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Manuel Farach

Weakley v. Eagle Logistics, Case No. 17-14022 (11th Cir. 2018).

Dismissal of a Chapter 13 case in which the Debtor took positions inconsistent with those taken in another case does not moot judicial estoppel considerations.

Felts v. Wells Fargo Bank, N.A., Case No. 16-16314 (11th Cir. 2018).

A lender's reporting a debtor as delinquent during a forbearance plan does not violate the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*.

RREF SNV-FL SSL, LLC v. Shamrock Storage, LLC, Case No. 1D16-2045 (Fla. 1st DCA 2018).

The transfer of a valueless asset, by definition, is not a fraudulent conveyance.

Chrzuszcz v. Wells Fargo Bank, N.A., Case No. 1D16-3239 (Fla. 1st DCA 2018).

The burden to prove an issue shifts back to the plaintiff when the defendant specifically denies a plaintiff's general allegations of compliance with conditions precedent. Accordingly, plaintiff must prove a "face-to-face" meeting under HUD regulations took place to foreclose a HUD loan.

Green Emerald Homes, LLC v. Residential Credit Opportunities Trust, Case No. 2D17-4410 (Fla. 2d DCA 2018).

A mortgage that defines "borrower" as the individuals signing the mortgage (and not subsequent property owners or successors of "borrower") does not require subsequent owners to sequester rents despite the existence of an assignment of rents clause in the mortgage.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14022
Non-Argument Calendar

D.C. Docket No. 3:16-cv-00205-HNJ

TIMOTHY WEAKLEY,

Plaintiff-Appellant,

versus

EAGLE LOGISTICS,
CELADON TRUCKING,

Defendants-Appellees.

No. 17-14023
Non-Argument Calendar

D.C. Docket No. 3:16-cv-00403-HNJ

TIMOTHY WEAKLEY,

Plaintiff-Appellant,

versus

JENNIFER ROBERTS,
QUALITY COMPANIES,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama

(June 29, 2018)

Before ED CARNES, Chief Judge, MARCUS, and ROSENBAUM, Circuit Judges.

PER CURIAM:

In this consolidated appeal, Timothy Weakley appeals the district court's grant of summary judgment against him in favor of Eagle Logistics Services and Celadon Trucking Services, and its grant of summary judgment against him (in a separate lawsuit) in favor of Jennifer Roberts and Quality Companies. Weakley contends that the district court abused its discretion by dismissing his two lawsuits based on the doctrine of judicial estoppel as a result of Weakley's failure to disclose them in his bankruptcy proceeding.

We review only for abuse of discretion the district court's application of judicial estoppel. Slater v. U.S. Steel Corp., 871 F.3d 1174, 1180 n.4 (11th Cir. 2017) (en banc). A debtor who has filed for bankruptcy "must file sworn

disclosures listing his debts and his assets, including any pending civil claims, and identifying any lawsuits he has filed against others." Id. at 1176. When a debtor fails to list a pending civil claim as an asset in a bankruptcy proceeding, the equitable doctrine of judicial estoppel allows a court to exercise its discretion to dismiss the debtor's civil claim. See id. at 1180.

We use a two-part test to guide district courts in applying judicial estoppel: (1) Whether the plaintiff "took a position under oath in the bankruptcy proceeding that was inconsistent with the plaintiff's pursuit of the civil lawsuit[s]," and (2) whether the inconsistent positions "were calculated to make a mockery of the judicial system." Id. at 1180–81 (quotation marks omitted). There is no question that Weakley took an inconsistent position under oath in a separate proceeding. In his Chapter 13 bankruptcy proceeding he failed to disclose the two lawsuits and the claims in them as assets after asserting those claims and an entitlement to damages in the lawsuits. See Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1275 (11th Cir. 2010) ("[F]ailure to timely amend a Chapter 13 reorganization plan to reflect a pending claim while simultaneously pursing that claim in another court of law constitutes inconsistent positions under oath."). As a result, we turn to the second prong.

As for the second prong, district courts must "look to all the facts and circumstances of the case to decide whether a plaintiff intended to mislead the court . . . ." Slater, 871 F.3d at 1186. For example, a court may consider:

> the plaintiff's level of sophistication, whether and under what circumstances the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures, whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures, whether the plaintiff identified other lawsuits to which he was [a] party, and any findings or actions by the bankruptcy court after the omission was discovered.

Id. at 1185. The court may also consider the plaintiff's explanation for the omission, id. at 1177, although it need not credit that explanation, id. at 1186 n.12; see also id. at 1190–91 (Carnes, C.J., concurring) ("[I]n deciding whether a plaintiff intended to mislead when she omitted a claim from her bankruptcy schedules, or failed to update a schedule to include the claim, the district court is not required to accept the plaintiff's denial of her intent. And that is true even if her denial is made under oath and not contradicted by other evidence.").

In concluding that Weakley intentionally misled the bankruptcy court, the district court considered that he not only failed to include the two lawsuits in his initial bankruptcy filings but he also failed to include them in any of the six separate amendments that he made to his schedules and filings during the bankruptcy proceeding. The court pointed out that it was not until the defendants in both lawsuits had relied on his failure to disclose as grounds for dismissal of the

lawsuits that Weakley finally amended his bankruptcy filings to disclose those two lawsuits and the claims they asserted. The court also considered his ability to benefit financially at his creditors' expense by concealing the two lawsuits. Not only that but Weakley had disclosed as assets in the bankruptcy proceeding two other lawsuits he had filed, both of which were of much lesser potential value than the two nondisclosed ones, which together sought damages in excess of $14,000,000. The district court reasoned that his failure to disclose the two higher claim lawsuits while disclosing the other two lesser claim ones "indicates a motive to exclude the potentially more lucrative, non-exempt [lawsuit assets] from the bankruptcy proceedings." Finally, the court took into account the fact that Weakley had filed four other bankruptcy petitions, "demonstrating that [he] should have been familiar with the requirements."

Although the district court reached its ruling before this Court issued its en banc decision in Slater, its analysis is consistent with that decision. Slater overruled our precedent that allowed courts to automatically infer a plaintiff's intent to mislead based solely on the plaintiff's failure to disclose a civil claim in a bankruptcy proceeding. See 871 F.3d at 1185. The district court did not infer Weakley's intent to defraud his creditors based only on his failure to disclose but instead made its determination based on the facts and circumstances relating to the

bankruptcy filings and nondisclosure. Our Slater decision requires a district court to consider the entire record, see id., which is what the district court did.

Weakley also argues that the judicial estoppel issue is moot because he voluntarily dismissed his Chapter 13 bankruptcy petition.[1] It isn't moot. The judicial estoppel issue presented to us in this appeal is not about what should happen in the bankruptcy proceeding, a case that has not been appealed to us. Instead, the issue is whether the district court abused its discretion in dismissing on judicial estoppel grounds the two lawsuits that Weakley filed against the appellees in the appeal before us. Weakley did not dismiss either one of these two lawsuits; instead, he has appealed the district court's dismissal of them. The propriety of that dismissal is not moot.

To the extent Weakley argues that his voluntary dismissal of his bankruptcy petition makes the district court's application of the judicial estoppel doctrine an abuse of discretion in this case, we reject that contention. Judicial estoppel serves to "prevent the perversion of the judicial process and protect its integrity." Id. at 1180 (quotation marks and alterations omitted). It cannot serve that purpose as well if a duplicitous debtor is assured that he can always avoid the doctrine's bite by dismissing his bankruptcy petition after his duplicity is found out. And that is

[1] In his briefs Weakley also makes several factual allegations that he did not make in the district court. We can't and won't consider those allegations. See Daniel v. Taylor, 808 F.2d 1401, 1404 n.2 (11th Cir. 1986) ("[T]his Court cannot consider evidence which was not before the district court.").

what Weakley sought to do. He didn't voluntarily dismiss his bankruptcy petition until after the defendants moved for summary judgment on the grounds that he intentionally omitted these two lawsuits from his bankruptcy filings. To guarantee Weakley and others in his situation that, if caught, they could always undo the application of the judicial estoppel doctrine would render it toothless.

Because the district court considered all the facts and circumstances of Weakley's cases in determining whether he intended to mislead the bankruptcy court, see id. at 1185, it did not abuse its discretion by applying judicial estoppel and dismissing these two lawsuits that he failed to disclose in his bankruptcy proceeding.

AFFIRMED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16314

D.C. Docket No. 8:14-cv-02528-JDW-AEP

CHRISTINA FELTS,

Plaintiff-Appellant,

versus

WELLS FARGO BANK, N.A.,
a national association,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(June 27, 2018)

Before TJOFLAT and WILSON, Circuit Judges, and ROBRENO,[*] District Judge.

