IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA
CASE NO.: 16-2004-CA-8651-XXXX-MA
DIVISION: CV-H
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.,
Plaintiff,
v.
DEAN THOMAS MIESMER, DECEASED, et al.,
Defendants.
_____/
SEPARATE DEFENDANT SARALEY MIESMER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS REVISED SECOND AMENDED COMPLAINT
INTRODUCTION

1. The purported assignment of the subject Mortgage from Mortgage Electronic Registration Systems, Inc. (MERS) to The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, dated November 7, 2005, is void.

2. Plaintiff fails to allege the capacity in which it brings suit.

3. Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, lacks standing to pursue this action and fails to properly invoke the subject matter jurisdiction of this court. This action must be dismissed.

A. The Plaintiff fails to allege in what capacity it brings suit.

4. The Plaintiff The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, is identified in the second paragraph of the complaint as The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee. No description is provided in the complaint or in any other pleading which explains the legal nature of the Plaintiff, which is a trustee for some unknown trust. As such, Plaintiff has not shown capacity to bring suit.

5. The Florida Rules of Civil Procedure, state that

> It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent required to show jurisdiction of the court. . . . When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleaders knowledge. Fla. R. Civ. Pro. Rule 1.120(a).

6. Further, the Florida Rules of Civil Procedure state that a complaint must include a "short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." Fla. R. Civ. Pro. Rule 1.110(b).

7. "Capacity to sue" is an absence of a legal disability which would deprive a party of the right to come into court. 59 Am. Jur. 2d Parties § 31 (1971).

8. Capacity is contrasted with standing, which requires sufficient interest in the outcome of litigation to warrant the court's consideration of its position. Keehn v. Joseph C. Mackey and Co., 420 So. 2d 398 (Fla. App. 4 Dist. 1982).

9. Capacity to sue is properly raised through a motion to dismiss where the defect appears on the face of the complaint. Hershel

California Fruit Products Co. v. Hunt Foods, 111. F. Supp. 603 (1975); Klebano v. New York Produce Exchange, 344 F.2d (2nd Cir. 1965).

10. Here, the Plaintiff identifies itself as The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, but fails to provide any additional information regarding the nature of the unidentified entity. The "as trustee" designation indicates that Plaintiff is acting on behalf of some unidentified trust. Because Plaintiff has not defined or identified the nature of the legal entity, Plaintiff has not adequately pled capacity to maintain suit before this Court.

11. Judge Rondolino of the 6th Circuit Court in Pinellas County recently granted a defendant's Motion to Dismiss on the basis of the plaintiff's failure to allege capacity. Wachovia Mortgage, FSB v. Matacchiero, No. 08-16936-CI-13 (Fla. 6th Cir. Ct. December 15, 2009).

B. The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, lacked the legal capacity to take an assignment of a non-performing/non-conforming loan in default.

12. While The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, has failed to define the nature of its legal entity, Defendant makes the following argument based on a presumption that Plaintiff is the trustee of a securitized trust.

13. If The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, is the trustee of a securitized trust, it appears in this case pursuant to a Pooling and Servicing Agreement (PSA), the trust instrument that sets forth the powers and limitations of The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee. The PSA sets forth all the rights, powers, obligations, and duties of the Trust. The four corners of the pooling and servicing agreement bind the Trust to the only actions which can lawfully be taken with respect to the administration of its assets. Further, the four corners of the PSA establish the only mechanism by which this New York Corporate Trust may acquire, transfer, dispose of, or sell any asset. The pooling and servicing agreement is filed of record with the Securities and Exchange Commission and is a matter of public record.

14. While Defendant does not have access to the PSA under which Plaintiff may be acting, Defendant's argument is based on common language within PSAs. PSAs include basic terms and there is very little variation between different PSAs. As a result, the PSA described below is likely an accurate representation of a PSA under which Plaintiff may be acting, if in fact Plaintiff is trustee of a securitized trust.

15. The PSA quoted below and used as an example can be found at: _http://www.secinfo.com/dqTm6.z2fp.d.htm_ (http://www.secinfo.com/dqTm6.z2fp.d.htm) . The terms of the pooling and servicing agreement are filed under oath with the SEC and the parties to the pooling and servicing agreement have represented under oath to the Securities and Exchange Commission and its investors, certificate holders, and counter parties, that the entire agreement of the entities, parties, agents, servants, with respect to the Trust are contained within the pooling and servicing agreement and its exhibits.

