Florida's 4th DCA Reverses Many Foreclosure Judgments

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"Oops – Our Bad – The Banks Didn't Have Standing to Foreclose"

In the first four months of 2016, Florida's 4th District Court of Appeals reversed many foreclosure judgments, primarily on standing grounds. In these appellate opinions, the appellate court repeatedly held that the banks failed to prove that they had standing to foreclose when they failed to prove that they had possession of the indorsed original note at the time the complaint was filed. These were all cases where the foreclosure was sought by a bank that was not the original lender. In the vast majority of foreclosure cases decided after 2008, the lender and the plaintiff/forecloser were different entities because the lender sold the loan. In most cases, the loans had been repeatedly sold. The threshold question that frequently arose in foreclosure cases was whether the entity seeking to foreclose owned the loan at the time the foreclosure was commenced. In legal terms, the entity seeking to foreclose had to establish that it had standing to foreclose.

The easiest way for an entity seeking to foreclose to establish that it owned the note and had the right to foreclose was to attach the original, properly indorsed note to the complaint. In tens of thousands of foreclosure cases filed from 2008 through 2012, the note was not attached. The entities seeking to foreclose not only did not attach the notes, but they included allegations that the original notes were lost. Later in the litigation, in the majority of these cases, the party seeking to foreclose would claim to have found the original, properly indorsed note. In such circumstances, in tens of thousands of cases where the homeowners lost their homes, the courts decided that the subsequent "found" note was sufficient to establish standing.

Now, when the foreclosure crisis has waned, the courts are agreeing with the homeowners that the foreclosing banks never established their right to foreclose. For tens of thousands of homeowners, this acknowledgment is a very bitter pill to swallow.

In simplest terms, a foreclosure case would be filed in June, with no note and an allegation that the original note was lost. In October, the bank would file what it claimed was the original indorsed note with the court, with no explanation of where the note had been found or where the note was in June when the case was filed. Courts essentially found that production of the note in October was sufficient proof in and of itself that the foreclosing bank owned the note back in June. The vast majority of foreclosure courts followed this absurd logic.

In 2014, some appellate courts finally began rejecting this "proof" of standing by the late filing of the indorsed note. Florida's 4th District Court of Appeals has been especially aggressive about this issue, repeatedly reversing lower court rulings. Most of these cases involve foreclosure complaints that were filed with a lost note count. The lower courts found there was sufficient evidence for standing when the bank came in later in the

n with an indorsed note, even though the indorsement was not dated. In most of nions reversing the lower courts, the appellate court relied on *McClean v. JPMorgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012) ("It is well settled that a plaintiff in a foreclosure case must demonstrate that it had standing at the time the complaint was filed."). The court also usually relied on *Calvo v. U.S. Bank Nat'l Ass'n*, 181 So. 3d 562, 564 (Fla. 4th DCA 2015) (An undated indorsement introduced after the complaint was filed, is insufficient, without further evidence, to prove standing at the time the complaint was filed.) Additionally, the court regularly relied on *Balch v. LaSalle Bank, N.A.*, 171 So. 3d 207, 209 (FLA. 4th DCA 2015), finding the plaintiff failed to prove standing where there was no evidence indicating when the indorsement was placed onto the note. These reversals resulted in remands with instructions to enter involuntary dismissals of the actions. Each of these opinions is available on the website of the 4th DCA.

Several of the cases dealt with the sufficiency of the evidence presented by the banks' witnesses. These witnesses are usually employees of the mortgage servicing companies that are successors to companies that previously serviced the loans. These employees are often unfamiliar with the practices, procedures and record-keeping of the previous company and are not able to testify from personal knowledge about critical facts, especially, whether the loan file contained the original indorsed note when the file reached the servicer. If the witness testifies that the file contained the original indorsed note, the question becomes why such note was not attached to the complaint at the time of the original filing.

The 4th DCA also reiterated its position that a Pooling and Servicing Agreement ("PSA") with a loan schedule showing the loan in dispute does not establish standing. In these cases, the banks attempted to use the PSA to prove standing. None of the banks or servicers produced the document custodian's transfer and delivery receipt certifying that delivery of the indorsed notes on the loan schedule was actually made at a certain place and on a specific date.

Opinions Released April 6, 2016:

***Edgar Braga v. Fannie Mae*, 4D14-1809**

CitiMortgage filed a foreclosure action against the homeowners/borrowers, and attached a copy of the promissory note, which included a stamp indicating an allonge was attached, but no allonge was actually included with the complaint. An amended complaint was later filed, substituting Fannie Mae as the plaintiff, and including an undated copy of an allonge. At trial, Fannie Mae's sole witness testified that he did not know when the allonge was created, nor was he aware of when CitiMortgage became the note's holder.

Ice Appellant, Royal Palm Beach, for Appellant.

***Susan Elman and Bruce Elman v. U.S. Bank*, 4D142520**

The borrowers executed a note and mortgage with Pinnacle Financial Corporation. The bank filed a foreclosure complaint with a count to reestablish a lost note, then filed an amended complaint, dropping the reestablishment count and attaching a copy of the note containing an undated special indorsement from Pinnacle to Impac Funding Corporation on an allonge. The loan number on the note was different from the loan number on the allonge. The bank then filed a third amended complaint which alleged that the bank was

lder of the Mortgage Note and Mortgage." The bank's witness could not state the e allonge was affixed to the note. The bank's witness testified that the payment log indicated that the loan had been sold to EMC and that Wells Fargo Bank was the servicer for the loan, but the witness could not explain EMC's relation to the ownership trail. The court found that the bank failed to prove the allonge was specially indorsed in the bank's favor and affixed to the original note prior to filing its complaint and therefore, the bank failed to prove standing.