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[*] Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ROBRENO, District Judge:

Christina Felts appeals from an order granting summary judgment in favor of her mortgage servicer, Wells Fargo Bank, N.A. ("Wells Fargo"), with respect to Felts' claim that Wells Fargo failed to conduct a reasonable investigation into the accuracy of its credit reporting of her mortgage loan, in violation of the Fair Credit Reporting Act ("the FCRA" or "the Act"), 15 U.S.C. § 1681 *et seq.* The district court found that Felts' FCRA claim against Wells Fargo failed as a matter of law because the undisputed material facts demonstrated that Wells Fargo's reporting of Felts' mortgage account as past due and delinquent during a forbearance plan was neither inaccurate nor materially misleading, and thus Felts failed to make the threshold showing that a reasonable investigation could have uncovered an inaccuracy. We affirm.

I.

In July 2009, Felts refinanced the mortgage on her Carmel, Indiana home through a new loan extended by the Federal National Mortgage Association, commonly known as Fannie Mae ("the Loan"). In connection with the Loan, Felts executed a Note and Mortgage that required her to make monthly mortgage payments of $2,197.38. Wells Fargo acted as the servicer for the Loan. As servicer, Wells Fargo was responsible for collecting Felts' mortgage payments, communicating with Felts regarding the payment of the Loan, and reporting certain

information to the consumer credit reporting agencies ("the CRAs") regarding Felts' compliance with her payment obligations under the Loan.

In January 2012, Felts lost her job. Several months later, she contacted Wells Fargo to discuss a revised payment plan for the Loan. Following Felts' telephone conversations with a Wells Fargo representative, Felts enrolled in an unemployment forbearance program offered by Fannie Mae and administered by Wells Fargo ("the Plan"). The terms of the Plan were set forth in an August 3, 2012, letter from Wells Fargo to Felts ("the Plan Letter"). The Plan Letter explained that Felts was required to make "monthly forbearance plan payments" of $25.00 per month beginning in September 2012 and ending in February 2013. Doc. 119-3 at 1. The Plan Letter stated that "[e]ven though your monthly statement will continue to show your regular mortgage payment amount, while you're under the Plan be sure you make the . . . forbearance plan payments by the due dates noted in place of your regular monthly mortgage payments." *Id.*

The Plan Letter further provided that, during the Plan's forbearance period, three conditions would apply: (1) if the loan was already in foreclosure, the foreclosure proceedings would be placed on hold; (2) Wells Fargo would "report to the credit bureaus that you are paying under a partial payment agreement for your Wells Fargo Home Mortgage"; and (3) the regular mortgage payments would

accrue during the course of the Plan. *Id.* at 2. With respect to the third condition, the Plan Letter stated:

> Even though your monthly forbearance plan payments are lower than your regular mortgage payments, the difference in the payment amounts accrues. We keep track of the total amount that accrues during the Plan period. The total accrued amount then becomes due and is your responsibility to pay after you complete the Plan, or when you become fully employed. When that happens, you can apply for payment assistance through a loan modification.

Id.

The Plan Letter further noted that "[e]ven though you are participating in this Plan, you remain responsible for all other terms and conditions of your existing mortgage." *Id.* at 3.

Prior to Felts' enrollment in the Plan, a Wells Fargo representative explained the terms of the Plan to Felts in a recorded telephone conversation. With respect to Felts' payment obligations, the representative explained that after the Plan ended, Wells Fargo would "take all that past due and they'll just tack it on to the end of the loan." Doc. 91-1 at 2-3. Felts asked whether her payments would still be considered late, clarifying "[b]ut you did say each month even though it's refigured as this it still shows up as a late payment?" *Id.* at 7. The Wells Fargo representative responded "[y]es. Because it's not the contractual payment." *Id.* Felts then confirmed that she understood.

After enrolling in the Plan, Felts made timely monthly payments of $25.00 per month through January 2013 in accordance with the terms of the Plan. She then secured new employment and applied for a loan modification with Wells Fargo. During a three-month trial period for the loan modification, Wells Fargo required Felts to make full payments on the Loan, which she did. Felts subsequently sold her home and paid off the entire remaining balance on the Loan by June 1, 2013.

In June 2013, Felts attempted to purchase a new home in Bradenton, Florida. Her loan officer obtained her credit report and informed Felts that Wells Fargo had reported the Loan to the CRAs as "past due" and "delinquent." Specifically, Wells Fargo reported the Loan as "30 Days Past Due" in August 2012, "60 Days Past Due" in September 2012, "90 days past due" in October 2012, "120 Days Past Due" in November 2012, "150 Days Past Due" in December 2012, and "180 or more Days Past Due" in January 2013. Doc. 105, Ex. 36. As of June 2013, Felts' credit report also listed a past due amount of $22,308 on the Loan. Doc. 114-3 at 6.

Over the next year and a half, Felts filed numerous disputes with all three major CRAs – Experian Information Solutions, Inc. ("Experian"), Equifax, Inc. ("Equifax"), and Trans Union LLC ("Trans Union") – regarding the Loan. The CRAs then reported the disputes to Wells Fargo. In response to the disputes, Wells

Fargo reported the account status of the Loan as "paid in full," and changed the "amount past due" to $0.00. Felts' updated credit report then reflected that there was no longer a past due amount on the Loan. However, Wells Fargo did not correct the delinquency information. Instead, on the dispute forms provided by the CRAs, Wells Fargo reported that Felts' account was past due from August 2012 through May 2013. A Wells Fargo loan specialist who processed one of the dispute forms testified that the account was considered past due for each of those months because Felts did not make her full contractual payment.

Felts was ultimately denied financing for the Bradenton home. In October 2014, Felts brought the underlying action against Wells Fargo, Experian, Equifax, and Trans Union, alleging that they violated various provisions of the FCRA in connection with their reporting of the credit status and history of the Loan.

With respect to Wells Fargo, Felts alleged that the company failed to conduct a reasonable investigation in response to Felts' credit reporting disputes regarding the Loan, as required under § 1681s-2(b) of the FCRA. Felts asserted that Wells Fargo's failure to conduct a reasonable investigation resulted in her denial of financing for the Bradenton home, which, in turn, required her to pay storage costs and rent for an additional six months. Felts further alleged that, because of her poor credit history, she was required to pay an initial deposit for an escrow account, a mortgage insurance premium, and appraisal and inspection costs

for her current home. Felts claimed that she suffered stress, anxiety, depression, and related physical symptoms due to her overall experience with Wells Fargo. Following discovery, Felts and Wells Fargo filed cross-motions for summary judgment.[1]

On August 31, 2016, the district court granted Wells Fargo's motion for summary judgment and denied Felts' cross motion. The court concluded that there was no genuine factual dispute as to the accuracy of the information Wells Fargo reported to the CRAs because there was no evidence of any factual inaccuracy or materially misleading impression. The district court then entered judgment for Wells Fargo. Felts appealed.

II.

We review summary judgment rulings *de novo*, applying the same legal standards used by the district court. *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1240 (11th Cir. 2013). "Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Jurich v. Compass Marine, Inc.*, 764 F.3d 1302, 1304 (11th Cir. 2014). "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case. An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party."

[1] In the meantime, Felts settled with the CRAs. As part of Felts' settlements with Experian and Trans Union, they both agreed to report the Loan with no history of past-due payments.

Hickson Corp. v. N. Crossarm Co., Inc., 357 F.3d 1256, 1259-60 (11th Cir. 2004) (citations omitted). We "may affirm a decision of the district court on any ground supported by the record." *Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 714 F.3d 1234, 1236 n.1 (11th Cir. 2013) (quoting *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1234 (11th Cir. 2010)).

III.

The FCRA is a consumer protection act that imposes certain duties on CRAs and "furnishers of information" to CRAs. Furnishers of information, including mortgage lenders, are required to (1) report accurate information to CRAs regarding consumers, *see* 15 U.S.C. § 1681s-2(a); and (2) conduct an investigation after receiving notice from a CRA of a dispute lodged by a consumer regarding information provided by the furnisher, *see id.* § 1681s-2(b). Consumers have no private right of action against furnishers for reporting inaccurate information to CRAs regarding consumer accounts. *See id.* § 1681s-2(c)(1). Instead, the only private right of action consumers have against furnishers is for a violation of § 1681s-2(b), which requires furnishers to conduct an investigation following notice of a dispute. *See id.*

Section 1681s-2(b) is the basis for Felts' claim here: she alleges that Wells Fargo – a furnisher of information to the CRAs regarding Felts' compliance with her payment obligations under the Loan – failed to conduct a reasonable

investigation in response to disputes she lodged with the three major CRAs regarding the information Wells Fargo reported.

