

2020 WL 20631

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District Court of Appeal of Florida, Third District.

HSBC BANK USA, NATIONAL
ASSOCIATION, etc., Appellant,

v.

FLORIDA KALANIT 770 LLC, et al., Appellees.

No. 3D18-0452

Opinion filed January 2, 2020

Synopsis

Background: Mortgage assignee brought action against successor property owner to foreclose mortgage and reestablish lost note, both of which were executed by prior borrowers who later conveyed the property by quitclaim deed. After case-in-chief at court trial, the Circuit Court, 11th Judicial Circuit, Miami-Dade County, [Pedro P. Echarte, J.](#), granted owner's motion for involuntary dismissal. Assignee appealed.

The District Court of Appeal, [Lindsey, J.](#), held that assignee was entitled to enforce lost note.

Reversed and remanded with instructions.

An Appeal from the Circuit Court for Miami-Dade County, [Pedro P. Echarte, Jr.](#), Judge. Lower Tribunal No. 15-28727

Attorneys and Law Firms

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Before [SCALES](#), [LINDSEY](#), and [LOBREE, JJ.](#)

Opinion

[LINDSEY, J.](#)

*1 Appellant HSBC Bank USA ¹ appeals an order granting Appellee Florida Kalanit 770, LLC's motion for involuntary dismissal in the underlying foreclosure action, which includes a count to re-establish a lost note. Because HSBC established that it was entitled to enforce the lost note, we reverse. Moreover, because HSBC's prima facie case for foreclosure is un rebutted by Florida Kalanit, we remand with instructions for the trial court to enter final judgment in HSBC's favor.

I. BACKGROUND

In August 2006, Yulesis Izquierdo executed a Promissory Note payable to WMC Mortgage Corp. The Note was secured by a Mortgage against the subject Property, which was executed by Izquierdo and Hector Smith (the "Borrowers"). In May 2010, the Borrowers defaulted under the Note and Mortgage by failing to make the payment due in May 2010 and all subsequent payments thereafter. The Borrowers were provided written notice of the default, and the default was not cured.

The Mortgage and Note were eventually assigned to HSBC, the Appellant. The Assignment was recorded in June 2012. Pursuant to a Pooling and Servicing Agreement, and as a result of various mergers, ² Bank of America took possession of the Note as a servicing agent and custodian of the Note. At some point thereafter, the Note was lost, and Select Portfolio Servicing, Inc. became the servicer.

In August 2014, the Borrowers conveyed the Property to Angel Management Group via quitclaim deed. Angel Management Group subsequently conveyed the Property, again via quitclaim deed, to Florida Kalanit, the Appellee. In December 2015, HSBC commenced the underlying foreclosure action. The operative Complaint includes one count to foreclose the Mortgage and another count to reestablish the lost Note. HSBC attached several documents to the Complaint, including the 2012 Assignment, servicer Select Portfolio Servicing's lost note affidavit, servicer Bank of America's lost note affidavit, a copy of the Note, and the Mortgage. Florida Kalanit filed an answer and affirmative defenses. The Borrowers failed to file any responsive pleadings, and a default was entered against them.

The matter then proceeded to a non-jury trial, where only Florida Kalanit contested the foreclosure. HSBC objected to Florida Kalanit's standing as a third-party non-mortgagor, but the trial court allowed Florida Kalanit to proceed.³ Following HSBC's case-in-chief, Florida Kalanit moved for involuntary dismissal, arguing that HSBC failed to establish standing to enforce the lost Note. The trial court agreed and granted involuntary dismissal based on a perceived conflict with the two lost note affidavits that HSBC had provided. This appeal followed.

