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IN THE SUPREME COURT OF FLORIDA

BANK OF AMERICA, N.A., ETC
Appellant,

v. Case No. SC16-1255

LINDA A. NASH, ET AL.,
Appellee, Petitioner
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

1. On October 16, 2014, the Circuit Court for Seminole County entered final judgment dismissing Plaintiff-Appellant Bank of America, N.A.'s ("Bank") foreclosure action against Borrower for a lack of standing.

2. Additionally, the Circuit Court voided the promissory note and mortgage, ordered Bank to repay all of Appellee-Borrower's prior mortgage payments, and granted Appellee-Borrower's post-trial motion for attorney's fees and costs.

3. On May 6, 2016, Fifth District Court of Appeal ("5th DCA") reversed the Circuit Court's final judgment on each and every point therein and, further, granted Bank's motion for attorney's fees on appeal (and remanded the matter to the Circuit Court to make an assessment thereof). *See Bank of Am. v. Nash*, No. 5D14-4511, 2016 WL 2596015 (Fla. 5th DCA May 6, 2016) (not yet released for publication).

4. On May 23, 2016, Appellee filed a Motion for Rehearing with the 5th DCA.

5. On June 13, 2016, the 5th DCA entered an Order denying Appellee's Motion for Rehearing.

6. On July 13, 2016, Appellee filed a Notice of Intent to Invoke Discretionary Jurisdiction of the Supreme Court with the 5th DCA.

7. For the reasons set forth below, Appellee-Petitioner respectfully states that the 5th DCA has overlooked or misapprehended critical facts in the case at bar, as well as misapprehended or misapplied the relevant law and entered a decision that conflicts with a number of other appellate court decisions as to a plaintiff's standing to bring a foreclosure lawsuit.

ARGUMENT

The Supreme Court of the State of Florida has discretionary jurisdiction to review and hear this matter pursuant to Florida Constitution Article V, Sections 3(b)(3) through 3(b)(6). Petitioner asserts that this matter is of statewide and nationwide importance and involves issues that potentially have the impact to stifle or limit jurisprudence in the State of Florida as to borrowers of mortgage loans. The Fifth District Court's decision, attached as Appendix A hereto, conflicts with established Florida law. Further the opinion conflicts with Florida Statutes Section 673.2051(1) and Section 677.501(1)(a).

1. The 5th DCA misapprehended and/or failed to consider that America's Wholesale Lender, a New York Corporation was never incorporated by or affiliated with Appellant Bank of America, N.A., Bank of America Corporation, Countrywide Homes Loans Inc., or any of its affiliates.

2. In its written opinion in this cause, the 5th DCA identified a promissory note from trial in favor of an entity identified as America's Wholesale Lender ("AWL").

3. It is estimated that 3.5 million homeowners across this District, State, and Country entered into a Mortgage or Deed of Trust wherein the "Lender" **is** "America's Wholesale Lender" under the laws of New York". [1]

4. The 5th DCA acknowledged that Nash executed a promissory note secured by a mortgage in favor AWL.

5. Yet, the 5th DCA decided that Appellant[2] had standing to foreclose by way of a promissory note **containing a single indorsement in blank from a different entity than that which was identified in the note and mortgage as the "Lender".**

6. Appellee asserts that the 5th DCA either failed to consider a significant fact or overlooked a crucial aspect in this case necessary in determining that the indorsement was proper and that Appellant had standing based on FS 673.2051(1) and FS 677. 501(1)(a) that clearly provide that an endorsement

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[1]A similar set of instruments exist in U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF CSFB ARMT 2005-6A v. MATT DIMANT; BRIDGETT DIMANT et al., Case No. 2013-CA-001130 in the 19th Judicial Circuit. There the Court granted Involuntary Dismissal of the Foreclosure Lawsuit.

[2] Appellant was alleged to be the "servicer" on behalf of the owner of the Note, Federal National Mortgage Association.

must be made by the party to whom the terms of the original documents run. In this case that was AWL not Countrywide.

7. Specifically, the 5th DCA's decision made no mention that the Mortgage at trial unequivocally defined and identified the "Lender" as "America's Wholesale Lender," a "corporation organized and existing under the laws of New York".

8. The parties identified in a promissory note as the "Lender" and "Borrower" must also be the same parties identified in the mortgage as the "Lender" and "Borrower". This correlation is similar to the requirement that a security instrument properly identify the subject matter that is to be the security for a Mortgage to be valid. See *Airflow Heating v. Baker*, 326 So.2d 449 (Fla. 4DCA 1976) citing *Fla. Bank & Trust Co. of West Palm Beach v. Ocean & Lake Realty Co.*, 118 Fla. 695, 160 So. 1 (1935) ("Where land intended to be mortgaged cannot be identified because of a lack of description the mortgage is ineffective").

