

## **LENDER'S LACK OF STANDING TO FORECLOSE STILL PREVENTS BORROWER FROM RECOVERING ATTORNEY'S FEES**

Third District Court of Appeal issued an opinion in The Bank of New York Mellon v. Jill Fitzgerald, Case No. 3D16-981, holding **that if a borrower successfully proves that a foreclosing bank did not have standing to foreclose on a mortgage, the borrower cannot invoke the reciprocity provisions of Florida Statute §57.105(7) to recover attorney's fees under that mortgage.**

In Fitzgerald, the borrower entered into a mortgage that provided that the “[l]ender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.” At the trial in the case, the borrower alleged that the bank did not have standing to foreclose as the bank was not the holder or the owner of the note and mortgage. The trial court agreed with the borrower and entered final judgment her favor, finding that the bank failed to prove standing because “[t]here was no Assignment of Mortgage, or any other document evidencing a transfer to the [bank] prior to the institution of the action attached to the Complaint.” The trial court further found that “[t]here was never any actual delivery of the note to the [bank] and no evidence of intent to deliver the note to the [bank] on the part of [the note's payee], the sole holder under the special indorsement.” Therefore, the note “was never negotiated in favor of the [bank] and the [bank] never became the holder of the note under Florida Statute §673.3011(1), such that it could enforce the note.” The borrower filed a timely motion for entitlement to tax costs and attorney's fees pursuant to Florida Statute §57.105(7). The motion argued that the borrower was entitled to attorney's fees and costs “as prevailing party based on the contract between the parties which formed the basis of the action.” **The bank argued in opposition that the borrower could not prove the bank was not a party to the mortgage contract and then use the mortgage contract to seek fees against the bank. The trial court sided with the borrower and entered a final judgment taxing attorney's fees and costs against the bank.**

Florida Statute §57.105(7) provides:

If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

See Florida Statute §57.105(7). The simple effect of Florida Statute §57.105(7) is to statutorily transform a unilateral attorney's fees contract provision into a reciprocal provision. See Florida Cmty. Bank, N.A. v. Red Road Residential, LLC, 197 So.3d 1112, 1115 (Fla 3d DCA 2016). **It should go without saying, but Florida Statute §57.105(7) cannot transform a contract's unilateral fee provision into a reciprocal provision if no contract exists between the parties.** See Fielder v. Weinstein Design Group, Inc., 842 So.2d 879, 880 (Fla. 4th DCA 2003); Bank of New York Mellon v. Mestre, 159 So.3d 953, 957 (Fla. 5th DCA 2015); Novastar Mortg., Inc. v. Strassburger, 855 So.2d 130, 131 (Fla. 4th DCA 2003).

On appeal, the Florida Third District Court of Appeal found that the borrower was not entitled to attorney's fees and costs under the mortgage using Florida Statute §57.105(7). The court reasoned that **because the borrower successfully showed that the bank did not have standing in the case, then no contract existed between the borrower and the bank. Continuing, the court held that if there was no contract, then there could be no award of attorney's fees and costs under the contract.** In support of its opinion, the Court cited to the Florida Fifth District Court of Appeal's opinion in HFC Collection Center, Inc. v. Stephanie Alexander, 190 So.3d 1114 (Fla. 5th DCA April 22, 2016).<sup>[1]</sup> In Alexander, the court held that a borrower could not use Florida Statute §57.105(7) as a basis for an attorney's fees award after her counsel successfully proved that the plaintiff was not the assignee to the credit card agreement that contained the attorney's fee provision. See id. at 3. Because there was no contract between them, the borrower was estopped from relying on the contract to obtain an attorney's fee award based on the terms of the contract. See id. at 4. The court in Fitzgerald further buttressed its decision by citing to its own decision in Florida Cmty. Bank, N.A. v. Red Road Residential, LLC, 197 So.3d 1112 (Fla 3d DCA 2016), in which it had previously held that a borrower that successfully argued that her signature on a mortgage was fraudulent could not turn around and use the mortgage to obtain attorney's fees and costs.

In short, **if a foreclosure action is dismissed in Florida for lack of standing to enforce the note and mortgage against the borrower, then no contract exists between the bank and the borrower that would allow the borrower to invoke the reciprocity provision of Florida Statute §57.105(7).**

The Fitzgerald opinion is not final until the time to file a motion for rehearing has expired or the motion for rehearing has been disposed of by the court.