

**CAUSE NO. 2021-77947**

**BYRONICA CONLEY**  
**Plaintiff**

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**IN THE HARRIS COUNTY**

**152<sup>nd</sup> CIVIL DISTRICT COURT**

vs.

**ALL ABOUT HOMES, LLC and**  
**FIRST AMERICAN NATIONAL, LLC**

**HARRIS COUNTY, TEXAS**

**Plaintiff's Motion For Partial Summary Judgement**

**A. Summary of Argument/Facts**

Defendant First American National, LLC foreclosed on a second lien on Plaintiff's ("Plaintiff" or "Conley") homestead in July 2021. It is undisputed that in December 2001, Plaintiff took a second mortgage on her homestead with **First Franklin Financial Corporation** for \$22,900.00 at 13.625% interest for 15 years.

It is also undisputed that Defendant First American National, LLC has not produced any written assignment, executed or otherwise, from **First Franklin Financial Corporation** assigning its rights under the deed of trust that would allow or give Defendant standing to foreclose Plaintiff's property.

Instead, Defendant relies on an Affidavit of Missing Assignment ("PHH Missing Assignment Affidavit") filed on April 6, 2021 by PHH Mortgage Corporation, an unrelated third party (Exhibit A-3). Plaintiff moves for a partial summary judgment on her request for a declaratory judgment that (1) Defendant First American National, LLC had no authority to foreclose on Plaintiff's property; and (2) Defendant First American National, LLC's assertion that the PHH Missing Assignment is somehow the assignment agreement violates the statute of frauds.

**A. Defendant has no authority to foreclose because there is no assignment of the deed of trust.**

“Because a power of sale under a deed of trust is a *harsh* method of collecting debts and of disposing of another's property, it can only be exercised by *strict compliance* with the note and conditions of sale.” *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ) (emphasis added).

In this case, Defendant admits that it is not a mortgagee or grantee that would give it the authority under Texas Property Code 51.002 to effectuate a foreclosure sale under the deed of trust. Instead, in an affidavit of its corporate representative, Defendant claims an assignment interest in the subject deed of trust as follows:

6. First Franklin Financial Corporation, its successors and assigns, assigned its interest in the Deed of Trust to First American. A true and correct copy of the Affidavit of Lost Assignment recorded in the official public records of Harris County, Texas is attached hereto as Exhibit A-3 and is incorporated herein for all purposes. Pursuant to assignment, First American is the beneficiary of the Deed of Trust.

(Exhibit A). Defendant solely relies on the PHH Missing Assignment affidavit to be the beneficiary entitled to enforce the deed of trust.

However, the PHH Missing Assignment Affidavit does not convey any interests from Franklin Financial Corporation to Defendant. Under Texas law, “[a]n assignment is the act by which one transfers to another, or causes to vest in another, his right of property”. *Highland Park State Bank v. Salazar*, 555 S.W.2d 484, 487 (Tex.Civ.App.1977).

An assignment is construed to have been made when the owner of a right manifests its intention to transfer the right to an assignee; an assignment is the *act* by

which a transfer is effected. *Miller v. Bank of the West*, No. 01–88–00195–CV, 1988 WL 88320, at \*2 (Tex.App.-Houston [1st Dist.] Aug. 25, 1988, no writ) (not designated for publication). Crucially, the manifestation of an assignment must convey the present intent of the owner to transfer his rights to another. *See Commercial Structures & Interiors, Inc. v. Liberty Educ. Ministries, Inc.*, 192 S.W.3d 827, 833 (Tex. App.—Fort Worth 2006, no pet.).

Defendant’s reliance on the PHH Missing Assignment Affidavit is misplaced because its does not contain any language indicating that First Franklin Financial Corporation intended to convey its rights to under the deed of trust to Defendant. The PHH Missing Assignment Affidavit does not identify when an assignment occurred, who executed an assignment, the consideration for any assignment, and other essential terms that one would find in an actual written assignment. **First Franklin Financial Corporation** could not have intended to convey its rights under the deed of trust because there is no written assignment regarding same<sup>1</sup>.

**B. Alternatively, Defendant cannot rely on the PHH Missing Assignment Affidavit because it violates the statute of frauds.**

A conveyance of an interest in real property is subject to the statute of frauds. *See Republic Nat'l Bank of Dallas v. Stetson*, 390 S.W.2d 257, 261 (Tex. 1965).\

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<sup>1</sup> Interestingly, the PHH Missing Assignment Affidavit identifies PHH Mortgage (**not Defendant**) as the purported current beneficiary of the subject deed of trust and same “has not further assigned or transferred said Deed of Trust to any other party.” (Exhibit A-3). Regardless Defendant never acquired any rights under the deed of trust.