Upon receipt of a notice from a CRA that a consumer disputes the completeness or accuracy of any information provided by a furnisher, the furnisher must (1) conduct an investigation with respect to the disputed information; (2) review all relevant information provided by the CRA; and (3) report the results of the investigation to the CRA. *See id.* § 1681s-2(b)(1). If the furnisher finds, following an investigation, that an item of information disputed by a consumer is incomplete, inaccurate, or cannot be verified, the furnisher must either modify, delete, or permanently block reporting of that information. *See id.* § 1681s-2(b)(1)(E). Further, with respect to information the furnisher finds to be inaccurate or incomplete, the furnisher also must report those results to all other CRAs. *See id.* § 1681s-2(b)(1)(D).

Section 1681s-2(b) thus "contemplates three potential ending points to reinvestigation: verification of accuracy, a determination of the inaccuracy or incompleteness, or a determination that the information 'cannot be verified.'" *Hinkle v. Midland Credit Mgmt., Inc.*, 827 F.3d 1295, 1301-02 (11th Cir. 2016) (quoting 15 U.S.C. § 1681s-2(b)(1)(E)). A furnisher may verify that the information is accurate by "uncovering documentary evidence that is sufficient to

prove that the information is true," or by "relying on personal knowledge sufficient to establish the truth of the information." *Id.* at 1303.

The "appropriate touchstone" for evaluating a furnisher's investigation under § 1681s-2(b) is "reasonableness." *Id.* at 1301-02. "[W]hat constitutes a 'reasonable investigation' will vary depending on the circumstances of the case and whether the investigation is being conducted by a CRA under § 1681i(a), or a furnisher of information under § 1681s-2(b)." *Id.* at 1302. We have explained that "[w]hether a furnisher's investigation is reasonable will depend in part on the status of the furnisher – as an original creditor, a collection agency collecting on behalf of the original creditor, a debt buyer, or a down-the-line-buyer – and on the quality of documentation available to the furnisher." *Id.* When a furnisher ends its investigation by reporting that the disputed information has been verified as accurate, "the question of whether the furnisher behaved reasonably will turn on whether the furnisher acquired sufficient evidence to support the conclusion that the information was true." *Id.*

Regardless of the nature of the investigation a furnisher conducted, a plaintiff asserting a claim against a furnisher for failure to conduct a reasonable investigation cannot prevail on the claim without demonstrating that *had* the furnisher conducted a reasonable investigation, the result would have been different; *i.e.*, that the furnisher would have discovered that the information it

reported was inaccurate or incomplete, triggering the furnisher's obligation to correct the information. Absent that showing, a plaintiff's claim against a furnisher necessarily fails, as the plaintiff would be unable to demonstrate any injury from the allegedly deficient investigation. And, in turn, a plaintiff cannot demonstrate that a reasonable investigation would have resulted in the furnisher concluding that the information was inaccurate or incomplete without identifying some facts the furnisher could have uncovered that establish that the reported information was, in fact, inaccurate or incomplete.

As a result, Felts cannot prevail on her claim against Wells Fargo pursuant to § 1681s-2(b) of the FCRA without identifying some fact in the record establishing that the information Wells Fargo reported regarding her account was inaccurate or incomplete. If the undisputed facts indicate that Felts has not met this threshold requirement, Wells Fargo is entitled to judgment as a matter of law.

IV.

On appeal, Felts argues that the district court erred in finding that she failed to make the requisite threshold showing that Wells Fargo reported inaccurate information regarding the Loan. She also contends, as she did below, that she could have met the threshold requirement by demonstrating that Wells Fargo's reporting was accurate but nonetheless materially misleading. Felts argues that the district court erred in finding that she failed to make this alternative showing.

A.

The district court held that Felts failed to demonstrate that Wells Fargo's reporting was inaccurate because the undisputed material facts demonstrated that Felts' reduced payments, although timely under the Plan, were not the payments she was contractually bound to make under the Note.

As stated above, the Note for the Loan required Felts to make monthly mortgage payments of $2,197.38 per month. Felts concedes that she did not make payments of $2,197.38 per month beginning in July 2012. Indeed, it is undisputed that Felts did not make any payment in July 2012 and August 2012, and paid only $25.00 per month from September 2012 through January 2013. Felts nonetheless contends that the following facts Wells Fargo reported regarding the Loan were inaccurate: (1) that the "Scheduled Monthly Payment Amount" for the Loan was $2,197.38 per month every month, including during the Plan's effective period; and (2) that Felts' payments on the account for the Loan were "past due" and "delinquent" from July 2012 to January 2013.

Felts argues that this information was inaccurate because, based on the text of the Plan Letter and Wells Fargo's correspondence and representations regarding the Plan, "it is undisputed that during the Forbearance Plan period, Felts was not required to pay $2,197.38 beginning in July 2012." Appellant's Br. at 25. Felts also contends that the Consumer Data Industry Association's guidelines regarding

credit reporting ("the CDIA Guidelines") required Wells Fargo to report Felts' account differently during the Plan period. Finally, Felts relies on four district court cases from outside this circuit permitting an FCRA claim against a furnisher to move forward on the basis of allegedly inaccurate reporting in connection with a loan modification agreement or forbearance plan, arguing that similar inaccuracies existed here.

We find none of these arguments persuasive: neither the facts Felts identifies in the record nor the CDIA Guidelines demonstrate that Wells Fargo reported inaccurate information, and the cases Felts cites are inapposite. We address Felts' arguments seriatim.

i.

Felts argues that, under the explicit terms of the Plan, she was not required to pay the full amount due on the Note during the Plan period. Felts points to the portion of the Plan Letter stating that "[t]he total accrued amount then *becomes due* and is your responsibility to pay after you complete the Plan, or when you become fully employed." *Id.* (quoting Doc. 119-3 at 2). Felts argues that this language means that the difference between the temporary, lower Plan payment and the full, original loan payment was not due until after she completed the Plan, and therefore that she was not required to make payments of $2,197.38 during the time period the Plan was in effect. Felts also notes that the definition of delinquency is "not

paying a debt as agreed," Appellant's Reply Br. at 5-6 (citing Black's Law Dictionary), and argues that because she paid the amounts Wells Fargo agreed she was required to pay in the Plan Letter, she was not delinquent on her debt. As a result, according to Felts, Wells Fargo should have reported the "Scheduled Monthly Payment Amount" as the lower amounts due under the Plan: zero dollars for July 2012 and August 2012, and $25.00 per month from September 2012 through January 2013. Felts also contends that Wells Fargo should not have reported Felts' payments as "past due" and "delinquent," because she was paying the amount Wells Fargo required her to pay under the Plan.

Felts' argument misconstrues Wells Fargo's reporting obligation. Wells Fargo was not required to furnish information to the CRAs regarding every agreement it formed with Felts. Instead, Wells Fargo was required to furnish information to the CRAs regarding Felts' payment status and history for one agreement in particular: the Note Felts signed for the Loan. The CRAs requested, and Wells Fargo submitted, information regarding Felts' compliance with her obligation to make installment payments in accordance with the Note she signed. Felts' apparent compliance with the terms of a second, separate agreement she entered into with Wells Fargo – the Plan – has no bearing on the accuracy of the information Wells Fargo reported to the CRAs regarding Felts' compliance with the terms of her first, original agreement – the Note – unless the Plan legally

modified the terms of the Note. As Felts has not identified any fact in the record establishing that the Plan legally modified the Note, the information Wells Fargo reported regarding Felts' compliance with the terms of the Note was not inaccurate: Wells Fargo reported that (1) the Scheduled Monthly Payment Amount for the Note was $2,197.38, which Felts agrees that it was; and (2) Felts did not pay the amount the Note required her to pay beginning in July 2012, which Felts concedes she did not do.

ii.

Felts contends that, because the FCRA requires "maximum possible accuracy," Appellant's Br. at 26 (quoting 15 U.S.C. § 1681e(b)), "it is unreasonable from a factual standpoint for a furnisher to ignore its own correspondence and representations to a consumer in evaluating both what it reports and the contents of disputes as they relate to the accuracy of such reporting," *id.*

None of the "correspondence and representations" Felts identifies establishes that the Plan legally modified the Note. As Felts concedes, the Plan Letter explicitly stated that Felts' payments under the Plan did not satisfy the amounts "owed" under the Note. This language does not suggest that the Plan modified the Note, and instead confirms the opposite: that Felts' partial payments under the Plan did not satisfy the monthly payments the Note required her to make.

Felts' conversations with the Wells Fargo employee also indicate that the Plan did not modify the Note: the Wells Fargo employee confirmed to Felts that her payments would "still show[] up as a late payment" because "it's not the contractual payment." Finally, the deposition testimony Felts cites merely describes how Wells Fargo decided what information to report and how the electronic systems Wells Fargo used for reporting functioned, and therefore has no bearing on the accuracy of the information Wells Fargo reported regarding Felts' account.

iii.