Korte & Wortman, P.A., West Palm Beach, for Appellants.

***Michael Maslak v. Wells Fargo Bank*, 4D14-4672, 4D14-4673 and 4D14-4707**

The homeowners/borrowers executed three promissory notes and mortgages to Washington Mutual Bank. JPMorgan Chase was the servicer of the loans. WaMu endorsed the notes to Wells Fargo, as Trustee for WaMu Mortgage Certificates, Series 2005-PR4. Wells Fargo foreclosed. The cases were consolidated for trial and final judgments of foreclosure were entered in favor of Wells Fargo. On appeal, the borrower argued that the trial court erred in admitting business records because Wells Fargo's witness was not qualified to lay a foundation for their admission. The appellate court agreed, stating: "What is missing here is testimony about Chase's procedures for inputting payment information into their systems and how the payment history was produced." Without the payment history, Wells Fargo failed to prove the amounts due and owing. The case was reversed and remanded for further proceedings to establish the amounts due and owing.

Wright, Ponsoldt & Lozeau, LLC for Appellants.

Opinion Released March 30, 2016:

***Laveria Knowles v. Bank of New York Mellon*, et al., 4D-15-630**

Reversal of the trial court's judgment of foreclosure and remand for an order of dismissal was appropriate because two important cases were decided after the trial. The first was *Jelic v. LaSalle Bank, Nat'l Ass'n*, 160 So. 3d 127, 130 (Fla. 4th DCA 2015) which reversed a final judgment of foreclosure, in part because there was no evidence that the party transferring the note into the trust had any intent to transfer an interest to the trustee. The second case was *Balch v. LaSalle Bank*, N.A., 171 So. 3d 207, 209 (Fla. 4th DCA 2015) reversing a final judgment of foreclosure, in part because "evidence that the note was transferred into the trust prior to the foreclosure action is insufficient by itself to confer standing because there was no evidence that the indorsee had the intent to transfer any interest to the trustee."

Ice Appellate, Royal Palm Beach, for Appellant.

Opinions released March 23, 2016:

***Ottoniel Cruz and Luz Cruz v. JPMorgan Chase Bank*, et al.**

The transfer of mortgages by the FDIC, as receiver of WaMu, at the collapse of WaMu, to JPMorgan Chase was the main issue before the court. The loan and mortgage were made by WaMu, then transferred to JPMorgan Chase. Before trial, JPMorgan Chase transferred its interests in the mortgage to PennyMac Corporation. When the foreclosure action was filed, JPMorgan Chase included a lost note count. During the course of the litigation, JPMorgan

dropped the lost note count. JPMorgan Chase attempted to rely on the Purchase and ɔtion Agreement ("PAA") between JPMorgan Chase and the FDIC, but the trial court found this insufficient to prove standing:

> Here, there was no proof that JPMorgan had possession of the note at the time it filed the complaint. JPMorgan acknowledged that the note was lost and not in its custody or control. Because the original note was never filed with the court and there was no other evidence of possession, no competent substantial evidence exists of possession... And, similar to Snyder, there exists no competent substantial evidence of ownership. The PAA has caveats where JPMorgan could refuse to acquire assets and there is no record evidence that the FDIC transferred the note to JPMorgan before the complaint was filed. Id. We reverse the final judgment of foreclosure based on JPMorgan's failure to prove standing.

Bravo, P.A. and Corona Law Firm for Appellants.

***Jorge Sosa and Jeanette Sosa v. Bank of New York Mellon*, et al.**

Bank of New York Mellon (BNYM) filed a mortgage foreclosure complaint against the homeowners/borrowers alleging one count of foreclosure and one count for reestablishment of a lost note. Although BNYM was not the original lender, BNYM alleged that it was the owner and holder of the Note and Mortgage and, in support, attached a copy of the Note containing a blank indorsement. At trial, BNYM announced it had located the original Note and intended to submit it as evidence. BNYM called a loan verification analyst for its purported servicer, Wells Fargo Bank, N.A., as its only witness. Through the analyst, the BNYM introduced the original Note which, unlike the copy of the Note attached to its complaint, was specially indorsed to JP Morgan Bank as Trustee ("JP Morgan"). When asked about her knowledge of how BNYM acquired the Note from JP Morgan, the witness testified that she learned about the transfer through general research she did "on the internet" and that "the internet will illustrate the transfer occurred in 2006." BNYM did not present any additional evidence establishing that it acquired the Note prior to filing the foreclosure action.

At the conclusion of the witness' testimony, BNYM rested. At that point, the homeowners/borrowers moved for an involuntary dismissal, arguing that the BNYM failed to establish it had standing. The homeowners/borrowers argued that the Note was indorsed to JP Morgan and there was no evidence establishing a relationship between JP Morgan and BNYM. BNYM countered that it identified itself as the successor in interest to JP Morgan in the style of the complaint. The court entered judgment in favor of BNYM.