16. Section 11.02 of the PSA titled "Prohibited Transactions and Activities" prohibits the Trust from acquiring the subject mortgage in this action because Section 11.02 states:

None of the Depositor, the Servicer, the Securities Administrator, the Master Servicer or the Trustee shall sell, dispose of or substitute for any of the Mortgage Loans (except in connection with (i) the foreclosure of a Mortgage Loan, including but not limited to, the acquisition or sale of a Mortgaged Property acquired by deed in lieu of foreclosure, (ii) the bankruptcy

of REMIC I, (iii) the termination of REMIC I pursuant to Article X of this Agreement, (iv) a substitution pursuant to Article II of this Agreement or (v) a purchase of Mortgage Loans pursuant to Article II of this Agreement), nor acquire any assets for any Trust REMIC (other than REO Property acquired in respect of a defaulted Mortgage Loan), nor sell or dispose of any investments in the Collection Account or the Distribution Account for gain, nor accept any contributions to any Trust REMIC after the Closing Date (other than a Qualified Substitute Mortgage Loan delivered in accordance with Section 2.03), unless it has received an Opinion of Counsel, addressed to the Trustee and the Securities Administrator (at the expense of the party seeking to cause such sale, disposition, substitution, acquisition or contribution but in no event at the expense of the Trustee) that such sale, disposition, substitution, acquisition or contribution will not (a) affect adversely the status of any Trust REMIC as a REMIC or (b) cause any Trust REMIC to be subject to a tax on "prohibited transactions" or "contributions" pursuant to the REMIC Provisions.

a. The subject mortgage was not original or qualified for transfer to a Trustee.

17. The trust of which Plaintiff may be trustee is likely what is known as a Real Estate Mortgage Investment Conduit (REMIC). See 26 USC §860D. Essentially, a REMIC is an investment vehicle in which transferable shares in a trust are sold to investors, the res of the trust consisting of mortgages and promissory notes. These securitized trusts are subject to strict regulation to qualify for favorable tax treatment as a REMIC under the IRS Code. 28 USC §§ 860A-860G. The REMIC provisions of the IRS tax code provide explicit instruction with respect to the transfer of mortgage assets into a trust to receive this special tax status pursuant to the IRS tax code. Further, the REMIC portion of the IRS tax code defines the activities that disqualify a trust for REMIC tax treatment. Pursuant to the terms of the pooling and servicing agreement this Trust cannot be the owner of Defendant's loan.

18. The subject mortgage was not transferred to the trustee until after the foreclosure action had been filed. The subject mortgage was not originally part of the mortgage pool and due to the strict REMIC rules, the only way the trustee could acquire the subject mortgage past the closing date of the trust (8-26-05) was (1) to obtain an "Opinion of Counsel", or (2) as a "qualified substitute mortgage" pursuant the REMIC Code as incorporated into the PSA.

19. A "qualified replacement mortgage" is defined in the REMIC code (26 U.S.C § 860G) and this definition is incorporated into the PSA. "Qualified Substitute Mortgage Loan": A mortgage loan substituted for a Deleted Mortgage Loan pursuant to the terms of this Agreement which must, on the date of such substitution, (i) have an outstanding principal balance, after application of all scheduled payments of principal and interest due during or prior to the month of substitution, not in excess of the Scheduled Principal Balance of the Deleted Mortgage Loan as of the Due Date in the calendar month during which the substitution occurs, (ii) have a Mortgage Rate not less than (and not more than one percentage point in excess of) the Mortgage Rate of the Deleted Mortgage Loan, (iii) if the mortgage loan is an Adjustable Rate Mortgage Loan, have a Maximum Mortgage Rate not less than the Maximum Mortgage Rate on the Deleted Mortgage Loan, (iv) if the mortgage loan is an Adjustable Rate Mortgage Loan, have a Minimum Mortgage Rate not less than the Minimum Mortgage Rate of the Deleted Mortgage Loan, (v) if the mortgage loan is an Adjustable Rate Mortgage Loan, have a Gross Margin equal to the Gross Margin of the Deleted Mortgage Loan, (vi) if the mortgage loan is an Adjustable Rate Mortgage Loan, have a next Adjustment Date

not more than two months later than the next Adjustment Date on the Deleted Mortgage Loan, (vii) have a remaining term to maturity not greater than (and not more than one year less than) that of the Deleted Mortgage Loan, (viii) have the same Due Date as the Due Date on the Deleted Mortgage Loan, (ix) have a Loan-to-Value Ratio as of the date of substitution equal to or lower than the Loan-to-Value Ratio of the Deleted Mortgage Loan as of such date, (x) be secured by the same lien priority on the related Mortgaged Property as the Deleted Loan, (xi) have a credit grade at least equal to the credit grading assigned on the Deleted Mortgage Loan, (xii) be a "qualified mortgage" as defined in the REMIC Provisions and (xiii) conform to each representation and warranty set forth in Section 6 of the Mortgage Loan Purchase Agreement applicable to the Deleted Mortgage Loan. In the event that one or more mortgage loans are substituted for one or more Deleted Mortgage Loans, the amounts described in clause (i) hereof shall be determined on the basis of aggregate principal balances, the Mortgage Rates described in clause (ii) hereof shall be determined on the basis of weighted average Mortgage Rates, the terms described in clause (vii) hereof shall be determined on the basis of weighted average remaining term to maturity, the Loan-to-Value Ratios described in clause (ix) hereof shall be satisfied as to each such mortgage loan, the credit grades described in clause (x) hereof shall be satisfied as to each such mortgage loan and, except to the extent otherwise provided in this sentence, the representations and warranties described in clause (xii) hereof must be satisfied as to each Qualified Substitute Mortgage Loan or in the aggregate, as the case may be."

