

FORECLOSURE CASES

Key: ■ The Good

■ The Bad and Ugly

Ice Legal Case

- 1. *Smith v. Kleiser*, 91 Fla. 84 (Fla. 1926)
 - **Standing.** “In a suit to foreclose a mortgage...it should be in the name of the real owner of the debt secured.” Foreclosure action must be brought by the actual owner of the loan, not by any servicer or temporary holder of the Note.
- 2. *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209 (Fla. 2d DCA 1975).
 - **Negotiability.** Note that incorporates terms from mortgage is not a negotiable instrument.
- 3. *Frost v. Regions Bank*, 15 So. 3d 905 (Fla. 4th DCA 2009)
 - **Summary Judgment Burden.** Must disprove affirmative defenses or establish their legal insufficiency.
 - **Conditions Precedent.** Bank failed to disprove or show legal insufficiency of affirmative defense that acceleration notice had not been sent. This case conflicts with *Godshalk* because court held that there was no authority for the proposition that the homeowners must specifically refer to the any language from the mortgage in their affirmative defense.
- 4. *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936 (Fla. 2d DCA 2010)
 - **Standing.** Bank could not prevail on summary judgment where neither Mortgage or Note identified plaintiff-Bank as holder of instruments.
- 5. *Riggs v. Aurora Loan Services, LLC*, 36 So. 3d 932 (Fla. 4th DCA 2010)
 - **Standing.** Where plaintiff brought the alleged “original” note and mortgage to hearing. This ignores requirement that evidence must be produced 20 days prior to the hearing (*Verizzo*).
 - **Self-Authentication.** Finds that the note and the signature of the endorser was self-authenticating under UCC. The court fails to parse out the difference between authenticating the document itself (proving that it is what it purports to be—an “original”) and the signatures on the document. The UCC only speaks to signatures, not to the document itself. Additionally, the best interpretation is that the UCC is referring only to the signature of the maker. The Comment to the UCC provision justifies the presumption in favor of authenticity of the signatures on the grounds that

the maker is in the best position to know whether his or her signature is genuine and to offer proof if it is not. This rationale would not apply to signatures on endorsements.

6. *Taylor v. Deutsche Bank Nat. Trust Co.*, 44 So. 3d 618 (Fla. 5th DCA 2010)

- **Standing.** Assignment from MERS sufficient to confer upon bank the authority to foreclose even though MERS was never holder of the note. MERS' right to assign flows from Mortgage provision in which homeowner granted MERS the status of a "non-holder in possession"—even though MERS was never in possession of the note.

7. *Servedio v. U.S. Bank Nat. Ass'n*, 46 So. 3d 1105 (Fla. 4th DCA 2010)

- **Summary Judgment.** In order for Bank to prevail at summary judgment, Bank must produce original note and mortgage.

8. *Valcarcel v. Chase Bank USA NA*, 54 So. 3d 989 (Fla. 4th DCA 2010)

- **Attorneys' Fees.** Attorneys' fees should be granted where foreclosure case dismissed without prejudice as a sanction (if there is an underlying basis such as a statute or contract).

9. *Kwong v. Countrywide Home Loans Servicing, L.P.*, 54 So. 3d 1033 (Fla. 4th DCA 2011)

- **Due Process.** Strict compliance with statutory requirements of service is mandated. Thus, failure to make notations on summons of complaint renders service defective.

10. *Harvey v. Deutsche Bank Nat. Trust Co.*, 69 So. 3d 300 (Fla. 4th DCA 2011)

- **Standing.** Assignments, even fraudulent ones, are irrelevant in a foreclosure action. Fraudulent assignment would be irrelevant, because that would be an issue between the plaintiff and the third party who was the true owner of the loan.

11. *Mazine v. M & I Bank*, 67 So. 3d 1129 (Fla. 1st DCA 2011)

- **Evidence.** Affidavit of Indebtedness not admissible at trial where sole witness could not lay foundation for business records exception to hearsay. Essentially applies *Glarum* in a trial setting.

12. *State Rd. 7 Inv. Corp. v. Natcar Ltd. P'ship*, 82 So. 3d 1013 (Fla. 4th DCA 2011)

- **Attorneys' Fees.** Mortgagee entitled to fees from mortgagor that were expended on priority litigation with another lienor because it was connected to its "collection of any and all such sums of money" on the note and mortgage.
- **Summary Judgment Burden.** Dispute as to principal amount owed created issue of fact that precluded summary judgment.