Felts argues that the CDIA Guidelines demonstrate that the information Wells Fargo reported regarding Felts' account was inaccurate. Felts explains that the Fannie Mae Servicing Guide instructed servicers of Fannie Mae-originated loans, including Wells Fargo, to follow the CDIA Guidelines when reporting information regarding borrowers' accounts to CRAs. Felts contends that, because the CDIA Guidelines required the "Scheduled Monthly Payment Amount" to be reported as the "new" payment amount for loans in forbearance, Wells Fargo should have reported that field as zero dollars for July 2012 and August 2012, and $25.00 for September 2012 through January 2013. In addition, the CDIA Guidelines instructed Wells Fargo to include the "Special Comment Code" of "CP," to indicate that the Loan was in forbearance, which Wells Fargo did not do.

Felts contends that compliance with these guidelines "would undoubtedly have painted a vastly different picture of Felts' creditworthiness." Appellant's Br. at 33.

Felts acknowledges that the CDIA Guidelines did not instruct Wells Fargo to report her account as non-delinquent. However, Felts attempts to tie the Scheduled Monthly Payment Amount field to the reporting of her account as past due and delinquent by arguing that, had Wells Fargo reported the Scheduled Monthly Payment Amount as the lower amounts due under the Plan, Felts "never could have been reported" as late on her account for the Loan, and "never could have had any alleged past-due balance" for the Loan.

We find that the CDIA Guidelines do not establish that Wells Fargo reported inaccurate information. The CDIA Guidelines did not preclude Wells Fargo from reporting Felts' account as "past due" and "delinquent" for the months that Felts did not make full payments under the Note. Felts' argument that reporting the Scheduled Monthly Payment Amount field differently would have required Wells Fargo to report Felts' loan as current again misconstrues Wells Fargo's reporting obligation. During the Plan period, Felts was past due and delinquent on her payment obligations under the Note. Even if Wells Fargo had reported the specific amounts of Felts' scheduled partial payments, as opposed to alternatively reporting that Felts was "paying under a partial payment agreement," it would not have been inaccurate for Wells Fargo to report that Felts was not satisfying her payment

obligations under the Note. With respect to the Scheduled Monthly Payment Amount field itself, although Wells Fargo admits that it did not report that field as indicated in the CDIA Guidelines, there are no facts in the record demonstrating that reporting the amount as the lower amount due under the Plan would have changed Felts' overall credit picture. Indeed, had Wells Fargo reported the Scheduled Monthly Payment Amount as $25.00 while simultaneously reporting Felts' account as "past due" and "delinquent" – which was accurate – prospective lenders may have interpreted the report to mean that Felts did not pay the lower, $25.00 per month payment.

iv.

None of the cases Felts cites compels a different result. Two of the cases Felts cites, *Bradshaw v. BAC Home Loans Servicing, LP*, 816 F. Supp. 2d 1066 (D. Or. 2011) and *Darrin v. Bank of America, N.A.*, No. 12-0228, 2013 WL 877087 (E.D. Cal. Mar. 7, 2013), involved loan modification agreements, not forbearance plans.[2] Under a forbearance plan, such as the one at issue here, a lender agrees to

[2] In *Bradshaw*, the District of Oregon denied a furnisher's motion for summary judgment where the furnisher had reported the plaintiffs' account as delinquent after sending the plaintiffs a letter stating that their loan modification agreement had been approved and instructing them to pay the modified amounts rather than the original amounts. *See* 816 F. Supp. 2d at 1069-70, 1072. The court determined that, viewing the facts in a light most favorable to the plaintiffs, they had entered into "a binding modification agreement" that lowered the payments due under their original mortgage. *Id.* at 1072. Given those facts, the court found that a factual dispute existed regarding the accuracy of the defendants' reporting of the account as delinquent during the loan modification period. *See id.* In *Darrin*, the Eastern District of California denied a motion to dismiss brought by the defendant furnisher where the furnisher reported the plaintiff's

temporarily refrain from exercising its rights under a loan agreement in exchange for payments from the borrower.[3] In this case, Wells Fargo agreed to forbear from its right to foreclose on Felts' home in exchange for Felts' payment of $25.00 per month. A loan modification agreement, by contrast, permanently legally alters a borrower's obligations under the original loan agreement. Loan modification agreements reduce a borrower's monthly payments over the remainder of the loan term by, for example, reducing the interest rate or extending the length of the loan term.[4]

Felts asserts that *Bradshaw* and *Darrin* are both applicable because the Plan was a precursor to a potential later loan modification, and therefore, as in those two cases, it was inaccurate for Wells Fargo to report her payments as past due and delinquent when she was making the payments Wells Fargo instructed her to make.

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mortgage account as delinquent while the plaintiff's loan modification application was pending, and the plaintiff alleged she made the payments the furnisher required her to make at that time. *See* 2013 WL 877087 at *4-5.

[3] As the U.S. Department of Housing and Urban Development explains, a forbearance is one of several loan workout options available to borrowers who are unable to make their payments. *See* HUD: Explore Loan Workout Solutions to Avoid Foreclosure, https://www.hud.gov/program_offices/housing/sfh/econ/loanworkoutsolutions (last visited June 26, 2018) [hereafter HUD Workout Solutions]. Under a forbearance, a lender "may allow [a borrower] to reduce or suspend payments for a short period of time." *Id.*

[4] Unlike a forbearance plan, a "mortgage modification" agreement allows the lender "to change one or more terms of [the] original loan to make the payments more affordable." HUD Workout Solutions. Under a modification, a borrower's loan is "permanently changed" by (1) adding the missed payments to the existing loan balance; (2) changing the interest rate, including making an adjustable rate into a fixed rate; or (3) extending the number of years the borrower has to repay. *Id.*

Felts is correct that the Plan Letter mentions that, at the close of the Plan period, Felts *could* apply for a loan modification. However, unlike in *Bradshaw*, in which the parties had already entered into a loan modification agreement, and *Darrin*, where the plaintiff's loan modification application was pending, Felts had not yet filed a loan modification application at the time that Wells Fargo reported her account as past due and delinquent. In addition, the payments Felts made were not the slightly reduced payments a borrower might have after legally modifying a loan agreement, but instead nominal payments that could not have resulted in the full payment of the Note within her lifetime.[5]

The sole case Felts cites in which a court considered a claim against a furnisher based upon information reported in connection with a forbearance plan as opposed to a loan modification agreement did not address whether or not the furnisher's reporting was accurate. In *Davenport v. Sallie Mae, Inc.*, 124 F. Supp. 3d 574 (D. Md. 2015), *aff'd*, 623 F. App'x 94 (4th Cir. 2015), the court determined that there were genuine issues of material fact with respect to whether or not the

[5] Relying on *Bradshaw*, Felts also argues that it was "misleading at best" for Wells Fargo to report her payments on the Note as delinquent while simultaneously instructing her to make smaller payments. Appellant's Br. at 29. The *Bradshaw* court explained that it was misleading for the furnisher to report the plaintiffs' mortgage loan as delinquent because, construing the facts in the light most favorable to the plaintiffs, they had legally modified the terms of their loan agreement and paid the amounts due under the modified agreement. *See Bradshaw*, 816 F. Supp. 2d at 1072. That is not the case here, as the Plan did not modify the terms of the Note. To the extent that Felts argues that it was misleading *to her* for Wells Fargo to report her account as past due and delinquent while she was making the payments Wells Fargo asked her to make, that cannot form the basis for an action against a furnisher, as the FCRA only provides a private right of action against furnishers for the failure to conduct a reasonable investigation.

furnisher had conducted a reasonable investigation after reporting a loan as delinquent during a forbearance plan. *See id.* at 581. The court based its determination on correspondence between the furnisher and the plaintiff, which the court found created a factual dispute regarding the reasonableness of the investigation. *See id.* Felts contends that because inaccuracy is a threshold question, the court must have considered and rejected the furnisher's argument that the information it reported was accurate. However, nothing in the court's opinion suggests that the court evaluated the accuracy of the reported information as a threshold question; instead, the court mentioned the accuracy argument in passing when summarizing the arguments the furnisher made, and then proceeded to analyze the disputed facts regarding the reasonableness of the investigation. Further, even if the court had determined that, under the specific facts of that case, it was inaccurate for the furnisher to report the loan as delinquent during the forbearance plan, that has no bearing on whether the Plan at issue in *this* case legally modified Felts' Note.

The final case Felts cites, *Thorpe v. EduCap, Inc.*, No. 13-3830, 2013 WL 5956191 (N.D. Cal. Nov. 6, 2013), is even less applicable: the court did not address whether the furnisher's reporting was accurate in the context of the FCRA. Instead, the court dismissed the plaintiff's FCRA claim against the furnisher for failure to state a claim because the plaintiff had not adequately alleged that the

furnisher's investigation was not reasonable. *See id.* at *6-7. The court separately evaluated whether the plaintiff had adequately pleaded that the furnisher's reporting of her student loan following a settlement agreement was misleading under California's Consumer Credit Reporting Act, not the FCRA. *See id.* at *3-5.

