___ Plaintiff's representative failed to attend by telephone at all times during the mediation session.

___ After the mediation resulted in an impasse, plaintiff's representative failed to file the certification regarding attendance at mediation by telephone at all times (Form Exhibit 7 attached to the Administrative Order).

IT IS ORDERED that Plaintiff shall appear before the court at the *[designation of courthouse/courtroom]* on *[date]* at *[time]* to show cause why sanctions for noncompliance with Administrative Order 2010-12 (as amended) should not be imposed. Plaintiff is cautioned that failure to appear at the show cause hearing may result in the case being dismissed and the imposition of other appropriate sanctions.

Signed on *[date]*

[signature block for judge]

[Certificate of Service]

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, FLORIDA

Case No(s).:

Plaintiff(s),

vs.

Defendant(s).

ORDER AFTER SHOW CAUSE HEARING
(Plaintiff's Failure to Comply with Administrative Order 2010-12 (as amended))

The court having determined that Plaintiff has failed to comply with the requirements of Administrative Order 2010-12 (as amended), it is ORDERED and ADJUDGED *(as marked)*:

Form A

___ Within 10 days from the date of this order, Plaintiff shall file submit Form A to the Program Manager.

Payment of RMFM Program Fees

___ Within 10 days from the date of this order, Plaintiff shall pay $_____ of the RMFM Program fees to the Program Manager.

Electronic Transmittal of Case Number and Borrower Contact Information

___ Within 10 days from the date of this order, Plaintiff shall electronically submit the case number and contact information to the borrower to the Program Manager.

Failure to File and Serve Certification Regarding Settlement Authority

___ Within 10 days after the date of this order, Plaintiff shall file and serve the certification regarding the person or entity with full settlement authority where the residence is not homestead (Form Exhibit 9 attached to the Administrative Order).

Attendance at Mediation

___ Plaintiff's counsel shall attend the next scheduled mediation in this case.

___ _____ *(Name)*, as plaintiff's representative designated in the most recent Form A filed in the court file, shall physically attend the next scheduled mediation in this case.

___ _____ *(Name)*, as plaintiff's agent with full authority to sign a settlement agreement shall attend the next scheduled mediation in this case.

Dismissal

___ This case is dismissed without prejudice.

Additional Sanctions

___ The court determines _____ is entitled to an award of attorney's fees and cost, the amount of which shall be determined at a subsequent hearing.

_____

_____

_____

Signed on *[date]*

[signature block for judge]

[Certificate of Service]

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, FLORIDA

Case No(s).:

Plaintiff(s),

vs.

Defendant(s).

ORDER REFERRING CASE TO RMFM PROGRAM
(Case Filed Prior to effective date of Administrative Order 2010-12 (as amended))

It appearing to the court that the residence which is the subject of this action to foreclose a mortgage is a "homestead residence" to which Administrative Order 2010-12 (as amended) applies and that Defendant _____ (Borrower) has requested that the case be referred to mediation, it is ORDERED:

The case is referred to the RMFM Program for mediation, and the plaintiff and borrower shall comply with Administrative Order 2010-12 (as amended). Within 10 days from the date of this Order, the plaintiff shall pay that portion of the RMFM Program fees payable at the time suit is filed, file a properly filled out Form A in the manner required by the Administrative Order, and transmit Form A to the Program Manager.

The plaintiff and borrower are to cooperate with the Program Manager and must attend any mediation scheduled by the Program Manager.

The plaintiff is advised and cautioned that failure to comply in a timely manner with the requirements of this order will result in dismissal of the cause of action without further order of the court.

Signed on *[date]*

[signature block for judge]

[Certificate of Service]

NOTICE OF MEDIATION

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, FLORIDA

Case No(s).:

Plaintiff(s),

vs.

Defendant(s).

NOTICE OF MEDIATION

Pursuant to Administrative Order 2010-12 (as amended), the Program Manager hereby sets this action for mediation on _____, _____, at _____, at the Osceola County Historic Courthouse, 3 Courthouse Square, 1st floor (entrance on right side of Courthouse steps) Kissimmee, Florida 34741.

The Mediator will be _____.

Fees.

Mediation fees are to be paid directly to the mediator at the time of the mediation session by the Plaintiff and are to be paid by cashier's check or money order made payable to the mediator. The case number is to be included on the payment. NO PERSONAL CHECKS WILL BE ACCEPTED.

Attendance.

Each of the following must be physically present at the mediation:

(a) the borrower;
(b) the borrower's counsel of record, if any;
(c) the plaintiff's lawyer; and
(d) the plaintiff's representative with full authority to settle as designated in the most recently filed Form A (plaintiff's representative may appear through the use of communication equipment if proper notice has been filed.

FAILURE OF ANY OF THESE PARTIES TO APPEAR MAY RESULT IN A DISMISSAL OF THE ACTION WITHOUT PREJUDICE, THE MATTER MAY PROCEED TO A FINAL HEARING, SUMMARY JUDGMENT OR DEFAULT JUDGMENT, OR ANY OTHER SANCTIONS AS THE COURT DEEMS APPROPRIATE.

Be prepared to present any information or papers that will support you side of the case. Borrower shall bring:

(a) a copy of the Borrower's Financial Disclosure for Mediation to the mediation session;
(b) any additional documents that the foreclosure counselor indicated to borrower would be required for mediation.

Plaintiff shall bring any and all documents and materials necessary for an effective mediation.

The mediation session is scheduled for up to two (2) hours.

If you need a foreign language interpreter to fully participate in your hearing, it is your responsibility to bring your own interpreter.

Re-Scheduling.

If you wish to change the date and time of the mediation, or cancel the mediation, either:

(1) you must enter into a written agreement prepared by the Plaintiff and signed by both parties or the attorney; or
(2) you must contact the Program Manager in writing who shall approve any change to the mediation date and time.

Either option (1) or (2) must be completed and presented to the Program Manager for processing at least ten (10) days prior to the scheduled mediation session.

Until you have received an amended Notice from the Program Manager either cancelling the scheduled mediation session or providing a reset date and time, the full fees will be due and no new date will be considered set. No phone call to reset or cancel a scheduled mediation session will be considered sufficient.

No request to cancel, reset or notice of settlement received by the Program Manager at least five (5) days prior to a scheduled mediation session shall be entertained or result in any refund of mediation fees.

Results of Mediation.

The mediator shall report to the Court whether an agreement was reached without comment or recommendation.

If there are any questions about the RMFM Program mediation process, please contact the Program Manager at Phone Number: (407) 742-2457, Fax Number: (407) 835-5037, E-mail address: RMFM@ocnjcc.org.

Signed on _____, 20___.

[Name of Program Manager]

BY: _____
(Signature)

_____
(Printed Name)

[Certificate of Service on the parties]

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator, Court Administration, Osceola County Courthouse, 2 Courthouse Square, Suite 6300, Kissimmee, Florida 34741, (407) 742-2417, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO.: 48-_____-CA-_____-O

_____,

Plaintiff,

vs.

_____,

Defendants.
_____/

MEDIATION ORDER

THIS CAUSE came before the Court on _____ on Plaintiff's Motion for Summary Final Judgment of Foreclosure. Appearing before the Court were Plaintiff's counsel and the homeowner(s). After reviewing the file, hearing argument of counsel and considering the statements made by the homeowner pertaining to the status of their case and their communications or attempted communications with the Plaintiff, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Parties to this case are ordered to attend mediation to be scheduled within 60 days of the date of this Order;
2. Counsel for Plaintiff shall coordinate and schedule the case for mediation and notify the Defendant what financial records must be supplied in advance of the mediation. Homeowner shall provide to bank's counsel all financial records as requested, as they are able to supply. In coordinating the date, time and place of the mediation, Counsel for Plaintiff shall communicate in person or by telephone with the Defendant Owner.

Such communication may not be made by the attorney's staff or lender representatives and the Defendant/Owner;

3. The mediator shall be selected from the list which is attached hereto as Exhibit "A". If the Plaintiff is unable to secure a mediator from Exhibit "A", or if, after exercising reasonable diligence, Counsel for Plaintiff is unable to coordinate mediation with the Defendant/Owner, Counsel for Plaintiff shall immediately notify the Court, in writing, so that the Court may attempt to identify and appoint an acceptable mediator and schedule mediation;

4. **A REPRESENTATIVE OF THE PLAINTIFF WITH FULL AUTHORITY TO SETTLE MUST PARTICIPATE IN THE MEDIATION AND ATTENDANCE OF THE REPRESENTATIVE MUST BE CONTINUOUS THROUGHOUT THE MEDIATION SESSION.** If the mediation representative for the Plaintiff is more than 25 miles from the proposed location of the mediation or is outside this circuit, or for other good cause shown by motion filed no more than five days prior to the mediation, attendance by telephone by such representative shall be permitted. However, Counsel for Plaintiff must be present in person at the mediation in all circumstances. A toll free number must be provided for use by the mediator or the parties as needed;

5. If the Defendant/Owner fails to appear at a properly noticed mediation without good cause, or if the matter impasses after mediation, the matter may be promptly noticed for final or summary judgment in accordance with the Rules of Civil Procedure;

6. If the Plaintiff fails to comply with the express terms of this Order, this action may be subject to dismissal or other sanctions may be imposed;

7. Costs of the mediation shall be born by the Plaintiff at a rate of $150.00 an hour for a minimum of 2 hours. Plaintiff shall bring payment for the first two hours to the mediation. All of the mediator's fee may be claimed as costs and included within any final judgment obtained. Unless otherwise agreed to with the mediator, any fee charged by the mediator shall be paid by the Plaintiff within 20 days of the mediation. Failure to timely pay the mediator may result in the imposition of sanctions. If Plaintiff fails to attend mediation as ordered herein, if the mediation cannot proceed at the scheduled time due to Plaintiff or Plaintiff's counsel, or if the mediator is not notified 48 hours in advance that a mediation session has been cancelled or is unnecessary, then the mediatory shall be entitled to a cancellation fee in the amount of $275.00 payable by Plaintiff.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida this _____ day of _____, 2010.

_____
JULIE H. O'KANE
Circuit Judge

Copies Furnished:

Plaintiff
Defendant

ORANGE COUNTY FORECLOSURE MEDIATIONS / MEDIATORS

Updated 12/10/2009

Mediator # (types): C=county, F=family, R=circuit, D=dependency

NAME	ADDRESS	EMAIL	PHONE
Arendas, Christine E. Mediator # 21382 R	P. O. Box 702348 St. Cloud, FL 34770-2348 (office located in Winter Park)	Christine@arendaslaw.com	407-957-3000
Beattie, Douglas B. Mediator #0076 R	Mediate First Inc. 200 E. Robinson St., Ste. 700 Orlando, FL 32801	admin@mediatefirstinc.com	407-649-9495
Bitter, Paige A. Mediator # 20901 CR	Siboni, Hamer & Buchanan, P.A. 307 NW 3rd St. Ocala, FL 34475	Pbitter@aol.com	352-207-6905
Blaher, Neal Mediator # 19286 R	Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A. 255 S. Orange Ave., Ste. 1401 Orlando FL 32801	nblaher@addmg.com	407-841-2330
Bolton, Brian Mediator # 6627 CR	Bolton and Helm, P.A. 723 E. Colonial Dr., Ste. 200 Orlando, Florida 32803	BBolton@boltonhelmlaw.com	407-781-0345
Brownlee, Jackson O. Mediator # 188 R	390 N. Orange Ave., Ste. 2500 Orlando, FL 32801	jbrownlee@iplawfl.com	407-926-7702
Calber, James A. Mediator #2409 FR	Mediate First Inc. 200 E. Robinson St., Ste. 700 Orlando, FL 32801	admin@mediatefirstinc.com	407-649-9495
Cersine, Matthew Mediator # 18139 CFR	P. O. Box 574102 Orlando, FL 32857	info@cersinelaw.com	407-459-1935
Chapin, Bruce E. Mediator # 3099 CR	Chapin Alternative Dispute Resolution Services 37 N. Orange Ave. Ste. 500 Orlando, FL 32801	BChapin@cfl.rr.com	407-481-8774
Clemons, Sandra Mediator #22292 CR	16820 Ivy Lake Dr. Odessa, FL 33556	blegroupmediator@aol.com	813-951-2298

