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Manuel Farach

HSBC Bank USA v. Parodi, --- So. 3d ----, 2016 WL 2342824 (Fla. 3d DCA 2016).
A trial court commits error when it refuses to vacate technically admitted Requests for Admission when the record reflects facts contradicting the technical admissions.

Florida Laundry Sevice, Inc. v. Sage Condominium Association, Inc., --- So. 3d ----, 2016 WL 2342851 (Fla. 3d DCA 2016).
The defense of impracticability, i.e., contract performance excused because it is unreasonably expensive to perform, is different from the defense of impossibility, i.e., contract performance excused because it is impossible to perform the contract.

Nationstar Mortgage, LLC v. Castro, --- So. 3d ----, 2016 WL 2342874 (Fla. 3d DCA 2016).
The trial court must address the *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981), factors before excluding a witness, including in foreclosure trials.

Wichi Management, LLC v. Masters, -- So. 3d ----, 2016 WL 2340743 (Fla. 3d DCA 2016).
An equitable lien may be imposed when (1) a written contract indicates an intention to charge a particular property with a debt or obligation or (2) a court imposes a lien out of general considerations of a right or justice as applied to a particular circumstances and based on the conduct of the parties. Moreover, funds must be directly traceable to the real property in question and the funds must have enriched the debtor's interest in that property in order for an equitable lien to be declared.

U.S. Bank Nat'l Assoc. v. Benoit, --- So. 3d ----, 2016 WL 2342891 (Fla. 4th DCA 2016).
A settlement agreement in a mortgage foreclosure case may be enforced even if the lender cannot produce the original promissory note.

Villalona v. 21st Mortg. Corp., --- So. 3d ----, 2016 WL 2342915 (Fla. 4th DCA 2016).
The assignee of a contract, including a mortgage, assumes the rights and obligations of the assignor, including the obligation to pay fees and costs of a prior unsuccessful foreclosure action by the assignor.

Bank of America v. Nash, --- So. 3d ----, 2016 WL 2596015 (Fla. 5th DCA 2016).
The failure to register as a foreign corporation transacting business in Florida, failure to register as a mortgage lender, and failure to file a proper fictitious name do not invalidate a note and mortgage nor prohibit their enforcement.

Third District Court of Appeal

State of Florida

Opinion filed May 04, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-652
Lower Tribunal No. 09-91730

HSBC Bank USA, etc.,
Appellant,

vs.

Fulbio S. Parodi,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Marvin H. Gillman, Senior Judge.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, and Diana B. Matson, Margaret E. Kepler, and Joshua R. Levine (Fort Lauderdale), for appellant.

Pomeranz & Associates, P.A., and Mark L. Pomeranz (Hallandale), for appellee.

Before ROTHENBERG, SALTER, and SCALES, JJ.

ROTHENBERG, J.

HSBC Bank USA, etc. ("HSBC") appeals from a final judgment involuntarily dismissing its foreclosure action filed against Fulbio S. Parodi ("Parodi") following HSBC's presentation of the evidence at a non-jury trial based solely on HSBC's untimely responses to Parodi's First Request for Admissions. As the record contains evidence that contradicts HSBC's technical admissions, we conclude that the trial court reversibly erred by involuntarily dismissing HSBC's foreclosure action.

It is undisputed that HSBC failed to timely respond to Parodi's First Request for Admissions, and therefore, each request was technically admitted pursuant to Florida Rule of Civil Procedure 1.370, which provides in relevant part as follows:

> **(a) Request for Admission.** . . . The matter is admitted unless the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter within 30 days after service of the request or such shorter or longer time as the court may allow . . . .
>
> **(b) Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to rule 1.200 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits.

However, HSBC's failure to timely respond to Parodi's First Request for Admissions does not preclude HSBC's "entitlement to relief from the effect of its technical admissions." Wells Fargo Bank, N.A. v. Donaldson, 165 So. 3d 40, 42

(Fla. 3d DCA 2015); see also PennyMac Corp. v. Labeau, 180 So. 3d 1216, 1220 (Fla. 3d DCA 2015) (stating that the "liberal standard for relief under [rule 1.370] reflects the strong preference that genuinely disputed claims be decided upon their merits rather than technical rules of default").