* * *

Under the circumstances of this case, regardless of whether Felts may have been confused about how her account would be reported to the CRAs, and whether the Wells Fargo could have better explained to Felts how the account would be reported, Felts did not meet her payment obligations under the Note. Therefore, the information Wells Fargo reported was not inaccurate as a matter of law.

B.

Felts argues in the alternative that, even if Wells Fargo's credit reporting regarding the Loan was technically accurate, it was nonetheless materially misleading. In support of this assertion, Felts cites cases from other circuits in which courts have allowed a consumer's claim to proceed against a furnisher on the basis of misleading statements or omissions, including three cases Felts claims are analogous to this action.

Felts cites *Freedom v. Citifinancial LLC*, in which the court denied a motion to dismiss an FCRA claim against the defendant furnisher, holding that the plaintiff had adequately alleged that the furnisher's reporting was inaccurate where it

reported the plaintiff's loan as discharged in bankruptcy, but then also reported a "scheduled payment" of $143.00 for the loan. *See* No. 15-10135, 2016 WL 4060510, at *6 (N.D. Ill. July 25, 2016). The court found that even though the report did indicate the debt was discharged, reporting a balance on the account "could create the mistaken impression that [the] [p]laintiff still owed on the account, which was not accurate." *Id.* Felts also cites *Twomey v. Ocwen Loan Servicing, LLC*, No. 16-0918, 2016 WL 4429895 (N.D. Ill. Aug. 22, 2016), in which the court similarly found that reporting a loan as having a balance and past due amount is misleading where the loan was discharged in bankruptcy, even if the report otherwise clearly indicates that the loan was discharged, because "a reader of the report could be misled into thinking that [the] [p]laintiff still personally owed this obligation (or, at a minimum, be confused as to this point)." *Id.* at 4.

Felts asserts that because she made every payment Wells Fargo required under the Plan, reporting her account as delinquent created a "wildly inaccurate" picture of her creditworthiness. Felts argues that she was conscientious, proactively contacting her loan servicer to discuss payment options following the termination of her employment, and that it was therefore misleading for her credit report to portray her as irresponsible by stating that her payments were "past due" and "delinquent," even if those statements were technically true. Felts claims that,

in terms of her credit report, she was hardly in a different position from someone who failed to make any loan payments whatsoever.

Felts' argument again ignores that her partial payments under the Plan simply were not the payments owed under the Note. Unlike in the cases Felts cites, where the borrowers no longer legally owed the amounts listed, Felts did owe payments under the Note, which she failed to make.[6] Therefore, it was not misleading for Wells Fargo to report that she was not making payments under the Note as agreed, particularly in light of Wells Fargo's additional statement that she was paying under a partial payment agreement.

Although Felts now likens her position to that of a person who made no payments at all, she ignores that the Plan provided her with a valuable benefit: she was permitted to stay in her home. Without the Plan, Wells Fargo could have foreclosed on Felts' mortgage following her inability to make full payments under the Note. Under the Plan, Wells Fargo gave up its foreclosure rights in exchange for token payments from Felts representing less than 2% of the amount owed each month. Indeed, if the Court adopted Felts' rule of law – that Wells Fargo was required to report Felts' payments as timely because it instructed her to make lower payments – Felts' credit report may have been misleading to prospective lenders,

[6] Felts also cites *Dougherty v. Quicksius, LLC*, No. 15-6432, 2016 WL 3757056 (E.D. Pa. July 14, 2016), in which the court held that a criminal background report created a misleading impression where it duplicated entries regarding the plaintiff's prior criminal offenses. *Id.* at *2. As it involved a criminal background report, and not liability under the FCRA, *Dougherty* is not applicable here.

the report's intended recipients. Felts' inability to meet her payment obligations under the Note is relevant information for a prospective lender: upon viewing Felts' credit report, a lender could surmise that, during a period of unexpected financial difficulty, Felts either did not have or did not choose to use other funds to pay the full amount due under the Note. Had Wells Fargo reported that Felts had made payments under the Note as agreed when she was in fact paying only $25.00 per month, the report would have conveyed that Felts fully met her payment obligations under the Note, which was not true.

Finally, Felts argues that Wells Fargo omitted information that created a materially misleading impression of Felts' compliance with the Note. Specifically, Felts focuses on Wells Fargo's omission of the lower payment amounts she agreed to pay under the Plan in the Scheduled Monthly Payment Amount field. As discussed above, those "omissions" did not render Felts' credit report misleading, particularly in light of Wells Fargo's additional affirmative statement that Felts was paying under a partial payment agreement.

V.

For the foregoing reasons, the judgment of the district court granting Wells Fargo's motion for summary judgment is

AFFIRMED.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-2045

RREF SNV-FL SSL, LLC,

Appellant,

v.

SHAMROCK STORAGE, LLC,
RICHARD MCALPIN, LITTLE
SABINE INVESTMENT GROUP,
INC., and JERRI M. MCALPIN,

Appellees.

On appeal from the Circuit Court for Escambia County.
J. Scott Duncan, Judge.

June 28, 2018

PER CURIAM.

RREF SNV-FL SSL, LLC, appeals an order denying its motion to avoid a fraudulent transfer brought pursuant to section 56.29, Florida Statutes (2013). We affirm.

I. BACKGROUND

This case comes to us for a second time. *See RREF SNV-FL SSL, LLC v. Shamrock Storage, LLC*, 178 So. 3d 90 (Fla. 1st DCA 2015). We detailed the parties' dispute and the procedural background in our earlier decision, *id.* at 90-91, so we offer only the abridged version here: Richard McAlpin owned a company that owned a Travelodge motel, and he owned a second company

(appellee Shamrock Storage) that operated storage units. Shamrock Storage got a bank loan that McAlpin personally guaranteed, and the company defaulted. A few months before the loan was set to mature, McAlpin gave his wife his motel-company stock, then receiving nothing in return. *Id.* Ultimately the bank got a judgment against McAlpin on the Shamrock loan, and it assigned that judgment to RREF SNV-FL SSL, LLC (RREF, for short), the appellant here.

RREF sought to avoid McAlpin's transfer of the stock. RREF contended this was a fraudulent transfer, and that the motel-company stock should be available to help satisfy its judgment against McAlpin. RREF alleged that the transfer was fraudulent both because there was an actual intent to defraud, and separately because there was constructive fraud. The trial court denied relief, concluding that it was "not satisfied that the transfer of Mr. McAlpin's [stock] was made to hinder creditors." *Id.* (quoting order).

RREF appealed, and we reversed. *Id.* We concluded that the trial court wrongly placed the burden of proof on RREF. *Id.* at 91. We explained that it was the appellees' burden to demonstrate the transfer was *not* fraudulent. *Id.* ("In situations like this one, the presumption in § 56.29(6) is that a spousal transfer should be voided unless *the defendant* can prove that it did not make the transfer to delay, hinder, or defraud creditors. . . ."); *see also* § 56.29(6)(a), Fla. Stat. (2013);* *Morton v. Cord Realty, Inc.*, 677 So. 2d 1322, 1324 (Fla. 4th DCA 1996) (noting that § 56.29 "shifts the burden to the defendant in proceedings supplementary to prove that a transfer made within one year before service of process is not fraudulent as to creditors").

On remand, and based on this court's earlier decision, the parties agreed the appellees had the burden to disprove both constructive and actual fraud. The court conducted another hearing on the matter, but for whatever reason, the parties agreed

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* The statutory provision shifting the burden of proof to the judgement debtor in supplementary proceedings is now in section 56.29(3)(a), Fla. Stat. (2017). The wording remains substantially similar to the prior version. *See* Ch. 2016-33, Laws of Fla.

neither side would present additional evidence. So the court—now with a different presiding judge—looked at the same record it already had. After hearing argument, the court entered an order again denying RREF's request. This time, the court found that the appellees proved McAlpin's stock transfer was not fraudulent. Once again, RREF appeals.

II. Analysis

Under section 726.106, a debtor's transfer is fraudulent as to a creditor if (a) the creditor's claim arose before the transfer, (b) the debtor was insolvent at the time of the transfer or became insolvent because of the transfer, and (c) the debtor made the transfer without receiving reasonably equivalent value in exchange for the transfer. § 726.106(1), Fla. Stat. (2013). On remand, the parties agreed that the appellees needed to disprove at least one of these three elements.