20. According to Plaintiff's complaint, the subject mortgage was in default at the time of the assignment so that the mortgage loan did not meet the "credit grade" requirement, and was not a "qualified mortgage."

REMIC regulations issued by the IRS state:

Defective obligations--(1) Defective obligation defined. For purposes of sections 860G(a)(4)(B)(ii) and 860F(a)(2) [26 USCS §§ 860G(a)(4)(B)(ii) and 860F(a)(2)], a defective obligation is a mortgage subject to any of the following defects:

(i) The mortgage is in default, or a default with respect to the mortgage is reasonably foreseeable.

(2) Effect of discovery of defect. If a REMIC discovers that an obligation is a defective obligation, and if the defect is one that, had it been discovered before the startup day, would have prevented the obligation from being a qualified mortgage, then, unless the REMIC either causes the defect to be cured or disposes of the defective obligation within 90 days of discovering the defect, the obligation ceases to be a qualified mortgage at the end of that 90 day period.

26 CFR 1.860G-2(f)

21. The subject mortgage in default was a "defective obligation, " not a qualified mortgage and clearly could not have been a "qualified substitute mortgage" when allegedly assigned to Plaintiff.

b. The subject mortgage is not (Real Estate Owned) REO property.

22. "REO property" is defined in the PSA:

"A Mortgaged Property acquired by the Servicer or its nominee on behalf of REMIC I through foreclosure or deed-in-lieu of foreclosure, as described in Section 3.21 of this Agreement or the Interim Servicer pursuant to the related Interim Servicing Agreement." Section 3.21(a) states; "(a) The deed or certificate of sale of any REO Property related to a Mortgage Loan shall be taken in the name of the Trustee, or its nominee, on behalf of the Trust Fund and for the benefit of the Certificateholders."

23. REO property is Trust property acquired upon the default of a mortgage loan that is already a part of the mortgage pool.

c. There is no Opinion of Counsel.

24. A REMIC shall not generally be subject to taxation and pursuant to the PSA, an Opinion of Counsel is required before the trustee could legally acquire the subject loan by assignment. 26 USCS § 860A. Section 2.03(B) states:

"the Seller shall obtain at its own expense and deliver to the Trustee an Opinion of Counsel to the effect that such substitution will not cause (a) any federal tax to be imposed on any Trust REMIC, including without limitation, any federal tax imposed on "prohibited transactions" under Section 860F(a)(1) of the Code or on "contributions after the startup date" under Section 860G(d)(1) of the Code, or (b) any Trust REMIC to fail to qualify as a REMIC at any time that any Certificate is outstanding."

25. The PSA defines "Opinion of Counsel" as follows:

"Opinion of Counsel": A written opinion of counsel, who may, without limitation, be salaried counsel for the Depositor, the Servicer, the Securities Administrator or the Master Servicer, acceptable to the Trustee, except that any opinion of counsel relating to (a) the qualification of any REMIC as a REMIC or (b) compliance with the REMIC Provisions must be an opinion of Independent counsel; provided however, any Opinion of Counsel provided by the Servicer pursuant to clause (b) above with respect to the continued eligibility of modified Mortgage Loans may be provided by internal counsel, provided that, the delivery of such Opinion of Counsel shall not release the Servicer from any of its obligations hereunder and the Servicer shall be responsible for such contemplated actions or inaction, as the case may be, to the extent it conflicts with the terms of this Agreement.

26. In this case there could be no opinion of independent counsel because the subject mortgage did not qualify as "foreclosure property" or a "qualified substitute mortgage" and was a "defective obligation" under the REMIC tax provisions.

27. Without such Opinion the transfer of the subject mortgage to the trustee subjects the Trust to be subject to a tax on prohibited transactions or contributions pursuant to the REMIC Provisions.

28. "Foreclosure property" is a permitted investment but the property must have first been included in the Trust as a qualified mortgage. 26 U.S.C. 860F.