13. *Henn v. Ultrasmith Racing, LLC*, 67 So. 3d 444, (Fla. 4th DCA 2011)

- **Attorneys' Fees.** Whether dismissal order was a sanction or a voluntary dismissal (which was technically improper since it was filed by company without an attorney), the defendant was entitled to attorneys' fees. Long discussion of *Valcarcel*.

14. *Wroblewski v. American Home Mortg. Servicing, Inc.*, 68 So. 3d 431, (Fla. 5th DCA 2011)

- **Summary Judgment Burden.** Bank failed to overcome assertion that it had not complied with condition precedent contained in the mortgage requiring notice of default.

15. *Gee v. U.S. Bank Nat. Ass'n*, 72 So. 3d 211 (Fla. 5th DCA 2011)

- **Summary Judgment Burden.** Summary judgment reversed where motion did not identify issues with particularity: 1) motion stated that note was not lost, but at hearing court granted motion based on lost note affidavit; and 2) motion stated nothing about reformation of the deed
- **Standing.** Bank did not have standing where there was a gap in the chain. There were two assignments, one from A to B and another from C to D. There was nothing from B to C.

16. *Taylor v. Bayview Loan Servicing, LLC*, 74 So. 3d 1115 (Fla. 2d DCA 2011)

- **Standing.** Standing shown at summary judgment where allonge to note dated transfer prior to filing of case. Rejected theory that mortgage did not follow note (without mentioning that it was a MERS mortgage).
- **Summary Judgment Burden.** Must disprove affirmative defenses or establish their legal insufficiency.
- **Conditions Precedent.** Bank failed to refute affirmative defense on lack of notice.

17. *Woodrum v. Wells Fargo Mortg. Bank, N.A.*, 73 So. 3d 873 (Fla. 4th DCA, 2011)

- **Summary Judgment Burden.** Where there is no answer, movant must conclusively demonstrate that the defendant cannot assert a genuine issue of material fact. Bank failed to refute affirmative defense raised in an affidavit in opposition to summary judgment. Court must consider such affidavit.

18. *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011)

- **Sufficiency of Affidavits.** Affiant must have personal knowledge and affidavit must set forth such facts as would be admissible in evidence to show affirmatively that affiant is competent to testify.

19. *Venture Holdings & Acquisitions Group, LLC v. AIM Funding Group, LLC*, 75 So. 3d 773 (Fla. 4th DCA 2011)

- **Standing.** A party must have standing to file suit at its inception and may not remedy this defect by subsequently obtaining standing. (Essentially, the same as the later holding in *McLean*, but here plaintiff did not have the note.) Here, Plaintiff had assigned away loans as collateral before filing suit.
- **Effect of Default.** Party in default does not admit that the plaintiff possesses the original note. Must show standing as of the time of summary judgment.

20. *Duke v. HSBC Mortgage Services, LLC*, 79 So. 3d 778 (Fla. 4th DCA 2011), reh'g denied (Feb. 8, 2012)

- **Standing.** Original opinion: discrepancy between lender on mortgage attached to complaint and allegations created issue of fact as to standing at the time the complaint was filed—hinting of a *McLean* type holding.

21. *Bryson v. Branch Banking and Trust Co.*, 75 So. 3d 783 (Fla. 2d DCA 2011)

- **Summary Judgment Burden.** Must disprove affirmative defenses or establish their legal insufficiency. Also, homeowner need not provide affidavit in support of affirmative defense, bank carries evidentiary burden of disproving the defense.
- **Self-authentication.** Bank's notice of default was not self-authenticating.

22. *Corya v. Sanders*, 76 So. 3d 31 (Fla. 4th DCA 2011)

- **Summary Judgment Burden.** Must disprove affirmative defenses or establish their legal insufficiency.

23. *Pino v. Bank of New York*, 76 So. 3d 927 (Fla., 2011).

- **Appellate Jurisdiction.** Supreme Court may retain jurisdiction over appeal that was properly certified as regarding an issue of great public importance, even though parties have settled case.

24. *Pino v. Bank of New York*, 38 Fla. L. Weekly S78 (Fla. 2013).

- **Post-judgment motions.** Trial court has no jurisdiction to reopen case that has been voluntarily dismissed in order to sanction misconduct that occurred during the case.