Cohen, David S., Esq. Mediator # 19012 CR	Law Offices of David S. Cohen, LC 5728 Major Blvd., Ste. 550 Orlando, FL 32819	dscohenlaw@yahoo.com	(407) 354-3420
Cohen, Meredith J. Mediator # 284 CFR	Meredith J. Cohen, P.A. 1227 Golden Ln. Orlando, FL 32804-7122	mjcohen@cfl.rr.com	407-977-0021
Cole, Thomas R. Mediator # 21794 R	14430 Mirabelle Vista Circle Tampa, FL 33626	trcoleesq@aol.com	813-920-1484
Collins, Viktoria Mediator # 20426 CR	Winderweedle, Haines, Ward & Woodman, P.A. 329 Park Ave. North, 2nd Flr. Winter Park, FL 32789 P.O. Box 880 Winter Park, FL 32790-0880	vcollins@whww.com	407-246-8434
Cumming, Kathleen S. Mediator # 21337 R	Wicker, Smith, O'Hara, McCoy & Ford, P.A 390 No. Orange Ave. P. O. Box 2753 Orlando, FL 32802	kcumming@wickersmith.com	407-210-2796
Davies, Kathleen S. Mediator # 20453 R	The Davies Law Firm, P.A. 126 E. Jefferson St. Orlando FL 32801	kdavies@thedavieslawfirm.com	407-540-1010
Diaz, Anthony J. Esq., CPA Mediator #15016 CFR	The Law Firm of Anthony J. Diaz 1211 Orange Ave., Ste. 104 Winter Park, FL 32789	AnthonyDiaz@attorney-cpa.com	407-774-4949
Dirlam, Gary L. Mediator #370 CR	108 E. Hillcrest St. Orlando, FL 32801	gldirlam@netscape.com	407-377-6009
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Espinosa, Marla E. Mediator # 18993 FR	P.O.Box 300010 Fern Park, FL 32730-0010	ESPIESQ@aol.com	407-733-3662
Fencik, Gregory A. Mediator # 23976 R	Miller, South & Milhausen, P.A. 1000 Legion Pl., Ste. 1200 Orlando, Florida 32801	gfencik@millersouth.com	407-539-1638
Fleming, David L. Mediator # 20431 R	493 Cypress St. Altamonte Springs, FL 32714	dfleming2c@aim.com	407-394-3276

Geller, Charles Mediator #20710 CFR	933 Lee Rd., Ste. 335 Orlando, FL 32810	Adr.geller@gmail.com	407-834-5800
Gillham, Elizabeth S. Mediator # 18844 CR	301 E. Pine St., Ste. 150 Orlando, FL 32801	liz@lizgillham.com	407-210-6520
Gotschall, Michael H. Mediator #19293 CR	Michael H. Gotschall 931 S. Semoran Blvd., Ste. 202 Winter Park, FL 32792	mike@gotschall.us	407-617-5060
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Haynes, Ted Mediator #21058 CR	7385 Habbersham Dr. Orlando, FL 32818	tedhaynes@hotmail.com	407-403-5868 or 407-716-7849
Henry, David W. Mediator # 20434 R	Swartz Campbell, LLC 250 S. Orange Ave. Ste. P-100 Orlando FL 32801	dhenry@swartzcampbell.com	407-209-1000
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Hyland, Clement L. Mediator # 18847 R	Hyland Mediation, LLC Bank of America Building 390 N. Orange Ave., 23rd Flr. Orlando, FL 32801	chyland@hylandmediation.com	407-9561121

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Zielinski, John W. Mediator # 19515 CR	John W. Zielinski, Esquire 332 N. Magnolia Ave. Orlando FL 32801	jwz61@dbksmn.com	407-422-2454

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3. ***WM Specialty Mortgage, LLC v. Salomon,*** **874 So. 2d 680 (Fla. 4th DCA 2004)**
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2. ***Wells Fargo Bank, N.A. v. Lupica,*** **2010 WL 2218584 (Fla. 5th DCA)**

Case law applicable to foreclosure cases

STANDING ISSUES

1. *Johns v. Gillian,* 184 So. 140 (Fla. 1938)

If a note or other debt secured by mortgage is transferred without any formal assignment of the mortgage or even a delivery thereof, the mortgage in equity passes as an incident to the debt if such be the intention of the parties, unless there is some plain and clear agreement to the contrary...A mere delivery of a note and mortgage with intention to pass the title on a proper consideration will vest the equitable interest in the person to whom it is so delivered.

2. *Jeff-Ray Corp'n v. Jacobson,* 566 So. 2d 885 (Fla. 4th DCA 1990)

... the trial court erred in denying defendant's March 9, 1988, motion to dismiss for failure to state a cause of action. Appellees' complaint for mortgage foreclosure was filed on January 4, 1988, and alleged an assignment of the subject mortgage to them in 1986. However, it was not attached to the complaint. When the alleged assignment was finally produced, it was dated April 18, 1988, some four months *after the lawsuit was filed.*

3. *WM Specialty Mortgage, LLC v. Salomon,* 874 So. 2d 680 (Fla. 4th DCA 2004)

Dismissal of mortgage foreclosure complaint filed by mortgage assignee for lack of standing, on grounds that assignee failed to show its interest in mortgage on date of filing, without consideration of whether there was equitable transfer of mortgage at time complaint was filed was error; assignment was executed after date of filing, but indicated that mortgage transferred prior to date of filing.

WM Specialty cites with approval to Johns and distinguishes Jeff-Ray.

The court in Jeff-Ray held that the trial court erred in not dismissing the complaint for failure to state a cause of action because it relied upon an assignment which was not in existence at the time the complaint was filed. The court cited rule 1.130, which requires a plaintiff to attach to the complaint all documents upon which the action is based. Id.

In Jeff-Ray, there was no mention in the opinion whether, although the assignment was executed after the complaint was filed, equitable transfer of the mortgage occurred prior to that date.

4. *Chemical Residential Mortgage v. Rector*, 742 So. 2d 300 (Fla. 1st DCA 1998)

We find that the complaint properly stated a cause of action for foreclosure by the holder of the note and mortgage. When they did not timely respond to the complaint, the appellees/mortgagees waived any denial of its allegations that the appellant was the owner and holder of the note and mortgage and that the appellees had defaulted on the note and mortgage. Because the lien follows the debt, [FN1] there was no requirement of attachment of a written and recorded assignment ***301** of the mortgage in order for the appellant to maintain the foreclosure action.

The argument most frequently presented in recent motions to dismiss pertains to the plaintiff's failure to attach an assignment to its complaint. The above quoted cases address the issue to a point; however, often the failure to attach an assignment occurs where copies of the note and mortgage are attached to the complaint and contradict the allegations that the plaintiff is the holder and owner of the note because the plaintiff is rarely the lender whose name appears in the attached note. Defendants argue that the attachments to the complaint contradict the allegations in the complaint and control the court's analysis in motions to dismiss. The trial and appellate courts are addressing this argument, but a firm, consistent position is hard to discern. This is partly due to the context in which the appellate courts receive these cases which is after a motion for summary judgment has been granted. In a recent case, the 2nd DCA discussed standing in the proof stage, at summary judgment, since the defendant never set its motion to dismiss for hearing. In reversing the trial court's entry of summary judgment in favor of the plaintiff, mortgagee, the court stated,

> In this case, U.S. Bank failed to meet this burden because the record before the trial court reflected a genuine issue of material fact as to U.S. Bank's standing to foreclose the mortgage at issue. The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative. *See* Mortgage Elec. Registration Sys., Inc. v. Azize, 965 So.2d 151, 153 (Fla. 2d DCA 2007); Troupe v. Redner, 652 So.2d 394, 395-96 (Fla. 2d DCA 1995); *see also* Philogene v. ABN Amro Mortgage Group, Inc., 948 So.2d 45, 46 (Fla. 4th DCA 2006) ("[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question."). While U.S. Bank alleged in its unverified complaint that it was the holder of the note and mortgage, the copy of the mortgage attached to the complaint lists "Fremont

Investment & Loan" as the "lender" and "MERS" as the "mortgagee." When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint. *See, e.g.*, Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So.2d 399, 401 (Fla. 2d DCA 2000) ("Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and may be the basis for a motion to dismiss."); Blue Supply Corp. v. Novos Electro Mech., Inc., 990 So.2d 1157, 1159 (Fla. 3d DCA 2008); Harry Pepper & Assocs., Inc. v. Lasseter, 247 So.2d 736, 736-37 (Fla. 3d DCA 1971) (holding that when there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable"). Because the exhibit to U.S. Bank's complaint conflicts with its allegations concerning standing and the exhibit does not show that U.S. Bank has standing to foreclose the mortgage, U.S. Bank did not establish its entitlement to foreclose the mortgage as a matter of law.

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

SUMMARY JUDGMENT ISSUES

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

Genuine issue of material fact existed as to whether purported holder of note and mortgage had standing to foreclose mortgage, thus precluding summary judgment to purported holder of mortgage in foreclosure suit.

U.S. Bank also did not attach an assignment or any other evidence to establish that it had purchased the note and mortgage. Further, it did not file any supporting affidavits or deposition testimony to establish that it owns and holds the note ***939** and mortgage. Accordingly, the documents before the trial court at the summary judgment hearing did not establish U.S. Bank's standing to foreclose the note and mortgage, and thus, at this point, U.S. Bank was not entitled to summary judgment in its favor.

U.S. Bank was required to establish, through admissible evidence, that it held the note and mortgage and so had standing to foreclose the mortgage before it would be entitled to summary judgment in its favor. Whether U.S. Bank did so through evidence of a valid assignment, proof of purchase of

the debt, or evidence of an effective transfer, it was nevertheless required to prove that it validly held the note and mortgage it sought to foreclose.

The incomplete, unsigned, and unauthenticated assignment attached as an exhibit to U.S. Bank's response to BAC's motion to dismiss did not constitute admissible evidence establishing U.S. Bank's standing to foreclose the note and mortgage, and U.S. Bank submitted no other evidence to establish that it was the proper holder of the note and/or mortgage.

2. *Verizzo v. Bank of N.Y.*, 28 So. 3d 976 (Fla. 2d DCA 2010)

Failure by purported assignee of promissory note to file with the trial court **at least 20 days before hearing on its motion for summary judgment** the original promissory note or the original recorded assignment of mortgage precluded summary judgment on purported assignee's foreclosure claim; documents were part of the evidence relied on in support of the summary judgment motion, and documents were not in fact filed until the day of the summary judgment hearing.

Additionally, material issue of fact existed whether plaintiff owned and held the note as nothing in record reflected an assignment or endorsement of the note to plaintiff.

3. *Riggs v. Aurora Loan Servs.*, 2010 WL 2382584 (Fla. 4th DCA)

On rehearing, the court withdraws the previous opinion. The court agrees with the circuit court that Aurora sufficiently established that it was holder of the note. Aurora's possession of the original note, indorsed in blank, was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms.

The court distinguishes this case from *BAC Funding* on its facts. Unlike the plaintiff in *BAC Funding*, Aurora offered both affidavits and the original note with a blank endorsement that supported its claim that it was the proper holder of the note and mortgage.

POST-JUDGMENT ISSUES

1. *Admin. of Veteran's Affairs v. Bertsche*, 574 So. 2d 320 (Fla. 4th DCA 1991)

The court held that the trial court abused its discretion by refusing to reschedule sale, after movant was unable to provide required bidding instructions for sale by original date because an appraisal could not be obtained in time between judgment and sale.

2. *Wells Fargo Bank, N.A. v. Lupica*, 2010 WL 2218584 (Fla. 5th DCA)

Trial court's action in denying bank's unopposed motion to vacate foreclosure sale constituted a gross abuse of discretion.

Foreclosures are equitable proceedings under Florida law and settlements between litigants are favored. The trial court's denial of Wells Fargo's unopposed motions flies in the face of these principles. Furthermore, it was not necessary for Wells Fargo to have attached a stipulation and/or copy of a signed loan modification or forbearance agreement.[FN1] There was no basis for the trial court to reject Wells Fargo's counsel's representation, as an officer of the court, that an agreement had been reached between the parties-particularly where the Lupicas never disputed such representation. The trial court's actions constituted a gross abuse of discretion. *See, e.g.*, *Opportunity Funding I, LLC v. Otetchestvennyi*, 909 So.2d 361 (Fla. 4th DCA 2005).

C

Supreme Court of Florida.
JOHNS et ux.
v.
GILLIAN et al.
Oct. 15, 1938.
Rehearing Denied Nov. 14, 1938.

Foreclosure suit by the Everglade Lumber Company, for which Sam Gillian was substituted as party plaintiff, against J. J. Johns and Rachel Johns, his wife, and others. Decree for plaintiff, and the named defendants appeal.

Affirmed.

West Headnotes

[1] Corporations 101 ⚿444

101 Corporations
101XI Corporate Powers and Liabilities
101XI(C) Property and Conveyances
101k441 Conveyances by Corporations
101k444 k. Execution. Most Cited Cases

Corporations 101 ⚿477(3)

101 Corporations
101XI Corporate Powers and Liabilities
101XI(D) Contracts and Indebtedness
101k475 Mortgages and Trust Deeds by Corporation
101k477 Form, Requisites, and Validity
101k477(3) k. By Whom Executed. Most Cited Cases

Corporations 101 ⚿477(4)

101 Corporations
101XI Corporate Powers and Liabilities
101XI(D) Contracts and Indebtedness
101k475 Mortgages and Trust Deeds by Corporation
101k477 Form, Requisites, and Validity
101k477(4) k. Seal. Most Cited Cases

The proper execution of a deed or mortgage by a corporation requires that execution be in the name and in behalf of the corporation, and under its corporate seal. F.S.A. § 692.01.

[2] Corporations 101 ⚿480.5

101 Corporations
101XI Corporate Powers and Liabilities
101XI(D) Contracts and Indebtedness
101k475 Mortgages and Trust Deeds by Corporation
101k480.5 k. Assignment, Payment, Discharge, Release and Satisfaction. Most Cited Cases
(Formerly 101k4801/2)

Where the seals affixed to an assignment of mortgage by a corporation were the private seals of the parties signing and not the common seal of the corporation, the assignment was inoperative as the foundation of any claim to the corporate property. F.S.A. § 692.01.

