NEGATIVE AMORTIZATION DOES NOT DESTROY NEGOTIABILITY

The Second DCA recently issued an opinion wherein it agreed with its sister court that a note containing a negative amortization provision is still a negotiable instrument as defined by Florida Statute § 673.104(1) *Stacknik v. U.S. Bank Nat'l Ass'n as Tr., MASTR Adjustable Rate Mortgages Tr. 2007-3 Mortgage Pass-Through Certificates, Series 2007-3*. In *Stacknik*, the borrower (Stacknik) appealed the bank's final judgment of foreclosure arguing the bank lacked standing to foreclose because it could not establish its holder status. Stacknick argued the note was rendered non-negotiable by a negative amortization clause which provided the principal balance might increase if the borrower's mortgage payments were insufficient to pay the accruing monthly interest. Stacknik reasoned that the possibility of her principal balance increasing under those circumstances rendered the note non-negotiable because the amount promised to be paid was not 'fixed'" as required by § 673.1041, which defines a negotiable instrument as;

"an unconditional promise to pay a fixed amount of money, with or without interest or other charges described promise or order"

Since holder status can only be established by possession of a "negotiable instrument," Stacknick argued the bank was not a holder, who is defined to be "… the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession…".

The Florida Second DCA disagreed with Stacknik and explained that her note was a negotiable instrument and therefore the bank was a "holder". The Court relied on Florida Statute § 673.1041(1) which allowed "interest or other charges" in addition to the "fixed amount of money." The Court concluded the amounts that might be added to the principal in accordance with the negative amortization provisions of the note fell under these "***other charges***" and did not affect the negotiability of the instrument.

The Court expressed its agreement with the Florida Fourth DCA in *Hannah v. PennyMac Holdings, LLC,* which reached the same conclusion on similar facts. The Court went on to explain in a footnote even if the note was determined to be non-negotiable, Stacknik would still be obligated under the note because "contractual obligations to pay money are enforceable independent of whether they are negotiable instruments."

Ancillary to her standing argument, Stacknik also argued Plaintiff failed to prove it complied with paragraph 22 of her mortgage which required the bank send her

notice of any default prior to foreclosing. Ostensibly, Plaintiff hired a third party to mail the default notices. At trial, the bank's evidence included a demand notice, mailing log, customer service notes, and witness testimony. Stacknik argued Plaintiff's witness lacked ***sufficient knowledge*** of the ***third-party's mailing practices*** and therefore failed to prove it sent the demand notice. The Second DCA disagreed explaining;

"proof of regular business practices, an affidavit swearing that the letter was mailed, or a return receipt" were all sufficient independently to satisfy conditions precedent."

The Court elaborated that the bank's mailing logs which indicated the notice was sent also constituted "adequate proof of mailing" and affirmed US Bank's foreclosure judgment in all respects.