In this case, the PHH Missing Assignment Affidavit cannot be a valid assignment for sole reason that **First Franklin Financial Corporation** never signed it.

As this Court is well aware “[a] promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.” (Tex. Bus. Com. Code 26.01).

### **C. Plaintiff’s Request for Declaratory Judgment**

The Texas Property Code sets conditions for “a sale of real property under a power of sale conferred by a deed of trust or other contract lien.” Tex. Prop. Code Ann. § 51.002(a) (West Supp. 2021). The Code further defines a “mortgagee” who is authorized to foreclose to include the “grantee” or “beneficiary” of a “security instrument” or as “the last person to whom the security interest has been assigned of record.” *Id.* § 51.0001(4). TEX. PROP. CODE ANN. § 51.0001(4); *Allan v. Nationstar Mortgage, LLC*, No. 14-18-00246-CV, 2019 WL 2939746, at \*3 (Tex. App.—Houston [14th Dist.] July 9, 2019, pet. denied).

In this case, Defendant has not and cannot produce any executed assignment or transfer of the deed trust from the original beneficiary, **FIRST FRANKLIN FINANCIAL CORPORATION**. Instead, Defendant mistakenly relies on the Affidavit of Missing Assignment filed by **PHH MORTGAGE CORPORATION** that is not a valid assignment and violates the statute of frauds.

Defendant took the extraordinary self help by conducting a nonjudicial foreclosure on Plaintiff's homestead without even verifying the chain of title. Plaintiff would respectfully request this Court to declare that Defendant had no standing, authority, or power to foreclose on Plaintiff's home on July 6, 2021 and to set aside and void the substitute trustee's sale and subsequent deed (RP-2021-418422) and other just and equitable relief the Court deems proper.

Respectfully submitted,

**DAVID TANG ATTORNEY AT LAW**



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DAVID TANG  
dtangattorney@gmail.com  
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6711 Stella Link, #343  
West University Place, Texas 77005  
Telephone: (832) 287-2129  
Telecopies: (832) 217-3227

**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was served in accordance with the Texas Rules of Civil Procedure on counsel of record on this the 20<sup>th</sup> day of June 2022.



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**DAVID TANG**

### Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

DAvid Tang on behalf of David Tang  
Bar No. 24014483  
dtangattorney@gmail.com  
Envelope ID: 65607000  
Status as of 6/21/2022 12:32 PM CST

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
David Tang	24014483	dtangattorney@gmail.com	6/20/2022 10:14:11 PM	SENT
Shelley LHopkins		ShelleyH@bdfgroup.com	6/20/2022 10:14:11 PM	SENT
Kate Barry		Kate@hopkinslawtexas.com	6/20/2022 10:14:11 PM	SENT
Leanna Kimball		leannak@bdfgroup.com	6/20/2022 10:14:11 PM	SENT
LaDonna Butler		ladonnab@bdfgroup.com	6/20/2022 10:14:11 PM	SENT

# **EXHIBIT A**

CAUSE NO. 2021-77947

BYRONICA CONLEY,

*Plaintiff,*

v.

ALL ABOUT HOMES, LLC and  
FIRST AMERICAN NATIONAL, LLC,

*Defendant.*

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IN THE DISTRICT COURT

152ND JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

**AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

STATE OF NEW JERSEY

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COUNTY OF MORRIS

Before me, the undersigned Notary Public on this day personally appeared Jeffrey Havens, personally known to me to be the person whose signature is affixed hereto, and after being duly sworn stated under oath, as follows:

1. “My name is Jeffrey Havens. I am over the age of twenty-one (21), have never been convicted of a felony or crime involving moral turpitude and am fully competent to provide this testimony. The facts stated in this declaration are within my personal knowledge and are true and correct.

2. I am currently employed by First American National, LLC (“First American”), the Defendant herein and mortgagee of the Note and Deed of Trust secured by property located at 12310 Wilde Laurel Lane, Houston, Texas 77014 (the “Property”).

3. In my referenced capacity, I am fully authorized to make this declaration for First American. I am the authorized agent or representative of First American with respect to Plaintiff Byronica Conley’s Loan. I have access to and have reviewed the servicing records and loan data for Plaintiff’s account. When First American receives documents from other parties, such as the prior mortgage servicers or mortgagees, those documents are placed in First American’s business records at or near the time they are received and are adopted as business records of First American. My testimony is based upon my familiarity with the business practices, record keeping system and practices of First American, the mortgage industry and my review of First American’s business records.

4. On or about December 17, 2001, Plaintiff obtained a loan in the original principal sum of \$22,900.00 (the “Loan”). The Loan was memorialized in a second note of same date, that obligated Plaintiff to repay the Loan through monthly payments of principal and interest (the “Second Note”). A true and correct copy of the Second Note is attached hereto as **Exhibit A-1** and is incorporated herein for all purposes.