A. Whether RREF's claim arose before the transfer.

The appellees did not prove the claim arose after McAplin's stock transfer. McAlpin transferred the stock to his wife in January 2010. The trial court found that McAlpin was not in default at the time and did not learn of the judgment against him until three or four months later. But regardless of whether McAlpin was in default in January 2010, there is no question that RREF (or its predecessor in interest) had a "claim" against him—as the term is statutorily defined—at the pertinent time. *See* § 726.102(4), Fla. Stat. (2013) ("'Claim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.").

B. Whether McAlpin was solvent at the time of the transfer.

The appellees did not prove McAlpin was solvent at the time of the transfer and remained solvent after it. In fact, they did not prove that McAlpin was solvent at any relevant time. He had judgments against him, and he was not meeting his obligations.

C. Whether McAlpin received reasonably equivalent value.

That leaves as the final issue whether the appellees proved McAlpin received reasonably equivalent value for the stock. We conclude that they did. McAlpin testified that he transferred the stock to his wife without receiving payment in exchange, but there was also evidence from which the trial court could find the stock had a value of zero. "[I]t is impossible to receive less than reasonably equivalent value for an asset that has no value." *In re Gomez*, 560 B.R. 866, 873 (Bankr. S.D. Fla. 2016). Therefore, there can be no constructive fraud under section 706.106(1) based on the transfer of a valueless asset. *See id*. ("Transfer of a valueless asset cannot hinder, delay or defraud any creditor of value as it is valueless."); *see also In re Todd*, 391 B.R. 504, 509 (Bankr. S.D. Fla. 2008) ("If no value was lost in the transfer between the Debtor and the Defendant, it is inherently the case that the Debtor did not receive less than equivalent value. As a result, the . . . section 726.106(1) [and other] claims fail as to the less than reasonably equivalent value element."); *In re Moodie*, 362 B.R. 554, 562 (Bankr. S.D. Fla. 2007) (finding transfer of "economically valueless" title does not meet the reasonably equivalent value standard in § 726.106(1)); *In re Gillman*, 120 B.R. 219, 220 (Bankr. M.D. Fla. 1990) ("[M]easured in an economic sense, the conveyance of the Debtor's interest in the subject property to the Defendant had no value. Thus, the transfer cannot be challenged as a fraudulent transfer . . . .").

AFFIRMED.

JAY and WINSOR, JJ., concur; ROBERTS, J., concurs in result only.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Michael Anthony Shaw and Stephen P. Drobny of Jones Walker LLP, Miami, for Appellant.

Robert O. Beasley and Phillip A. Pugh of Litvak, Beasley, Wilson & Ball, LLP, Pensacola, for Appellees.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-3239

PIOTR CHRZUSZCZ,

Appellant,

v.

WELLS FARGO BANK, N.A.,

Appellee.

On appeal from the Circuit Court for Duval County.
Virginia Norton, Judge.

June 28, 2018

M.K. THOMAS, J.

Piotr Chrzuszcz, "the Borrower," appeals the final judgment of foreclosure in favor of Wells Fargo, "the Bank." He argues the trial court erred by denying his Motion for Involuntary Dismissal because the Bank failed to comply with a condition precedent to foreclosure. We agree and reverse and remand for entry of an involuntary dismissal.

I. Facts

In 1998, the Borrower executed an FHA fixed-rate promissory note, paragraph 6(B) of which indicated acceleration would only be permitted if the Lender followed Housing and Urban Development, "HUD," regulations:

> If the Borrower defaults by failing to pay in full any monthly payment, then Lender may, except *as limited by regulations of the Secretary in the case of payment defaults*, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. *This Note does not authorize acceleration when not permitted by HUD regulations*. As used in this Note, "Secretary" means Secretary of Housing and Urban Development or his or her designee.

(Emphasis added).

The HUD regulation at issue in this case requires the Bank, prior to initiating a foreclosure action, to either have a face-to-face interview with the Borrower, or reasonably attempt to do so:

> b) The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced . . . .

24 C.F.R. § 203.604(b) (2012).

In 2012, the Bank filed a verified complaint seeking to foreclose the mortgage and recover the indebtedness under the note as a result of the Borrower's default. The complaint included a general claim that the Bank had satisfied all conditions precedent to initiating suit: "[A]ll conditions precedent, to acceleration of the subject loan and foreclosure of the subject Mortgage, have been performed, have occurred, or were waived." In response, the Borrower filed an answer, asserting,

"[s]pecifically, and without limitation, [the Bank] failed to comply with the requirements of the National Housing Act, 12 U.S.C. § 1701x(c)(5) and 24 C.F.R. 203.604, under which [the Bank] is required to complete pre-foreclosure counseling with the Defendant." The Borrower did not, however, plead the failure to complete conditions precedent as a separate affirmative defense.

At the first bench trial, the Borrower argued that the Bank's failure to comply with the face-to-face counseling requirement was a condition precedent to filing suit. Without explanation, the trial judge declined to entertain the argument. The Bank then called a single witness, Dustin Green, who was employed by the Bank as a loan verification analyst. He testified based on his review of various business records. With the exception of a default letter dated December 4, 2011, and a letter log, Green offered no testimony regarding whether the Bank complied with the face-to-face counseling requirement.

After the Bank rested its case, the Borrower moved for an involuntary dismissal based on the Bank's lack of standing. The trial court granted the motion, entering an involuntary dismissal over the Bank's objection; however, the trial court later vacated the involuntary dismissal upon the Bank's Motion for Rehearing.

At the second bench trial, before a different trial judge, Mr. Green was again the sole witness called by the Bank. He offered no testimony regarding whether the Bank complied with the face-to-face counseling requirement. At the conclusion of the Bank's case, the Borrower moved for an involuntary dismissal based on the Bank's failure to comply with the face-to-face counseling requirement as a condition precedent to filing the foreclosure action.

The Bank responded that compliance with HUD regulations was an affirmative defense, as opposed to a condition precedent, and the Borrower had failed to plead noncompliance as an affirmative defense. The Borrower then recalled Mr. Green and elicited testimony that: 1) no documents reflected any face-to-face counseling occurred with the Borrower; and 2) none of the five exceptions to the face-to-face requirement applied. The Bank, as rebuttal evidence, introduced several certified letters it sent to the

Borrower. The Borrower objected to the evidence as irrelevant because, with one exception, the letters predated the default.

After the presentation of all the evidence, the Borrower renewed his Motion for Involuntary Dismissal, which the trial court took under advisement. Ultimately, the trial court denied the Borrower's Motion and entered a Final Judgment of Foreclosure. The Borrower filed a timely Motion for Rehearing, which was also denied by the trial court. This appeal followed.

II. Standard of Review

"A trial court's ruling on a motion for involuntary dismissal is reviewed *de novo*." *Citigroup Mortg. Loan Trust Inc. v. Scialabba*, 238 So. 3d 317, 319 (Fla. 4th DCA 2018) (citing *Deutsche Bank Nat'l Tr. Co. v. Clarke*, 87 So. 3d 58, 60 (Fla. 4th DCA 2012)). We likewise review *de novo* questions of law, such as which party bears the burden of proof. *See, e.g., Brown v. Cowell*, 19 So. 3d 1171 (Fla. 1st DCA 2009).

III. Analysis

The Borrower argues that the HUD requirement that the Bank either have a face-to-face interview with the Borrower, or make a reasonable effort to arrange a face-to-face meeting constituted a condition precedent to foreclosure. Accordingly, as a condition precedent, the Bank bore the burden of proving its satisfaction at trial. The Bank, on the other hand, asserts the Borrower's allegation that it failed to comply with the face-to-face interview requirement was an affirmative defense; thus, the Borrower had the responsibility to specifically plead and prove the defense. We agree with the Borrower's contention that, in the current case, the HUD-mandated face-to-face interview (or attempt to interview) was a condition precedent to the foreclosure action, and the Bank shouldered the burden of proving its satisfaction.

"'Conditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty.'" *University Housing by Dayco Corp. v. Foch*, 221 So. 3d 701, 704

(Fla. 3d DCA 2017) (quoting *Land Co. of. Osceola Cty., LLC v. Genesis Concepts, Inc.*, 169 So. 3d 243, 247 (Fla. 4th DCA 2015) (emphasis omitted)). Where there are conditions precedent to filing the suit, the plaintiff bears the burden of proving substantial compliance. *Scialabba*, 238 So. 3d at 319 (citing *Liberty Home Equity Sols., Inc. v. Raulston*, 206 So. 3d 58, 60 (Fla. 4th DCA 2016)).

On the other hand, "[a]n affirmative defense is an assertion of facts or law by the defendant that, if true, would avoid the action." *Custer Med. Ctr. v. United Auto Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010). The defendant, as the one who raises the affirmative defense, bears the burden of proving that affirmative defense. *Id.*

Thus, if the Bank is correct that its alleged failure to conduct the HUD-required face-to-face interview was an affirmative defense, the Borrower bore the burden of proving it below; if, on the other hand, the face-to-face interview was a condition precedent to filing the mortgage foreclosure action, the Bank bore the burden of proving it had complied.