[3] Corporations 101 ⚿51

101 Corporations
101IV Seal
101k51 k. Seal. Most Cited Cases

Evidence 157 ⚿383(7)

157 Evidence
157X Documentary Evidence
157X(D) Production, Authentication, and Effect
157k383 Conclusiveness and Effect
157k383(7) k. Private Contracts and Other Writings. Most Cited Cases

A corporation may alter its seal at pleasure and may adopt as its own the private seal of an individual, but when adopted, the seal must be used as the seal of the individual and cannot be treated as that of the corporation, and the declaration in an instrument that it is so affixed is conclusive of its character and effect. Comp.Gen.Laws 1927, § 5672; F.S.A. § 692.01.

[4] **Mortgages 266 ⚷235**

266 Mortgages
266V Assignment of Mortgage or Debt
266k234 Transfer of Debt or Obligation Secured
266k235 k. In General. Most Cited Cases
If a note or other debt secured by mortgage is transferred without any formal assignment of the mortgage or even a delivery thereof, the mortgage in equity passes as an incident to the debt if such be the intention of the parties, unless there is some plain and clear agreement to the contrary.

[5] **Mortgages 266 ⚷461**

266 Mortgages
266X Foreclosure by Action
266X(G) Evidence
266k461 k. Admissibility of Evidence. Most Cited Cases
Where note secured by mortgage was executed by husband and wife, renewal note signed by wife alone was void, but although an action could not be maintained on the note itself, the note could be used in foreclosure proceedings as evidence of the amount of unpaid indebtedness and terms on which loan was made.

[6] **Mortgages 266 ⚷270**

266 Mortgages
266V Assignment of Mortgage or Debt
266k270 k. Evidence. Most Cited Cases
A defectively executed assignment of mortgage by a corporation could be taken as evidence that corporation had, before commencement of foreclosure suit, sold and transferred to purported assignee the entire interest of the corporation in the note and mortgage. F.S.A. § 692.01.

[7] **Mortgages 266 ⚷235**

266 Mortgages
266V Assignment of Mortgage or Debt
266k234 Transfer of Debt or Obligation Secured
266k235 k. In General. Most Cited Cases
A mere delivery of a note and mortgage with intention to pass the title on a proper consideration will vest the equitable interest in the person to whom it is so delivered.

[8] **Mortgages 266 ⚷224**

266 Mortgages
266V Assignment of Mortgage or Debt
266k224 k. Form and Requisites of Assignments of Mortgage in General. Most Cited Cases
Any form of assignment of mortgage which transfers the real and beneficial interest in the securities unconditionally to the assignee will entitle him to maintain an action for foreclosure.

[9] **Mortgages 266 ⚷235**

266 Mortgages
266V Assignment of Mortgage or Debt
266k234 Transfer of Debt or Obligation Secured
266k235 k. In General. Most Cited Cases
The transferee of a mortgage would be entitled to foreclose in equity on proof of his purchase of the debt, notwithstanding lack of written assignment.

[10] **Mortgages 266 ⚷270**

266 Mortgages
266V Assignment of Mortgage or Debt
266k270 k. Evidence. Most Cited Cases
Evidence held sufficient to constitute transferee the equitable owner of mortgage, and to entitle him to foreclosure thereof.

[11] **Appeal and Error 30 ⚷1009(3)**

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(3) k. On Conflicting Evidence. Most Cited Cases
The conclusion of the chancellor from conflicting evidence that transferee of mortgage had not represented himself as owner to occupant, and that occupant was not entitled to an equity in the mortgaged property to the extent of the value of improvements allegedly made at transferee's request, would not be

disturbed on appeal.

[12] **Improvements 206 ⚿4(4)**

206 Improvements
206k4 Compensation
206k4(4) k. Lien. Most Cited Cases
An equitable lien on property benefited arises when a person in good faith and under a mistake as to the condition of the title makes improvements, renders services, or incurs expenses that are permanently beneficial to another's property, but such lien does not arise when the expenditures are made with knowledge of the real state of the title, or where there is an adequate remedy at law.

[13] **Improvements 206 ⚿4(2)**

206 Improvements
206k4 Compensation
206k4(2) k. Good Faith of Claimant. Most Cited Cases
A recovery cannot be had for improvements made by an occupant with actual notice of the existence of an adverse claim which subsequently appears to be superior to that of the occupant, or for improvements made with notice of anything calculated to put a man of ordinary prudence on the alert.

[14] **Mortgages 266 ⚿491**

266 Mortgages
266X Foreclosure by Action
266X(K) Judgment or Decree
266k485 Scope and Extent of Relief
266k491 k. Rights of and Relief to Defendants in General. Most Cited Cases
Where chancellor found from conflicting evidence that transferee of mortgage did not represent himself to occupant to be the owner of the mortgaged premises, and where occupant was informed by tax collector that transferee did not own the property, and thereafter occupant made improvements on the premises, occupant was not entitled in foreclosure suit to credit for improvements made on ground that transferee had fraudulently represented to occupant that he was the owner.

*577 **141 Appeal from Circuit Court, Broward County; George W. Tedder, judge. G. H. Martin, of Fort Lauderdale, for appellants.

Robert J. Davis, of Fort Lauderdale, for appellees.

PER CURIAM.

This appeal is from a final decree rendered in a suit involving the foreclosure of a mortgage on real estate. In 1923 Pearl M. Brown, a married woman, was the owner of the property, and purchased building material from Everglade Lumber Company, a corporation, for the purpose of repairing and improving the property. In payment either in full or in part for the material, the said Pearl M. Brown, and her husband Charles L. Brown, made, executed and delivered to the Everglade Lumber Company their promissory note secured by a mortgage upon the property. The mortgage was not recorded until shortly before the institution of this suit.

In 1926 Pearl M. Brown reduced the indebtedness to $400 by payment to the corporation, for which it granted her an extension of 90 days on the payment of the balance, and delivered to her the original note with the understanding that the corporation would receive a new note as evidence of the unpaid balance. The new note was given and signed by Pearl M. Brown alone, which the corporation accepted. Pearl M. Brown died, leaving as her heirs her husband and a minor daughter. The husband subsequently remarried and moved away, leaving the property abandoned.

Sam Gillian, plaintiff in the court below, had a considerable interest in Everglade Lumber Company, holding more *578 than a majority of the stock. In 1927-28, when the Everglade Lumber Company fell into financial difficulties, Gillian advanced money to the corporation for which it delivered to him a number of securities, among which was the mortgage herein sued on. No written assignment of the mortgage was made at that time.

Gillian was concerned for the protection of the property, and about 1932 he took possession of the mortgaged premises, allowing appellant J. J. Johns to move in. There is some conflict in the testimony relating to the arrangement entered into between Gillian and Johns. Gillian contends that Johns was to repair the house during his spare time and take care of it, that he (Gillian) was to furnish the materials for

making it livable and that Johns could apply whatever charge he made for services on the rent. Johns contends that the property was to be the home of himself and his wife for the balance of their lives.

In January, 1937, Gillian began foreclosure proceedings in the name of the corporation, naming as defendants the heirs of Pearl M. Brown and Johns and his wife. When it was discovered that the debt and mortgage had been transferred to Gillian in 1927 or 1928 the directors of Everglade Lumber Company executed a written assignment, purporting to assign the mortgage to Gillian, and Gillian was substituted as plaintiff. Decrees pro confesso were entered against the heirs of Pearl M. Brown. Appellants J. J. Johns and Rachel Johns, his wife, appeared and upon their amended answer the issues were made up and the cause proceeded.

A final decree was rendered in favor of the plaintiff allowing him credits for payments made on taxes, materials and plumbing supplies. The lower court recognized Johns as a tenant of Gillian, and allowed the heirs of the mortgagor a credit for rent in the final decree, but refused to ***579** allow appellant Johns any credit for the improvements made by him. From the final decree this appeal was taken.

Appellant Johns in his brief has stated his first question as follows:

'Where there is no proof that a corporation of Florida has or has not been dissolved, does an Assignment of Mortgage, executed by several persons designated to be directors, who signed in their respective individual capacity, operate to transfer ownership of a mortgage of which the corporation is mortgagee?'

Section 5672, Comp.Gen.Laws 1927, sets out the method by which a corporation may convey lands:

'Any corporation may convey lands by deed sealed with the common or corporate seal and signed in its name by its president or any vice-president or chief executive officer.'

The formal parts of the assignment are as follows:

'Know all men by these presents: That U. S. Caoyt, Sam Gillian, Mrs. Ivey Stranahan and William Wingate, Directors of Everglade Lumber Company, a corporation, of the first part, in consideration of the sum of Ten Dollars and other valuable consideration, Dollars, lawful money of the United States, to them in hand paid by Sam Gillian, * * *' etc.

The attestation clause reads thus:

'In witness whereof, we have hereunto set our hands and seals, the 17th day of ****143** February, in the year one thousand and nine hundred and thirty-seven. U. S. Cayot, Pres. (Seal); Sam Gillian, Sec. Tr. (Seal); Ivy J. Stranahan (Seal); William Wingate (Seal):'

The certificate of acknowledgment states that:

'* * * before me personally came U. S. Cayot, Sam Gillian, Mrs. Ivey Stranahan and William Wingate, to me known to be the individuals described in and who executed the within and foregoing assignment, and they acknowledge before ***580** me that they executed the same for the purposes therein expressed.'

[1][2][3] Private seals of officers and directors are not seals of the corporation. Mitchell v. St. Andrews Bay Land Co., 4 Fla. 200. It is essential to the proper execution of a deed or mortgage by a corporation that it be done in the name and in behalf of the corporation, and under its corporate seal. The seals affixed in the above assignment are the private seals of the parties signing, and not the common seal of the corporation. The attestation clause is conclusive of this point, and as the corporation could only convey under its corporate seal, the assignment is necessarily inoperative as the foundation of any right or claim to the corporate property. A corporation may alter its seal at pleasure, and may adopt as its own the private seal of an individual if it chooses to do so, but when adopted it must be used as the seal of the individual, it cannot be treated as that of the corporation, and a declaration in the instrument that it is so affixed is conclusive of its character and effect. Brown et al. v. Farmers' Supply Depot Co. et al., 23 Or. 541, 32 P. 548; Richardson v. Scott River W. & M. Co., 22 Cal. 150; Shackleton v. Allen Chapel African M. E. Church, 25 Mont. 421, 65 P. 428; Combe's Case, 9 Co. Rep. 75(a), 76(b), 77 Reprint 843, 847; Brinley v. Mann, 2 Cush., Mass., 337, 48 Am.Dec. 669; Notes to 7 Am.Dec., page 450; See, also Campbell v. McLaurin Investment Co., 74 Fla. 501, 77 So. 277.

[4] However, it has frequently been held that a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt. If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt, unless there be some plain and clear agreement***581** to the contrary, if that be the intention of the parties. Jones on Mortgages, Vol. 2, Sec. 1033; Collins v. W. C. Briggs, Inc., 98 Fla. 422, 123 So. 833; Miami Mortgage & Guaranty Co. v. Drawdy, 99 Fla. 1092, 127 So. 323.

[5] The renewal note signed by Pearl M. Brown alone was, of course, void. Although an action may not be maintained on the note itself, it can be used in the foreclosure proceedings as evidence of the amount of the unpaid indebtedness and the terms on which the loan was made. National Granite Bank v. Tyndale, 176 Mass. 547, 57 N.E. 1022, 51 L.R.A. 447.

[6][7] Although the assignment of the mortgage from Everglade Lumber Company to Gillian was defectively executed, it may be taken as evidence to show that the company had, before the commencement of the suit, sold and transferred to Gillian its entire interest in the note and mortgage. Dougherty v. Randall, 3 Mich. 581. A mere delivery of a note and mortgage, with intention to pass the title, upon a proper consideration, will vest the equitable interest in the person to whom it is so delivered. Daly v. New York & G. L. Ry. Co. et al., 55 N.J.Eq. 595, 38 A. 202.

'The transfer of the note or obligation evidencing the debt being as a general rule the equivalent of the assignment of the debt itself, such transfer operates as an assignment of the mortgage securing the debt, and it is not necessary that the mortgage papers be transferred, nor, in order that the beneficial interest shall pass, that a written assignment be made.' 41 C.J., Mortgages, Sec. 686, pp. 673.

'Generally speaking, wherever it was the intention of the parties to a transaction that the mortgage interest should pass, but a written assignment was not made, or else the writing was insufficient to transfer the legal title to the security, equity will effectuate such intention and invest the ***582** intended owner of the mortgage with the equitable title thereto.' 41 C.J., Mortgages, Sec. 691, pp. 677.

[8][9] Any form of assignment of a mortgage, which transfers the real and beneficial interest in the securities unconditionally to the assignee, will entitle him to maintain an action for foreclosure. See Jones on Mortgages (8 Ed.), Sec. 1029, and cases cited. Or if there had been no written assignment, Gillian would be entitled***144** to foreclose in equity upon proof of his purchase of the debt. Pease v. Warren, 29 Mich. 9, 18 Am.Rep. 58.

[10] In the foreclosure proceedings appellee Gillian gave the following testimony in regard to the transfer of the debt owned by the Browns to Everglade Lumber Company:

'Mr. Davis: Q. And who is the owner of this note at the present time?