This Court has consistently and repeatedly held it is reversible error to involuntarily dismiss an action or grant summary judgment based solely on the failure to timely respond to a request for admissions where the pleadings and/or the record evidence contradicts the technical admissions and no prejudice has been demonstrated. See PennyMac Corp., 180 So. 3d at 1220 (holding that in light of record supporting PennyMac's requested relief from the technical admissions and the absence of any showing of prejudice to Labeau, the trial court abused its discretion by failing to grant relief); Wells Fargo Bank, 165 So. 3d at 41-42 (reversing trial court's involuntary dismissal of Well Fargo's foreclosure action at trial based on Well Fargo's failure to timely respond to Donaldson's request for admissions where the verified complaint and attachments thereto contradicted the technical admissions and Wells Fargo denied its technical admissions in its reply to Donaldson's answer and affirmative defenses); Ruiz v. De Varona, 785 So. 2d 508, 509 (Fla. 3d DCA 2000) (noting that a trial court is required to look beyond the pleadings when determining the propriety of entering summary judgment and that dismissal based solely on the failure to timely respond to a request for admissions

is error where the pleadings make clear the opposing party's position and the existence of disputed facts; and concluding that, because the record was replete with evidence contradicting the technical admissions, it was error to grant summary judgment); Sher v. Liberty Mut. Ins. Co., 557 So. 2d 638, 639 (Fla. 3d DCA 1990) (same).

In the instant case, the trial court clearly erred by involuntarily dismissing HSBC's foreclosure action based solely on its technical admissions because these technical admissions were contradicted by HSBC's pleadings, discovery responses, and/or trial evidence; Parodi failed to argue or demonstrate prejudice; and the trial court failed to find prejudice. Specifically, the record demonstrates that HSBC is the owner and holder of the note, and became the owner and holder prior to filing the foreclosure action; HSBC fulfilled or performed all conditions precedent to acceleration; HSBC timely provided Parodi with the requisite notice prior to acceleration; and Parodi defaulted under the terms of the note and mortgage by failing to make the required payments and therefore owes money to HSBC. Accordingly, we reverse the final judgment involuntarily dismissing HSBC's foreclosure action filed against Parodi and remand for further proceedings.

Reversed and remanded.

Third District Court of Appeal

State of Florida

Opinion filed May 4, 2016.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D15-1264; 3D15-2440
Lower Tribunal No. 13-11848

Florida Laundry Services, Inc., etc.,
Appellant,

vs.

Sage Condominium Association, Inc., etc.,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

Ferdie and Lones and Ainslee R. Ferdie, for appellant.

Michael C. Compo, for appellee.

Before WELLS, EMAS and LOGUE, JJ.

EMAS, J.

In this consolidated appeal, Florida Laundry Services, Inc. appeals a final judgment entered in favor of defendant, Sage Condominium Association ("Sage") following a three-day nonjury trial, as well as a subsequent final order awarding attorney's fees and costs in favor of Sage.

Upon our review of the record on appeal, we affirm the trial court's final judgment, which was supported by competent, substantial evidence and which properly found, upon the evidence presented, that Sage was excused from performance of the lease agreement by the doctrine of impracticability. See Restatement (Second) of Contracts § 261 (Am. Law Inst. 1981) (providing that "[w]here after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary"). Florida law has embraced this defense, calling it a "cousin" of the defense of impossibility, Ferguson v. Ferguson, 54 So. 3d 553, 556 (Fla. 3d DCA 2011), and explicitly recognizes that "[t]he doctrine is not limited to strict impossibility, but includes 'impracticability' due to unreasonable expense." Hopfenspirger v. West, 949 So. 2d 1050, 1054 (Fla. 5th DCA 2006).

We reject the other claims raised on appeal of the final judgment, including the assertion that the trial court erred in determining Sage's expert witness to be

qualified to offer expert opinions and erred in considering such expert testimony. "It is well established that the acceptance or rejection of expert testimony is a matter within the sound discretion of the trial court, and such decision will not be overturned on appeal absent a showing of abuse of discretion." Kaiser v. Harrison, 985 So. 2d 1226, 1232 (Fla. 5th DCA 2008). See also Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989) (holding that the "determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error"). Under section 90.702, Florida Statutes (2015), a witness may be "qualified as an expert by knowledge, skill, experience, training, or education. . . ." (Emphasis added.) See also Vega v. State Farm Mut. Auto, 45 So. 3d 43, 44 (Fla. 5th DCA 2010). An expert is not required to be licensed in the State of Florida in order to be qualified to offer expert testimony. Donald S. Zuckerman, P.A. v. Hofrichter & Quiat, P.A., 629 So. 2d 217 (Fla. 3d DCA 1993); Lee County Elec. Co-op, Inc. v. Lowe, 344 So. 2d 308 (Fla. 2d DCA 1977).

Finally, we affirm the final order awarding attorney's fees and costs to Sage as the prevailing party below. The trial court correctly applied the law in determining Sage's entitlement and properly exercised its discretion in determining the reasonable attorney's fees and costs to be awarded.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed May 4, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-1855
Lower Tribunal No. 13-33700

Nationstar Mortgage, LLC,
Appellant,

vs.

Alejandro Castro, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, William L. Thomas, Judge, and Marvin Gillman, Senior Judge.