9. Assuming the aforementioned is correct, then the first indorsement on any Note must be made by the entity with the necessary enforcement rights, i.e., by the original "Lender."[3] The Florida Uniform Commercial Code requires such. See Fla. Stat. 673.2051 and FS 677.501. See also *St. Clair v. US BANK NAT. ASS'N*, 173 So. 3d 1045 (Fla. 2d DCA 2015) ("Because mere possession was

[3] In this case there was no proof that the original "Lender" authorized otherwise.

inadequate to establish standing, U.S. Bank was required to show that it received the instrument from a holder with enforcement rights.")

10. The sole indorsement contained on the note reflects an entity other than the lender as the endorser. Thus the entity endorsing was without authority to do so.[4]

11. The 4th DCA in *Jelic v. Lasalle Bank*, 160 So.3d 127(Fla. 4th DCA 2013) stated: "Under section 673.2051(1), Florida Statutes (2009), when a note contains a special endorsement, the "instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person." Also see *Lacombe v. Deutsche Bank National Trust Co.*, 149 So.3d 152 (Fla.1st DCA 2014). The 5th DCA decision directly conflicts with these decisions as to standing to foreclose and the FS 673.2051 requirements as to endorsements.

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[4]While this Court gave credit to an Assignment of Mortgage by "MERS as nominee for AWL", logic would imply that "AWL" would be the entity found and defined in that Mortgage being assigned: the "**corporation** organized and existing under the laws of New York". Additionally, the Assignment of Mortgage in this case did not assign the Note. Furthermore, this Court did not conclude that the Assignment of Mortgage assigned the subject Note; rather it only assigned the mortgage. Moreover, while this Court found that Appellant relied on an Assignment of Mortgage, "[A]n assignment of mortgage, even if executed before the foreclosure action commenced, is insufficient to prove standing where the assignment reflects transfer of only the mortgage, not the note." *Tilus v. AS Michai LLC*, 161 So. 3d 1284, 1286 (Fla. 4th DCA 2015)

12. The 5th DCA decision to reverse conflicts with numerous other DCA decisions across the State of Florida relative to the requirement of the Plaintiff to prove standing to bring a foreclosure lawsuit. In this case, the Appellant was not the original lender, did not produce a note indorsed by the original lender, did not produce any evidence (such as a servicing agreement or power of attorney) that they were entitled to bring the lawsuit, and did not prove that they held the note at the time the lawsuit was filed.

13. It appears this Court overlooked the fact that the Assignment of Mortgage was executed by an Assistant Secretary of Mortgage Electronic Registration Systems, Inc., as nominee for "America's Wholesale Lender" and not for "Countrywide Home Loans, Inc." The Assignment identified "America's Wholesale Lender" as the assignor. However the 5th DCA's decision stated that "Countrywide Home Loans, Inc.," assigned the Mortgage to "BAC".

14. An additional question is whether an entity that is a legal nullity, i.e., not a corporation existing under the laws of any State and not licensed to issue mortgages in Florida, can issue a valid promissory note and a mortgage to secure it?

15. "A corporation is a legal entity by fiction of law. Its existence depends upon and is determined by the statute under which it is created." *In re Charter Co.*, 68 B.R. 225, 229 (M.D. Fla. 1986). A mere trade name or fictitious name is not

a valid legal entity. *See, e.g., Osmo Tec SACV Co. v. Crane Envtl., Inc.*, 884 So. 2d 324, 327 (Fla. 2d DCA 2004) (holding that a fictitious name has "no independent legal existence"); 18A Am. Jur. 2d *Corporations* § 230 Prac. Tip (Westlaw database May 2016 Update) ("A corporation's use of a fictitious or assumed business name, or the use of d/b/a or 'doing business as' to associate a trade name with the corporation using it, does not create a legal entity separate from the corporation[.]" (footnotes omitted)).

16. The originator of the loan was America's Wholesale Lender ("AWL"), but no such entity existed in 2005 when the note and mortgage were executed. *See* Fla. Office of Fin. Reg., Certif. No. 15-F-089 (June 1, 2015) ("A diligent search of the records of the [Florida] Office [of Financial Regulation] reveals no record of licensure . . . for Countrywide or AWL after 2/14/2002.") [copy of license termination dated June 1, 2015 is attached hereto].

17. At best, AWL was a fictitious and/or trade name under which Countrywide a New York corporation, sometimes did business. *See Nash*, 2016 WL 2596015, at *1. Bank of America subsequently acquired Countrywide and, thus, purports to have assumed the note and mortgage but provided no proof at trial that the subject loan was acquired as part of the Appellant's acquisition of Countrywide.

18. At the time AWL purported to execute the note and mortgage with Borrower, AWL did not exist under the relevant (New York) law. And because AWL did

not exist, it owned nothing and transferred nothing to Countrywide, which in turn conveyed nothing to Appellant. *See Black's Law Dictionary* 1849 (9th ed. 2009) (the concept of *nemo dat quod non habet*, meaning "[n]o one gives what he does not have"). The entire transaction was a legal nullity.