1. The subject mortgage was not "foreclosure property."

29. The REMIC Code defines "Foreclosure property," as follows:

"Foreclosure property" means property—

(A) which would be foreclosure property under section 856(e) [26 USCS § 856(e)] (without regard to paragraph (5) thereof) if acquired by a real estate investment trust, and

(B) Which is acquired in connection with the default or imminent default of a qualified mortgage held by the REMIC. 26 USCS § 860G

The term "foreclosure property" does not include property acquired by the real estate investment trust as a result of indebtedness arising from the sale or other disposition of property of the trust described in section 1221(a)(1) [26 USCS § 1221(a)(1)] which was not originally acquired as foreclosure property." 26 USCS § 856(e)

"Property is not eligible for the election to be treated as foreclosure property if the loan or lease with respect to which the default occurs (or is imminent) was made or entered into (or the lease or indebtedness was acquired) by the trust with an intent to evict or foreclose, or when the trust knew or had reason to know that default would occur ("improper knowledge")" . 26 CFR 1.856-6.

30. In this case, the action was filed before transfer to Plaintiff. This clearly indicates that the Plaintiff acquired the indebtedness

with the intent to foreclose upon the mortgage.
2. Plaintiff had no power to acquire or take assignment of the subject mortgage. It is a prohibited transaction.
31. Section 11.01 of the PSA states:
The Closing Date is hereby designated as the "Startup Day" of each Trust REMIC within the meaning of Section 860G(a)(9) of the Code. Following the Startup Day, neither the Securities Administrator nor the Trustee shall accept any contributions of assets to any Trust REMIC other than in connection with any Qualified Substitute Mortgage Loan delivered in accordance with Section 2.03 unless it shall have received an Opinion of Counsel to the effect that the inclusion of such assets in the Trust Fund will not cause the related REMIC to fail to qualify as a REMIC at any time that any Certificates are outstanding or subject such REMIC to any tax under the REMIC Provisions or other applicable provisions of federal, state and local law or ordinances.
d. The PSA requires the original lender, Oak Street Mortgage, LLC, to buy back the subject Mortgage when the note is missing.
32. Plainitff could not have accepted the subject mortgage into the trust without the original note. The note in the instant case was lost or destroyed at some undetermined point in time.
33. Section 2.03 of the PSA Repurchase or Substitution of Mortgage Loans states:
"the Trustee shall promptly notify the Seller and the Servicer of such defect, missing document or breach and request that the Seller deliver such missing document, cure such defect or breach within sixty (60) days from the date the Seller was notified of such missing document, defect or breach, and if the Seller does not deliver such missing document or cure such defect or breach in all material respects during such period, the Trustee shall enforce the obligations of the Seller under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan from REMIC I at the Purchase Price within ninety (90) days after the date on which the Seller was notified of such missing document, defect or breach, if and to the extent that the Seller is obligated to do so under the Mortgage Loan Purchase Agreement."
C. The Plaintiff is a securitized trust in this case and the purported assignment is void under controlling New York Law
34. Section 12.04 of the Pooling and Servicing Agreement states:
"This Agreement shall be construed in accordance with the laws of the State of New York and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws without regard to conflicts of laws principles thereof."
35. New York Trust law says every sale, conveyance or other act of the trustee in contravention of the trust is void. " NY CLS EPTL § 7-2.4, Application of Muratori, 183 Misc. 967, 970 (N.Y. Sup. Ct. 1944) See also Dye v Lewis (1971) 67 Misc 2d 426, 324 NYS2d 172, mod on other grounds (1972, 4th Dept) 39 App Div 2d 828, 332 NYS2d 968. (The authority of a trustee to whom a mortgage had been delivered under a trust indenture was subject to any limitations imposed by the trust instrument, and every act in contravention of the trust was void.)
a. The Plaintiff has not provided a Power of Attorney to this court.
36. Under New York property law, for the Plaintiff to receive a proper assignment of a mortgage by an authorized agent, a power of attorney is necessary to demonstrate how the agent is vested with authority to assign the mortgage. Wells Fargo Bank, N.A. v. Farmer, 2008 NY Slip Op 51133U (N.Y. Sup. Ct. 2008); _Deutsche Bank Natl. Trust Co. v. Clouden, 2007 NY Slip Op 51767U, 5 (N.Y. Sup. Ct. 2007)_ (http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=ge...) ; U.S. Bank

Natl. Assn. v. Bernard, 2008 NY Slip Op 50247U, 3 (N.Y. Sup. Ct. 2008); HSBC Bank USA, N.A. v. Yeasmin, 2008 NY Slip Op 50924U, 3 (N.Y. Sup. Ct. 2008). The Plaintiff has not provided a valid Power of Attorney to this court showing the signer of the subject assignment was vested with authority to assign the subject mortgage.

b. The assignment of the mortgage without having possession of the original note is a legal nullity.

37. To constitute a valid assignment there must be a perfected transaction between the parties intended to vest in the assignee a present right in the thing assigned. _Donovan v. Middlebrook, 95 A.D. 365, 367-368 (N.Y. App. Div. 1904)_ (http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=ge...) .

38. "Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law." Kribbs v. Alford, 120 N.Y. 519 (N.Y. 1890).