Akerman LLP and Nancy M. Wallace (Tallahassee) and William P. Heller (Fort Lauderdale) and Eric M. Levine (West Palm Beach), for appellant.

Graham Legal and Ashley Jaye Arends, for appellee, Cookies & Crackers Corp.

Before SUAREZ, C.J., and SHEPHERD and SALTER, JJ.

SALTER, J.

Nationstar Mortgage appeals an order involuntarily dismissing its residential foreclosure action and an order denying a motion for rehearing regarding the dismissal. Concluding that the dismissal was an unwarranted and excessive sanction, we reverse.

Appellee Alejandro Castro obtained a $352,000 residential mortgage loan as part of his purchase of a Miami Beach condominium in 2006. He defaulted on the note and mortgage in 2009. In 2013, following the transfer of the loan and original note and mortgage to Nationstar, and after the acquisition of the mortgaged condominium by appellee Cookies & Crackers Corp. ("C&C"), Nationstar commenced the underlying circuit court foreclosure action.

In early 2015, the case was set for trial. Three weeks before trial, counsel for C&C took the deposition of Nationstar's corporate representative. Following the deposition, however, that witness was noticed to appear in another trial in another Florida circuit. A week before the scheduled trial of the present case, Nationstar notified opposing counsel that another previously-listed witness would be assigned to testify as corporate representative. After discussion, the attorneys jointly moved for a continuance of the non-jury trial in order to alleviate any prejudice. Their respective clients consented to the joint motion.

On the date scheduled for trial, the trial court denied the joint motion to continue. C&C then moved to exclude Nationstar's proposed corporate witness on

the grounds that the witness who had been deposed was not made available, and the trial court granted the motion. At that point, C&C's attorney moved for an involuntary dismissal. The trial court granted that motion as well and later denied Nationstar's motion for rehearing. This appeal followed.

Analysis

Nationstar's counsel represented to the trial court that its proffered corporate representative would have testified to the same facts, figures, and corporate records as the representative who had been deposed. The court and counsel for C&C did not propose an adjournment to allow a deposition to be taken to confirm that fact.

Although C&C's counsel mentioned Binger without citation (Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981)), the trial court did not address any of the factors detailed in that case. The exclusion of a proffered witness on the facts presented here, even an unlisted witness, "is a drastic remedy which should pertain in only the most compelling circumstances." Walters v. Keebler Co., 652 So. 2d 976, 977 (Fla. 1st DCA 1995) (citing Binger, 401 So. 2d 1310). In the present case, the trial court did not consider what prejudice, if any, might be suffered by C&C, nor did it address any lesser steps or sanctions that might have adequately addressed the substitution of one duly-listed corporate representative for another witness also listed in Nationstar's pretrial catalogue.

Here, as in a recent appeal involving a similar record, Deutsche Bank National Trust Co. ex rel. LSF MRA Pass-Through Trust v. Perez, 180 So. 3d 1186 (Fla. 3d DCA 2015), prejudice was neither demonstrated nor properly considered by the trial court. And here, as in that case, we reverse and vacate the trial court's order of dismissal and remand the case for further proceedings consistent with this opinion.

Reversed; order of dismissal vacated.

Third District Court of Appeal

State of Florida

Opinion filed May 4, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-1873
Lower Tribunal No. 12-1106

Wichi Management LLC,
Appellant,

vs.

Roger L. Masters, et al.,
Appellees.

An appeal from the Circuit Court for Miami-Dade County, Antonio Marin, Judge.

Mario A. Lamar, P.A. and Mario A. Lamar; Arnaldo Velez, P.A. and Arnaldo Velez, for appellant.

Law Offices of La Ley con John H. Ruiz, P.A. and John H. Ruiz, Christine M. Lugo, and Gustavo J. Losa, for appellee R & L Financial Services, Inc.

Before SUAREZ, C.J., and SHEPHERD and SALTER, JJ.

SUAREZ, C.J.

Appellant WICHI Management, LLC ("WICHI") appeals a Final Judgment which granted Appellee R&L Financial Service, Inc. ("R&L") an equitable lien on

a promissory note and mortgage owned and held by WICHI, as well as the summary judgment underlying the judgment granting the lien. We reverse finding no legal or equitable basis for the lien.

In general, this appeal arises out of a note and mortgage given by Roger and Maria Masters to WICHI's predecessor in interest which were recorded in the public records of Miami-Dade County in 2006. The loan was modified on several occasions and was declared in default in July 2011. At that time a Notice of Lis Pendens was also recorded in the public records of Miami-Dade County. An action to foreclose on the note and mortgage was filed in January 2012 and WICHI was substituted as plaintiff in February 2013. In May 2013 WICHI and the Masters entered into a settlement under which a Deed in Lieu of Foreclosure was issued.

