo View profile More options Apr 17, 7:02 pm

sorry, waiver is in the note and it is of presentment which is defined as "right to require noteholder to demand payment of amounts due not to "present the note"

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Muriel E. Certo
California Bar Number 219109

From: murielce...@hotmail.com
To: foreclosure-defense@googlegroups.com
Subject: RE: Authority supporting claim that holder must surrender Note at SJhearing
Date: Sat, 17 Apr 2010 15:55:34 -0700

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Greg Seven View profile More options Apr 17, 7:52 pm

Waiver of your right to presentment, usually contained in the note is commonly defined to mean demand for payment (like when you go to a bank to cash a check you must both present it and made a demand to the bank to honor it). In the context of a promissory note instrument, waiver of presentment means the lender does not have to present the note to you to in order to demand payment, when payment under its terms is due, but he must present the instrument when you wish to pay it. This waiver of requiring a demand for payment does not in any way obviate your separate rights as a presentee (the note maker, debt obligor) to demand your rights of physical inspection of a note instrument before you pay it to an alleged payee, assuring yourself that he is indeed the holder, and that the instrument bears all necessary and proper indorsements. Nor have you waived your rights to surrender and return of it upon payment.

Capiche?

JEDTI
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www.gregorydclarklaw.com

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Subject: RE: Authority supporting claim that holder must surrender Note at SJhearing
To: "Foreclosure Defense" <foreclosure-defense@googlegroups.com>
Date: Saturday, April 17, 2010, 6:55 PM

what about the waiver of presentment in the mortgage

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K&F View profile More options Apr 18, 12:57 pm

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Do you own or hold a mortgage?

From: Greg Seven
Sent: Saturday, April 17, 2010 7:52 PM
To: foreclosure-defense@googlegroups.com ; JEDTI
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Greg Seven View profile More options Apr 18, 6:00 pm

A negotiable instrument can have a holder, and can have an owner who are different persons, or the same person. Holdership and ownership under the code are separate concepts.

A mortgage is not a NI thus no one can be a "holder" of it in the sense of the UCC definition. In fact a mortgage cannot exist without a debt to support it and under common law it cannot be held or conveyed separate from the debt. By itself it is a nullity.

Now "Holdership" under the law of conveyancing is an entirely different concept from under the UCC. Like oil and vinegar they simply do not mix. Apples and Oranges. Think of "holding title" like when you receive a deed to land: you are the grantee and now hold legal title to that land under the terms set forth in the deed.

And this is why the MERS configured mortgage is so problematic . . .

JEDTI
G.
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--- On Sun, 4/18/10, K&F <rkl...@kleinandfortune.com> wrote:

From: K&F <rkl...@kleinandfortune.com>
Subject: Re: Authority supporting claim that holder must surrender Note at SJhearing
To: foreclosure-defense@googlegroups.com
Date: Sunday, April 18, 2010, 12:57 PM

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Subject: Re: Authority supporting claim that holder must surrender Note at SJhearing
To: foreclosure-defense@googlegroups.com

The key to demanding production of the note for physical inspection and surrender is 673.5011. I used this recently against Chase to force them to produce the note so my client could pay it off. After threat, they flew it down to Tampa. Then I told them that when I came over to see it I would pay it off with a cashiers check (which I faxed to them a day ahead of time to verify) and that they would have to immediately surrender it to me upon payment. They at first said no that they would only let me see the note, take my check, then process the check for some indeterminate time return the note later. I said Bullsh*t. I told them that if they refused to tender the note as I tendered payment that I would walk with the check and the debt would be considered discharged under the UCC. They caved and surrendered the note. Also, since I served them with a 701.04 (1) demand that they failed to complied with, they coughed up $1,000.00 for my fees.

JEDTI
G.
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--- On Fri, 4/16/10, MATTHEW ELLROD <mattell...@verizon.net> wrote:

From: MATTHEW ELLROD <mattell...@verizon.net>

Subject: Re: Authority supporting claim that holder must surrender Note at SJhearing
To: foreclosure-defense@googlegroups.com
Date: Friday, April 16, 2010, 10:16 AM

No, if presentment were required it would be a pre-suit requirement (condition precedent).

Matt Ellrod

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Steve Albee View profile More options Apr 19, 9:27 am

Yes, the note follows the mortgage, so if there is an endorsement of note from A to B then an assignment of the mortgage is unnecessary. At least that is what I've been lead to believe, but if someone has another take then definitely let us know.

Steve Albee

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John A. Morey View profile More options Apr 19, 9:37 am

I agree with Steve.

Sent from my Verizon Wireless BlackBerry

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MATTHEW ELLROD View profile More options Apr 19, 9:51 am

This has a lot of new (to me) stuff in it. First, I guess you conceded in that case that the note was negotiable (so that 673.5011 would apply)? Also, had the plaintiff actually made presentment (we have discussed that most notes waive it), so that the provisions of 673.5011(2)(b) on which you were relying were triggered?

Matt Ellrod

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Victoria McNair View profile More options Apr 19, 11:48 am

Then what about the Jeff-Ray case, and Progressive, and the recent BAC case?

I think the other line of authority is more from the old days--before the lenders destroyed all the unities. Before they created MERS, etc.

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Greg Seven View profile More options Apr 19, 2:29 pm

Bingo, Victoria goes to the head of the class.

You can only receive that which your "note" ancestor held. The MERS mortgage was not granted to the original note holder. It was never coupled at inception with the note holder but was granted to MERS with the specific language that MERS was the mortgagee, not the lender, and that MERS as 'nominee" holds legal title.

My opinion though has always been that MERS really got nothing due to the, vague, ambiguous, and thus indeterminate grant language used in the instrument and, of course, the fact of the splitting of the mortgage from the note at birth. That is what the Landmark v. Kesler case basically says, that whatever MERS got, if anything, was not even worthy of service of process in a foreclosure case: No Standing. It also noted that MERS was not even given the power to assign the mortgage. To me the legal math works out pretty straightforward:

Nullity + assignment = Zero

The mortgage, in essence, was a failed transaction, a failure to launch. At best, plaintiffs have an inchoate equitable lien or maybe a claim to seek reformation, if they can prove mistake.

But they never plead it.

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--- On Mon, 4/19/10, Victoria McNair <victoria.mcn...@trls.org> wrote:

From: Victoria McNair <victoria.mcn...@trls.org>
Subject: RE: Authority supporting claim that holder must surrender Note at SJhearing
To: foreclosure-defense@googlegroups.com
Date: Monday, April 19, 2010, 11:48 AM

Then what about the Jeff-Ray case, and Progressive, and the recent BAC case?

I think the other line of authority is more from the old days--before the lenders destroyed all the unities. Before they created MERS, etc.

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End of messages

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