Florida appellate courts have addressed whether face-to-face interviews as required by section 203.604 constitute a condition precedent or an affirmative defense in a foreclosure suit. In *Diaz v. Wells Fargo Bank, N.A.*, 189 So. 3d 279, 285 (Fla. 5th DCA 2016), it was unclear whether the HUD regulations were incorporated into the terms of the mortgage; the Fifth District held that in such cases where it was unclear whether alleged conditions precedent even applied, "the burden is on the party asserting the existence of the conditions precedent to establish their applicability."

In *Harris v. United States Bank National Association*, 223 So. 3d 1030, 1032 (Fla. 1st DCA 2017), this Court recognized "[t]his case turns on whether a HUD regulation, the face-to-face counseling rule, is a condition precedent to foreclosure, and if so, whether compliance with those regulations was properly and timely pled." We determined the HUD regulation of face-to-face counseling was a condition precedent to foreclosure pursuant to the terms of that particular mortgage; however, we also held the issue was waived where the Bank never claimed compliance and Harris did not allege noncompliance until closing arguments. *Id.* at 1032-33.

The case at hand is most analogous to *Palma v. JPMorgan Chase Bank*, 208 So. 3d 771 (Fla. 5th DCA 2016). There, as here: 1) the note and mortgage clearly required compliance with HUD regulations, including the face-to-face interview requirements in section 203.604, as a condition precedent to foreclosure; 2) the bank's complaint alleged compliance with all conditions precedent to foreclosure; and 3) the borrower denied the allegation that conditions precedent had been completed and specifically asserted the bank had failed to comply with the HUD requirement of a face-to-face interview. *Id.* at 773. The Fifth District determined that Palma's specific denial of the bank's allegation it had satisfied all conditions precedent to the mortgage foreclosure action "shifted the burden back to Bank to prove at trial that it complied with [section 203.604]." *Id.* at 775. The court reasoned there was "no meaningful reason to treat compliance with section 203.604 in an FHA mortgage differently than compliance with paragraph twenty-two in a standard mortgage, which our court has determined is a condition precedent to foreclosure." *Id.*

Here, as in *Palma*, where the Bank asserted in the complaint that all conditions precedent had been satisfied, but the Borrower denied that assertion with the specific claim that the Bank failed to meet the face-to-face counseling requirement of section 203.604, the burden of proving the condition precedent was shifted back to the Bank.

The Bank's reliance on the Florida Supreme Court case of *Custer Med Center v. United Auto Ins. Co.,* 62 So. 3d 1086 (Fla. 2010), is misplaced. There, the supreme court noted "a defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as an *affirmative defense*, for which the defensive pleader has the burden of pleading and persuasion." *Id.* at 1096. However, *Custer*, as noted in *Palma*, is distinguishable from the case at hand for two main reasons. First, *Custer* dealt not with conditions precedent to a foreclosure action pursuant to HUD, but rather, with the issue of whether an insured's attendance at a medical examination was a condition precedent to the existence of an automobile insurance policy that provided personal injury protection (PIP) benefits. *Id.; see also Palma*, 208 So. 3d at 774 n.3. Further, in *Custer*, the defendant raised as an affirmative defense

the insured's unreasonable failure to appear at a medical examination. 62 So. 3d at 1096. In *Palma* and the current case, on the other hand, the Bank initially alleged all conditions precedent had been met, and the Borrowers, in response, specifically denied those allegations. *Palma*, 208 So. 3d at 774 n.3. The specific denial did not amount to an affirmative defense. Thus, both here and in *Palma*, the burden of proving compliance with the condition precedent shifted back to the Bank.

As such, the Bank bore the burden of proving it had met the condition precedent, pursuant to section 203.604, of holding or attempting to hold face-to-face interviews with the Borrower. It failed to do so.

REVERSED and REMANDED for entry of a voluntary dismissal of this case.

ROWE and MAKAR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Mark P. Stopa of the Stopa Law Firm, Tampa, for Appellant.

Michele L. Stocker of Greenberg Traurig, P.A., Fort Lauderdale; Kimberly S. Mello and Danielle M. Diaz of Greenberg Traurig, P.A., Tampa, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GREEN EMERALD HOMES, LLC, Appellant, v. RESIDENTIAL CREDIT OPPORTUNITIES TRUST; JOHN DOE OR ANY OTHER PERSON IN POSSESSION; and MAGNOLIA PARK AT RIVERVIEW HOMEOWNERS ASSOCIATION, INC., Appellees.	)	Case No. 2D17-4410

Opinion filed June 27, 2018.

Appeal from the Circuit Court for Hillsborough County; Richard A. Nielsen, Judge.

Brennan Grogan of Levine Law Group, Palm Beach Gardens, for Appellant.

Melisa Manganelli of Law Offices of Mandel, Manganelli & Leider, P.A., Boca Raton, for Appellee Residential Credit Opportunities Trust.

No appearance for remaining Appellees.

BLACK, Judge.

Green Emerald Homes, LLC, challenges the order granting Residential Credit Opportunities Trust's motion to sequester rents pursuant to section 697.07, Florida Statutes (2017). The order requires that Green Emerald Homes—as title owner to property which is the subject of Residential Credit's foreclosure action—deposit rents collected on the property into the trust account of Residential Credit's attorneys pending resolution of the foreclosure action. We reverse.

In 2008, three individuals—Jonathan Orjuela, Yury Tatiana Mesa Diaz, and Michael Arjuela (the borrowers)—executed a promissory note and mortgage in favor of CTX Mortgage Company, LLC. The mortgage contains an assignment of rents provision and was recorded in the public records of Hillsborough County in March 2008.

In June 2014, as the result of a junior lienholder foreclosure action instituted by Magnolia Park at Riverview Home Owners Association, Inc., Green Emerald Homes purchased the property and was issued a certificate of title. In September 2014, Residential Credit was assigned the note and mortgage, becoming the senior lienholder.[1] One month later, Residential Credit filed a foreclosure action, naming Green Emerald Homes, Magnolia Park, and unknown tenants as defendants.[2] In April 2017, after issuing "demand for rents" letters to Green Emerald Homes and the borrowers but not receiving those rents, Residential Credit filed a "Motion to Sequester

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[1]The note and mortgage appear to have been assigned from CTX to Countrywide Bank, FSB, then from Countrywide to Bank of America, N.A., then from Bank of America to Bayview Loan Servicing, LLC, and finally from Bayview to Residential Credit.

[2]The borrowers were not named as defendants.

Earnings, Revenues, Rents, Issues, Profits, and Incomes," relying on section 697.07 and the terms of the mortgage. The motion sought an order directing any and all defendants, including specifically Green Emerald Homes, to deposit "all earnings, revenues, rents, issues, profits and income earned and derived from the property at issue."

Following a hearing, the trial court granted Residential Credit's motion and ordered Green Emerald Homes to file a copy of any rental agreements to which it was a party for 2017 and to deposit into the trust account of Residential Credit's attorneys any rents collected from March 2017 forward. The order also required that any rents due but not previously paid to Green Emerald Homes by renters of the property be tendered by the renters to Residential Credit's attorneys for deposit into their trust account. We conclude that the trial court erred in granting the motion to sequester rents.[3]

The mortgage executed by the borrowers contains the following assignment of rents provision:

> Borrower unconditionally assigns and transfers to Lender all of the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hearby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.
>
> If Lender gives notice of breach to Borrower: (a) all rents received by Borrower shall be held by Borrower as trustee

[3]A transcript of the hearing was not provided to this court and, upon order to supplement the record, Green Emerald Homes has advised that a court reporter was not present at the hearing.

> for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the rents of the Property; and (c) each tenant of the Property shall pay all rents due and unpaid to Lender or Lender's agent on Lender's written notice to the tenant.
>
> Borrower has not executed any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this paragraph 17.
>
> Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

"[A] mortgagor and mortgagee are free to contract for an assignment of rents, and enforcement of that assignment will be governed by [section 697.07]." Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490, 498 (Fla. 3d DCA 1994). Section 697.07 "establish[es] procedures designed to give effect to the parties' rent assignment agreement." Wane v. U.S. Bank, Nat'l Ass'n, 128 So. 3d 932, 934 (Fla. 2d DCA 2013) (alteration in original) (quoting Ormond Beach Assocs., Ltd. P'ship v. Citation Mortg., Ltd., 634 So. 2d 1091, 1092 (Fla. 5th DCA 1994)). Section 697.07 provides, in pertinent part:

> (1) A mortgage or separate instrument may provide for an assignment of rents of real property or any interest therein as security for repayment of an indebtedness.
>
> (2) If such an assignment is made, the mortgagee shall hold a lien on the rents, and the lien created by the assignment shall be perfected and effective against third parties upon recordation of the mortgage or separate instrument in the public records of the county in which the real property is located, according to law.