39. A transfer of the mortgage without the debt is a nullity and no interest is acquired by it.

40. "It thus appears that the right of the plaintiff to foreclose dependent upon his acquiring a title to the bond to secure which the mortgage was given." Manne v. Carlson, 49 A.D. 276, 278 (N.Y. App. Div. 1900) citing Merritt v. Bartholick (36 N.Y. 44). See also Kluge v Fugazy, 145 A.D.2d 537, 538, 536 N.Y.S.2d 92 (2d Dept 1988), ("foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.").

41. The assignment by a mortgagee of the mortgage lien in the land, without an assignment of the debt, is considered in law as a nullity. Flyer v. Sullivan, 284 A.D. 697, 698 (N.Y. App. Div. 1954). An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. Carpenter v. Longan, 83 U.S. 271, 274 (U.S. 1873).

42. It is axiomatic that to be effective, an assignment of the a note and a mortgage given as security therefor must be made by the owner of such note and mortgage and that an assignments made by entities having no ownership interest in the note and mortgage pass no title therein to the assignee. Matter of Stralem. 303 A.D.2d 120, 758 N.Y.S.2d 345, and the cases cited therein).

43. MERS does not, and has apparently never, held the beneficial interest in any mortgage or note. Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.), 350 B.R. 74 (Bankr. S.D. Ohio 2006)

44. A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee. LaSalle Bank Natl. Assn. v. Lamy, 2006 NY Slip Op 51534U, 2 (N.Y. Sup. Ct. 2006). The LaSalle Bank court went on to say; "The ….assignment of the mortgage to the plaintiff, upon which the plaintiff originally predicated its claims of ownership to the subject mortgage, was made by an entity (MERS) which had no ownership interest in either the note or the mortgage at the time the purported assignment thereof was made. The …..assignment of mortgage is thus invalid." Id.

45. Here, the subject mortgage lists Oak Street Mortgage, LLC as Lender and defines "note" as "the promissory note signed by Borrower." Further that "The Note states Borrower owes Lender…"

46. There is no evidence of record that establishes that MERS either held the promissory note or was given the authority by the lender to

assign the note, therefore the assignment is invalid. California courts have also so ruled. In Saxon Mortg. Servs. v. Hillery, 2008 U.S. Dist. LEXIS 100056 (N.D. Cal. Dec. 9, 2008), the court held that where there was no evidence that the lender had assigned the note to MERS, the assignment of the mortgage and note by MERS to the plaintiff was invalid, and the action was dismissed.

47. Because MERS is not and was not the owner of the note, nor did it have the note in its possession, its attempted assignment of same to The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, was invalid.

D. Without the original promissory note, or its reestablishment, Plaintiff lacks standing.

48. It is axiomatic that a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note, unless the Plaintiff actually holds the original note. In re Shelter Dev. Group, Inc., 50 B.R. 588, 590-591 (Bankr. S.D. Fla. 1985).

49. In a mortgage foreclosure action, a lender is required to either present the original promissory note or give a satisfactory explanation for the lender's failure to present it prior to it being enforced. See Downing v. First National Bank of Lake City, 81 So. 2d 486 (Fla. 1955); Figueredo v. Bank Espirito Santo, 537 So. 2d 1113 (Fla. 3d DCA 1989); National Loan Investors, L.P. v. Joymar Assocs., 767 So. 2d 549, 551 (Fla. Dist. Ct. App. 3d Dist. 2000).

50. In Pastore-Borroto Dev., Inc. v. Marevista Apartments, M.B., Inc., 596 So. 2d 526 (Fla. Dist. Ct. App. 3d Dist. 1992), the mortgagor's failure to produce the original note or any explanation as to the absence of it required vacation of the foreclosure judgment.

51. "A party suing on a promissory note -- whether just on the note itself or together with a claim to foreclose on a mortgage securing the note -- must therefore be in possession of the original of the note or reestablish the note pursuant to Fla. Stat. § 673.3091.

52. If it is not in possession of the original note, and cannot reestablish it, the party simply may not prevail in an action on the note." DASMA Invs., LLC v. The Realty Ass. Fund III, 459 F. Supp. 2d 1294, 1302 (S.D. Fla. 2006). See also, Emerald Plaza West v. Salter, 466 So.2d 1129, 1129 (Fla.App. 3 Dist.,1985)(holding that trial court erred in granting foreclosure of a mortgage without requiring either production of the original promissory note and assignment of mortgage or reestablishment of those documents).

E. The assignment of the right to enforce a lost note in the instant case is invalid.

53. The Plaintiff does not presently have standing and cannot establish standing to prosecute this foreclosure action until it first obtains a judgment of enforcement of the lost note under Florida Statute § 673.3091, Carlsen & Co., Inc. v. Feldman, 677 So.2d 970 (Where actions for reestablishment and enforcement of lost document proceed simultaneously, trier of fact should decide reestablishment issue before enforcement or breach issues).