25. *Land Dev. Services, Inc. v. Gulf View Townhomes, LLC*, 75 So. 3d 865 (Fla. 2d DCA 2011).

- **Summary Judgment Burden.** Defendants could not prevail on defensive summary judgment where there was no note filed, since Defendants could not prove that plaintiff could never come forward with a note.

26. *Bank of New York Trust Co., N.A. v. Rodgers*, 79 So. 3d 108 (Fla. 3d DCA 2012).

- **Standing.** Determined not by evidence at trial, but by “unopposed” substitution of party plaintiff before trial and “self-executing assignments.” No original note or mortgage in the file. Scathing dissent points out many of the problems with this opinion.

27. *Kimmick v. U.S. Bank Nat. Ass'n*, 83 So. 3d 877 (Fla. 4th DCA 2012).

- **Estoppel/Waiver.** Payment on modification raised issue of fact as to whether bank waived default.
- **Summary Judgment Burden.** Must disprove affirmative defenses or establish their legal insufficiency.
- **Conditions Precedent.** Same.

28. *Helping Hand Private Foundation, Inc. v. Ocean Palms*, 77 So. 3d 896 (Fla. 5th DCA 2012).

- **Summary Judgment Burden.** Must disprove affirmative defenses or establish their legal insufficiency.
- **Sufficiency of Affidavits.** Affiant must have personal knowledge and affidavit must set forth such facts as would be admissible in evidence to show affirmatively that affiant is competent to testify.

29. *Deutsche Bank Nat. Trust Co. v. Lippi*, 78 So. 3d 81 (Fla. 5th DCA 2012).

- **Standing.** Follows *Harvey* in holding that bank has standing if it alleges that it is the holder of the original note, regardless of any recorded assignments. Here the assignment was executed after the case was filed. Case ignores *McLean* and progeny that standing cannot be acquired after the lawsuit is filed.

30. *Arsali v. Chase Home Finance, LLC*, 79 So. 3d 845 (Fla. 4th DCA 2012), reh'g denied (Feb. 27, 2012), *review granted*, 86 So. 3d 1112 (Fla. 2012).

- **Setting aside sale.** Sale can be set aside for reasons other than inadequacy of sale price.

31. *Feltus v. US Bank, N.A.*, 80 So. 3d 375 (Fla. 2d DCA 2012).

- **Standing.** Bank's reply that it had now found the "lost" note was insufficient to amend the pleadings because an amendment after homeowner filed answer would require permission of court or homeowner. It went to summary judgment, therefore, on the lost note count, creating issue of fact.
- **Sufficiency of Affidavits.** Also makes passing reference to the fact that the affiant must have personal knowledge of ownership.

32. *Verizzo v. Bank of New York*, 28 So. 3d 976 (Fla. 2d DCA 2010).

- **Summary Judgment.** Judgment in favor of Bank must be reversed where evidence in support of summary judgment was filed beneath the 20 day deadline as required by Florida Rules of Civil Procedure 1.510(c).

33. *McLean v. JP Morgan Chase Bank N.A.*, 79 So. 3d 170 (Fla. 4th DCA 2012), reh'g granted (Feb. 8, 2012).

- **Standing.** First case to recognize that mere possession of an endorsed note does not establish standing as of the date the case is filed.

34. *Beaumont v. Bank of New York Mellon*, 81 So. 3d 553 (Fla. 5th DCA 2012).

- **Standing.** Judgment reversed on reestablishment of lost note count where bank failed to prove who lost the note, when it was lost, who had the right to enforce when it was lost, who owned the note, and how the borrower would be protected from a claim by another person to enforce the note.
- **Estoppel/Waiver.** Debtor did not waive the issue of whether bank to which promissory note was purportedly assigned had standing to bring action to enforce the note by failing to raise the issue as an affirmative defense where there was no

evidence that debtor was on notice before his answer was filed that ownership of the note had been transferred.

- **Sufficiency of Affidavits.** Assignment was not competent summary judgment evidence where document was not attached to an affidavit for authentication.

35. *Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626 (Fla. 5th DCA 2012).