'Mr. Martin: Object to the question, it calls for the conclusion of the witness.

'Witness: A. I am.

'Mr. Davis: Q. How did you acquire the note? A. Bought it from the Everglade Lumber Co.

'Q. And did they give you any evidence of the sale of the note? A. Well, they assigned the note to me. I don't just understand the question.

'Q. Did they give you any written evidence of the transfer of the note to you? A. Well, when I take over papers of that kind the officers of the company transfer it as they do in any transaction.'

And upon cross-examination by Mr. Martin, Gillian testified as follows:

'Q. Did you ever see any deed of conveyance of any sort to that property from any person? A. Why the lumber company conveyed their interests to me, whatever it is.

'Q. Did you or the lumber company, one of the two ***583** have a deed to the property from the Browns or from some other person? A. Well, it isn't my understanding, with the exception of the mortgage deed, that we had. We had a mortgage there.

'Q. You told Mr. Johns here that you owned the property didn't you when you put him in possession? A. No.

'Q. How long before Mr. Johns went into possession was it that you took possession of the property? A. I don't know exactly, we made some transfers, at least things went to pieces, and I put up some money for the company, and they gave me as security that property and other stuff. I was trying to carry the company along, and that was the time that that happened.

'Q. When did you become the owner of this mortgage then? A. It was back in probably in 1927 or '28. That was the time we had the trouble. That was when they transferred a bunch of the stuff to me as security. I could find out by going to the records.

'Q. When you started this case last winter, you told your attorney that the Everglade Lumber Co. owned that mortgage did you not? A. Well, I think the mortgage is made out to me, or something to that effect.

'Q. But you owned the mortgage from 1927? A. Yes, down to date, from whatever time the transfers were made, of a bunch of securities, I don't remember what time it was, I just don't remember.'

The testimony as to the assignment of the debt and other securities was uncontradicted. We are of the opinion that this was sufficient to constitute Gillian the equitable owner of the mortgage and entitle him to foreclose the same.

[11] Appellants further contend that irrespective of where the ownership of the alleged mortgage reposes, the fact that appellants made valuable improvements on the mortgaged property at the request of Gillian, who represented himself ***584** to be the owner of the property, gives appellants an equity in the property to the extent of the value of the improvements, that is superior to the rights of the holder of the mortgage. This contention is based upon allegations and testimony that Gillian represented himself to be the owner of the property in question and Johns, without knowledge of the real state of the title, was misled by these misrepresentations. However, Gillian denied that he made such representations and contended that his understanding with Johns was that he (Johns) could move into the property involved herein and repair it during his spare time, that Gillian would furnish the materials, and that Johns could apply whatever charge he made for services on the rent.

The decree of the court below could not have been rendered denying appellant Johns the right to compensation for his alleged improvements unless the chancellor found that Gillian had not represented himself to be the owner of the property and Johns made the improvements with knowledge of the true state of the title. Because of the fact that the evidence upon the question of appellee Gillian's representations as to his ownership of the property involved herein was conflicting, we cannot say that the conclusion of the chancellor was clearly erroneous. Smith v. Hollingsworth 85 Fla. 431, 96 So. 394.

[12] The rule as to when an equitable lien arises by implication for improvements ****145** or benefits to property is set out as follows in 37 C.J. 321, Liens, Sec. 26:

'An equitable lien on the property benefited has been held to arise where a person in good faith, and under a mistake as to the condition of the title, makes improvements, renders services, or incurs expenses that are permanently beneficial to another's property. But there is no such lien where the expenditures are made with knowledge of the ***585** real state of the title; nor will such a lien arise where there is an adequate remedy at law.'

[13] And in a Note in Ann.Cas.1916B, 57, it is stated:

'As a corollary of the rule that an occupying claimant ousted by a paramount title can recover for such improvements only as are made under a bona fide belief in his own title, many decisions have announced the broad proposition that no recovery can be had for improvements made with actual notice of the existence of an adverse claim which subsequently proves to be superior to that of the occupant.'

Notice in this connection does not mean direct and positive information; but anything calculated to put a man of ordinary prudence on the alert is notice. Note in Ann.Cas.1916B, 59; Lee v. Bowman et al., 55 Mo. 400.

[14] Appellant Johns in his testimony stated that when he first started to make repairs on the property he went to Mr. Moore, the Tax Collector, at the request of appellee Gillian to get a tax statement on the property, and that Mr. Moore informed him that appellee Gillian did not own the property, This was clearly sufficient to put a man of ordinary prudence on the alert.

The facts, as found by the chancellor and by which we are bound, are that Gillian did not represent himself to be the owner of the property in question, that Johns had knowledge of the real state of the title, and that the improvements were made subsequently to Johns' acquisition of such knowledge. Under these facts the cases cited by appellants in their brief based upon the alleged fraudulent representations of Gillian are not controlling. The decree of the Circuit Court is therefore affirmed.

ELLIS, C. J., and WHITFIELD, TERRELL, BROWN, BUFORD, and CHAPMAN, JJ., concur.
Fla. 1938
Johns v. Gillian
134 Fla. 575, 184 So. 140

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566 So.2d 885, 15 Fla. L. Weekly D2278
(Cite as: 566 So.2d 885)

District Court of Appeal of Florida,
Fourth District.

JEFF-RAY CORPORATION, Appellant,
v.
James Cary JACOBSON, Bruce M. Gottlieb and Mary E. Jacobson, Appellees.
Nos. 88-2594, 88-3363.

Sept. 12, 1990.

In a mortgage foreclosure action, the Circuit Court, Broward County, Joseph E. Price, Jr., J., granted summary judgment for plaintiffs and denied defendant's subsequent motion for relief and rehearing. Defendant appealed. The District Court of Appeal held that: (1) denial of motion for rehearing was improper in light of showing that substantial prejudice was likely to occur if defendant was not allowed to rebut and show misrepresentation or mistake in the amount due, and (2) foreclosure action could not be based on alleged assignment of mortgage which did not exist until four months after complaint was filed.

Reversed and remanded.

Stone, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] **Judgment 228 ⚿343**

228 Judgment
228IX Opening or Vacating
228k343 k. Right to Relief in General. Most Cited Cases
Defendant was entitled to relief from summary judgment entered in a mortgage foreclosure action in light of showing that substantial prejudice was likely to occur if not allowed to rebut and show misrepresentation or mistake as to the amount due which was substantially at variance with the defendant's claimed amortization.

[2] **Mortgages 266 ⚿417**

266 Mortgages
266X Foreclosure by Action
266X(B) Right to Foreclose and Defenses
266k417 k. Persons Entitled to Foreclose. Most Cited Cases
Mortgage foreclosure action could not be based on an alleged assignment of the mortgage which did not exist until four months after complaint was originally filed.

***885** Oliver Addison Parker of Law Office of Oliver Addison Parker, Fort Lauderdale, for appellant.

Charles A. Finkel of Jacobson and Associates, Hollywood, for appellees.

PER CURIAM.

[1] We reverse the final summary judgment entered in favor of the plaintiffs in this mortgage foreclosure. The appellant made an unrebutted showing that it did not receive notice of the summary judgment motion or hearing until receipt of the judgment itself. It was an abuse of discretion for the trial court to deny appellant's motion for relief and rehearing. The appellant has shown the likelihood that substantial prejudice may occur if not allowed to rebut and show misrepresentation or mistake in the amount due, which is substantially at variance with the defendant's claimed amortization.

***886** We recognize that an apparent prior lack of diligence in the defense may have influenced the trial court decision on the motion for rehearing. However, in the absence of findings or any rebuttal of the appellant's affidavits, the motion for rehearing should have been granted. We note that the defendants' motion was filed immediately upon receipt of the court order. *Cf.* *Zimmerman v. Vinylgrain Indus.*, 464 So.2d 1353 (Fla. 1st DCA 1985); *Lacore v. Giralda Bake Shop, Inc.*, 407 So.2d 275 (Fla. 3d DCA 1981). *See also* *Okeechobee Ins. Agency, Inc. v. Barnett Bank*, 434 So.2d 334 (Fla. 4th DCA 1983).

We also reverse and remand on the second point raised by appellant; that is, that the trial court erred in

denying defendant's March 9, 1988, motion to dismiss for failure to state a cause of action. Appellees' complaint for mortgage foreclosure was filed on January 4, 1988, and alleged an assignment of the subject mortgage to them in 1986. However, it was not attached to the complaint. When the alleged assignment was finally produced, it was dated April 18, 1988, some four months *after the lawsuit was filed.*

[2] Our opinion in *Safeco Insurance Co. v. Ware*, 401 So.2d 1129 (Fla. 4th DCA 1981), would support dismissal of the action based on failure to comply with Florida Rule of Civil Procedure 1.130. Given the scenario before us, appellees' complaint could not have stated a cause of action at the time it was filed, based on a document that did not exist until some four months later. *Marianna & B.R. Co. v. Maund*, 62 Fla. 538, 56 So. 670 (Fla.1911). If appellees intend to proceed on the April 18, 1988, assignment, they must file a new complaint.

Therefore, the final summary judgment is reversed and remanded for further proceedings in accordance with this opinion.

ANSTEAD and POLEN, JJ., concur.
STONE, J., concurs in part and dissents in part with opinion.STONE, Judge, concurring in part and dissenting in part.
I concur in reversing the order denying appellant's motion for relief and rehearing for the reasons stated in the majority opinion. As to the second point discussed in the majority opinion and as to all other issues raised on appeal, I would affirm.

Fla.App. 4 Dist.,1990.
Jeff-Ray Corp. v. Jacobson
566 So.2d 885, 15 Fla. L. Weekly D2278

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874 So.2d 680, 29 Fla. L. Weekly D1268
(Cite as: 874 So.2d 680)

H

District Court of Appeal of Florida,
Fourth District.
WM SPECIALTY MORTGAGE, LLC, Appellant,
v.
Alan F. SALOMON and Frances Salomon, et al., Appellees.
No. 4D03-3318.

May 26, 2004.

Background: Assignee of mortgagee brought foreclosure action and obtained default judgment. Mortgagor moved to vacate default. The Circuit Court, 17th Judicial District, Broward County, J. Leonard Fleet, J., vacated default and dismissed complaint. Assignee appealed.

Holding: The District Court of Appeal, Stevenson, J., held that dismissal of complaint without consideration of assignee's equitable interest was error.
Affirmed in part, reversed in part, and remanded.

West Headnotes

Mortgages 266 ⚿429

266 Mortgages
266X Foreclosure by Action
266X(E) Parties and Process
266k428 Plaintiffs
266k429 k. In General. Most Cited Cases
Dismissal of mortgage foreclosure complaint filed by mortgage assignee for lack of standing, on grounds that assignee failed to show its interest in mortgage on date of filing, without consideration of whether there was equitable transfer of mortgage at time complaint was filed was error; assignment was executed after date of filing, but indicated that mortgage transferred prior to date of filing. West's F.S.A. RCP Rule 1.130.

*680 Mark Broderick of Echevarria & Associates, P.A., Tampa, for appellant.

Gary Barcus, Pembroke Pines, for appellees Alan and Frances Salomon.

STEVENSON, J.

In the instant case, WM Specialty Mortgage, LLC, (WM Specialty) appeals a final order dismissing its mortgage foreclosure action with prejudice and an order vacating default. We affirm the order vacating default, but reverse the order of dismissal.

On December 3, 2002, WM Specialty filed a mortgage foreclosure complaint *681 against the borrower/appellee, Alan F. Salomon. Salomon failed to respond to the complaint and a default was entered. He subsequently hired an attorney, however, who moved to vacate the default. In addition, Salomon filed a motion to dismiss, along with affidavits. Salomon challenged the complaint as not complying with Florida Rule of Civil Procedure 1.130(a) in that it attached a mortgage in favor of Fremont Investment and Loan (Fremont), but no assignment of mortgage showing that WM Specialty was in privity with Fremont. In his affidavit, Salomon stated that he did not execute a mortgage with WM Specialty. In response, WM Specialty filed an assignment of mortgage.

The assignment reflected that the mortgage was transferred to WM Specialty by Fremont on November 25, 2002; however, the jurat indicated that the assignment was not executed until January 3, 2003. Following a hearing, the trial court entered an order vacating the default against Salomon, finding that

> [T]he present plaintiff, WM Specialty Mortgage, LLC, did not own and hold the note when it filed its foreclosure lawsuit on December 3, 2002; did not own and hold the note when it served Alan Salomon and Frances Salomon on December 17, 2002; and only on January 3, 2003, at the earliest did the plaintiff acquire the mortgage note by assignment, long after the lawsuit was filed and after these named defendants were served. The complaint is therefore void *ab initio*.

In a subsequent order entitled "Final Order," the court denied a motion to compel discovery as moot, stating

874 So.2d 680, 29 Fla. L. Weekly D1268
(Cite as: 874 So.2d 680)

> The July 23, 2003 Order Vacating Defaults found that plaintiff's complaint was void ab initio since the assignment of mortgage was executed after the complaint was filed. The effect of this finding was to dismiss the complaint as of July 23, 2003. Plaintiff may file refile [sic] a separate [sic] action as the July 23, 2003 Order did not provide for amending the complaint.

