PLAINTIFF'S TESTIMONY OF POSSESSION OF ORIGINAL NOTE AT INCEPTION MAY FAIL WHEN CONTRAVENED BY PLEADINGS & WITHOUT OTHER EVIDENTIARY SUPPORT

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In *David L. Ham, Jr. v. Nationstar Mortgage, LLC,* 1D14-4024 (Fla. 1st DCA May 12, 2015), the First District Court of Appeals ("First DCA") reversed the trial court's Final Judgment of Foreclosure in favor of Nationstar for failing to furnish competent and substantial evidence overcoming Borrower's standing defense, and that the original Plaintiff possessed the original note, indorsed in blank, at the inception of the lawsuit. Here, 123 Loan, LLC ("123 Loan") originated the subject loan in 2004, and allegedly assigned the note to Aurora Loan Services, LLC ("Aurora") at some unknown time. Aurora then filed the initial Complaint with a count seeking to re-establish a lost note. Years later, Aurora filed an Amended Complaint which dropped the lost note count, and attached a copy of the original note with an undated blank endorsement from 123 Loan. In his Answer, Borrower raised standing as an affirmative defense and challenged whether Aurora possessed the original note, indorsed in blank, at the time of the lawsuit's filing. Thereafter, Nationstar substituted in as Plaintiff in this case.

At trial, Nationstar designated a witness without relation to 123 Loan or Aurora, and she testified that her review of unspecified business records of a prior servicer of the loan indicated that Aurora possessed the original note, indorsed in blank, prior to the lawsuit's filing despite the lost note count. Nationstar did not introduce any documentary evidence on this topic. The First DCA, weighing the evidence considered by the trial court through the *de novo* standard, concluded that the testimony of Nationstar's witness did not constitute competent and substantial evidence that Aurora had standing at the suit's inception because the initial Complaint sought to re-establish the lost note, the indorsement was undated, and the assignment of mortgage was dated after the suit's filing. The First DCA did note that a lender could still prove standing through testimony when the documentary evidence is insufficient if the witness possesses personal knowledge of the matters at issue (i.e. the transfer of the original note occurring before the suit's filing). This did not occur here and Nationstar was reversed on appeal.

I don’t view this opinion as the First DCA chipping away at a lender’s reliance on prior servicer records. Rather, the case’s posture was a perfect storm to cast doubt on the testimony of Nationstar, a plaintiff that did not commence the action or originate the loan. If Aurora filed suit *without* a lost note count, or Nationstar could present at least some documentary evidence from the prior servicer incorporated into its records that indicated an assignment of the note to Aurora prior to the suit’s filing, than I believe this ruling could have gone the other way. Also, this case did not involve a pooling and servicing agreement and trust relationship so Nationstar could not prove standing as a non-holder of the note with the rights of a holder through trust documentation. Nevertheless, this case underscores the evidentiary issues presented when a subsequent servicer or plaintiff attempts to prove standing at inception when the note is not attached to the complaint, or the attached note does not include an indorsement or allonge demonstrating the instrument’s transfer to the plaintiff before the suit’s filing, and the subsequent servicer or plaintiff later relies upon an undated indorsement or allonge and testimony unsupported by documentation.