The appellate court found the testimony of the BNYM witness to be insufficient:

> Here, the Bank claims that it presented through its witness's testimony substantial, competent evidence that the Bank was the successor trustee to JP Morgan and, thus, had standing to sue under the Note. The Bank's position is patently overstated. The witness did not work for the Bank or JP Morgan and was unable to describe the relationship between the two. Moreover, the witness's entire body of knowledge on the subject was limited to what the witness learned from a search on "the internet." Such evidence is not competent to establish the Bank's standing as nonholder in possession with the rights of a holder.

The trial court's decision was reversed and the case was remanded for entry of an order of

tary dismissal of the action.
Law firm for Appellants.

Opinions Released March 9, 2016:

***Sharlene Hampton Lewis v. U.S. Bank*, 4D14-815**

U.S. Bank filed a foreclosure action and included a count seeking to reestablish a lost note. No copy of the original note was attached to the complaint. When the case went to trial, the bank produced a note and an allonge. The endorsements on the allonge to the note were undated and the bank's witness could not testify when the endorsements were placed on the allonge. The appellate court found that the bank's reliance on a pooling and servicing agreement was insufficient to establish the bank's standing to bring suit at the time the suit was filed, citing *Jarvis v. Deutsche Bank Nat'l Trust Co.*, 169 So. 3d 194, 196 (Fla. 4th DCA 2015); *Balch v. Lasalle Bank N.A.*, 171 So. 3d 207, 209 (Fla. 4th DCA 2015); and *Perez v. Deutsche Bank Nat'l Trust Co.*, 174 So. 3d 489, 491 (Fla. 4th DCA 2015).

In *Jarvis v. Deutsche Bank Nat'l Trust Co.*, 169 So. 3d 194, 196 (Fla. 4th DCA 2015), decided June 15, 2015, the court rejected Deutsche Bank's argument that a Pooling and Servicing Agreement from the trust that stated when the loans were to have been transferred to the trust and testimony from a bank representative that the trust had physical possession of the note were insufficient to establish standing where the original note contained no blank or special indorsements and no assignment of mortgage was offered into evidence. The *Jarvis* court relied on *Kiefert v. Nationstar Mortg., LLC*, 153 So. 3d 351, 353 (Fla. 1st DCA 2014). In *Kiefert*, the mortgage servicer's witness was only able to testify that its predecessor was in possession of the note when the complaint was filed, "Not that the note had been endorsed at the time the complaint was filed."

Jacobs Keeley PLLC for Appellants.

In *Jarvis*, the appellants were represent by The Mack Firm, Englewood.

Opinions Released February 24, 2016:

***Abdel Darwiche and Batoul Darwiche v. Bank of New York Mellon*, et al., 4D13-4395**

In the Darwiche case, the copy of the note attached to the complaint stated that the original lender was America's Wholesale Lender. The note did not contain any indorsements. In its complaint, filed July 28, 2009, Bank of New York Mellon ("BNYM") alleged that the mortgage was transferred to it by virtue of "an assignment to be recorded" and that it "owns and holds the Note and Mortgage."

After Appellants filed a motion to dismiss challenging the bank's standing, BNYM filed a copy of the note reflecting an undated blank indorsement signed by Countrywide Home Loans, Inc., doing business under the fictitious name of America's Wholesale Lender, the original lender. The bank also maintained in its response to Appellants' motion that it was in possession of the original note and mortgage and that it came into ownership of the same through a valid assignment of mortgage.

Thereafter, BNYM filed a motion for summary judgment of foreclosure. In support of its motion, BNYM filed an affidavit attesting that it "has possession of the promissory note," and that it is "the assignee of the security instrument for the referenced loan." BNYM also filed the original note and mortgage, along with a copy of the recorded assignment of mortgage. The original note contained the undated blank indorsement by the original

The assignment of mortgage, notarized August 5, 2009 (after suit was filed), ...d a transfer of the note and mortgage from MERS to BNYM, effective June 22, 2009 (before suit was filed). After the hearing, the trial court entered a final summary judgment in favor of the bank.

Reversing the trial court, the appellate court noted that the affidavits in support of the BNYM's motion for summary judgment did not specifically state when the bank came into possession of the note, nor did the bank otherwise indicate that it owned or possessed the note at the time suit was filed. Though the bank filed the original note and mortgage prior to the summary judgment hearing, its bare assertion in its supporting affidavit that it "has possession of the promissory note" fails to clarify at what point the bank obtained possession of the blank-indorsed note, and is therefore insufficient evidence of whether the bank possessed the note from the inception of the suit. See *Cromarty v. Wells Fargo Bank, NA*, 110 So. 3d 988, 989 (Fla. 4th DCA 2013) ("While the note introduced had a blank [i]ndorsement and was sufficient to prove ownership by appellee, who possessed the note, nothing in the record shows that the note was acquired prior to the filing of the complaint. The [i]ndorsement did not contain a date, nor did the affidavit filed in support of the motion for summary judgment contain any sworn statement that the note was owned by the plaintiff on the date that the complaint was filed.")