Meanwhile, in 2010 and 2011, through a series of promissory notes, Roger Masters borrowed a total of $278,745.79 from R&L. Roger Masters failed to repay that loan, and, in an entirely different proceeding from the WICHI foreclosure, in December 2012 R&L obtained a final judgment solely against Roger Masters based on his breach of those promissory notes. That judgment was in the amount of $373,610.29.

The R&L promissory notes did not provide R&L any security interest in any real property, and specifically not in the real property at issue in the WICHI

foreclosure. To the contrary, at least one of the R&L promissory notes indicated that Roger Masters pledged amounts due under a trust of which he was a beneficiary as collateral for the note. It is unclear from the record in this action whether R&L made any efforts to collect on that collateral or to collect the amounts owed by Roger Masters from any other source. Nevertheless, in March 2013 R&L moved to intervene in the WICHI foreclosure action, arguing that its interests would be affected by the foreclosure because at least a portion of the proceeds Roger Masters received from R&L had been used to bring the WICHI mortgage current prior to the foreclosure. The motion to intervene was granted[1] and R&L thereafter moved for summary judgment claiming that, as a result of the payments on the WICHI mortgage, R&L had an equitable lien on WICHI's note and mortgage. Over WICHI's objection, that motion for summary judgement was granted. A later trial was held for determination of the amount of the equitable lien and a final judgment setting the amount of the lien at $96,337.20 was entered. WICHI appeals both the summary judgment and the final judgment. We agree with WICHI that both were erroneous because R&L both failed to prove and would be unable to prove, factually or legally, an entitlement to any equitable lien.

[1] While we believe the granting of that motion was in error and contrary to controlling law, Union Central Life Ins. Co. v. Carlisle, 593 So. 2d 505 (Fla. 1992), that Order is not before us in this appeal.

Florida law is clear that an equitable lien may be imposed on one of two bases: (1) a written contract that indicates an intention to charge a particular property with a debt or obligation; or (2) a declaration by a court out of general considerations of a right or justice as applied to a particular circumstances of a case. Golden v. Woodward, 15 So. 3d 664 (Fla. 1st DCA 2009). The parties agree that there was no evidence of any written document demonstrating any intent to subject any real property at issue to any security interest, so the first basis is unavailable to R&L.

With respect to the second means of obtaining an equitable lien, it has been stated that "an equitable lien is a right granted by a court of equity, arising by reason of the conduct of the parties affected, that would entitle one party as a matter of equity to proceed against certain property. . . . In order to warrant the imposition of an equitable lien under Florida law, the funds, payment of which is to be secured by an equitable lien, must be directly traceable to the real property in question, having unjustly enriched the debtor's interest in that property. " Fla. Jur. 2d, Liens § 4, and cases cited therein, emphasis added. In this case then, the trial court was required to consider the conduct of R&L and of WICHI in determining whether an equitable lien could be imposed and was required to consider whether Roger Masters' interest in the real property was enriched.

The evidence showed that neither WICHI nor its predecessor had any knowledge of the source of any payment made by the Masters, nor did either have any knowledge of the existence of R&L. Nothing presented demonstrated that WICHI or its predecessor took any action with respect to R&L – i.e., neither made any representations to R&L or communicated with R&L in any way. Thus, no evidence supported any conduct on WICHI's part which would have justified the imposition of an equitable lien against it or its property interests.

In addition, nothing presented showed that Roger Masters' interest in the real property was in any way enriched by his payment of the contractually required amounts due under the note and mortgage. This is not a case such as Palm Beach Sav. & Loan Assn's F.S.A. v. Fishbein, 619 So. 2d 267, 270 (Fla. 1993) where taxes and a first mortgage were paid off by the funds at issue. Instead, this case involves the simple payment of amounts due under a note and mortgage.

Moreover, there is simply no logic to R&L's claim that WICHI was somehow unjustly enriched by receipt of the payments made by Roger Masters out of a portion of the funds he obtained from R&L. The Masters owed a debt to WICHI's predecessor and made payment on that debt. Such payment can in no way be viewed as unjust or enriching WICHI's predecessor. Instead, those payments signify nothing more than compliance with the contractual obligation the Masters owed to WICHI's predecessor. That R&L – unwittingly or not – provided

the source of those payments is entirely irrelevant to WICHI's entitlement to those payments or its right to foreclose on its security interest in the real property to obtain more complete satisfaction of the debt owed by the Masters.

More to the point, R&L had numerous methods by which it could have protected its own interest in obtaining repayment of the promissory notes it accepted from Roger Masters and failed to do so. The loss incurred as a result of that failure does not fall upon WICHI. Instead, it must remain solely with R&L, which remains at liberty to seek satisfaction of its debt from the resources of Roger Masters, upon whom it solely relied to make payment on the notes.