54. For a party to enforce a lost, destroyed or stolen instrument, it must comply with Florida Statatute § 673.3091. The Statute reads:

§ 673.3091. Enforcement of lost, destroyed, or stolen instrument

(1) A person not in possession of an instrument is entitled to enforce the instrument if:

(a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled

to enforce the instrument when loss of possession occurred;
(b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
(c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
(2) A person seeking enforcement of an instrument under subsection (1) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, s. 673.3081 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

55. The section provides that a person seeking to enforce a lost note must show that the person was entitled to enforce it when it was lost. Mortgage Elec. Registration Sys. v. Badra, 991 So. 2d 1037 (Fla. Dist. Ct. App. 4th Dist. 2008).

56. The Florida District Court of Appeal, Fourth District explained that in Florida, one cannot assign the right to enforce a lost note unless that right has been established first. In _State St. Bank & Trust Co. v. Lord, 851 So. 2d 790, 792-793 (Fla. Dist. Ct. App. 4th Dist. 2003)_ (http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=ge... 51+So.+2d+792) , the court explained, "the Uniform Commercial Code was amended to delete the requirement that the transferee be in possession at the time the instrument was lost and now provides that the person seeking to enforce the instrument either was entitled to enforce the instrument when loss of possession occurred, or acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred. (U.C.C. § 3-309(a)(1)). In State St. Bank, the Mortgagee by assignment was unable to pursue a mortgage foreclosure in the absence of proof that either the mortgagee or its assignor ever had possession of the missing promissory note.

57. The assignor, Oak Street Mortgage, LLC, acting through its nominee MERS must have first established that it has the right to enforce the lost note before it can assign that right to The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee. See _In re Am. Equity Corp., 332 B.R. 645 (Bankr. M.D. Fla. 2005)_ (http://www.lexis.com/research/xlink?app=00075&view =full&searchtype=get&search=332+B.R.+645) .

58. Oak Street Mortgage, LLC, acting through its nominee MERS has attempted to assign a speculative right to enforce the lost note, which it cannot do.

59. The record and pleadings sub judice are void of anything more than an empty claim that the Plaintiff The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee was in possession of the note when it was lost.

60. Plaintiff has failed to show that the original lender was entitled to enforce the note, and consequently there was no right to enforce the lost note for the assignor, Oak Street Mortgage, LLC, acting through its nominee MERS to assign.

61. Therefore the subject assignment is invalid under Florida Statute 673.3091(1)(a).

F. Because the Plaintiff lacks standing, it cannot invoke the subject

matter jurisdiction of this court.

62. When the court speaks of invoking a court's jurisdiction, it generally means that (1) the indispensable parties to the controversy have been lawfully brought before the court; (2) the controversy has been brought before the court by an appropriate pleading; and, if the action is in rem, (3) the court has power or control over the res. Dep't of Revenue ex rel. Vickers v. Pelsey, 779 So. 2d 629 (Fla. Dist. Ct. App. 1st Dist. 2001)

63. Before subject matter jurisdiction can arise, a proceeding must be "commenced under the proper rules of law." _Roberts v. Seaboard Surety Co., 158 Fla. 686, 698, 29 So. 2d 743, 749 (1947)._ (https://www.lexis.com/research/buttonTFLink?_m=3bc0300c99c415df73bd0c...<cite%20cc="USA"><![CDATA[2004%20FL%20S.%20Ct.%20Briefs%20227]]></cite>&_butType=3&_butStat=2&_butNum=36&_butInline=1&_butinfo=<cite%20cc="USA"><![CDATA[158%20Fla.%20686,at%20698]]></cite>&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlb-zSkAt&_md5=46159c660aede957a580475c64fc1664) The determination of standing to sue concerns a court's exercise of jurisdiction to hear and decide the cause pled by a particular party.

64. Generally, one with a legally protectable right or interest at stake in an otherwise justiciable controversy is a proper party to obtain judicial resolution of that controversy. Fla. R. Civ. P. 1.210(a). Rogers & Ford Constr. Corp. v. Carlandia Corp., 626 So. 2d 1350 (Fla. 1993); Progressive Express Insurance Company v. McGrath Community Chiropractic, 913 So.2d 1281 (Fla. 2nd DCA 2005).

65. Only those who have standing to be heard in a judicial proceeding may participate in it. Trawick, Fla. Prac. & Proc. § 4-15; Byrom v. Gallagher, 578 So. 2d 715, 717 (Fla. Dist. Ct. App. 5th Dist. 1991).