As to the assignment of mortgage, upon which the BNYM relied to establish its standing, the appellate court agreed with the homeowners/borrowers that genuine issues of material fact remained as to whether the assignment of mortgage was sufficient to establish BNYM's standing at the inception of the suit, noting:

> The complaint was filed on July 28, 2009. Although the assignment transferring the note and mortgage to the bank states an "effective date" of June 22, 2009, the assignment appears to have been notarized and executed on August 5, 2009, which was clearly after the complaint was filed. We have held that "two inferences can be drawn from the 'effective date' language." *Vidal v. Liquidation Props., Inc.*, 104 So. 3d 1274, 1277 (Fla. 4th DCA 2013). One inference is that ownership of the note and mortgage was equitably transferred to the bank on June 22, 2009 (prior to suit), but another inference is that the parties to the transfer were attempting to backdate an event to their benefit. Id. We have previously warned that "[a]llowing assignments to be retroactively effective would be inimical to the requirements of pre-suit ownership for standing in foreclosure cases." Id. at 1277 n.1. "Because the language yields two possible inferences, proof is needed as to the meaning of the language, and a disputed fact exists." Id. at 1277.

Neustein Law Group for Appellants.

***Frederic Monot v. U.S. Bank*, et al., 4D14-2527**

In *Monot*, the appellate court reversed the trial court's entry of a final judgment of foreclosure, finding, "The bank simply failed to prove standing because it failed to prove that it possessed the original note endorsed in its favor prior to filing the complaint."

U.S. Bank, NA filed a complaint against the homeowners/borrowers on December 2, 2009. Count I sought foreclosure of the mortgage and count II sought to reestablish a lost note. U.S. Bank alleged that it held the mortgage by virtue of an assignment. It also alleged that it "owns and holds the note and subject mortgage." And, it alleged that "[t]he Plaintiff, its Assignor, or its servicer, was in possession of the Note and was entitled to enforce the Note

The bank attached a copy of the note and mortgage to the complaint. The attached note was executed in favor of Chevy Chase Bank and did not contain any indorsements. On December 11, 2009, the bank filed a notice of filing original note and mortgage. Unlike the copy of the note attached to the complaint, this note contained an undated special indorsement from Chevy Chase Bank to U.S. Bank, N.A. The appellate court found that this late filing of the indorsed note was insufficient relying on *Tilus v. AS Michai LLC*, 161 So. 3d 1284, 1286 (Fla. 4th DCA 2015) (citing *Bristol v. Wells Fargo Bank, Nat'l Ass'n*, 137 So. 3d 1130, 1132 (Fla. 4th DCA 2014)).

The appellate court also found that the bank's witnesses did not establish standing:

> The bank's witness testified that based on her records review, the bank obtained physical possession of the note in June 2007. While she later testified that the bank had the original endorsed note in its possession at the time the complaint was filed, she admitted that she did not know the specific date on which the note was endorsed to the bank. And, she did not check the collateral file for the original note and had no personal knowledge of whether the original note was in the collateral file when received by the servicer… because she did not review its contents. She also did not know why the endorsed note was not attached to the complaint nor the specific date the note was endorsed to the bank.

U.S. Bank also argued that the PSA showed it had been the owner of the loan since June 1, 2007, because the mortgage loan schedule showed the note was transferred into the PSA. Relying on *Jarvis v. Deutsche Bank Nat'l Trust Co.*, 169 So. 3d 194, 196 (Fla. 4th DCA 2015), the appellate court also rejected this argument.

Arthur Morburger for Appellant.

***Charles Nolan v. Mia Real Holdings*, LLC, 4D15-666**

Flagstar Bank filed a foreclosure action against the homeowner, which it voluntarily dismissed. Flagstar assigned the note and mortgage to DKR Mortgage, which then filed a second foreclosure action against the homeowner, on the same note, alleging the same breach. MIA Real Holdings substituted as the party plaintiff in that action after it purchased the note from DKR Mortgage. MIA voluntarily dismissed the second action. Subsequently, MIA filed a third complaint on the same note, alleging the same breach, which resulted in the final judgment on appeal.

The appellate court reversed the final judgment of foreclosure because the action was barred by the "two dismissal" rule of Florida Rule of Civil Procedure 1.420(a)(1). In successive actions, two different plaintiff/note holders sought to foreclose based on the same breach. Each plaintiff filed a voluntary dismissal of its lawsuit. The appellate court held that for the purpose of rule 1.420(a)(1), the two noteholders—the original plaintiff and the subsequent assignee of the note—were the same "plaintiff" under the rule, so that the second voluntary dismissal triggered an "adjudication on the merits."

Korte & Wortman, P.A., West Palm Beach, for Appellant.

Opinions Released February 17, 2016:

***Lirris Smith Gallimore v. Bank of America*, 4D13-3269**

America's filed a two-count complaint against the homeowner. Count I sought mortgage foreclosure and Count II sought enforcement of a lost note. The subject note and mortgage were signed on January 19, 2007, and both list Encore Credit Corp. ("Encore") as the lender. The copy of the note attached to the complaint did not contain any indorsements or allonges. There were no allegations of transfer of the note in the complaint.

Subsequently, the Bank moved to amend its complaint, dropping the lost note count. Attached to a proposed amended complaint was a copy of the original note, which included an undated blank indorsement on the back of the last page of the note. The Bank did not obtain a pretrial order granting leave to amend the complaint.

The case proceeded to a non-jury trial in August 2013. Bank of America's sole witness testified that she worked for "SPS," the servicer for the Bank. On cross-examination, the witness admitted that SPS became the servicer only two months before trial. The witness gave little testimony about the indorsement on the note. The only significant testimony regarding the indorsement was that the witness saw the indorsement on a copy of the note in SPS's system in June of 2013.