Reverse and remanded with instructions to enter judgment in favor of WICHI on any and all claims made by R&L.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

U.S. BANK NATIONAL ASSOCIATION, as Trustee on Behalf of the Holders of CSAB Mortgage-Backed Pass-Through Certificates, Series 2007-1,
Appellant,

v.

ZACARIE BENOIT, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INCORPORATED AS NOMINEE FOR FIRST INTERSTATE FINANCIAL CORP., and **THACKER LIMITED PARTNERSHIP,**
Appellees.

No. 4D14-4052

[May 4, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Kathleen D. Ireland, Senior Judge; L.T. Case No. 09-1380 (11).

G. Bart Billbrough and Caroline Milewski of Billbrough & Marks, P.A., Coral Gables, for appellant.

Kendrick Almaguer, Peter Ticktin, and Joshua Bleil of The Ticktin Law Group, P.A., Deerfield Beach, for appellee Zacarie Benoit.

LEVINE, J.

The issue presented is whether a court must enforce a settlement agreement and enter consent final judgment of foreclosure when both parties mutually assent to the agreement but the plaintiff is subsequently unable to produce the original promissory note. We hold that since Florida law "highly favor[s]" settlement, the trial court erred when it refused to enforce the parties' agreement.

U.S. Bank, N.A., as trustee, filed a foreclosure action against Zacarie Benoit, the appellee. The bank attached a copy of the mortgage as well as a copy of the promissory note, endorsed in blank, to the complaint. Subsequently, the parties entered into a Settlement Agreement and Release of Claims.

In the settlement agreement, the parties stipulated that appellee executed the promissory note and mortgage, that the loan was assigned to the trust, and that appellee was in default. Appellee consented to entry of final judgment of foreclosure in favor of the bank. Appellee further agreed to release and discharge all defenses and causes of action, "whether known or unknown, foreseen or unforeseen," against the bank and trust, "notwithstanding the discovery or existence of any additional or different facts or claims."

In the agreement, the bank also warranted that it owned the right to enforce its claim against appellee and had not transferred this right. The bank also agreed to indemnify appellee should the bank have misrepresented this fact and transferred its right to enforce a claim against appellee.

When the bank moved for consent final judgment, it was then unable to produce the original note. According to the bank, it had lost the original note at some point after it had filed its complaint. The lower court denied, without prejudice, the bank's motion for entry of consent final judgment. The court also ordered the bank not to file for consent final judgment without also producing the original note and mortgage.

The case went to trial. On the day of trial, the bank was unable to show that it had possession of the original note. The lower court entered an order of involuntary dismissal. The bank now appeals.

The bank argues that the lower court should have enforced the settlement agreement notwithstanding its inability to produce the original note. We agree. Because we find this issue is dispositive, we do not need to reach the bank's other argument.

In Florida, settlement agreements are "highly favored" "and will be enforced when it is possible to do so." *Treasure Coast, Inc. v. Ludlum Constr. Co.*, 760 So. 2d 232, 234 (Fla. 4th DCA 2000). "[P]arties have broad discretion in fashioning the terms of a settlement agreement," *Aboumahboub v. Honig*, 182 So. 3d 682, 684 (Fla. 4th DCA 2015), and courts must enforce a settlement agreement so long as the parties agree on the "essential terms and seriously understand and intend to be bound by the terms," *Treasure Coast*, 760 So. 2d at 234.

We recognize that "possession of the original note is a significant fact in deciding whether the possessor is entitled to enforce its terms." *Deutsche Bank Nat'l Ass'n Trust Co. v. Clarke*, 87 So. 3d 58, 61 (Fla. 4th DCA 2012). Moreover, "a plaintiff seeking to foreclose on a defendant *must*

produce the original note (or provide satisfactory explanation of the failure to produce) *and surrender it to the court* or court clerk *before* the issuance of a final judgment in order to take it out of the stream of commerce." *Deutsche Bank Nat'l Trust Co. v. Huber*, 137 So. 3d 562, 564 (Fla. 4th DCA 2014).

Nevertheless, a judgment of foreclosure does not always require surrender of the original note. For example, where a plaintiff satisfies the requirements for the enforcement of a lost, destroyed, or stolen instrument, the plaintiff may foreclose on a property even where the plaintiff no longer has possession of the original note. *See* § 673.3091, Fla. Stat. (2004). The danger that the original note might be negotiated to a bona fide purchaser for value is abrogated by the requirement that the one seeking to enforce a lost note must indemnify the defendant. *Id.*; *see also* § 702.11, Fla. Stat. (2013).

Here, the parties agreed to resolve litigation through a settlement agreement and expressed their intention to be bound by the settlement agreement's terms.[1] The agreement was not specifically conditioned upon the bank's production of the original note. In fact, appellee affirmatively waived any defenses "whether known or unknown, foreseen or unforeseen." Additionally, the parties' agreement provided that the bank would indemnify appellee had the bank previously negotiated the note.