WM Specialty filed a timely notice of appeal.

Procedurally, the instant case presents itself to this court in a somewhat awkward posture. Instead of challenging WM Specialty's interest in a motion to dismiss, Salomon did so in his motion to vacate the default. In disposing of that motion, the court granted the motion, but went further than vacating the default and found that the complaint was "*void ab initio.*" Subsequently, in denying a motion to compel discovery as moot, the trial court indicated that the effect of the earlier order vacating the default was to dismiss the complaint as of the date of that order. Because the trial court clearly intended that the two orders finally dispose of the case, this court has jurisdiction.[FN1]

> FN1. In the order on the motion to compel, the trial court indicated that WM Specialty could refile a separate action since the order vacating default and dismissing the complaint did not provide the opportunity for WM Specialty to amend the complaint.

In vacating the default against Salomon and essentially dismissing the cause for lack of standing, the trial court relied upon *Jeff-Ray Corp. v. Jacobson*, 566 So.2d 885, 886 (Fla. 4th DCA 1990). In that case, the defendant sought to dismiss a foreclosure complaint on the ground that it failed to state a cause of action. The trial court denied the motion to dismiss. This court reversed because the complaint for foreclosure, which had been filed on January 4, 1988, had alleged an assignment of mortgage dated in 1986, but the assignment was not attached to the complaint. When the assignment was produced, it was dated ***682** April 18, 1988, some four months after the lawsuit was filed. *Id.*

The court in *Jeff-Ray* held that the trial court erred in not dismissing the complaint for failure to state a cause of action because it relied upon an assignment which was not in existence at the time the complaint was filed. The court cited rule 1.130, which requires a plaintiff to attach to the complaint all documents upon which the action is based. *Id.*

In *Jeff-Ray*, there was no mention in the opinion as to whether, although the assignment was executed after the complaint was filed, equitable transfer of the mortgage occurred prior. This situation was addressed in *Johns v. Gillian*, 134 Fla. 575, 184 So. 140, 143 (1938). In *Johns*, a homeowner purchased building materials from a lumber company in 1923 and gave, in exchange for the debt, the promissory note and mortgage on her home. *Id.* at 141. The homeowner thereafter died. In 1927, the lumber company fell on hard times and received an advance of money from Gillian. In exchange, the company delivered to Gillian a number of securities, among which was the homeowner's note and mortgage. No assignment of the mortgage was executed. *Id.*

In 1937, Gillian began foreclosure proceedings in the name of the company against the homeowner's surviving husband and heirs. After suit was initiated, the company executed an assignment purporting to assign the note and mortgage to Gillian and Gillian was substituted as the plaintiff. *Id.* The assignment was found to have been defectively executed because the corporate seal was not used; the court nevertheless held that equitable interest in the property had passed to Gillian, based on the following reasoning:

> However, it has frequently been held that a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt. If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt, unless there be some plain and clear agreement to the contrary, if that be the intention of the parties.
>
> ....
>
> Although the assignment of the mortgage from Everglade Lumber Company to Gillian was defectively executed, it may be taken as evidence to show that the company had, before the commencement of the suit, sold and transferred to Gillian its entire interest in the note and mortgage. A mere delivery of a note and mortgage, with in-

> tention to pass the title, upon a proper consideration, will vest the equitable interest in the person to whom it is so delivered.
>
> ....
>
> Any form of assignment of a mortgage, which transfers the real and beneficial interest in the securities unconditionally to the assignee, will entitle him to maintain an action for foreclosure. Or if there had been no written assignment, Gillian would be entitled to foreclose in equity upon proof of his purchase of the debt.

Id. at 143-44 (citations omitted).

The analysis applied in *Johns* is applicable to this case; therefore, the dismissal was error. Here, the assignment indicates that on November 25, 2002, Fremont physically transferred the mortgage to WM Specialty, even though the assignment was not actually executed until January 3, 2003. At a minimum, as WM Specialty suggests, the court should have upheld the complaint because it stated a cause of action, but considered the issue of WM Specialty's***683** interest on a motion for summary judgment. An evidentiary hearing would have been the appropriate forum to resolve the conflict which was apparent on the face of the assignment, i.e., whether WM Specialty acquired interest in the mortgage prior to the filing of the complaint.

Accordingly, we reverse the order of dismissal and remand for further proceedings. Appellant has failed to demonstrate error with respect to the order vacating default.

AFFIRMED in part, REVERSED in part, and REMANDED.

GUNTHER and TAYLOR, JJ., concur.
Fla.App. 4 Dist.,2004.
WM Specialty Mortg., LLC v. Salomon
874 So.2d 680, 29 Fla. L. Weekly D1268

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742 So.2d 300, 23 Fla. L. Weekly D2273
(Cite as: 742 So.2d 300)

H

District Court of Appeal of Florida,
First District.

CHEMICAL RESIDENTIAL MORTGAGE,
formerly known as Margaretten & Company, Inc.,
now known as Chase Manhattan Mortgage Corporation, Appellant,
v.
Terry RECTOR and Patricia Rector, et al., Appellees.
Nos. 97-4380, 98-432.

Oct. 7, 1998.

In mortgage foreclosure action, the Circuit Court, Duval County, Karen K. Cole, J., vacated final judgment of foreclosure. Mortgagor appealed. The District Court of Appeal, Barfield, C.J., held that by failing to timely respond to complaint, mortgagees waived any denial of complaint's allegations that mortgagor was the owner and holder of note and mortgage, and that mortgagees had defaulted on note and mortgage.

Reversed and remanded with directions.

West Headnotes

Mortgages 266 ⚿454(2)

266 Mortgages
266X Foreclosure by Action
266X(F) Pleading
266k454 Plea, Answer, or Affidavit of Defense
266k454(2) k. Denials. Most Cited Cases
By failing to timely respond to complaint, mortgagees waived any denial of complaint's allegations that mortgagor was the owner and holder of note and mortgage, and that mortgagees had defaulted on note and mortgage.

***300** Roger D. Bear of Roger D. Bear, P.A, Orlando, and Shawn G. Rader of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, for Appellant.

Fred Tromberg and Deborah L. Greene of Tromberg & Safer, Jacksonville, for Appellees Terry Rector and Patricia Rector.

BARFIELD, Chief Judge.

In this appeal from several orders entered in a mortgage foreclosure action, we find that the trial court erred as a matter of law in its order of June 30, 1997, in which it denied the appellant/mortgagor's April 23, 1997, motion to amend the final judgment of foreclosure and reset the sale date, vacated the April 7, 1995, final judgment of foreclosure, and vacated the August 5, 1996, order amending the final judgment. We find that the complaint properly stated a cause of action for foreclosure by the holder of the note and mortgage. When they did not timely respond to the complaint, the appellees/mortgagees waived any denial of its allegations that the appellant was the owner and holder of the note and mortgage and that the appellees had defaulted on the note and mortgage. Because the lien follows the debt, [FN1] there was no requirement of attachment of a written and recorded assignment ***301** of the mortgage in order for the appellant to maintain the foreclosure action.

FN1. *See, Warren v. Seminole Bond & Mortgage Co.*, 127 Fla. 107, 172 So. 696 (1937); *Johns v. Gillian*, 134 Fla. 575, 184 So. 140 (Fla.1938); *American Central Ins. Co. v. Whitlock*, 122 Fla. 363, 165 So. 380 (1936); *Collins v. W.C. Briggs, Inc.*, 98 Fla. 422, 123 So. 833 (1929); *Drake Lumber Co. v. Semple*, 100 Fla. 1757, 130 So. 577 (1930).

The June 30, 1997, order is REVERSED. The appellees' motion for appellate attorney fees is DENIED. The appellant is entitled to appellate attorney fees. This case is REMANDED to the trial court, which shall reinstate the April 7, 1995, final judgment of foreclosure, vacate its order of June 30, 1997, and all subsequent orders, reconsider the appellant's motion to amend the final judgment of foreclosure and set a new sale date, and determine a reasonable appellate attorney fee.

DAVIS, J. and SHIVERS, DOUGLASS B., Senior Judge, concur.

742 So.2d 300, 23 Fla. L. Weekly D2273
(Cite as: 742 So.2d 300)

Fla.App. 1 Dist.,1998.
Chemical Residential Mortg. v. Rector
742 So.2d 300, 23 Fla. L. Weekly D2273

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28 So.3d 936, 35 Fla. L. Weekly D369
(Cite as: 28 So.3d 936)

H

District Court of Appeal of Florida,
Second District.
BAC FUNDING CONSORTIUM INC. ISAOA/ATIMA, Appellant,
v.
Ginelle JEAN-JACQUES, Serge Jean-Jacques, Jr., and U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset Backed Certificates, Series 2006-CB5, Appellees.
No. 2D08-3553.

Feb. 12, 2010.
Rehearing Denied March 26, 2010.

Background: Purported holder of note and mortgage filed foreclosure suit against mortgagors. The Circuit Court, Sarasota County, Robert B. Bennett, Jr., J., granted summary judgment to purported mortgage and note holder. Mortgagors appealed.

Holding: The District Court of Appeal, Villanti, J., held that genuine issue of material fact existed as to whether purported note and mortgage had standing to foreclose mortgage.

Reversed and remanded.

West Headnotes

[1] Judgment 228 ⚿181(25)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(25) k. Mortgages and secured transactions, cases involving. Most Cited Cases
Genuine issue of material fact existed as to whether purported holder of note and mortgage had standing to foreclose mortgage, thus precluding summary judgment to purported holder of mortgage in foreclosure suit.

[2] Mortgages 266 ⚿429

266 Mortgages
266X Foreclosure by Action
266X(E) Parties and Process
266k428 Plaintiffs
266k429 k. In general. Most Cited Cases

Mortgages 266 ⚿431

266 Mortgages
266X Foreclosure by Action
266X(E) Parties and Process
266k428 Plaintiffs
266k431 k. Holders of obligations secured. Most Cited Cases
The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative.

[3] Judgment 228 ⚿185(4)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(4) k. Documentary evidence or official record. Most Cited Cases

Judgment 228 ⚿185.3(15)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(15) k. Liens and mortgages. Most Cited Cases
Incomplete, unsigned, and unauthenticated assignment of mortgage attached as an exhibit to purported mortgage and note holder's response to motion to dismiss did not constitute admissible summary judgment evidence establishing purported mortgage holder's standing to foreclose note and mortgage.

[4] Pleading 302 ⚿312

302 Pleading

28 So.3d 936, 35 Fla. L. Weekly D369
(Cite as: 28 So.3d 936)

302X Exhibits
302k312 k. Variance between pleading and instrument annexed, filed, or referred to. Most Cited Cases
When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint.

***936** F. Malcolm Cunningham, Jr., and Amy Fisher of The Cunningham Law Firm, P.A., West Palm Beach, for Appellant.

***937** Cindy L. Runyan of Florida Default Law Group, LP, Tampa, for Appellee U.S. Bank National Association.

No appearance for Appellees Ginelle M. Jean-Jacques and Serge Jean-Jacques, Jr.

VILLANTI, Judge.

BAC Funding Consortium Inc. ISAOA/ATIMA (BAC) appeals the final summary judgment of foreclosure entered in favor of U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset Backed Certificates, Series 2006-CB5 (U.S. Bank). Because summary judgment was prematurely entered, we reverse and remand for further proceedings.

On December 14, 2007, U.S. Bank filed an unverified mortgage foreclosure complaint naming the Jean-Jacqueses and BAC as defendants. The complaint included one count for foreclosure of the mortgage and a second count for reestablishment of a lost note. U.S. Bank attached a copy of the mortgage it sought to foreclose to the complaint; however, this document identified Fremont Investment and Loan as the "lender" and Mortgage Electronic Registrations Systems, Inc., as the "mortgagee." U.S. Bank also attached an "Adjustable Rate Rider" to the complaint, which also identified Fremont as the "lender."

Rather than answering the complaint, BAC responded by filing a motion to dismiss based on U.S. Bank's lack of standing. BAC argued that none of the attachments to the complaint showed that U.S. Bank actually held the note or mortgage, thus giving rise to a question as to whether U.S. Bank actually had standing to foreclose on the mortgage. BAC argued that the complaint should be dismissed based on this lack of standing.

U.S. Bank filed a written response to BAC's motion to dismiss. Attached as Exhibit A to this response was an "Assignment of Mortgage." However, the space for the name of the assignee on this "assignment" was blank, and the "assignment" was neither signed nor notarized. Further, U.S. Bank did not attach or file any document that would authenticate this "assignment" or otherwise render it admissible into evidence.

For reasons not apparent from the record, BAC did not set its motion to dismiss for hearing. Subsequently, U.S. Bank filed a motion for summary judgment. At the same time, U.S. Bank voluntarily dismissed its count for reestablishment of a lost note, and it filed the "Original Mortgage and Note" with the court. However, neither of these documents identified U.S. Bank as the holder of the note or mortgage in any manner. U.S. Bank did not file the original of the purported "assignment" or any other document to establish that it had standing to foreclose on the note or mortgage.

Despite the lack of any admissible evidence that U.S. Bank validly held the note and mortgage, the trial court granted summary judgment of foreclosure in favor of U.S. Bank. BAC now appeals, contending that the summary judgment was improper because U.S. Bank never established its standing to foreclose.