When Bank of America attempted to introduce the original note at trial, the homeowner objected, arguing that the original note was never produced prior to trial and that she was surprised by the blank indorsement and was not aware that the lost note count had been dropped. There was no order dropping the lost note count or notice of voluntary dismissal of the lost note count. Bank of America moved to amend the pleadings to conform to the evidence, since it had the original note at trial. The trial court granted the "motion to drop," overruled the objections to the admission of the original note into evidence, and subsequently entered a judgment of foreclosure. The homeowner appealed.

On appeal, the court noted that since the indorsement was undated, the indorsement did not facially establish that it was placed on the note prior to the filing of the complaint. Additionally, there was no testimony by Bank of America's witness as to when the indorsement was placed on the note, or that the indorsement was on the note at the time suit was filed. Instead, all the witness could say was that she saw the indorsement on a copy of the note in SPS's system in June of 2013, over four years after the complaint was filed. Likewise, the copy of the note that was attached to the complaint did not exhibit an indorsement; thus, there was no circumstantial evidence that the note was indorsed before suit was filed. There was also no evidence that there was an assignment of the note or mortgage. The appellate court concluded that Bank of America presented no evidence at trial proving it had standing at the time the complaint was filed.

Korte & Wortman, P.A., West Palm Beach, for Appellant.

***Mark Barnett and Yvette Barnett v. U.S. Bank*, et al., 4D13-4179**

Bank of America, "as Successor by Merger to LaSalle Bank, National Association, as Trustee for Washington Mutual Mortgage Pass-Through Certificates, WMALT Series 2005-11," filed a mortgage foreclosure complaint against the homeowners on May 25, 2010. The complaint alleged that Bank of America "is the current owner of or has the right to enforce the Note and Mortgage. See attached Exhibit C." The copy of the note attached to the complaint identified First Savings Mortgage Corporation as the lender. The note also contained an undated special indorsement from First Savings Mortgage Corporation to a third party, Residential Funding Corporation. Also attached to the complaint was a copy of the

ge. The mortgage, like the note, identified First Savings Mortgage Corporation as the and contained the following statement:

> "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument.

Attached as Exhibit C to the complaint was a copy of an unrecorded assignment of mortgage dated April 8, 2010, from MERS to Bank of America, the successor to LaSalle Bank, with the same name designation in the complaint. The assignment transferred both the mortgage and the note to Bank of America.

In their answer, Appellants challenged Bank of America's standing. Bank of America later filed the original note and mortgage with the trial court. In February 2013, U.S. Bank was substituted as party plaintiff upon a motion alleging the right to enforce the loan had been transferred to it.

The matter proceeded to a non-jury trial. At trial, U.S. Bank called one witness, a home loan research officer for JP Morgan Chase Bank, N.A., the servicer of the loan at the time. The bank's witness gave confusing testimony about the ownership of the loan. At no time did U.S. Bank present testimony as to possession of the note at the time suit was filed. In response to Appellants' closing argument regarding lack of standing, the trial court stated: "I find that by virtue of possession of the original Note that there was standing at the filing of the suit, of the foreclosure action." Thereafter, final judgment was entered in favor of U.S. Bank. The homeowners appealed.

The appellate court agreed with the homeowners' argument that U.S. Bank failed to prove that Bank of America had sufficient standing to file suit. There was no evidence presented to prove that Bank of America actually possessed the note at the time of the filing of the complaint. While there was evidence of an assignment transferring the note and mortgage from MERS, as nominee for the original lender, to Bank of America, which predates the complaint, U.S. Bank failed to present any evidence to account for the undated special indorsement on the note from First Savings to the third party. Likewise, U.S. Bank presented no evidence showing whether the assignment of the note and mortgage to Bank of America occurred before or after the undated indorsement of the note to the third party.

The appellate court found that the assignment of mortgage could be construed as circumstantial evidence that Bank of America possessed the note at the time suit was filed, but that the unexplained, undated indorsement to the third party was also circumstantial evidence that Bank of America may not have possessed the note at the time suit was filed. At trial, U.S. Bank had the burden of proof by greater weight of the evidence. The appellate court concluded that the trial court erred in ruling that, by virtue of possession of the original note, there was standing at the time suit was filed, reversed the final judgment and directed the trial court to dismiss the proceeding.

Sackrin & Tolchinsky, Hallandale Beach, for Appellant.

Opinions Released February 10, 2016:

***Darlene Angelini and Joseph Angelini v. HSBC Bank*, et al., 4D14-216**

HSBC Bank originally brought a lost note count along with a foreclosure count. The copy of the note attached to the complaint showed a different bank as the lender and bore no indorsements. The original note eventually introduced at trial (apparently after being

had a blank indorsement. The Bank's witness was unable to testify when the indorsement was placed on the note. However, when asked to "testify who owned the note on the date the complaint was filed," he answered, "HSBC did." The trial court judge found these facts sufficient to establish standing. The appellate court disagreed, finding:

> The Bank's testimony did not establish the relevant fact: that it held the note at the time the complaint was filed. Although the Bank clearly was the holder at the time it introduced the blank-indorsed note at trial, "[a] plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed and cannot be established retroactively by acquiring standing to file a lawsuit after the fact." *LaFrance v. U.S. Bank Nat'l Ass'n*, 141 So. 3d 754, 756 (Fla. 4th DCA 2014).

Patrick Giunta, P.A., Fort Lauderdale, for Appellant.