- **Conditions Precedent.** Held that a denial that “any of the notices required by the document” had been sent was insufficiently specific to raise condition precedent as a defensive issue at summary judgment. The dissent calls this result “absurd” and adds, “The good news for plaintiffs, especially mortgage foreclosure plaintiffs, is that the seemingly insurmountable difficulties of actual compliance with the summary judgment rule can now be avoided by the simple expedient of attacking the ‘specificity’ and ‘particularity’ of the defendant’s response to their assertion that all conditions precedent were met.”

36. *Trucap Grantor Trust 2010-1 v. Pelt*, 84 So. 3d 369 (Fla. 2d DCA 2012).

- **Verification.** Verification of complaint may be made on “knowledge and belief.” Because a “document” and a “pleading” are the same thing, the rule’s statement that a “document” can be verified on “knowledge and belief,” means that the Complaint need not be verified on personal knowledge.

37. *Harvey Covington & Thomas, LLC v. WMC Mortg. Corp.*, So. 3d 558 (Fla. 1st DCA 2012).

- **Discovery.** Trial court abused its discretion when it denied Defendant’s motion for continuance of summary judgment on the basis of outstanding discovery. Generally, trial courts cannot grant summary judgment when the opposing party has not had an opportunity to complete discovery.

38. *Thomas v. Ocwen Loan Servicing, LLC*, 84 So. 3d 1246 (Fla. 1st DCA 2012).

- **Summary Judgment.** Plaintiff *must* affirmatively refute all of Defendant’s affirmative defenses, or show that they are legally insufficient to be entitled to summary judgment.

39. *Becker v. Deutsche Bank Nat. Trust Co.*, 88 So. 3d 361 (Fla. 4th DCA 2012).

- **Verification.** Verification of complaint pursuant to Fla. R. Civ. P. 1.110(b) can be accomplished through a separate verification on a different page, even though the verification is not incorporated within the complaint.

40. *Henderson v. Litton Loan Servicing, LP*, 92 So. 3d 301 (Fla. 4th DCA 2012); No. 4D10-1167 (Fla. 4th DCA July 18, 2012).
- **Standing.** Bank claimed standing to pursue foreclosure as “holder” of the promissory note. Note was not indorsed in blank, or indorsed to Plaintiff. Therefore, Plaintiff could not be the “holder” of an instrument made out to another party.
 - **Summary Judgment.** Note not endorsed in blank or to Plaintiff created issue of material fact, precluding summary judgment.
41. *Bonilla v. Bank United*, 93 So. 3d 1103 (Fla. 4th DCA 2012).
- **Due Process.** Trial court abused its discretion in denying a 1.540(b) motion to vacate. On the eve of summary judgment, the trial court permitted the defense lawyer to withdraw with 30 days for defendants to find new attorneys. However, 5 days later, the trial court proceeded with summary judgment as originally scheduled, and ruled in favor of Bank. Appellate court held that such an action constitutes surprise and a violation of due process.
42. *Zervas v. Wells Fargo Bank, N.A.*, 93 So. 3d 453 (Fla. 2d DCA 2012).
- **Summary Judgment.** Where Bank moves for summary judgment before an answer is filed, the Bank has the heavy burden to prove to a certainty that no answer could present a genuine issue of material fact.
 - **Conditions Precedent.** Bank must establish that it provided contractually required notices to prevail on summary judgment.
43. *Cerron v. GMAC Mortgage, LLC*, 93 So. 3d 456 (Fla. 2d DCA 2012).
- **Summary Judgment.** Plaintiff moving for summary judgment must conclusively refute the Homeowner’s affirmative defenses, or show that the defenses are legally insufficient.
 - **Conditions Precedent.** Where homeowner alleged failure to provide contractually required notice, burden on summary judgment fell on Bank to prove that it did, in fact provide notice.
44. *Dage v. Deutsche Bank National Trust Co.*, 95 So. 3d 1021 (Fla. 2d DCA 2012).
- **Vacating Final Judgment.** Lack of standing is insufficient to vacate a final judgment, where the final judgment was entered over two years before the motion to vacate. Lack of standing only renders the judgment voidable, not void. As such, this is insufficient to merit setting aside the judgment under Rule 1.540(b)(4) (rule allowing relief from judgment on the basis of a void judgment).

45. ***Gascue v. HSBC Bank, USA***, 97 So. 3d 263 (Fla. 4th DCA 2012).

- **Vacating Final Judgment.** Where Defendant moved to vacate within one year of final judgment, the failure of a defendant’s attorney to appear at a summary judgment hearing is the type of “excusable neglect” that warrants relief from final judgment. (Defendant must also show a meritorious defense and due diligence in moving to vacate the judgment).