The summary judgment standard is well-established. "A movant is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.*, 928 So.2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla. R. Civ. P. 1.510(c)). When a plaintiff moves for summary***938** judgment before the defendant has filed an answer, "the burden is upon the plaintiff to make it appear to a certainty that no answer which the defendant might properly serve could present a genuine issue of fact." *Settecasi v. Bd. of Pub. Instruction of Pinellas County*, 156 So.2d 652, 654 (Fla. 2d DCA 1963); *see also W. Fla. Cnty. Builders, Inc. v. Mitchell*, 528 So.2d 979, 980 (Fla. 2d DCA 1988) (holding that when plaintiffs move for sum-

mary judgment before the defendant files an answer, "it [is] incumbent upon them to establish that no answer that [the defendant] could properly serve or affirmative defense it might raise" could present an issue of material fact); *E.J. Assocs., Inc. v. John E. & Aliese Price Found., Inc.*, 515 So.2d 763, 764 (Fla. 2d DCA 1987) (holding that when a plaintiff moves for summary judgment before the defendant files an answer, "the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact"). As these cases show, a plaintiff moving for summary judgment before an answer is filed must not only establish that no genuine issue of material fact is present in the record as it stands, but also that the defendant could not raise any genuine issues of material fact if the defendant were permitted to answer the complaint.

[1][2][3][4] In this case, U.S. Bank failed to meet this burden because the record before the trial court reflected a genuine issue of material fact as to U.S. Bank's standing to foreclose the mortgage at issue. The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative. *See* *Mortgage Elec. Registration Sys., Inc. v. Azize*, 965 So.2d 151, 153 (Fla. 2d DCA 2007); *Troupe v. Redner*, 652 So.2d 394, 395-96 (Fla. 2d DCA 1995); *see also* *Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So.2d 45, 46 (Fla. 4th DCA 2006) ("[W]e conclude that ABN had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question."). While U.S. Bank alleged in its unverified complaint that it was the holder of the note and mortgage, the copy of the mortgage attached to the complaint lists "Fremont Investment & Loan" as the "lender" and "MERS" as the "mortgagee." When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint. *See, e.g.*, *Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So.2d 399, 401 (Fla. 2d DCA 2000) ("Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits control[s] and may be the basis for a motion to dismiss."); *Blue Supply Corp. v. Novos Electro Mech., Inc.*, 990 So.2d 1157, 1159 (Fla. 3d DCA 2008); *Harry Pepper & Assocs., Inc. v. Lasseter*, 247 So.2d 736, 736-37 (Fla. 3d DCA 1971) (holding that when there is an inconsistency between the allegations of material fact in a complaint and attachments to the complaint, the differing allegations "have the effect of neutralizing each allegation as against the other, thus rendering the pleading objectionable"). Because the exhibit to U.S. Bank's complaint conflicts with its allegations concerning standing and the exhibit does not show that U.S. Bank has standing to foreclose the mortgage, U.S. Bank did not establish its entitlement to foreclose the mortgage as a matter of law.

Moreover, while U.S. Bank subsequently filed the original note, the note did not identify U.S. Bank as the lender or holder. U.S. Bank also did not attach an assignment or any other evidence to establish that it had purchased the note and mortgage. Further, it did not file any supporting affidavits or deposition testimony to establish that it owns and holds the note ***939** and mortgage. Accordingly, the documents before the trial court at the summary judgment hearing did not establish U.S. Bank's standing to foreclose the note and mortgage, and thus, at this point, U.S. Bank was not entitled to summary judgment in its favor.

In this appeal, U.S. Bank contends that it was not required to file an assignment of the note or mortgage or otherwise prove that it validly held them in order to be entitled to summary judgment in its favor. We disagree for two reasons. First, because BAC had not yet answered the complaint, it was incumbent on U.S. Bank to establish that no answer that BAC could properly serve or affirmative defense that it might allege could raise an issue of material fact. Given the facial conflict between the allegations of the complaint and the contents of the exhibit to the complaint and other filings, U.S. Bank failed to meet this burden.

Second, regardless of whether BAC answered the complaint, U.S. Bank was required to establish, through admissible evidence, that it held the note and mortgage and so had standing to foreclose the mortgage before it would be entitled to summary judgment in its favor. Whether U.S. Bank did so through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer, it was nevertheless required to prove that it validly held the note and mortgage it sought to foreclose. *See* *Booker v. Sarasota, Inc.*, 707 So.2d 886, 889 (Fla. 1st DCA 1998) (holding that the trial court, when considering a motion for summary judgment in an action on a promissory note, was not permitted to simply assume that the plaintiff was the holder of the note in the absence of record evidence of such). The incomplete,

unsigned, and unauthenticated assignment attached as an exhibit to U.S. Bank's response to BAC's motion to dismiss did not constitute admissible evidence establishing U.S. Bank's standing to foreclose the note and mortgage, and U.S. Bank submitted no other evidence to establish that it was the proper holder of the note and/or mortgage.

Essentially, U.S. Bank's argument in favor of affirmance rests on two assumptions: a) that a valid assignment or transfer of the note and mortgage exists, and b) that a valid defense to this action does not. However, summary judgment is appropriate only upon record proof-not assumptions. Given the vastly increased number of foreclosure filings in Florida's courts over the past two years, which volume has taxed both litigants and the judicial system and increased the risk of paperwork errors, it is especially important that trial courts abide by the proper standards and apply the proper burdens of proof when considering a summary judgment motion in a foreclosure proceeding.

Accordingly, because U.S. Bank failed to establish its status as legal owner and holder of the note and mortgage, the trial court acted prematurely in entering final summary judgment of foreclosure in favor of U.S. Bank. We therefore reverse the final summary judgment of foreclosure and remand for further proceedings.

Reversed and remanded for further proceedings.

ALTENBERND and SILBERMAN, JJ., Concur.
Fla.App. 2 Dist.,2010.
BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques
28 So.3d 936, 35 Fla. L. Weekly D369

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28 So.3d 976, 35 Fla. L. Weekly D494
(Cite as: 28 So.3d 976)

C

District Court of Appeal of Florida,
Second District.
David VERIZZO, Appellant,
v.
The BANK OF NEW YORK, as Successor Trustee Under Novastar Mortgage Funding Trust, Series 2006-3, Appellee.
No. 2D08-4647.

March 3, 2010.

Background: Purported assignee of promissory note and mortgage brought foreclosure action against mortgagor. The Circuit Court, Sarasota County, Robert W. McDonald, Jr., J., awarded summary judgment to purported assignee. Mortgagor appealed.

Holding: The District Court of Appeal, Silberman, J., held that triable issue existed as to whether purported assignee actually owned the note and had standing to foreclose the mortgage.

Reversed and remanded.

West Headnotes

[1] Judgment 228 185(5)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(5) k. Weight and sufficiency. Most Cited Cases

Judgment 228 185.2(3)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.2 Use of Affidavits
228k185.2(3) k. Showing to be made on supporting affidavit. Most Cited Cases
If a plaintiff files a motion for summary judgment before the defendant answers the complaint, the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact. West's F.S.A. RCP Rule 1.510(c).

[2] Judgment 228 185(4)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(4) k. Documentary evidence or official record. Most Cited Cases

Judgment 228 185.3(15)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(15) k. Liens and mortgages. Most Cited Cases
Failure by purported assignee of promissory note to file with the trial court at least 20 days before hearing on its motion for summary judgment the original promissory note or the original recorded assignment of mortgage precluded summary judgment on purported assignee's foreclosure claim; documents were part of the evidence relied on in support of the summary judgment motion, and documents were not in fact filed until the day of the summary judgment hearing. West's F.S.A. RCP Rule 1.510(c).

[3] Judgment 228 181(25)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(25) k. Mortgages and secured transactions, cases involving. Most Cited Cases
Genuine issue of material fact as to whether purported assignee of promissory note actually owned the note and had standing to foreclose mortgage precluded summary judgment on purported assignee's claim to foreclose the mortgage.
***976** David Verizzo, pro se.

28 So.3d 976, 35 Fla. L. Weekly D494
(Cite as: 28 So.3d 976)

*977 Patricia A. Arango of Law Offices of Marshall C. Watson, P.A., Fort Lauderdale, for Appellee.

SILBERMAN, Judge.

David Verizzo, pro se, appeals a final judgment of foreclosure entered after the trial court granted the motion for summary judgment filed by the Bank of New York, as successor trustee under Novastar Mortgage Funding Trust, Series 2006-3 (the Bank). Because the Bank's summary judgment evidence was not timely served and filed and because a genuine issue of material fact remains, we reverse and remand for further proceedings.

The Bank filed a two-count complaint against Verizzo seeking to reestablish a lost promissory note and to foreclose a mortgage on real property. Included in the attachments to the complaint was a copy of the mortgage. The mortgage indicated that the lender was Novastar Mortgage, Inc., a Virginia corporation (Novastar), and that the mortgagee was Mortgage Electronic Registration Systems, Inc. (MERS), acting as a nominee for Novastar. The attachments to the complaint did not include copies of the note or any assignment of the note and mortgage to the Bank. Verizzo filed a motion for enlargement of time to respond to the complaint. The Bank agreed to the entry of an order allowing Verizzo to file a response within 20 days from the date of entry of the order.

On August 5, 2008, before Verizzo had responded to the complaint, the Bank served its motion for summary final judgment of foreclosure. The summary judgment hearing was scheduled for August 29, 2008. On August 18, 2008, the Bank served by mail a notice of filing the original promissory note, the original recorded mortgage, and the original recorded assignment of mortgage. The assignment reflects that MERS assigned the note and mortgage to the Bank of New York. However, the note bears an endorsement, without recourse, signed by Novastar stating, "Pay to the Order of: JPMorgan Chase Bank, as Trustee."

On the date of the summary judgment hearing, Verizzo filed a memorandum in opposition to the Bank's motion. He argued, among other things, that his response to the complaint was not yet due in accordance with the agreement for enlargement of time, that the Bank did not timely file the documents on which it relied in support of its motion for summary judgment, and that the documents were insufficient to establish that the Bank was the owner and holder of the note and mortgage.

[1] On August 29, 2008, the trial court granted the motion for summary judgment and entered a final judgment of foreclosure. We review the summary judgment by a de novo standard. *Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc.*, 928 So.2d 1272, 1274 (Fla. 2d DCA 2006). "A movant is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Id.* (quoting Fla. R. Civ. P. 1.510(c)). If a plaintiff files a motion for summary judgment before the defendant answers the complaint, "the plaintiff must conclusively show that the defendant cannot plead a genuine issue of material fact." *E.J. Assocs., Inc. v. John E. & Aliese Price Found., Inc.*, 515 So.2d 763, 764 (Fla. 2d DCA 1987).

[2] Rule 1.510(c) requires that the movant "serve the motion at least 20 days **978 before the time fixed for the hearing[ ] and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court." Further, cases have interpreted the rule to require that the movant also file the motion and documents with the court at least twenty days before the hearing on the motion. *See Mack v. Commercial Indus. Park, Inc.*, 541 So.2d 800, 800 (Fla. 4th DCA 1989); *Marlar v. Quincy State Bank*, 463 So.2d 1233, 1233 (Fla. 1st DCA 1985); *Coastal Caribbean Corp. v. Rawlings*, 361 So.2d 719, 721 (Fla. 4th DCA 1978). The promissory note and assignment constituted a portion of the evidence that the Bank relied on in support of its motion for summary judgment, and it is undisputed that the Bank did not attach those documents to the complaint or serve them at least twenty days before the hearing date. In fact, although the Bank's notice of filing bears a certificate of service indicating that the notice was served on August 18, 2008, the notice and the documents were not actually filed with the court until August 29, 2008, the day of the summary judgment hearing.

[3] In addition to the procedural error of the late service and filing of the summary judgment evidence, those documents reflect that at least one genuine issue of material fact exists. The promissory note shows that Novastar endorsed the note to "JPMorgan Chase Bank, as Trustee." Nothing in the record reflects assignment or endorsement of the note by JPMorgan Chase Bank to the Bank of New York or MERS. Thus, there is a genuine issue of material fact as to whether the Bank of New York owns and holds the note and has standing to foreclose the mortgage. *See* *Mortgage Electronic Registration Sys., Inc. v. Azize*, 965 So.2d 151, 153 (Fla. 2d DCA 2007) (recognizing that the owner and holder of a note and mortgage has standing to proceed with a mortgage foreclosure action); *Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So.2d 45, 46 (Fla. 4th DCA 2006) (determining that the plaintiff "had standing to bring and maintain a mortgage foreclosure action since it demonstrated that it held the note and mortgage in question").

Therefore, based on the late service and filing of the summary judgment evidence and the existence of a genuine issue of material fact, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded.

WHATLEY and MORRIS, JJ., Concur.
Fla.App. 2 Dist.,2010.
Verizzo v. Bank of New York
28 So.3d 976, 35 Fla. L. Weekly D494

END OF DOCUMENT

--- So.3d ----, 2010 WL 2382584 (Fla.App. 4 Dist.)
(Cite as: 2010 WL 2382584 (Fla.App. 4 Dist.))