Opinions Released January 27, 2016:

***Jean W. Chery v. Bank of America*, 4D14-3446**

This case involved a very common fact pattern. The trial court entered a final foreclosure judgment, but the appellate court reversed, finding that Bank of America, N.A. ("BANA") failed to prove standing. In common with many foreclosure appeals, the issue of standing in this case focused on undated indorsements on the note.

Countrywide Home Loans Servicing, L.P. ("Countrywide HLS") filed a two-count complaint against the homeowner, seeking a mortgage foreclosure and enforcement of a lost note. Attached to the complaint was a copy of a mortgage signed by the homeowner, with Great Country Mortgage Bankers, Corp. ("Great Country") listed as the original lender. A copy of the note was not attached to the complaint. The complaint alleged that Countrywide HLS "owns and holds the Note and Mortgage."

The trial court granted a motion by Countrywide HLS to substitute BAC Home Loans Servicing ("BAC"), formerly known as Countrywide HLS, as the plaintiff. In the motion for substitution of plaintiff, Countrywide HLS explained that the basis for the substitution was that "[s]ubsequent to the commencement of this action, Plaintiff filed a name change to [BAC] with the State of Texas."
BAC filed a copy of the note, which contained four undated indorsements:

1. from Great Country to Countrywide Bank, FSB;
2. from Countrywide FSB to Countrywide Home Loans, Inc.;
3. from Countrywide Home Loans, Inc. to Countrywide HLS.; and
4. from Countrywide HLS indorsed in the blank.

The trial court granted a second motion to substitute plaintiff, this time filed by BAC, seeking to replace itself with BANA, since BAC merged into BANA.

At trial, BANA called one witness, who testified that the note had four indorsements. However, the witness was unable to testify as to the date that any of the indorsements were placed on the note. She did not testify as to the date the note was transferred from the original lender to Countrywide Bank, FSB, in part because the trial court interrupted the questioning on cross-examination with the comment: "She already said she doesn't know the dates on the endorsement." Although a screenshot of the business record information maintained by BANA was admitted into evidence, from which the witness testified that a subsidiary of Countrywide had possession of the note since May 29, 2007 (almost two years

suit was filed), the witness was not asked, and did not testify, that the business ; showed the note was indorsed at the time suit was filed.

After denying the Homeowner's motion for involuntary dismissal, which included arguments as to standing, the trial court entered a final judgment foreclosing the mortgage.

The appellate court reversed, finding that while there were the four indorsements on the note, which could easily be followed from the original lender to BANA, there was no evidence that the note was indorsed in a manner to give the original plaintiff the status of holder at the time suit was filed.

BANA argued that since the witness testified that Countrywide, an entity subsequently acquired by BANA, had possession of the note on May 29, 2007, and there was a blank indorsement on the note when it was filed with the court, that proves the original plaintiff and BANA had standing to seek foreclosure of the mortgage. The appellate court disagreed, finding that such evidence was sufficient to prove BANA had standing at the time of trial, but the evidence was insufficient to prove the original plaintiff, an entity subsequently acquired by BANA, had standing at the time suit was filed.

James Jean-Francois, P.A., Hollywood, for Appellant.

Opinions Released January 20, 2016:

***Alan Ha and Tram Le Ha v. BAC Home Loans Servicing*, et al., 4D13-4198**

Mr. Ha executed a promissory note made payable to Countrywide Home Loans, Inc. He and his wife executed a mortgage agreement securing the loan. Subsequently, the appellee, BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing ("BAC"), brought a foreclosure action against Mr. and Mrs. Ha. BAC alleged it was the servicer for the owner and acting upon the owner's authority. The copy of the note attached to the complaint was made payable to Countrywide Home Loans, Inc. and did not contain an endorsement.

At trial, BAC offered the original note, which contained an undated blank endorsement. BAC's witness, an employee of Bank of America, did not know when the endorsement was made.

On appeal, BAC argued that the original note established its standing to foreclose. The appellate court agreed, stating:

> Although BAC may have established its standing at the time of trial by filing the original note endorsed in blank, it did not establish its standing at inception of the suit. ..By now it should be understood that a plaintiff's standing at inception of the suit is not established by filing the note with an undated endorsement after the complaint has been filed. See *Matthews v. Fed. Nat'l Mortg. Ass'n*, 160 So. 3d 131, 133 (Fla. 4th DCA 2015) (holding that standing at inception of the suit was not established where the note attached to the complaint was not made payable to the plaintiff and contained no endorsement, even though the original note endorsed in blank was introduced at trial); *Focht v. Wells Fargo Bank*, N.A., 124 So. 3d 308, 310 (Fla. 2d DCA 2013) (finding that bank's submission of original note endorsed in blank did not establish standing at inception of suit where it was submitted several months after bank filed the complaint); *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012) ("'[T]he plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed.'

> ;, a party is not permitted to establish the right to maintain an action retroactively cquiring standing to file a lawsuit after the fact." (citation omitted)). BAC does not point to any evidence establishing its standing at the inception of the suit and the record does not reflect any such evidence was introduced at trial.

The Ticktin Law Group, Deerfield Beach, for Appellant.