66. "Before this potential jurisdiction of the subject-matter--this power to hear and determine--can be exercised, it must be lawfully invoked and called into action; the parties and the subject-matter of the particular case must be brought before the court in such a way that it acquires the jurisdiction and the power to act." Fla. Power & Light Co. v. Canal Auth., 423 So. 2d 421, 424 (Fla. Dist. Ct. App. 5th Dist. 1982).

67. It is because judicial subject matter jurisdiction is a sovereign power that its lack cannot be remedied by the acquiescence or consent of the parties. Id. Standing to sue cannot be conferred by consent. Florida Comm. on Hurricane Loss Projection Methodology v. State of Florida, 716 So.2d 345 (Fla. 1st DCA 1998)

68. Without a legitimate and worthy plaintiff there can be no justiciable controversy over which this court has jurisdiction. Your Construction Center, Inc. v. Gross, 316 So. 2d 596 (Fl. 4th DCA 1975); Downing v. First National Bank of Lake City, 81 So.2d 486 (Fla. 1955); Shelter Development Group v. MMA of Georgia, Inc, 50 B.R. 588 (USBC, S.D. Florida 1985); Tamiami Abstract and Title Company v. Berman, 324 So. 2d 137 (Fla. 3rd DCA 1975); Laing v. Gainey Builders, Inc., 184 So. 2d 897 (Fla. 1st DCA 1966). See also Davanzo v. Resolute Insurance Company, et al., 346 So.2d 1227, 1977 Fla.App. LEXIS 16014 (One who holds legal title to a mortgaged property is an indispensable party in suit to foreclose a mortgage).

69. Plaintiff alleges in its complaint that the subject note was endorsed to and ownership of the note was transferred to Residential Funding Corporation, thereafter to JPMorgan Chase Bank, as trustee, and thereafter to The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee.

70. The endorsement on the note purports to endorse the note from Residential Funding Corporation to JPMorgan Chase Bank, as trustee.

71. There is no proof of transfer from the original lender, Oak Street Mortgage, LLC or its nominee MERS, to Residential Funding

Corporation.

72. When exhibits are attached to a complaint, the contents of the exhibits control over the allegations contained in the complaint. BAC Funding Consortium, Inc. v. Jean-Jacques, ____ So. 3d _____, 2010 WL 476641 (Fla. 2nd DCA 2010) (citing Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So. 2d 399, 401 (Fla. 2nd DCA 2000) ("Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and may be the basis for a motion to dismiss."); Blue Supply Corp. v. Novos Electro Mech., Inc., 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008); Harry Pepper & Assocs., Inc. v. Lasseter, 247 So. 2d 736, 736-37 (Fla. 3d DCA 1971) (holding that when there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations 'have the effect of neutralizing each allegation as against each other, thus rendering the pleading objectionable.")).

73. Recently, Judge Carithers of this circuit entered an Order Granting Defendant's Motion to Dismiss because the allegations in Plaintiff's complaint and the attached exhibits were repugnant to one another, " rendering the resulting count insufficient on its face." American General Finance, Inc. v. Harris, No. 16-2009-CA-000068-MA (Fla. 4th Cir. Ct. March 15, 2010). While this order is not precedent, it should be viewed as persuasive authority.

74. Because the allegations in Plaintiff's complaint as to standing and the exhibits attached to Plaintiff's complaint contradict each other, and the exhibit does not show that The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, has standing to foreclose the mortgage, Plaintiff did not establish its entitlement to foreclose the mortgage.

75. The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, lacks standing to commence this foreclosure action because The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, lacks a sufficient stake in the alleged controversy and because The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, lacks a legally cognizable interest that would be affected by the outcome of the litigation due to the subject assignment being invalid. See Nedeau v. Gallagher, 851 So.2d 214, 216 (Fla. 1st DCA 2003).

76. Because the Plaintiff The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, has not shown that it has standing to pursue the instant action, it cannot invoke the subject matter jurisdiction of this court.

G. The Plaintiff cannot establish standing retroactively.

77. The Florida Supreme Court held in 1911 that "A plaintiff cannot supply the want of a valid claim at the commencement of the action by the acquisition or accrual of one during the pendency of the action." Marianna & B. R. Co. v. Maund, 62 Fla. 538, 543 (Fla. 1911).

78. Florida Rule of Civil Procedure 1.190(c) states:

(c) Relation Back of Amendments. When the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

79. However, Florida case law holds that the rule does not permit a party to establish the right to maintain an action retroactively by acquiring standing to file a lawsuit after the fact. Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic, 913 So. 2d 1281 (Fla. Dist. Ct. App. 2d Dist. 2005). A plaintiff's lack of standing at the inception of a case is not a defect that may be cured by the acquisition of standing after the

case is filed. Id.

80. In Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 (Fla. Dist. Ct. App. 4th Dist. 1990) the court held that the assignee of a mortgage could not maintain the mortgage foreclosure action because the assignment was dated four months after the action was filed. The plaintiff was required to file a new complaint.

