

PROMISSORY NOTES ARE NEGOTIABLE INSTRUMENTS

The Fourth District Court of Appeal recently held that a promissory note is a negotiable instrument even though it references provisions in the mortgage. [Onewest Bank, FSB v. Jose Nunez, Case No. 4D13-48176, 2016 WL 803542 \(Fla. 4th DCA March 2, 2016\)](#). This opinion is the first in Florida to specifically discuss the negotiability of promissory notes.

Below, the state court issued an involuntary dismissal of the foreclosure action ruling that the promissory note secured by the mortgage was not a negotiable instrument. OneWest appeals. First, the Fourth DCA notes that even if the note was not negotiable, dismissal of the action would be inappropriate. Second, and most importantly, the Fourth DCA held that the promissory note is a negotiable instrument.

Appellees argue that Section 11 of the promissory note contains language which refers to and incorporates provisions of the mortgage. Section 11 states:

In addition to the protective given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the “Security Instrument”), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. . .

Following Section 11, the Note includes a provision from the mortgage relating to the transfer of property. This language is standard in most promissory notes.

The main issue considered by the court was whether or not the language set forth in Section 11 complies with the Uniform Commercial Code’s definition of negotiable instruments. In order for a note to be a negotiable instrument it must be “an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order . . .” Section 673.1041(1), Florida Statutes (2013). The term unconditional is defined in Section 673.1061, Florida Statutes (2013) and states that mere reference to another writing does not itself make the instrument conditional (or not negotiable) if it references “a statement of rights with respect to collateral, prepayment, or acceleration.” The Court

concludes that the note's language (including Section 11) is merely referencing the mortgage as to the collateral rights or rights of acceleration which, as noted by the UCC, does not destroy the unconditional nature of the note or render the note non-negotiable.

The Court further discusses and differentiates the note in the *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209 (Fla. 2d DCA 1975) opinion and the note in this action. In *Holly Hill*, the Second DCA held that the note was conditional and therefore, not negotiable, because the note specifically made the terms of the mortgage "a part [t]hereof." The language used in the *Holly Hill* note incorporated the terms of the mortgage by making it "subject to" those mortgage terms. The language in the note in this action, discussed above, merely references the terms of the mortgage and does not incorporate those terms.

The Fourth DCA therefore concluded that the note's language did not render it non-negotiable as it merely references the mortgage and does not incorporate the terms therein.