***Yosvani Alfonso and Elbita Alfonso v. JPMorgan Chase Bank*, 4D13-4713**

The original plaintiff filed a foreclosure complaint against the homeowners/borrowers. The original plaintiff alleged it was "the current owner of or has the right to enforce the Note and Mortgage." However, the original plaintiff attached to the complaint a copy of the note containing an endorsement from the original lender to the successor plaintiff. Despite that endorsement, the original plaintiff did not allege in what capacity it had the right to enforce the note and mortgage as the plaintiff in the action.

The court later granted the original plaintiff's motion to substitute the successor plaintiff in the action. The defendants' answer alleged as an affirmative defense that the original plaintiff lacked standing to foreclose because, at the time the original plaintiff filed the action, the note attached to the complaint indicated that the successor plaintiff, and not the original plaintiff, was the note's assignee.

At the trial, the successor plaintiff introduced the original note into evidence. The successor plaintiff also called one of its employees as its trial witness. The witness testified that: the successor plaintiff acquired the note before the original plaintiff filed suit; the successor plaintiff maintained possession of the note until trial; and the original plaintiff was the loan's servicer until it was merged into the successor plaintiff after the action was filed. The witness did not testify that the original plaintiff had the authority to enforce the note on the successor plaintiff's behalf when the original plaintiff filed the foreclosure action.

The circuit court found that "the [successor plaintiff] has met [its] burden of proving the debt and the amount of the debt and their standing at the time of the debt . . . ." The court then entered a final judgment of foreclosure in the successor plaintiff's favor.

On appeal, the homeowners primarily argued the court erred in finding that the successor plaintiff had standing at the time the original plaintiff filed the foreclosure action. The appellate court agreed with the homeowners' argument, stating:

> "A servicer that is not the holder of the note may have standing to commence a foreclosure action on behalf of the real party in interest, but [evidence must be presented] . . . demonstrating that the real party in interest granted the servicer authority to enforce the note." *Rodriguez v. Wells Fargo Bank*, N.A., No. 4D14-100, 2015 WL 5948169, at *1 (Fla. 4th DCA Oct. 14, 2015).

The appellate court found that the successor plaintiff, which was the real party in interest, failed to present any evidence demonstrating that it granted the original plaintiff/servicer the authority to enforce the note at the time the original plaintiff/servicer filed the foreclosure action. Thus, the successor plaintiff did not prove that the original plaintiff/servicer had standing to commence the foreclosure action.

The Brand Law Firm, Coconut Grove, for Appellants.

The bank filed a copy of the note with the complaint, but that copy did not contain an indorsement. Later in the litigation, the bank filed a copy of the note with an indorsement. The 4th DCA held that the bank, as a successor plaintiff, failed to demonstrate that its predecessor had standing at the time the action was commenced.

> Although the bank eventually filed a blank-indorsed note, the note attached to the complaint did not contain the indorsement, and the bank points to no other evidence demonstrating standing at the time the complaint was filed. The bank asks this court to take judicial notice of the FDIC's assignment of the note and mortgage to its predecessor before the complaint was filed. However, even if standing were demonstrated by the assignment, this evidence was not admitted at trial, and our judicial notice would not change the fact that the trial court erred in entering judgment for the bank where it did not prove standing.

Korte & Wortman, P.A., West Palm Beach, for Appellant.

Opinions Released January 6, 2016:

***Fallon Rahima Jallali v. Christiana Trust*, et al., 4D14-2369**

This was another case where the bank sought to foreclose based on an undated, blank-indorsed note that it filed after filing the initial complaint. The appellate court walked through the process:

> If the foreclosing party "asserts standing based on an undated endorsement of the note, it must show that the endorsement occurred before the filing of the complaint through additional evidence, such as the testimony of a litigation analyst." Id. (quoting *Lloyd v. Bank of N.Y. Mellon*, 160 So. 3d 513, 515 (Fla. 4th DCA 2015)). When a plaintiff attempts to foreclose based upon an undated, blank-endorsed note that it filed after the initial complaint, and provides no proof that it was the holder or authorized representative of the holder prior to the inception of the lawsuit, it fails to prove its standing to foreclose. See, e.g., *Perez v. Deutsche Bank Nat'l Trust Co.*, 174 So. 3d 489, 490-91 (Fla. 4th DCA 2015) (reversing final judgment of foreclosure where bank attempted to prove standing based in part upon an undated blank-endorsed note filed after the initial complaint, but failed to provide evidence that it possessed the note prior to the time suit was filed).

Countrywide was the original lender in this case. The appellate court noted that while a substituted plaintiff can acquire standing to foreclose if the original party had standing, the record was devoid of any proof that Countrywide had possession of the blank-endorsed note prior to the inception of the lawsuit. Regarding an assignment, the appellate court ruled:

> Appellee also failed to prove that Countrywide had standing to foreclose based upon the assignment of mortgage, as it was clear the assignment took place after suit was filed. See *Balch v. LaSalle Bank N.A.*, 171 So. 3d 207, 209 (Fla. 4th DCA 2015) (reversing a foreclosure judgment in part because the "assignment [of the mortgage] was executed after the complaint was filed").

Cyrus Bischoff, Miami, for Appellant.