46. ***Spencer v. EMC Mortgage Co.***, 97 So. 3d 257 (Fla. 3d DCA 2012).

- **Lack of Prosecution.** Where Plaintiff fails to meet any of the safe harbors within Rule 1.420(e), trial court is required to dismiss a case for lack of prosecution, even though dismissal would result in a dismissal with prejudice. To wit: ten months of no record activity, and after proper notice of lack of prosecution, failure to conduct any record activity within the following 60 day period, and further failure to show good cause in writing at least five days before the hearing, required dismissal for failure to prosecute.
- **Statute of Limitations.** Mortgage foreclosures are time-barred after 5 years from the date of acceleration.
- **Sufficiency of Affidavits.** Facially incorrect interest rate calculations in the summary judgment affidavit requires reversal of summary judgment.

47. ***Schofield v. Wells Fargo Bank, N.A.***, 95 So. 3d 1051 (Fla. 5th DCA 2012).

- **Due Process.** Service of process must strictly comply with all relevant statutory provisions. Failure of process server to place date, time, ID number, and initials on summons must result in quashing service of process.

48. ***Finnegan v. Deutsche Bank Nat. Trust Co.***, 96 So. 3d 1093 (Fla. 4th DCA 2012).

- **Conditions Precedent.** Paragraph 20 of the Mortgage required notice to Borrower before the commencement of any judicial action. Where Borrower filed an affidavit swearing non-receipt, and Plaintiff files an uncertified copy of the alleged letter, this becomes an issue of material fact necessitating trial.
- **Summary Judgment Burden.** Unsworn and uncertified copies of alleged breach letter **could** not be considered in summary judgment.

49. ***Vidal v. Liquidation Properties, Inc.***, 104 So. 3d 1274 (Fla. 4th DCA 2012).

- **Standing.** Back-dated assignment with undated endorsement is insufficient to establish that Bank acquired standing prior to the commencement of the action, as is required under *McLean*.

50. *Dominko v. Wells Fargo Bank, N.A.*, 102 So. 3d 696 (Fla. 4th DCA 2012).

- **Conditions Precedent.** Where the Bank fails to obtain a default, and fails to address the required paragraph 22 pre-suit letter in their affidavit in support of summary judgment, the Bank is not entitled to summary judgment.
- **Conditions Precedent.** Plaintiff's general allegation that all conditions precedent had occurred, without supporting evidence, is insufficient to obtain summary judgment in favor of plaintiff.
- **Summary Judgment Burden.** Plaintiff moving for summary judgment in the absence of an answer has a "difficult burden" of establishing not only that no issue of material fact exists in the record as it stands, but also that if permitted to answer, the defendant could not raise any genuine issue of material fact.

51. *Spikes v. Onewest Bank, FSB*, 106 So. 3d 475 (Fla. 4th DCA 2012).

- **Equity.** Inadvertent failure for wife, with a marital interest in the home, to join husband in signing note and mortgage will not preclude mortgage foreclosure.
- **Equitable Lien.** Where wife, with a marital interest in the home, does not join the husband in signing the note and mortgage, the court will impose an equitable vendor's lien to record the Bank's interest in the wife's stake of the property.
- **Homestead Protection.** Non-owner spouse cannot claim homestead exemption against an equitable lien imposed for a purchase money mortgage, regardless if any fraud was involved in not signing the loan documents.

52. *Sas v. Fed. Nat. Mortg. Ass'n*, 2D11-6327, 2013 WL 2120264 (Fla. 2d DCA 2013).

- **Best Evidence Rule/Hearsay.** Bank witness cannot testify about records not admitted into evidence.

53. *Lyttle v. BankUnited*, 5D10-3790, 2013 WL 2256865 (Fla. 5th DCA 2013).

- **Standing.** Plaintiff must tender original note or reestablish a lost note. Additionally, note must be endorsed to plaintiff or endorsed in blank. Alternatively, the plaintiff may submit evidence of an assignment or an affidavit of ownership.

54. *Nivia v. Bank United*, 4D12-2831, 2013 WL 2218013 (Fla. 4th DCA 2013).

- **Post-judgment motions.** Motion to cancel foreclosure sale properly denied after summary judgment while parties engaged in HAMP modification. The federal directive for a thirty-day postponement of proceedings after notification of non-approval of modification does not apply when the request for modification was made after the sale date had been set.