19. In the Complaint, Appellant stated "Federal National Mortgage Association" is the owner of the note. Plaintiff is the servicer of the loan and is the holder of the note. Federal National Mortgage Association has authorized Plaintiff to bring this action." Yet, Appellant failed to attach any documents demonstrating this authority, such as a power of attorney or a servicing agreement, nor were any entered into evidence at trial. No such authority existed.[5] Bank of America failed to attach or reference any document authorizing it to bring the foreclosure on behalf of Fannie Mae. See *Assil v. Aurora Loan Servs., LLC*, 171 So. 3d 226, 229 (Fla. 4th DCA 2015) (reversing final judgment of foreclosure for servicer where the servicer "failed to provide sufficient proof that it was authorized to prosecute the action on behalf of [the note owner] . . . or was otherwise . . . entitled to enforce the Note at the time it filed the action"). See also *St. Clair v. US BANK NAT. ASS'N*, 173 So. 3d 1045 (Fla. 2d DCA 2015).

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[5] There was a copy of a Note attached to the Complaint with a blank undated endorsement, it was not made by the "Lender" identified in the Note and Mortgage.

20. The only Exhibits introduced by Appellant at trial were a Note, Mortgage, Default Notice and a Payment History.

21. The 5th DCA stated in its decision that Countrywide, "a New York Corporation Doing Business as America's Wholesale Lender," indorsed the note in blank.

22. No evidence or case law was provided to show how a Corporation other than the original Lender could endorse the subject Note, other than vague testimony from Appellant's witness.[6] District Courts have held that in the case of a foreclosure, there must be showing of proof as to the entity relationship and transfers or acquisitions of interests, such as a purchase or servicing agreement. See *Wright v. JPMorgan Chase Bank, NA*, 169 So. 3d 251 (Fla. 4th DCA 2015). Although the witness' testified that AWL was "a *business* entity or a *business* name for Countrywide" and that Countrywide was doing *business* as AWL." the Plaintiff failed to produce any business records evidencing such. (emphasis added). See *Gonzalez v. BAC Home Loans Servicing, L.P.*, 180 So. 3d 1106, 1108 (Fla. 5th DCA 2015) (reiterating that the testimony regarding business records not entered into evidence at trial is insufficient to prove standing in a

[6] Throughout the trial, the lower Court did not find the witness' testimony to be credible. The Trier of Fact frequently questioned him on many issues. The testimony failed the threshold requirements of the business records exception and the decision in *Holt v. Calchas, LLC*, 2014 WL 5614374 (Fla. 3rd DCA, 2014) and *Hunter v. Aurora Loan Services*, 137 So.3d 570 (Fla. 1st DCA 2014). The witness never claimed to work for AWL, a New York Corp, never claimed to work for Countrywide, nor was any evidence presented. For that matter no witness made an appearance for AWL, and never claimed to work for Countrywide.

foreclosure case (citing *Schmidt v. Deutsche Bank*, 170 So. 3d 938, 941 (Fla. 5th DCA 2015). It was wrong for the 5th DCA to enter a judgment for the Appellant.

23. Appellant did not prove standing at inception as the endorsement[7] was undated and the trial testimony did not prove it. See *Bristol v. Wells Fargo Bank, N.A.*, 137 So. 3d 1130 (Fla. 4th DCA 2014); *Tilus v. AS MICHAI LLC*, supra).

24. Lastly, Appellee Petitioner was denied due process of law as a result of the 5th DCA's entry of a judgment for the Appellant instead of remanding the case back to the trial Court for further proceedings. The Court entered judgment for Appellee at the conclusion of the Appellant's case at trial. Petitioner did not have the opportunity to present her case at trial. Therefore, the entry of the judgment by the 5th DCA in their written opinion denied Appellee her rights to due process prior to the taking of her property as required by the.

CONCLUSION

For the reasons stated above, Appellee respectfully requests that this Court accept jurisdiction of this case as it is of "exceptional importance" in this State and across the Country and the 5th DCA's written opinion conflicts with other decisions of the 5th DCA and other appellate courts as to the standing of a plaintiff to bring a foreclosure lawsuit.

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[7] An indorsement [on the back of the Note] was improper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via e-mail to Mary J. Walter, Esquire, at mjw@lgplaw.com, Attorney for Appellant, this 25th day of July, 2016.

Pierce & Associates, PLC

/s/ John G. Pierce
John G. Pierce, Esq.
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CERTIFICATE OF FONT

I HEREBY CERTIFY, that the foregoing Appellant's Initial Brief was prepared using Times Roman 14 font in accordance with Fla.R.App.P. 9.210(a)(2).

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