H
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Fourth District.
Jerry A. **RIGGS**, Sr., Appellant,
v.
AURORA LOAN SERVICES, LLC, Appellee.
No. 4D08-4635.

June 16, 2010.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. CACE 07-17670(14).
Jerry A. Riggs, Sr., Cooper City, pro se.

Diana B. Matson and Roy A. Diaz of Smith, Hiatt & Diaz, P.A., Fort Lauderdale, for appellee.

ON MOTION FOR REHEARING

PER CURIAM.

*1 We grant appellee Aurora Loan Service, LLC's motion for rehearing, withdraw our previous opinion of April 21, 2010, and replace it with the following.

Aurora filed a mortgage foreclosure action against Jerry Riggs, Sr., alleging that it was the "owner and holder" of the underlying promissory note. With the complaint, Aurora filed copies of the mortgage and promissory note, which named Riggs as the mortgagor and First Mangus Financial Corporation as the mortgagee. Aurora asserted that the original note was in its possession.

Aurora moved for summary judgment. In support of the motion, it filed two affidavits attesting that it owned and held the note and mortgage. At the hearing on the motion, Aurora produced the original mortgage and promissory note. The note had an indorsement in blank with the hand printed signature of Humberto Alday, an agent of the indorser, First Mangus. The circuit court granted summary judgment in favor of Aurora over Riggs's objections that Aurora's status as lawful "owner and holder" of the note was not conclusively established by the record evidence.

We agree with the circuit court that Aurora sufficiently established that it was the holder of the note.

Aurora's possession of the original note, indorsed in blank, was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms. The note was a negotiable instrument subject to the provisions of Chapter 673, Florida Statutes (2008). An indorsement requires a "signature." § 673.2041(1), Fla. Stat. (2008). As an agent of First Magnus, Alday's hand printed signature was an effective signature under the Code. *See* §§ 673.4011(2)(b), 673.4021, Fla. Stat. (2008). The indorsement in this case was not a "special indorsement," because it did not "identif[y] a person to whom" it made the note payable. § 673.2051(1), Fla. Stat. (2008). Because it was not a special indorsement, the indorsement was a "blank indorsement," which made the note "payable to bearer" and allowed the note to be "negotiated by transfer of possession alone." § 673 .2051(2), Fla. Stat. (2008). The negotiation of the note by its transfer of possession with a blank indorsement made Aurora Loan the "holder" of the note entitled to enforce it. §§ 673.2011(1), 673.3011(1), Fla. Stat. (2008).

There is no issue of authentication. The borrower did not contest that the note at issue was the one he executed in the underlying mortgage transaction. With respect to the authenticity of the indorsement, the note was self authenticating. Subsection 90 .902(8), Florida Statutes (2008), provides that "[c]ommercial papers and signatures thereon and documents relating to them [are self authenticating], to the extent provided in the Uniform Commercial Code." Subsection 673.3081(1), Florida Statutes (2008), provides that "[i]n an action with respect to an instrument, the authenticity of, and authority to make, each signature

on the instrument is admitted unless specifically denied in the pleadings." Nothing in the pleadings placed the authenticity of Alday's signature at issue.

***2** We distinguish *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So.3d 936 (Fla. 2d DCA 2010), on its facts. In that case, the second district reversed a summary judgment of foreclosure where the plaintiff seeking foreclosure filed no supporting affidavits and the original note did not identify the plaintiff as its holder. *Id.* at 938-39. The court explained its holding by pointing out that the plaintiff had failed to offer "evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer." *Id.* at 939. Unlike the plaintiff in *BAC Funding*, Aurora offered both affidavits and the original note with a blank endorsement that supported its claim that it was the proper holder of the note and mortgage.

Affirmed.

GROSS, C.J., and POLEN and STEVENSON, JJ., concur.

Fla.App. 4 Dist.,2010.
Riggs v. Aurora Loan Services, LLC
--- So.3d ----, 2010 WL 2382584 (Fla.App. 4 Dist.)

END OF DOCUMENT

Westlaw

574 So.2d 320, 16 Fla. L. Weekly 534
(Cite as: 574 So.2d 320)

C

District Court of Appeal of Florida,
Fourth District.

ADMINISTRATION OF VETERAN'S AFFAIRS, an Officer of the United States of America, Appellant,
v.
George A. BERTSCHE, Appellee.
No. 90-0933.

Feb. 20, 1991.

Movant appealed from decision of Circuit Court, Palm Beach County, Richard I. Wennet, J., denying motion to reschedule foreclosure sale with prejudice. The District Court of Appeal held that trial court abused its discretion by refusing to reschedule sale, after movant was unable to provide required bidding instructions for sale by original date because an appraisal could not be obtained in time between judgment and sale.

Reversed and remanded.

West Headnotes

Mortgages 266 ⚖357

266 Mortgages
266IX Foreclosure by Exercise of Power of Sale
266k357 k. Postponement of Sale. Most Cited Cases
Trial court abused discretion in denying petition to reset date for foreclosure sale, after movant was unable to provide required bidding instructions for sale because appraisal could not be obtained in time between judgment and sale.

***320** Deborah S. Wildhage of Shapiro & Fishman, Boca Raton, for appellant.

No brief filed for appellee.

PER CURIAM.

This is an appeal from an order denying appellant's motion to reschedule foreclosure sale with prejudice and from an order clarifying said order. We reverse and remand.

A Clerk's Sale was scheduled for December 4, 1989 of a property on which the court had entered a summary judgment of foreclosure on November 8, 1989. The sale was not held. Appellant moved the trial court to reschedule the sale, alleging that ***321** appellant was unable to provide the required bidding instructions for the sale because an appraisal could not be obtained in the time between judgment and sale. Ultimately, the two orders being reviewed were entered.

Appellant contends that the trial court's decision to refuse to reset the foreclosure sale constituted an abuse of judicial power. We agree. *See David v. Sun Fed. Sav. & Loan Ass'n*, 461 So.2d 93, 95 (Fla.1984); *Commonwealth Mortgage Corp. of America, L.P. v. Frankhouse*, 551 So.2d 599 (Fla. 4th DCA 1989); *First Nationwide Savings v. Thomas*, 513 So.2d 804, 805 (Fla. 4th DCA 1987).

GLICKSTEIN, WARNER and GARRETT, JJ., concur.

Fla.App. 4 Dist.,1991.
Administration of Veteran's Affairs v. Bertsche
574 So.2d 320, 16 Fla. L. Weekly 534

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Westlaw

--- So.3d ----, 2010 WL 2218584 (Fla.App. 5 Dist.), 35 Fla. L. Weekly D1256
(Cite as: 2010 WL 2218584 (Fla.App. 5 Dist.))

H

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
Fifth District.
WELLS FARGO BANK, N.A. As Trustee, etc.,
Appellant,
v.
Carl T. **LUPICA** and Margaret **Lupica**, Appellees.
No. 5D09-2902.

June 4, 2010.

Background: Bank brought foreclosure action against homeowners. The Circuit Court, Volusia County, John V. Doyle, J., entered foreclosure judgment in bank's favor. Bank then moved to vacate the foreclosure sale. The Circuit Court purported to deny the motion. Bank appealed. The District Court of Appeal, 17 So.3d 864, found that Circuit Court's "denied" stamp on postjudgment motion did not constitute rendition of a final order so as to permit appellate review, and relinquished jurisdiction to allow Circuit Court to provide a basis for its denial. The Circuit Court entered a final order denying banks motion, on the basis bank failed to attach a stipulation and/or copy of loan modification or forbearance agreement signed by all parties to its motion to vacate.

Holding: The District Court of Appeal, Evander, J., held that Circuit Court's denial of bank's motion to vacate foreclosure sale constituted a gross abuse of discretion.

Reversed and remanded.

West Headnotes

[1] Mortgages 266 ⚿529(3)

266 Mortgages
266X Foreclosure by Action
266X(M) Sale
266k529 Opening or Vacating and Actions to Set Aside
266k529(3) k. Grounds in General. Most Cited Cases

Mortgages 266 ⚿529(10)

266 Mortgages
266X Foreclosure by Action
266X(M) Sale
266k529 Opening or Vacating and Actions to Set Aside
266k529(10) k. Proceedings and Relief. Most Cited Cases
Trial court's action in denying bank's unopposed motion to vacate foreclosure sale constituted a gross abuse of discretion, where denial flew in the face of principle that settlements between litigants in foreclosure proceedings are favored, there was no basis for trial court to reject bank's counsel's representation, as an officer of the court, that an agreement had been reached between the parties, and it was not necessary for bank to attach a stipulation and/or copy of a signed loan modification or forbearance agreement to its motion to vacate.

[2] Compromise and Settlement 89 ⚿2

89 Compromise and Settlement
89I In General
89k1 Nature and Requisites
89k2 k. In General. Most Cited Cases

Mortgages 266 ⚿386

266 Mortgages
266X Foreclosure by Action
266X(A) Nature and Form of Remedy
266k386 k. In Equity. Most Cited Cases
Foreclosures are equitable proceedings under Flor-

ida law and settlements between litigants are favored.

Appeal from the Circuit Court for Volusia County, John V. Doyle, Judge.Richard S. Melver, of Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A. Tampa, for Appellant.

No Appearance for Appellee.

EVANDER, J.

*1 Wells Fargo appeals from the denial of its unopposed motion to cancel foreclosure sale and its subsequent unopposed motion to vacate the foreclosure sale. Because we find that the denial of these motions constituted a gross abuse of discretion, we reverse.

Wells Fargo filed a mortgage foreclosure action against the Lupicas, based on their alleged failure to make due and owing monthly installment payments. No answer was filed by the Lupicas and a final summary judgment was subsequently entered in favor of Wells Fargo. Shortly prior to the scheduled foreclosure sale, Wells Fargo filed a motion to cancel sale, alleging that the parties had reached a loan modification agreement. The motion was denied by stamping the word "Denied" on the face of the motion. Wells Fargo purchased the mortgaged property at the foreclosure sale for $100 and then filed an unopposed motion to vacate sale, stating that the parties had reached a forbearance agreement. The trial court again denied the motion by use of a "Denied" stamp.

When Wells Fargo initially appealed the denial of these motions, we were compelled to relinquish jurisdiction to the trial court because the trial court's action did not constitute "rendition" of a final order so as to permit appellate review. *Wells Fargo Bank, N.A. v. Lupica*, 17 So.3d 864 (Fla. 5th DCA 2009). We further directed the trial court to provide the basis for its denials of Wells Fargo's motion to cancel sale and subsequent motion to vacate sale. *Id.* at 866.

The trial court then entered a final order denying the motions. The purported basis for the denial of Wells Fargo's two unopposed motions was the failure to attach a stipulation and/or a copy of the loan modification or forbearance agreement signed by all parties. The trial judge further suggested that the parties should have discussed the modification of the loan prior to entry of the final judgment "which could have avoided unnecessary consumption of the time of two courts."

[1][2] Foreclosures are equitable proceedings under Florida law and settlements between litigants are favored. The trial court's denial of Wells Fargo's unopposed motions flies in the face of these principles. Furthermore, it was not necessary for Wells Fargo to have attached a stipulation and/or copy of a signed loan modification or forbearance agreement.[FN1] There was no basis for the trial court to reject Wells Fargo's counsel's representation, as an officer of the court, that an agreement had been reached between the parties-particularly where the Lupicas never disputed such representation. The trial court's actions constituted a gross abuse of discretion. *See, e.g., Opportunity Funding I, LLC v. Oetchestvennyi*, 909 So.2d 361 (Fla. 4th DCA 2005).

REVERSED and REMANDED.

GRIFFIN and SAWAYA, JJ., concur.

FN1. Subsequent to the trial court's entry of its final order, the Florida Supreme Court approved a form motion for the cancellation of a foreclosure sale:

> Form 1.996(b). Motion to Cancel and Reschedule Foreclosure Sale.
>
> Plaintiff moves to cancel and reschedule the mortgage foreclosure sale because:
>
> * * *
>
> (2) The sale needs to be cancelled for the following reason(s):

* * *

(f) Plaintiff and Defendant have entered into a Forbearance Agreement.

In re Amends. to the Fla. Rules of Civil Proc., 35 Fla. L. Weekly S97 (Fla. Feb. 11, 2010). The form motion does not reference the attachment of a stipulation or copy of a forbearance agreement.

Fla.App. 5 Dist.,2010.
Wells Fargo Bank, N.A. v. Lupica
--- So.3d ----, 2010 WL 2218584 (Fla.App. 5 Dist.),
35 Fla. L. Weekly D1256

END OF DOCUMENT

FORECLOSURE DIVISION FORM

Date of Hearing:_____ Date serving Motion for Summary Judgment:_____

Case Number: _____ Date serving Notice of Hearing: _____

_____
PLAINTIFF(S)

vs.