Under these particular circumstances, the lower court should have enforced the parties' agreement due to the agreement's terms and Florida's law "highly favor[ing]" settlement. *See Treasure Coast*, 760 So. 2d at 234. We therefore reverse with instruction to enforce the settlement agreement and for other proceedings consistent with this opinion.

Reversed and remanded.

STEVENSON and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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[1] Appellee argues for the first time on appeal that the bank misrepresented that it possessed the original note so as to induce appellee's acceptance of the settlement agreement. We do not address this argument because appellee did not properly raise it in the lower court.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ANA VILLALONA,
Petitioner,

v.

21ST MORTGAGE CORPORATION,
Respondent.

No. 4D15-4151

[May 4, 2016]

Petition for writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joel T. Lazarus, Judge; L.T. Case No. CACE 14022730.

Brian Korte and Scott J. Wortman of Korte & Wortman, P.A., West Palm Beach, for petitioner.

Victor Kline of Greenspoon Marder, P.A., Orlando, for respondent.

GERBER, J.

The defendant in a foreclosure action petitions for certiorari review of the circuit court's order denying her motion for stay of the action. The defendant argues she was entitled to a stay because she had not been paid her attorney's fees and costs incurred in defending an action previously dismissed by a first plaintiff, which later assigned the note and mortgage to the second plaintiff. We grant the petition, because the second plaintiff acquired not only the rights, but also the obligations, of the first plaintiff.

The first plaintiff filed a mortgage foreclosure action against the defendant. The first plaintiff later voluntarily dismissed the action. The defendant filed a motion for attorney's fees and costs. The circuit court granted the defendant's motion, and awarded the amount of fees and costs which the defendant was to recover from the first plaintiff.

Later, the second plaintiff filed a new foreclosure action against the defendant, based upon the same claim upon which the first plaintiff based its action. The second plaintiff attached to its complaint documents

evidencing the assignment of the note and mortgage from the first plaintiff to the second plaintiff.

The defendant moved to stay the second plaintiff's action pending payment of her fees and costs from the previously dismissed action, pursuant to Florida Rule of Civil Procedure 1.420(d). That rule provides:

> **Costs.** Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs. When one or more other claims remain pending following dismissal of any claim under this rule, taxable costs attributable solely to the dismissed claim may be assessed and judgment for costs in that claim entered in the action, but only when all claims are resolved at the trial court level as to the party seeking taxation of costs. *If a party who has once dismissed a claim in any court of this state commences an action based upon or including the same claim against the same adverse party, the court shall make such order for the payment of costs of the claim previously dismissed as it may deem proper and shall stay the proceedings in the action until the party seeking affirmative relief has complied with the order.*

Fla. R. Civ. P. 1.420(d) (2014) (emphasis added).

In response, the second plaintiff primarily argued that, because it was a different party than the first plaintiff, rule 1.420(d) did not require the payment of the defendant's fees and costs from the previously dismissed action in order to preclude staying the proceedings in the pending action.

The circuit court denied the defendant's motion for stay. This petition followed. We have jurisdiction. *See*, *e.g.*, *Albertson's, Inc. v. Neil*, 784 So. 2d 584, 585 (Fla. 4th DCA 2001) (accepting certiorari jurisdiction to review a trial court order denying a stay until payment of costs under rule 1.420).

We grant the petition. The fact that the second plaintiff was a different party than the first plaintiff does not preclude rule 1.420(d)'s application. On the contrary, rule 1.420(d) applies because the second plaintiff, as assignee, acquired not only the rights, but also the obligations, of the first plaintiff, as assignor.

This reasoning is consistent with the reasoning of one of our recent cases. In *Nolan v. MIA Real Holdings, LLC*, 185 So. 3d 1275 (Fla. 4th DCA 2016), we applied rule 1.420(a)(1)'s "two dismissal" provision to bar the

third holder of a note from bringing a third foreclosure action against the defendants based upon the same default. We reasoned:

> Any other interpretation of the rule could lead to as many voluntary dismissals as there are assignments and this is an area where notes are often assigned and reassigned. The two voluntary dismissals, taken by two different plaintiffs but involving the same note and the same breach, required that the second dismissal operate as an adjudication on the merits; if it wanted to pursue its claim for non-payment, [the third holder] was required to refile a lawsuit against the [defendants] alleging a new and separate breach by non-payment on the note.

Id. at 1276 (internal citations omitted). *See also Variety Children's Hosp. v. Mt. Sinai Hosp. of Greater Miami, Inc.*, 448 So. 2d 546, 548 (Fla. 3d DCA 1984) ("[T]he dismissal of the first two actions operates as a bar to the filing of a third complaint by [the plaintiff] *and by those in privity with* [*the plaintiff*], including its insurers.") (emphasis added).