55. *Saver v. JP Morgan Chase Bank*, 4D12-2069, 2013 WL 1979824 (Fla. 4th DCA 2013).
- **Standing.** Court (Palm Beach County Judge Lewis) erred in granting summary judgment where bank failed to allege or prove that it had standing at the time it filed suit. “If the plaintiff's name is not on the mortgage, it can establish standing by proving that the mortgage was either assigned or equitably transferred prior to the date it filed the complaint. [citing *Mclean*] The following evidence is sufficient to establish standing in such a scenario: 1) a special endorsement on the note in favor of the plaintiff or a blank endorsement, 2) evidence of an assignment from the payee to the plaintiff, or 3) an affidavit of ownership.”
56. *Deutsche Bank Nat. Trust Co. v. Prevratil*, 2D12-2030, 2013 WL 2231279 (Fla. 2d DCA 2013).
- **Verification.** Trial court departed from essential requirements of law to require that verification of Complaint be made by mortgagee rather than mortgagee’s agent, where agent had power of attorney.
57. *Humphrey v. Deutsche Bank Nat. Trust Co.*, 2D12-1172, 2013 WL 2121729 (Fla. 2d DCA 2013).
- **Due Process.** After quashing service of process, trial court had no jurisdiction to order homeowner to provide current address to mortgagee.
58. *Wells Fargo Bank, N.A. v. Bohatka*, 38 Fla. L. Weekly D885 (Fla. 1st DCA 2013).
- **Dismissal standard.** Trial court’s review of motion to dismiss is limited to the four corners of the challenged complaint, thus court cannot physically examine the note as part of its decision to dismiss.
59. *Cromarty v. Wells Fargo Bank, NA*, 110 So. 3d 988 (Fla. 4th DCA 2013).
- **Summary Judgment.** Summary judgment reversed where bank failed to negate affirmative defense of standing. Endorsement was undated and summary judgment did not contain any sworn statement that the note was owned by the plaintiff on the date that the complaint was filed.
60. *Mendoza v. Chase Home Fin., LLC*, 38 Fla. L. Weekly D856 (Fla. 3d DCA 2013).
- **Post-judgment motions.** Trial court erred in denying Rule 1.540(b) motion based on the fact that homeowners did not receive notice of trial. Footnote by author of opinion (Senior Judge Schwartz who also handles foreclosures at trial level) states that the appellate court agrees with the trial court conclusion that “there was no cognizable defense to the foreclosure action.”

61. *Ruppert v. RBC Centura Bank*, 38 Fla. L. Weekly D807 (Fla. 4th DCA 2013).
- **Summary Judgment Burden.** Trial court must first resolve the issues raised in affirmative defenses before entering partial summary judgment of an equitable lien.
62. *Kurian v. Wells Fargo Bank, Nat. Ass'n*, 38 Fla. L. Weekly D804 (Fla. 4th DCA 2013) (opinion upheld on rehearing, but waiting on citation to substituted opinion).
- **Summary Judgment Burden.** Summary Judgment improper where bank failed to refute affirmative defenses regarding the “Paragraph 22” defense of failure to comply with conditions precedent (lack of notice of acceleration).
 - **Conditions Precedent.** Summary Judgment improper where bank failed to refute affirmative defenses regarding the “Paragraph 22” defense of failure to comply with conditions precedent (lack of notice of acceleration).
63. *Green v. JPMorgan Chase Bank, N.A.*, 109 So. 3d 1285, 1287 (Fla. 5th DCA 2013).
- **Amendment of Pleadings.** Abuse of discretion to deny homeowner’s motion to add counterclaim.
 - **Summary Judgment Burden.** Summary Judgment improper where bank failed to refute affirmative defense of lack of standing.
 - **Standing.** Endorsement in blank did not establish that the bank had the right to enforce the note when it filed suit. Purchase and Assumption Agreement purportedly showing purchase before the case was filed, was not authenticated for Summary Judgment. Affidavit stated only that the bank “holds” the note, not that it held the note at the time it filed suit.
64. *U.S. Bank, N.A. v. Wanio-Moore*, 111 So. 3d 941 (Fla. 5th DCA 2013).
- **Verification.** Trial court erred in concluding that a foreclosure verification must state the signer’s position.
65. *Foerster v. Regent Bank*, 110 So. 3d 526 (Fla. 4th DCA 2013).
- **Summary Judgment Burden.** Summary Judgment improper where there remains a genuine issue of fact regarding whether bank complied with the condition precedent contained in the mortgage to provide pre-suit notice of acceleration.
 - **Conditions Precedent.** Summary Judgment improper where there remains a genuine issue of fact regarding whether bank complied with the condition precedent contained in the mortgage to provide pre-suit notice of acceleration.
66. *Boumarate v. HSBC Bank USA, N.A.*, 109 So. 3d 1239 (Fla. 5th DCA 2013).