New York Mellon v. Dennis Conley, 4D14-2430

In this foreclosure case, the trial court granted the borrower's motion for involuntary dismissal because the bank did not present competent substantial evidence of its standing to foreclose. The appellate court affirmed, noting the many changes of ownership:

> The record in this case reveals that, at one time or another, at least six different banking entities claimed ownership of the borrower's note. The problem is not the number of entities claiming ownership, but the similarities of their names.
>
> Two of the entities are:
>
> • JP Morgan Chase Bank; and
>
> • JP Morgan Chase & Co.
>
> Two others are:
>
> • Bank of New York Company, Inc.; and
>
> • The Bank of New York Mellon Trust Company, National Association

The appellate court emphasized that when a nonholder in possession attempts to establish its right to enforce a note, and thus its standing to foreclose, "the precise identity of each entity in the chain of transfers is crucial."

The plaintiff in this case was Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company, N.A. as Successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS4. Home Loan Corporation dba Expanded Mortgage Credit was the original lender. The note had two special indorsements: (1) Home Loan Corporation indorsed the note to Residential Funding Corporation; and (2) Residential Funding Corporation indorsed the note to JP Morgan Chase Bank, as Trustee.

Bank of New York Mellon presented the original note bearing the special indorsement in favor of "JP Morgan Chase Bank, as Trustee." At trial, a witness for the Bank of New York Mellon testified that the note was deposited into a trust with JP Morgan Chase Bank as the original trustee. The witness also testified that the Bank of New York Mellon became the successor trustee in April of 2006.

The appellate court analyzed the Bank's evidence as follows:

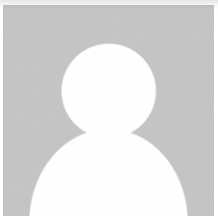
> An excerpt of a Pooling and Servicing Agreement (PSA) was placed into evidence. The PSA created the Residential Asset Securities Corporation Series 2004-KS4 Trust and listed JPMorgan Chase Bank as the trustee. The witness agreed that the PSA did not establish that the Bank of New York Mellon had any interest in the note.
>
> A 200+ page document was placed into evidence entitled "Purchase and Assumption Agreement by and between the Bank of New York Company, Inc. and JPMorgan Chase & Co." (emphasis added). This purchase agreement was dated April 7, 2006. The witness was under the impression that the agreement established that the plaintiff purchased the trust assets of JP Morgan Chase Bank. However, the document contradicts his testimony. Neither the plaintiff (the "Bank of New York Mellon Trust Company, N.A.") nor the indorsee on the note and trustee of the RASC 2004KS4 Trust ("JP Morgan Chase Bank") are parties to the purchase and assumption agreement.
>
> "When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person." § 673.2051(1), Fla.

> (2014). Where a bank is seeking to enforce a note which is specially indorsed to her, the bank is a nonholder in possession. Murray v. HSBC Bank USA, 157 So. 3d 355, 358 (Fla. 4th DCA), review dismissed, 171 So. 3d 117 (Fla. 2015). A nonholder in possession may prove its right to enforce the note through:
>
> (1) evidence of an effective transfer; (2) proof of purchase of the debt; or (3) evidence of a valid assignment.
>
> See Lamb v. Nationstar Mortg., LLC, 174 So. 3d 1039, 1040 (Fla. 4th DCA 2015). A nonholder in possession must account for its possession of the instrument by proving the transaction (or series of transactions) through which it acquired the note. Murray, 157 So. 3d at 358.
>
> At bar, the plaintiff attempted to prove its right to enforce the note through proof of purchase of the debt. The plaintiff's proof of purchase, however, is an agreement between two entities that have no relationship to either the plaintiff or the indorsee. At most, the agreement establishes that somehow JP Morgan Chase & Co. became the trustee for the RASC 2004KS4 Trust and transferred/sold its interest in the trust to a company called The Bank of New York Company. The Agreement does not connect the indorsee of the note (JP Morgan Chase Bank) to the plaintiff (the Bank of New York Mellon).

The appellate court relied on *Verizzo v. Bank of New York*, 28 So. 3d 976 (Fla. 2d DCA 2010). There, the Bank of New York attempted to foreclose on a note indorsed to JPMorgan Chase Bank, as Trustee. Id. at 977. At summary judgment, the Bank of New York produced an assignment between MERS and the Bank of New York. Reversing summary judgment, the court found:

> The promissory note shows that Novastar endorsed the note to "JPMorgan Chase Bank, as Trustee." Nothing in the record reflects assignment or endorsement of the note by JPMorgan Chase Bank to the Bank of New York or MERS. Thus, there is a genuine issue of material fact as to whether the Bank of New York owns and holds the note and has standing to foreclose the mortgage. Id. at 978 (emphasis added).

Korte & Wortman, P.A., West Palm Beach, for Appellees/Homeowners.



Lynn Szymoniak is an attorney who has been active in the South Florida area for thirty years. From cases ranging from civil rights issues, insurance fraud, and election procedures, Lynn Szymoniak has a reputation for being a dogged defender of justice and has been called as an expert witness for the United States Government. In 2010, facing foreclosure after being forced from work by breast cancer and to care for her ailing mother, Lynn Szymoniak noticed inconsistencies in the banks paperwork. This lead to the discovery of the illegal practice known as 'robo-signing,' where banks fake needed signatures to foreclose on homes. Lynn Szymoniak sued on behalf of the government, forcing the banks to date to pay out over $95 Million to HUD to be used for foreclosure relief, allowing people behind on their mortgages to find a way to stay in their homes. Lynn Szymoniak took her share of the settlement and founded the Housing Justice Foundation, an organization dedicated to helping the victims of foreclosure fraud and exposing the crimes of predatory lenders.