II. STANDARD OF REVIEW

*2 We review the trial court's involuntary dismissal order de novo, "viewing all of the evidence presented and all available inferences from that evidence in the light most favorable to the non-moving party." [Deutsche Bank Nat'l Tr. Co. v. de Brito](#), 235 So. 3d 972, 974 (Fla. 3d DCA 2017) (citing [Maggole, Inc. v. Roberson](#), 116 So. 3d 556, 558 (Fla. 3d DCA 2013)). Moreover, it is firmly established in Florida that a defendant's motion for involuntary dismissal must be denied if the plaintiff has presented competent substantial evidence (even if conflicting) that establishes a prima facie case when considered in a light most favorable to the plaintiff. [Valdes v. Ass'n I.N.E.D., H.M.O., Inc.](#), 667 So. 2d 856, 856–57 (Fla. 3d DCA 1996) (citing [Tillman v. Baskin](#), 260 So. 2d 509, 511–12 (Fla. 1972); [Wygodny v. K-Site 600 Assocs.](#), 644 So. 2d 579, 581 (Fla. 3d DCA 1994); [Capital Media, Inc. v. Haase](#), 639 So. 2d 632, 633 (Fla. 2d DCA 1994); [Foster v. City of Gainesville](#), 579 So. 2d 774, 776 (Fla. 1st DCA 1991); [Saporito v. Madras](#), 576 So. 2d 1342, 1345 (Fla. 5th DCA 1991)).

III. ANALYSIS

The issue before us concerns HSBC's standing to enforce a lost note, which is governed by [section 673.3091, Florida Statutes](#) (2019):

(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.

(Emphasis added).

HSBC argues that it satisfied the requirements for re-establishing the lost Note. We agree. There is no dispute that WMC Mortgage was the loan originator. Moreover, Florida Kalanit acknowledged that the Assignment recorded in 2012 shows "the originator does an assignment into the trust [HSBC]" Although the Assignment transfers the Note and Mortgage from WMC Mortgage to HSBC, Florida Kalanit takes issue with the chain of assignment.

This confusion stems from the two lost note affidavits, particularly the affidavit provided by Bank of America. More specifically, Florida Kalanit argued as follows: "so you have an affidavit from Bank of America that says we acquired possession of the note. Then you have an assignment that does not include Bank of America in its chain." Similarly, the trial court found that the Bank of America affidavit identified Bank of America as the note holder, but the Select Portfolio Servicing affidavit identified HSBC as the note holder.

The language from the Bank of America affidavit giving rise to this confusion is as follows:

5. [Bank of America] first acquired possession of the Note on or before January 5, 2007, as the custodian of the Note, and the note holder was accordingly entitled to enforce the Note when loss of possession occurred.

Both Florida Kalanit and the trial court incorrectly read this language to say that Bank of America, not HSBC, was the note holder. However, a straightforward reading of the affidavit proves otherwise. The first paragraph in the affidavit clearly identifies Bank of America as "the servicing agent for the subject loan." Moreover, the affiant claims to have "personal knowledge of [Bank of America's] procedures with respect to the safekeeping and retrieval of original notes

serviced by [Bank of America] on behalf of the note holder” (Emphasis added). In other words, the affidavit does not state that Bank of America itself is the note holder. Bank of America is the *servicer* who acquired possession of the note “as the custodian,” and the note holder is a separate entity—in this case HSBC. In short, there is no conflict between the two affidavits, and there is no need to show Bank of America in the chain of assignment.⁴ Therefore, the evidence below conclusively showed that HSBC was entitled to enforce the lost Note.

IV. CONCLUSION

Footnotes

- 1 HSBC Bank USA, National Association, as Trustee, in Trust for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2007-WM1, Asset Backed Pass-Through Certificates
- 2 See § 658.45(2), Fla. Stat. (2019) (“The corporate existence of each of the constituent banks or trust companies shall be merged into and continue in the resulting bank or trust company, and such resulting bank or trust company shall be deemed to be the same bank or trust company as each constituent bank and trust company participating in the merger.”).
- 3 It is not necessary for us to decide whether Florida Kalanit had standing, so we decline to address this issue.
- 4 As previously explained, Bank of America's role as servicer was governed by the Pooling and Servicing Agreement.
- 5 “Foreclosure plaintiffs must show: (1) an agreement; (2) a default; (3) an acceleration of debt to maturity; and (4) the amount due.” [Bank of Am., N.A. v. Delgado](#), 166 So. 3d 857, 859 (Fla. 3d DCA 2015) (citing [Kelsey v. SunTrust Mortg., Inc.](#), 131 So. 3d 825, 826 (Fla. 3d DCA 2014)).

*3 Because Florida Kalanit only argues that HSBC failed to re-establish the lost Note and concedes all other elements of HSBC's foreclosure case,⁵ we reverse the involuntary dismissal and remand for entry of final judgment in favor of HSBC.

Reversed and remanded.

All Citations

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