








## FORECLOSURE CASES

Key:  The Good

 The Bad and Ugly

 Ice Legal Case

-  1. *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.
-  2. *Beaumont v. Bank of New York Mellon*, 37 Fla. L. Weekly D427 (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.
-  3. *Duke v. HSBC Mortgage Services, LLC* --- So.3d ----, 2012 WL 385512, 37 Fla. L. Weekly D369 (Fla. 4th DCA 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.
-  4. *McLean v. JP Morgan Chase Bank N.A.* --- So.3d ----, 2012 WL 385532, 37 Fla. L. Weekly D334 (Fla. 4th DCA February 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.
-  5. *Venture Holdings & Acquisitions Group, LLC v. AIM Funding Group, LLC*, 75 So.3d 773, 36 Fla. L. Weekly D2567, (Fla. 4th DCA November 23, 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.
6. *Arsali v. Chase Home Finance, LLC*, --- So.3d ----, 2012 WL 204480 (Fla. 4th DCA January 25, 2012)
- **Setting aside sale.** Sale can be set aside for reasons other than inadequacy of sale price.
7. *Pino v. Bank of New York*, 76 So.3d 927 (Fla. December 08, 2011)
8. *Glarum v. LaSalle Bank Nat. Ass'n*, --- So.3d ----, 2011 WL 5573941 (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.
9. *Helping Hand Private Foundation, Inc. v. Ocean Palms*, 77 So.3d 896 (Fla. 5th DCA, January 20, 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.
10. *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.
11. *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.
12. *Corya v. Sanders*, 76 So.3d 31 (Fla. 4th DCA 2011)
- **Summary Judgment Burden.** Must disprove affirmative defenses or establish their legal insufficiency.

13. *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.

14. *Feltus v. US Bank, N.A.* --- So.3d ----, 2012 WL 246464 (Fla.App. 2 Dist.), 37 Fla. L. Weekly D253, 2<sup>nd</sup> DCA, Jan. 27, 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.

15. *State Rd. 7 Inv. Corp. v. Natcar Ltd. P'ship*, 36 Fla. L. Weekly D1806, 2011 WL 3586124 (Fla. 4th DCA August 17, 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.

16. *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.

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

18. *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*.

19. ***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).

20. ***BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques***, 28 So. 3d 936 (Fla. 2d DCA 2010)

21. ***Land Dev. Services, Inc. v. Gulf View Townhomes, LLC***, 75 So. 3d 865, 868 (Fla. 2d DCA 2011)

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

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

24. ***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.

25. ***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.

26. ***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.

27. *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.

28. *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.

29. *Trucap Grantor Trust 2010-1 v. Pelt*, 2D11-2492, 2012 WL 832784 (Fla. 2d DCA March 14, 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.

30. *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.

31. *Godshalk v. Countrywide Home Loans Servicing, L.P.*, Case No. 5D10-2376 (Fla. 5th DCA March 9, 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.”

32. *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.

33. *Kimmick v. U.S. Bank Nat. Ass'n*, --- So.3d ----, 2012 WL 126774, 4<sup>th</sup> DCA, January 18, 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.

34. *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.