81. The court in Citimortgage, Inc. v. Eason, No. 08-CA-5013-ES (Fla. 6th Cir. Ct. Aug. 26, 2009), followed the Jeff-Ray decision, concluding in its Order Denying Motion for Summary Judgment that the Plaintiff did not have standing when it filed the lawsuit because the assignment of the mortgage to plaintiff, which claimed to be effective as of a date prior to the filing of the suit, was actually signed seven months after the foreclosure action had been filed. See also Indymac Fed. Bank, FSB v. Rogers, Order Granting Defendant's Motion to Dismiss, No. 08-15958-CI-20 (Fla. 6th Cir. Ct. Mar. 3, 2010) ("The Plaintiff's failure to establish standing by virtue of exhibits attached to its complaint or subsequently filed is a defect that may not be cured by the acquisition of standing after the case is filed."). Deutschebank Nat. Trust Co. v. Supplee, Order Adopting Recommendation of General Magistrate, No. 09-3829-CA (Fla. 20th Cir. Ct. Feb 16, 2010) (granting Defendant's Motion to Dismiss because plaintiff because exhibits attached to the complaint did not prove plaintiff owned mortgage and note and assignment dated eight days after filing the action was not sufficient to cure defect).

82. In _WM Specialty Mortg., LLC v. Salomon, 874 So. 2d 680, 681 (Fla. Dist. Ct. App. 4th Dist. 2004)_ (http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=ge...) , the court distinguished the Jeff-Ray Corp. decision, holding that where the note and mortgage were physically delivered to the assignee prior to the date of the written assignment, the effective date of the assignment would relate back to the date of delivery.

83. Different courts around the country confronted with this same issue have ruled against assignees who claimed retroactive standing absent proof of delivery. See Countrywide Home Loans v. Jones, Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment, DEP F-21402-08 (October 14, 2009) (fact that the plaintiff procured the assignment so late in the litigation "cannot be overlooked"); Onewest Bank, FSB v. Cullen, 2010 NY Slip Op _____, 5 (N.Y. Sup. Ct. 2010) ("[W]hen a retroactive written assignment is executed after the commencement of the action, in the absence of proof of actual delivery of the note and mortgage prior to the commencement of the action, the retroactive assignment is insufficient to confer standing upon the assignee in a foreclosure action."); Credit-Based Asset Servicing & Securitization, LLC v. Akitoye, 2009 NY Slip Op 50076U, 4 (N.Y. Sup. Ct. 2009) ("effective" date of assignment found to be impossible); New Century Mtge. Corp. v. Durden, 2009 NY Slip Op 50175U, 2 (N.Y. Sup. Ct. 2009); ("Where there is no evidence that plaintiff, prior to commencing the foreclosure action, was the holder of the mortgage and note, took physical delivery of the mortgage and note, or was conveyed the mortgage and note by written assignment, an assignment's language purporting to give it retroactive effect prior to the date of the commencement of the action is insufficient to establish the plaintiff's requisite standing."); Indymac Bank, FSB v. Boyd, 2009 NY Slip Op 50094U, 2 (N.Y. Sup. Ct. 2009)(assignment executed three days after commencement of action with "effective" date predating assignment was insufficient to import standing to plaintiff where plaintiff provided no evidence that it took physical possession of the note and mortgage before commencing the action) Deutsche Bank Trust Co. Ams. v. Peabody, 2008 NY Slip Op 51286U (N.Y. Sup. Ct.

2008)(The assignment's language purporting to give it retroactive effect, absent a prior or contemporary delivery of the note and mortgage, is insufficient to grant it standing.); HSBC Mortg. Servs. v. Horn, 2008 U.S. Dist. LEXIS 82826 (S.D. Ohio Sept. 30, 2008) (MERS assignment five days after commencement of the action was insufficient for plaintiff to satisfy its burden of demonstrating standing at the time of the filing of the complaint).

84. The purported assignment of the subject note to Plaintiff occurred after the filing of the foreclosure action.

85. Thus, Plaintiff did not have standing to pursue the foreclosure when the foreclosure was filed.

86. Plaintiff cannot establish standing retroactively and its complaint should be dismissed.

CONCLUSION

87. Pursuant to the foregoing case law and statutes, for any and all of the above reasons, the Plaintiff lacks standing to pursue this action because the subject assignment from MERS to The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, dated November 7, 2005, is a legal nullity, is invalid and void, and consequently The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as trustee, cannot invoke the subject matter jurisdiction of this court in the instant action and the Plaintiff's Revised Second Amended Complaint should be dismissed.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed to H. Keith Thomerson, Hinshaw& Culbertson, 50 North Laura Street, Suite 4100, Jacksonville, Florida 32202, Attorneys for Plaintiff, by U.S mail on _____.

JACKSONVILLE AREA LEGAL AID, INC.