5. To secure the Plaintiff's payment obligations under the Second Note, the Plaintiff contemporaneously executed a Second Lien Purchase Money Deed of Trust ("Deed of Trust") granting a second lien security interest in the Property to First Franklin Financial Corporation. A true and correct copy of the Deed of Trust is attached hereto as **Exhibit A-2** and is incorporated herein for all purposes.

6. First Franklin Financial Corporation, its successors and assigns, assigned its interest in the Deed of Trust to First American. A true and correct copy of the Affidavit of Lost Assignment recorded in the official public records of Harris County, Texas is attached hereto as **Exhibit A-3** and is incorporated herein for all purposes. Pursuant to assignment, First American is the beneficiary of the Deed of Trust.

7. Based on the records of First American, Byronica Conley failed to make the payments due under the Note. On April 7, 2021, Notice of Default was sent to Byronica Conley. A true and correct copy of the Notice of Default is attached hereto as **Exhibit A-4** and is incorporated herein for all purposes.

8. On June 9, 2021, counsel for First American sent Plaintiff Notice of Acceleration. A true and correct copy of the Notice of Acceleration is attached hereto as **Exhibit A-5** and is incorporated herein for all purposes.

9. Plaintiff failed to cure the default, and on July 6, 2021 the Property sold at foreclosure sale to Defendant All About Homes, LLC. A true and correct copy of the Substitute Trustee's Deed is attached hereto as **Exhibit A-6** and incorporated herein for all purposes.

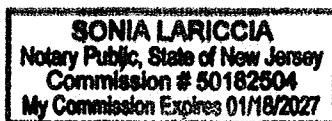
10. I am a custodian of records of First American. Attached to this Affidavit are records kept in the regular course of business and it was the regular course of business of First American, or its predecessor, for an employee or representative of First American, with knowledge of the act, event, condition or opinion recorded, to make the record, or to transmit information thereof to be included in such record; and the records attached hereto were all made at or near the time of the act, event, condition or opinion, or reasonably soon thereafter. The records attached to this Affidavit as **Exhibits A-1, A-2, A-3, A-4, A-5, and A-6** are true and correct copies of the originals or the exact duplicates of the originals."

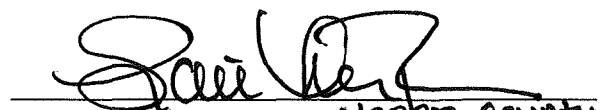
Further affiant sayeth not.

  
NAME: Jeffrey Havens

TITLE: Officer-VP of First American

SWORN AND SUBSCRIBED before me by Jeffrey Havens on this the 27 day of April 2022.



  
Notary Public In and For MORRIS county  
The State of NEW JERSEY

# **EXHIBIT A-3**

**AFFIDAVIT OF MISSING ASSIGNMENT**

The undersigned **ANTHONY AVILES**, being duly sworn deposes and states as follows:

1. That I am a **MANAGER** of **PHH MORTGAGE CORPORATION** ("servicer") having its principal place of business at 5720 PREMIER PARK DRIVE, WEST PALM BEACH, FL 33407, an officer duly authorized to make this affidavit.
2. That I have personal knowledge of the facts set forth in this Affidavit including that of **PHH MORTGAGE CORPORATION**'s business records kept in the course of its regularly conducted business activities. I have personal knowledge of **PHH MORTGAGE CORPORATION**'s procedures with respect to the safekeeping and retrieval of collateral documents and loans serviced by **PHH MORTGAGE CORPORATION** on behalf various Beneficiaries.
3. That Affiant is the servicer and attorney-in-fact for **PHH MORTGAGE CORPORATION** ("Current beneficiary"), who is the Beneficiary of a certain deed of trust (the "deed of trust") dated on 12/17/2001 made by **BYRONICA CONLEY, A SINGLE PERSON** as Trustor(s) to **FIRST FRANKLIN FINANCIAL CORPORATION** as Original Beneficiary, which mortgage was recorded on 12/20/2001 in the office of the Recorder, Registrar or Clerk of **HARRIS**, in the State of **TEXAS**, AS INSTRUMENT NUMBER V491039



RP-2021-183186

4. Based upon the records maintained in Affiant's system of record, the Current Beneficiary owns and holds said Deed of Trust as a result of sale and assignment thereof to the Current Beneficiary from a previous Beneficiary. The Current Beneficiary duly and properly acquired the Deed of Trust and has in its possession the Deed of Trust loan documentation pertaining to same.

5. That I have examined an abstract of the public records of said County, and all known collateral documents in possession of the Affiant, and there appears to be a gap in the chain of assignments of said Deed of Trust from the Original Beneficiary to the Current Beneficiary. There is at least one assignment between FIRST FRANKLIN FINANCIAL CORPORATION and FIRST AMERICAN NATIONAL, LLC and perhaps others within this gap that do not appear of public record.