- **Summary Judgment Burden.** Summary Judgment improper. Bank must prove its right to enforce the note as of the date of the summary judgment hearing. Burden remained with bank even when defect was not raised in homeowner's pleadings and even though the bank's "standing" was not an issue due to homeowner's default.

67. *Wells Fargo Bank, NA v. Giglio*, 38 Fla. L. Weekly D618 (Fla. 4th DCA 2013).

- **Post-judgment Motions.** Trial court abused its discretion in denying bank's motion for dismissal of foreclosure action post-judgment when case had been settled.

68. *Shahar v. Green Tree Servicing LLC*, 38 Fla. L. Weekly D563 (Fla. 4th DCA 2013).

- **Unclean Hands.** Homeowner's allegations were legally sufficient to properly assert the defense of unclean hands, stating that lender altered income information on the loan application and the type of loan sought without homeowner's knowledge.
- **Summary Judgment Burden.** Summary judgment improper where bank's affidavit failed to negative the allegations of unclean hands.
- **Record on Appeal.** Transcripts of summary judgment argument unnecessary to preserve issues for appeal, because the hearing consists of legal argument, not the taking of evidence.

69. *Charley v. Green Tree Servicing, LLC*, 38 Fla. L. Weekly D560 (Fla. 4th DCA 2013)

- **Summary Judgment Burden.** Summary Judgment improper where genuine issues of fact remained as to bank's standing.
- **Standing.** Standing to foreclose may be established by either an assignment or equitable transfer of the mortgage prior to the filing of the complaint. (Notes that two different plaintiffs filed separate actions to foreclose the same mortgage.)

70. *Lindsey v. Wells Fargo Bank, N.A.*, 38 Fla. L. Weekly D464 (Fla. 1st DCA 2013).

- **Summary Judgment Burden.** Summary Judgment improper because Wells Fargo did not establish its standing or refute homeowner's affirmative defense claiming lack of standing.
- **Standing.** To have standing to foreclose, the bank must demonstrate that it holds the note and mortgage in question at the time the complaint is filed. (Footnote states that standing is an affirmative defense that is waived if not raised in the answer.)

71. *Serrano v. HSBC Bank USA, Nat. Ass'n*, 107 So. 3d 527 (Fla. 4th DCA 2013).

- **Conditions Precedent.** Summary Judgment improper where there remains a genuine issue of fact regarding whether bank complied with the condition precedent contained in the mortgage to provide pre-suit notice of acceleration.

72. *Deutsche Bank Nat'l Trust Co. v. LGC*, 107 So. 3d 486 (Fla. 2d DCA 2013).

- **Discovery Sanctions.** Abuse of discretion to dismiss bank's foreclosure action for failure to comply with discovery order. Dismissal with prejudice is the ultimate sanction reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result.

73. *Yale Mortg. Corp. v. Blot*, 107 So. 3d 1181 (Fla. 3d DCA 2013).

- **Excusable Neglect.** Homeowner failed to show sufficient excusable neglect to vacate default where homeowner waited 70 days after service and two weeks after default to retain an attorney and no explanation was offered for failure to act earlier.

74. *BarrNunn, LLC v. Talmer Bank & Trust*, 106 So. 3d 51 (Fla. 2d DCA 2013).

- **Order to Show Cause (§702.10).** Error to enter judgment on motion for order to show cause where mortgagor had filed a motion to dismiss complaint. Court cannot deny motion to dismiss as meritless and immediately enter final judgment because the filing of defenses "constitutes cause and precludes the entry of a final judgment."

75. *Cong. Park Office Condos II, LLC v. First-Citizens Bank & Trust Co.*, 105 So. 3d 602 (Fla. 4th DCA 2013).