Here, the second plaintiff stands in the same shoes as the third holder in *Nolan* for purposes of applying rule 1.420(d). Therefore, the circuit court's order, denying the defendant's motion to stay pending the payment of her fees and costs from the previously dismissed action, departed from the essential requirements of law, resulting in irreparable harm.

Based on the foregoing, we grant the defendant's petition and quash the circuit court's order denying her motion to stay. We remand with directions for the court to stay the second plaintiff's action pending the payment of the defendant's fees and costs from the previously dismissed action.

We have considered the second plaintiff's other arguments in response to the defendant's petition, and conclude without further discussion that those arguments lack merit.

Petition granted with directions.

CIKLIN, C.J., and FORST, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BANK OF AMERICA, N.A., ETC.,

Appellant,

v. Case No. 5D14-4511

LINDA A. NASH, ET AL.,

Appellees.

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Opinion filed May 6, 2016

Appeal from the Circuit Court
for Seminole County,
Robert J. Pleus, Jr., Senior Judge.

Mary J. Walter, of Liebler Gonzalez & Portuondo, Miami, for Appellant.

John G. Pierce, of Pierce & Associates, PLC, Orlando, for Appellee, Linda A. Nash.

Shawn Timothy Newman, Olympia, Pro Hac Vice, for Appellee, Homeowners SuperPAC.

PER CURIAM.

Bank of America, N.A. ("Bank"), as successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP, appeals the trial court's final judgment denying its foreclosure action against Linda A. Nash, invalidating the note and

mortgage, ordering a refund of all mortgage payments, and awarding attorney's fees to Nash. We reverse.

In 2005, Nash executed a promissory note secured by a mortgage in favor of America's Wholesale Lender ("AWL"). Countrywide Home Loans, Inc., "a New York Corporation Doing Business as America's Wholesale Lender," subsequently indorsed the note in blank, and MERS, as nominee for AWL, assigned the mortgage to BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loan Servicing, LP ("BAC"). In 2010, BAC sent a notice of default to Nash. When Nash failed to cure the default, Bank, successor by merger to BAC, filed a mortgage foreclosure complaint against her, alleging that all conditions precedent had been performed. Copies of the original mortgage and note, acceleration notice, and assignment of mortgage were attached to the complaint. Nash filed an answer and affirmative defenses, alleging that Bank did not have standing to foreclose and that the note and mortgage were invalid because both documents and the indorsement delineated AWL as both a corporation and a fictitious name.

Following a trial, the trial court entered a final judgment in favor of Nash, finding that Bank did not have standing to bring the action and that the note and mortgage were void because AWL was not incorporated when the loan was made, was not a licensed mortgage lender in Florida, and did not have authority to do business in Florida. The trial court then ordered Bank to repay to Nash all sums that she had paid on the note and mortgage as well as her attorney's fees.

"A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose." McLean v. JP

Morgan Chase Bank Nat'l Ass'n, 79 So. 3d 170, 173 (Fla. 4th DCA 2012) (finding that, to establish standing, plaintiff must show it held or owned note at time complaint was filed). Under section 673.3011, Florida Statutes (2011), a person entitled to enforce the note and foreclose on a mortgage is the holder of the note, a non-holder in possession of the note who has the rights of a holder, or a person not in possession of the note who is entitled to enforce under section 673.3091, Florida Statutes. Thus, "[t]he party that holds the note and mortgage in question has standing to bring and maintain a foreclosure action." Deutsche Bank Nat'l Tr. Co. v. Lippi, 78 So. 3d 81, 84 (Fla. 5th DCA 2012). If the note does not name the plaintiff as the payee, the note must bear a special indorsement in favor of the plaintiff or a blank indorsement. See Riggs v. Aurora Loan Servs., LLC, 36 So. 3d 932, 933 (Fla. 4th DCA 2010).

"A trial court's decision as to whether a party has satisfied the standing requirement is reviewed de novo." Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91, 116 (Fla. 2011). We conclude that the trial court erred in finding that Bank did not have standing to bring this action. According to the unrebutted testimony from Chad Anderson, a mortgage resolution associate with Bank who was familiar with the subject loan and its records, Bank, or entities that merged into Bank, had always serviced the loan. He identified AWL as the original lender and Countrywide as the original loan servicer. He testified that AWL was "a business entity or a business name under Countrywide" and that Countrywide, a New York corporation, was doing business as AWL. Mr. Anderson testified that Countrywide serviced the loan from commencement until April 27, 2009, when its name changed to BAC. In July 2011, BAC merged into

Bank. Thus, the evidence shows that the loan was never transferred, and Bank, as a result of the merger with BAC, had standing to foreclose.