6. That I have concluded that such missing assignment(s) either were never completed or, if completed, were lost, misplaced or destroyed before the same could be placed of record.

7. That, based on my review of the chain of endorsements that appear on the Note and the securitized documents for this loan, this loan was indeed assigned from FIRST FRANKLIN FINANCIAL CORPORATION to FIRST AMERICAN NATIONAL, LLC and as such, an assignment should have been executed and recorded to indicate same.

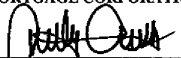
8. That, after a diligent good faith attempt, I have concluded such assignment(s) cannot now be obtained. If a copy of one or more incomplete or otherwise unrecordable intervening assignment(s) are available, they are attached to this affidavit.

9. Based upon the records maintained in Affiant's system of record, the Current Beneficiary has not further assigned or transferred said Deed of Trust to any other party.

10. That this affidavit is made to induce the Recorder, Registrar or Clerk of said County to accept for recording this instrument, executed and acknowledged by the Affiant, in place of said lost, misplaced or destroyed assignment(s).

11. The Current Beneficiary agrees to indemnify and hold harmless the Recorder, Registrar or Clerk of said County from and against any cost or claims that may arise by reason of the acceptance and recording of this affidavit.

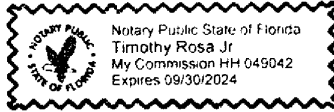
Dated on 4 / 2 / 2021 (MM/DD/YYYY)  
 PHH MORTGAGE CORPORATION

  
 \_\_\_\_\_  
 ANTHONY AVILES  
 MANAGER

STATE OF FLORIDA  
 COUNTY OF PALM BEACH

Sworn to (or affirmed) and subscribed before me by means of  physical presence or  online notarization on 4 / 2 / 2021 (MM/DD/YYYY), by ANTHONY AVILES as MANAGER for PHH MORTGAGE CORPORATION. He/she is personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument.

  
 \_\_\_\_\_  
 Timothy ROSA Jr  
 Notary Public - STATE OF FLORIDA  
 Commission expires: 9-30-2024



Document Prepared By: Anthony Aviles, PHH Mortgage Corporation, One Mortgage Way, Mt. Laurel, NJ 08054, 800-449-8767

RP-2021-183186



RP-2021-183186  
# Pages 3  
04/06/2021 04:07 PM  
e-Filed & e-Recorded in the  
Official Public Records of  
HARRIS COUNTY  
TENESHIA HUDSPETH  
COUNTY CLERK  
Fees \$22.00

RECORDERS MEMORANDUM

This instrument was received and recorded electronically and any blackouts, additions or changes were present at the time the instrument was filed and recorded.

Any provision herein which restricts the sale, rental, or use of the described real property because of color or race is invalid and unenforceable under federal law.  
THE STATE OF TEXAS  
COUNTY OF HARRIS

I hereby certify that this instrument was FILED in File Number Sequence on the date and at the time stamped hereon by me; and was duly RECORDED in the Official Public Records of Real Property of Harris County, Texas.



*Teneshia Hudspeth*  
COUNTY CLERK  
HARRIS COUNTY, TEXAS

RP-2021-183186

**CAUSE NO. 2021-77947**

**BYRONICA CONLEY**  
Plaintiff

vs.

**ALL ABOUT HOMES, LLC and**  
**FIRST AMERICAN NATIONAL, LLC**

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**IN THE HARRIS COUNTY**

**152<sup>nd</sup> CIVIL DISTRICT COURT**

**HARRIS COUNTY, TEXAS**

**NOTICE OF SUBMISSION**

Please take notice that the following motion(s) will be heard on the Court's submission docket at 8:00 a.m., July 11, 2022:

Plaintiff's Motion for Partial Summary Judgment

Respectfully submitted,

**DAVID TANG ATTORNEY AT LAW**



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Telephone: (832) 287-2129  
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**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was served in accordance with the Texas Rules of Civil Procedure on counsel of record on this the 20<sup>th</sup> day of June 2022.

A handwritten signature in black ink, appearing to read 'DAVID TANG', written over a horizontal line.

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**DAVID TANG**

### Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

DAvid Tang on behalf of David Tang  
Bar No. 24014483  
dtangattorney@gmail.com  
Envelope ID: 65607000  
Status as of 6/21/2022 12:32 PM CST

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
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Leanna Kimball		leannak@bdfgroup.com	6/20/2022 10:14:11 PM	SENT
LaDonna Butler		ladonnab@bdfgroup.com	6/20/2022 10:14:11 PM	SENT
David Tang	24014483	dtangattorney@gmail.com	6/20/2022 10:14:11 PM	SENT