- **Standing.** Standing and fraud are affirmative defenses that must be pled or are considered waived.
- **Summary Judgment Burden.** A trial court does not abuse its discretion in granting a motion for summary judgment, despite the pendency of discovery, where the non-moving party has failed to act diligently in taking advantage of discovery opportunities.

76. *Vidal v. Liquidation Props., Inc.*, 104 So. 3d 1274 (Fla. 4th DCA 2013).

- **Summary Judgment Burden.** Summary Judgment improper when genuine issues of fact remained due to fact that allonge was undated. Bank also failed to rebut affirmative defenses for violations of TILA (one year statute of limitation not applicable to actions in recoupment).
- **Standing.** Plaintiff must prove that it had standing to foreclose when the complaint was filed and may be established by either an assignment or an equitable transfer of the mortgage.

77. *Chase Home Loans, LLC v. Sosa*, 104 So. 3d 1240, 1241 (Fla. 3d DCA 2012)

- **Post-Judgment Motions.** Mortgagor's wife's alleged mental instability was insufficient to constitute mistake, inadvertence, surprise, or excusable neglect, as would support mortgagor's 1.540(b) motion to vacate foreclosure sale in which

mortgagor alleged that wife had actively concealed foreclosure process from mortgagor by hiding all notifications under family sofa.

- **Evidence.** Unsworn representations of counsel—despite being “officers of the court”—about factual matters do not have any evidentiary weight in the absence of a stipulation.

78. *Willis v. Bank of New York Mellon*, No. 4D12-894 (Fla.4th DCA 2013).

- **Summary Judgment Burden.** The court erred in granting a reformation when entering summary judgment when the Bank’s boilerplate motion was insufficient to give notice of the issue.

79. *Kelly v. BankUnited FSB*, No. 4D11-2022 (Fla. 4th DCA2013).

- **Excusable Neglect.** Attorney’s failure to appear due to secretarial error was evidenced by affidavit. Since the record demonstrated excusable neglect the court should have granted the motion for rehearing.

80. *Lindgren v. Deutsche Bank*, No. 4D12-2568 (Fla. 4th DCA June 19, 2013)

- **Summary Judgment Burden.** Allegations in a verified complaint based on “information and belief” are not sufficient to refute affirmative defenses as personal knowledge is required.

81. *DiSalvo v. Suntrust Mortgage, Inc.*, No. 2D11-2707 (Fla. 2nd DCA 2013)

- **Conditions Precedent.** The filing of a default notice without proper authentication fails to prove compliance of the conditions precedent.
- **Summary Judgment Burden.** It is improper to rely on the unauthenticated copy of a default notice as evidence supporting summary judgment.
- **Summary Judgment Burden.** Defendants’ denial of conditions precedent being met in their answer with specificity and particularity left a genuine issue of fact although their affirmative defenses are stricken.

82. *Bennett v. Deutsche Bank National Trust Company*, No. 4D12-2471 (Fla. 4th DCA 2013)

- **Self-authentication.** Defendants allegations that the signatures on the allonges were not authorized because they were made by the same person on behalf of two entities was not sufficient to overcome the statutory presumption that the signatures were authentic & authorized.

83. *Brown v. US Bank National Association*, No. 4D12-4612 (Fla. 4th DCA 2013)

- **Due Process.** Bank failed to show valid service of process when the date and time on the summons did not match the date or time on the return of service.
- **Due Process.** Since no Answer or Affirmative Defenses were raised by Defendant, the defect in service was not waived and the denial of Defendant's motion to quash was reversible error.

 84. ***Yang and Romeo v. Sebastian Lakes Condo Assoc.***, No. 4D12-3363 and 4D12-3364 (Fla. 4th DCA 2013)

- **Evidence – Hearsay/Business Records Exception.** A proper foundation to the exception has not been laid if the witness is relying on records from another company and has no personal knowledge of that company's practice or procedures. Applies *Glarum* in a trial setting.

 85. ***State Street Bank and Trust v. Badra***, 765 So. 2d 251 (Fla. 4th DCA 2000)

- **Collateral Estoppel/Res Judicata.** Trial court granted Defendant's motion for judgment on the pleadings when notices were sent to wrong address. Trial court's determination was that the action was premature. When Bank filed a different action based on different notices the final judgment did not act as an adjudication on the merits precluding application of res judicata to bar second foreclosure action.