In its final judgment, the trial court also found that AWL was not licensed or authorized to do business in Florida. This was not raised as an affirmative defense, and no record evidence establishes that AWL or Countrywide was not licensed as a mortgage lender in 2005. Even if AWL was required to obtain a license and did not do so, disciplinary measures for such a violation would include, among others, a fine or reprimand.[1] §§ 494.0025, 494.0072, Fla. Stat. (2005). The failure to comply with the licensing requirement would "not affect the validity or enforceability of any mortgage loan . . . ." § 494.0022, Fla. Stat. (2005). Likewise, while section 607.1501(1), Florida Statutes (2005), prohibits a foreign corporation from transacting business in Florida until it obtains a certificate of authority from the Department of State, activities including

[1] While it is unlawful for any person to act as a mortgage lender in Florida without a current active license, see section 494.0025(1), Florida Statutes (2005), there are exceptions for

> (a) A bank, bank holding company, trust company, savings and loan association, savings bank, credit union, or insurance company if the insurance company is duly licensed in this state.
>
> (b) Any person acting in a fiduciary capacity conferred by authority of any court.
>
> (c) A wholly owned bank holding company subsidiary or a wholly owned savings and loan association holding company subsidiary that is approved or certified by the Department of Housing and Urban Development, the Veterans Administration, the Government National Mortgage Association, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation.

§ 494.006(1)(a)-(c), Fla. Stat. (2005).

"[c]reating or acquiring indebtedness, mortgages, and security interests in real or personal property" or "[s]ecuring or collecting debts or enforcing mortgages and security interests in property securing the debts" do not constitute transacting business. § 607.1501(2)(g), (h), Fla. Stat. (2005). Thus, even assuming AWL/Countrywide was a foreign corporation, it did not need to obtain a certificate of authority in order to create or enforce a mortgage or note.

The only remaining issue concerns Nash's claim that AWL was a fictitious name for Countrywide, if Countrywide failed to register that name. A person may not engage in business under a fictitious name unless the name is registered with the Division of Corporations of the Department of State. § 865.09(3), Fla. Stat. (2005). If a business fails to comply, it and any successors or assigns may not maintain any action, suit, or proceeding in any court. Id. § 865.09(9)(a). Here, there is no evidence to suggest that Countrywide failed to register AWL as a fictitious name, but, even so, such a failure to register "does not impair the validity of any contract, deed, mortgage, security interest, lien, or act of such business and does not prevent such business from defending any action, suit, or proceeding in any court of this state." Id. § 865.09(9)(b).

The trial court also found that a condition precedent of the foreclosure had not been met because there was no receipt of the default letter. However, the failure to perform a condition precedent was not raised in Nash's affirmative defenses. As a result, the defense is waived. Fla. R. Civ. P. 1.140(h). Even had it been properly raised, it was meritless.

According to Mr. Anderson, the default letter was mailed to Nash at her designated mailing address. The trial court's conclusion that Bank was required to

establish proof of delivery in order to establish that it met all required conditions precedent to foreclosure was misplaced. Here, the note states that

> [u]nless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Thus, under the note, notices may be mailed to the property address or to a different address, if designated. Bank did so. The fact that the letter may not have been received is irrelevant.

Bank also argues that the trial court erred by granting relief beyond Nash's pleadings, specifically, by invalidating the note and mortgage and ordering Bank to return all prior mortgage payments when Nash never requested this relief. "A trial court is without jurisdiction to award relief that was not requested in the pleadings or tried by consent." Wachovia Mortg. Corp. v. Posti, 166 So. 3d 944, 945 (Fla. 4th DCA 2015). Therefore, "a judgment which grants relief wholly outside the pleadings is void." Bank of N.Y. Mellon v. Reyes, 126 So. 3d 304, 309 (Fla. 3d DCA 2013); see Mullne v. Sea-Tech Constr. Inc., 84 So. 3d 1247, 1249 (Fla. 4th DCA 2012). Further, granting relief, which was neither requested by appropriate pleadings, nor tried by consent, is a violation of due process. Posti, 166 So. 3d at 945-46. Pleadings sufficient to invoke a court's jurisdiction, according to the rules of civil procedure, include a complaint, petition, counterclaim, crossclaim, and a third-party complaint. Fla. R. Civ. P. 1.100(a).

We agree that the trial court erred by granting relief that was outside the scope of the pleadings. Nash alleged in her answer and affirmative defenses that the note and mortgage were invalid, but no request for repayment was pled.

For these reasons, we reverse the judgment in favor of Nash and remand for entry of judgment in favor of Bank. We also reverse the award of attorney's fees in favor of Nash.

REVERSED and REMANDED.

ORFINGER, BERGER and EDWARDS, JJ., concur.