> (3) Unless otherwise agreed to in writing by the mortgagee and mortgagor, the assignment of rents shall be enforceable upon the mortgagor's default and written demand for the rents made by the mortgagee to the mortgagor, whereupon the mortgagor shall turn over all rents in the possession or control of the mortgagor at the time of the written demand or collected thereafter (the "collected rents") to the mortgagee less payment of any expenses authorized by the mortgagee in writing.
>
> (4) Upon application by the mortgagee or mortgagor, in a foreclosure action, and notwithstanding any asserted defenses or counterclaims of the mortgagor, a court of competent jurisdiction, pending final adjudication of any action, may require the mortgagor to deposit the collected rents into the registry of the court, or in such other depository as the court may designate.

"[A]n assignment of rents creates a lien on the rents in favor of the mortgagee, and the mortgagee will have the right to foreclose that lien and collect the rents, without the necessity of foreclosing on the underlying mortgage." Ginsberg, 645 So. 2d at 498; see also § 697.07(2). However, during the pendency of a foreclosure of the mortgage the statute also allows the rents to be deposited into the registry of the court or another depository designated by the court upon motion by the mortgagee or mortgagor. § 697.07(4); see also Wane, 128 So. 3d at 934 ("Section 697.07 draws a clear line between a motion seeking sequestration of rents into the court registry [under subsection (4)] and a motion seeking an actual assignment of rents to the lender pending foreclosure [under subsection (3)]."). To be entitled to the sequestration of rents, the movant must establish only "a pending foreclosure action and an assignment of rents provision in the applicable mortgage." Wane, 128 So. 3d at 934.

Green Emerald Homes does not dispute that Residential Credit has standing to enforce the assignment of rents or seek sequestration of rents. The

mortgage establishes that CTX Mortgage Company, LLC, was the original lender and mortgagee. See § 721.82(6), Fla. Stat. (2008) (defining "mortgagee" as "a person holding a mortgage lien"). When Residential Credit was later assigned the mortgage and note, it assumed "all beneficial interest under the mortgage," as well as the debt evidenced by the note and "all rights accrued or to accrue under" the mortgage and note. Thus, Residential Trust became the mortgagee.

Green Emerald Homes does dispute, however, Residential Credit's claim of entitlement to sequestration of rents as against Green Emerald Homes.[4] Green Emerald Homes asserts that it is not a party to the mortgage and is not the mortgagor for purposes of section 697.07. We agree.

The mortgage identifies the mortgagors and borrowers as the three individuals who executed the mortgage. See also § 721.82(7) (defining "mortgagor" as "a person granting a mortgage lien or a person who has assumed the obligation secured by a mortgage lien"). When Green Emerald Homes purchased the property at the Magnolia Park foreclosure sale, it did not become the mortgagor/borrower. See Bank of N.Y. Mellon, ex rel. Certificate Holders of CWABS Inc., Asset-Backed Certificates, Series 2007-5 v. Diaz, 232 So. 3d 435, 436 (Fla. 4th DCA 2017) ("The title owner purchased the subject property at a prior foreclosure sale brought by a homeowner's association. The title owner was not the borrower under the note

[4]We note that Residential Credit did not seek to enforce its statutorily-created lien on the rents subject to the assignment of rents provision in the mortgage, pursuant to section 697.07(3); it sought only sequestration of rents, pursuant to section 697.07(4). See Ginsberg, 645 So. 2d at 498 ("According to the statute an assignment of rents creates a lien on the rents in favor of the mortgagee, and the mortgagee will have the right to foreclose that lien and collect the rents, without the necessity of foreclosing on the underlying mortgage.").

and mortgage."). It became the owner of the property subject to the superior interest and lien imposed by the recorded mortgage. See, e.g., Wells Fargo Bank, N.A., ex rel. Carrington Mortg. Loan Tr., Series 2006 FRE1 Asset-Backed Pass-Through Certificates v. Rutledge, 230 So. 3d 550, 552 (Fla. 2d DCA 2017); PNC Bank, Nat'l Ass'n v. MDTR, LLC, 44 Fla. L. Weekly D281 (Fla. 5th DCA Feb. 2, 2018) (stating that the third-party purchaser took the property subject to a mortgage but did not become a party to the mortgage). Further, because Magnolia Park, which held the junior lien on the property, was not a party to the mortgage and note and therefore not obligated under those documents, the title passed to Green Emerald Homes through the junior-lien foreclosure could not bind Green Emerald Homes to the terms of those documents. Green Emerald Homes is a third party to the mortgage and note at issue; it is not an assignee of the mortgagors. See Rodriguez v. Fed. Nat'l Mortg. Ass'n, 220 So. 3d 577, 578 (Fla. 5th DCA 2017). Green Emerald Home's title to the property does not reflect an assumption of rights and obligations; moreover, Residential Credit does not make such an allegation in its foreclosure complaint.

Finally, while the statute creates a lien on rents which is effective against Green Emerald Homes—as a third party—by virtue of recordation of the mortgage, see § 697.07(2), the statute does not require that the third-party title owner assign to the mortgagee rents owed to it under a separate document not subject to the foreclosure action.[5] The statute specifically and repeatedly places the obligation on the mortgagor.

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[5]On this record we cannot determine whether any tenants—assuming there are tenants—are long-term renters whose leases originated with the borrowers such that rents paid to the mortgagors/borrowers during the time the mortgagors/borrowers were the owners of record and in default would be subject to sequestration under section 697.07. Nonetheless, because Residential Credit did not

It also specifically provides that "[n]othing herein shall alter the lien priorities, rights, or interests among mortgagees or other lienholders." § 697.07(7). Again, Green Emerald Homes purchased the property at a junior lien foreclosure sale and took title subject to the mortgage. In the same way that a nonparty to the mortgage cannot enforce the terms of the mortgage with regard to attorney's fees, neither can the mortgagor impose the obligations of the mortgage against a nonparty to the mortgage who has not otherwise assumed those obligations. See, e.g, PNC Bank, 44 Fla. L. Weekly D281 ("[T]he status of prevailing party does not equate to the status of a mortgagor under the mortgage 'so as to trigger section 57.105(7)'s reciprocity provision.' Only a mortgagor under the subject mortgage is due such reciprocity." (quoting Fla. Cmty. Bank, N.A. v. Red Rd. Residential, LLC, 197 So. 3d 1112, 1116 (Fla. 3d DCA 2016))); cf. Madl v. Wells Fargo Bank, N.A., 43 Fla. L. Weekly D82 (Fla. 5th DCA Dec. 29, 2017) (denying rehearing on the order granting attorney's fees, finding that through valid assignment of the mortgage the foreclosing bank became a party to the mortgage and was required to pay prevailing party attorney's fees to the mortgagors).

We are aware of the ramifications of our conclusion in the existing foreclosure environment and are not indifferent to them. As has been discussed in prior

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name the mortgagors/borrowers in its foreclosure suit, it could not seek to enforce the mortgage terms for those rents in this case. Cf. Wane, 128 So. 3d at 933 (discussing motion seeking assignment of rents from borrower's tenant); Terant v. Beltway Capital, LLC, 147 So. 3d 1103 (Fla. 3d DCA 2014) (discussing sequestration of rents as against borrower). Our holding has no application to rents paid or payable to the mortgagors/borrowers had they been defendants below or to rents payable under a lease executed by the mortgagors/borrowers as landlords and assumed by the third-party purchaser.

opinions, the "innovative procedure" of third parties purchasing properties at junior lien foreclosure sales and subsequently renting those properties for a return on their investments has "a measure of good," potentially even benefiting the mortgagees, but also "a measure of bad," including significant delay of mortgage foreclosure proceedings, "that ought to be regulated or prohibited." See Bonafide Props. v. Wells Fargo Bank, N.A., ex rel. Certificate Holders of Banc of Am. Alt. Loan Tr. 2006-5, Mortg. Pass-Through Certificates, Series 2006-5, 198 So. 3d 694, 696-98 (Fla. 2d DCA 2016) (Altenbernd, J., concurring). In instances of unwarranted delay, the inability of the mortgagee to sequester rents as against the third-party title owners—particularly where that third party is collecting rent but not paying the homeowners' association dues, property taxes, or property insurance, let alone the mortgage—further discourages a speedy resolution of the mortgage foreclosure action from the third party's perspective. However, we must apply the language of the mortgage and section 697.07 as they are plainly written.

Accordingly, we reverse the order granting Green Emerald Homes' motion to sequester rents.

Reversed.

CASANUEVA and VILLANTI, JJ., Concur.