_____
DEFENDANT(S)

DEFENDANT(S) (Every Defendant MUST be listed)	RETURN OF SERVICE DATE	TYPE P/S/C*	ANSWER DATE	DEFAULT DATE	PARTIES DROPPED DATE

*P - Personal Service; S -Substitute Service; C - Constructive Service

Original Promissory Note: Yes_____ No_____ ATTACH ADDING MACHINE TAPE OF AMOUNTS ADDED IN FINAL JUDGEMENT

Mortgage: Yes_____ No_____ (Staple tape here)

Assignment (if any): Yes_____ No_____ ATTACH COPY OF CLERK'S DOCKET

HAMP MEETING OCCURRED: Yes_____ No_____

AFFIDAVITS: AMOUNT

Amount of Indebtedness: _____

Costs: _____

Attorney's Fee: _____

a. Expert Affidavit: _____

ATTORNEY NAME: _____ FBN: _____

ATTORNEY SIGNATURE: _____ FIRM NAME: _____

Civil Cover Sheet

The civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form shall be filed by the plaintiff or petitioner for the use of the Clerk of Court for the purpose of reporting judicial workload data pursuant to Florida Statutes section 25.075. (See instructions for completion).

I. CASE STYLE

Orange County, Florida
Circuit Court
Judge: 2010-CA-12385

WELLS FARGO BANK, N.A.,

Plaintiff(s),

v.

PARAMOUNT LAKE EOLA, L.P., THE PARAMOUNT ON LAKE EOLA CONDOMINIUM ASSOCIATION, INC., DINON SUN, WENFANG SUN and MYX, LLC,

Defendant(s).

II. TYPE OF CASE (If the case fits more than one type of case, select the most definitive category.) If the most descriptive label is a subcategory (is indented under a broader category), place an x in both the main category and subcategory boxes.

- ☐ Condominium
- ☐ Contracts and indebtedness
- ☐ Eminent Domain
- ☐ Auto negligence
- ☐ Negligence-other
  - ☐ Business governance
  - ☐ Business torts
  - ☐ Environmental/Toxic tort
  - ☐ Third party indemnification
  - ☐ Construction defect
  - ☐ Mass tort
  - ☐ Negligent security
  - ☐ Nursing home negligence
  - ☐ Premises liability-commercial
  - ☐ Premises liability-residential
- ☐ Products liability
- ☒ Real property/Mortgage foreclosure
  - ☒ Commercial foreclosure
    - ☐ $0 - $50,000
    - ☐ $50,001 - $249,999
    - ☒ $250,000 or more
- ☐ Professional Malpractice
  - ☐ Malpractice-business
  - ☐ Malpractice-medical
  - ☐ Malpractice-other professional
- ☐ Other
  - ☐ Antitrust/Trade regulation
  - ☐ Business transactions
  - ☐ Constitutional challenge-statute or ordinance
  - ☐ Constitutional challenge-proposed amendment
  - ☐ Corporate trusts
  - ☐ Discrimination-employment or other
  - ☐ Insurance claims
  - ☐ Intellectual property
  - ☐ Libel/Slander
  - ☐ Shareholder derivative action
  - ☐ Securities litigation
  - ☐ Trade secrets

- ☐ Homestead Residential foreclosure
  - ☐ $0 - $50,000
  - ☐ $50,001 - $249,999
  - ☐ $250,000 or more
- ☐ Nonhomestead Residential foreclosure
  - ☐ $0 - $50,000
  - ☐ $50,001 - $249,999
  - ☐ $250,000 or more
- ☐ Other real property actions
  - ☐ $0 - $50,000
  - ☐ $50,001 - $249,999
  - ☐ $250,000 or more

III. REMEDIES SOUGHT (check all that apply):
- ☒ monetary;
- ☒ non-monetary declaratory or injunctive relief;
- ☐ punitive

IV. NUMBER OF CAUSES OF ACTION: [4]
(specify) Foreclosure of Mortgaged Real and Personal Property, (2) Breach of Notes, Appointment of a Receiver

V. IS THIS CASE A CLASS ACTION LAWSUIT?
- ☐ yes
- ☒ no

VI. HAS NOTICE OF ANY KNOWN RELATED CASE BEEN FILED?
- ☒ no
- ☐ yes If "yes," list all related cases by name, case number and court.

VII. IS JURY TRIAL DEMANDED IN COMPLAINT?
- ☐ yes
- ☒ no

Date 5/25/10

Signature of Attorney for Party Initiating Action

Harry M. Wilson, III, Attorney

00705581

FORM 1.996(a). FINAL JUDGMENT OF FORECLOSURE

FINAL JUDGMENT

This action was tried before the court. On the evidence presented

IT IS ADJUDGED that:

1. Plaintiff, ...(name and address)....., is due ~~..... as principal, $..... as interest to date of this judgment, $..... for title search expense, $..... for taxes, $..... for insurance premiums, $..... for attorneys' fees, with $..... for court costs now taxed, less $..... for undisbursed escrow funds and less $..... for unearned insurance premiums, under the note and mortgage sued on in this action, making a total sum of $....., that shall bear interest at the rate of .....% a year.~~

Principal	$.....
Interest to date of this judgment	.....
Title search expense	.....
Taxes	.....
Attorneys' fees	
Finding as to reasonable number of hours:	.....
Finding as to reasonable hourly rate:	.....
Attorneys' fees total	.....
Court costs, now taxed	.....
Other:	.....
Subtotal	$.....
LESS: Escrow balance	.....
LESS: Other	.....
TOTAL	$.....

that shall bear interest at the rate of .....% a year.

2. Plaintiff holds a lien for the total sum superior to ~~any~~all claims or estates of defendant(s), ~~.....(name and address, and social security number if known).....,~~ on the following described property in ..... County, Florida:

(describe property)

3. If the total sum with interest at the rate described in paragraph 1 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on .....(date)....., ~~between 11:00 a.m. and 2:00 p.m.~~ to the highest bidder for cash, except as prescribed in paragraph 4, at the ~~..... door of the~~ courthouse ~~in~~located at .....(street address of courthouse)..... in ..... County in ~~.....~~.....(name of city)....., Florida, in accordance with section 45.031, Florida Statutes~~.~~, using the following method (CHECK ONE):

☐ At .....(location of sale at courthouse; *e.g.*, north door)....., beginning at .....(time of sale)..... on the prescribed date.

☐ By electronic sale beginning at .....(time of sale)..... on the prescribed date at .....(website).....

4. Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it~~,~~ as is necessary to pay the bid in full.

5. On filing the certificate of title the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 1 from this date to the date of the sale; and by retaining any remaining amount pending the further order of this court.

6. On filing the certificate of ~~title~~sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property ~~and the purchaser at the sale~~, except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property. If any defendant remains in possession of the property, the clerk shall without further order of the court issue forthwith a writ of possession upon request of the person named on the certificate of title.

7. Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, ~~writs of possession and~~ a deficiency judgment.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK

NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

[If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:]

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) **WITHIN 10 DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.**

IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) **TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT** (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) **FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.**

ORDERED at ....., Florida, on .....(date).....

_____

Judge

NOTE: Paragraph 1 must be varied in accordance with the items unpaid, claimed, and proven. The form does not provide for an adjudication of junior lienors' claims nor for redemption by the United States of America if it is a defendant. The address of the person who claims a lien as a result of the judgment must be included in the judgment in order for the judgment to become a lien on real estate when a certified copy of the judgment is recorded. Alternatively, an affidavit with this information may be simultaneously recorded. For the specific requirements, see section 55.10(1), Florida Statutes; *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1998). ~~The address and social security number (if known) of each person against whom the judgment is rendered must be included in the judgment, pursuant to section 55.01(2), Florida Statutes.~~

Committee Notes

1980 Amendment. The reference to writs of assistance in paragraph 7 is changed to writs of possession to comply with the consolidation of the 2 writs.

2010 Amendment. Mandatory statements of the mortgagee/property owner's rights are included as required by the 2006 amendment to section 45.031, Florida Statutes. Changes are also made based on 2008 amendments to section 45.031, Florida Statutes, permitting courts to order sale by electronic means.

Additional changes were made to bring the form into compliance with chapters 718 and 720 and section 45.0315, Florida Statutes, and to better align the form with existing practices of clerks and practitioners. The breakdown of the amounts due is now set out in column format to simplify calculations. The requirement that the form include the address and social security number of all defendants was eliminated to protect the privacy interests of those defendants and in recognition of the fact that this form of judgment does not create a personal final money judgment against the defendant borrower, but rather an in rem judgment against the property. The address and social security number of the defendant borrower should be included in any deficiency judgment later obtained against the defendant borrower.

Addendum to Final Judgment

This addendum is a part of the final judgment to which it is attached. The rights and interests of the parties and anyone acquiring title to the mortgaged property at foreclosure sale are subject to and governed by the Helping Families Save Their Homes Act of 2009, 12 U.S.C. 5201. This means among other things that:

The party acquiring title through foreclosure sale takes subject to the interests of tenants as follows:

1. If the property is occupied by a bona fide tenant who has an unexpired written lease then the party acquiring title at the foreclosure sale shall honor all terms and conditions of the existing lease. The tenant must also honor all terms and conditions of the existing lease. However, if the party acquiring the property at foreclosure sale intends to occupy it as their primary residence then they may terminate the lease by giving the tenant a 90 day written notice before terminating the tenancy. Until the lease is terminated both parties must perform all terms and conditions of the existing lease.

2. If the property is occupied by a bona fide tenant without a lease or with a lease terminable at will under Florida law then the party acquiring title through foreclosure sale shall give the tenant a minimum 90 day written notice before terminating the tenancy. Until the tenancy is terminated both parties must perform all terms and conditions of the tenancy.

3. If the tenant is a participant in the Section 8 voucher program the new owner takes the property subject to the Section 8 lease and the Section 8 Housing Assistance Payments contract provided however, if the new owner wants to live in the property then he shall give the tenant a minimum 90 day written notice before terminating the tenancy. Until the tenancy is terminated both parties must perform all terms and conditions of the tenancy.

A lease or tenancy is considered bona fide only if:

a. The mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

b. The lease or tenancy was the result of an arms-length transaction; and

c. The lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

FORM 1.996(b). MOTION TO CANCEL AND RESCHEDULE FORECLOSURE SALE

Plaintiff moves to cancel and reschedule the mortgage foreclosure sale because:

1. On this Court entered a Final Judgment of Foreclosure pursuant to which a foreclosure sale was scheduled for , 20 .

2. The sale needs to be canceled for the following reason(s):

a. Plaintiff and Defendant are continuing to be involved in loss mitigation;

b. Defendant is negotiating for the sale of the property that is the subject of this matter and Plaintiff wants to allow the Defendant an opportunity to sell the property and pay off the debt that is due and owing to Plaintiff.

c. Defendant has entered into a contract to sell the property that is the subject of this matter and Plaintiff wants to give the Defendant an opportunity to consummate the sale and pay off the debt that is due and owing to Plaintiff.

d. Defendant has filed a Chapter Petition under the Federal Bankruptcy Code;

e. Plaintiff has ordered but has not received a statement of value/appraisal for the property;

f. Plaintiff and Defendant have entered into a Forbearance Agreement;

g. Other

_____

_____

_____

3. If this Court cancels the foreclosure sale, Plaintiff moves that it be rescheduled.

I hereby certify that a copy of the foregoing Motion has been furnished by U.S. mail postage prepaid, facsimile or hand delivery to this day of , 20 .

NOTE. This form is used to move the court to cancel and reschedule a foreclosure sale.

APPENDIX B

BEST PRACTICES CASE MANAGEMENT FORMS

IN THE CIRCUIT COURT OF THE

_____JUDICIAL CIRCUIT

Plaintiff

IN AND FOR _____,
FLORIDA

vs.

GENERAL JURISDICTION
CASE NO.:

Defendant

_____/

Notice of Hearing Form – Residential Foreclosure

El tribunal no proveé intérpretes judiciales para los casos de reposesión hipotecaria (foreclosure). Si usted no habla inglés, por favor traiga su propio intérprete calificado para traducirle a usted en esta audiencia. Alguien que tenga más de 18 años.

Tribunal la pa bay entèprèt nan ka lè yo menase pou sezi kay ou. Tanpri, vini ak you moun ki gen plis ke 18 an pou tradui pou ou nan odyans sa a, si ou pa pale Angle.

TO: (name of party being noticed, should include service list)
You are notified that the undersigned lawyer will bring the following Motion:

---

before the Honorable _____
For hearing: _____

Address: _____
Date: _____
Time: _____

This hearing may be confirmed the business day before by calling _____.
Movant's failure to contact opposing side to confirm/cancel hearings may result in sanctions.

By:_____,_____
(attorney)
Bar No._____
Address: _____
Telephone No.: _____
Fax No: _____
Email address: _____

IN ACCORDANCE WITH THE AMERICANS WITH DISABILITIES ACT OF 1990, PERSONS NEEDING SPECIAL ACCOMIDATIONS TO PARTICIPATE IN THIS PROCEEDING SHOULD CONTACT THE COURT ADA COORDINATOR NO LATER THAN 7 DAYS PRIOR TO THE PROCEDDING AT (XXX) XXX-XXXX (VOICE) OR (XXX) XXX-XXXX (TDD) AND (XXX) XXX-XXXX FOR FAX, WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS DOCUMENT. TDD USERS MAY ALSO CALL 1-800-955-8771, FOR THE FLORIDA RELAY SERVICE.

IN THE CIRCUIT COURT OF THE
_____ JUDICIAL CIRCUIT
IN AND FOR _____,
FLORIDA

GENERAL JURISDICTION
CASE NO.:

Plaintiff

vs.

Defendant.
_____/

Notice of Hearing on Motion to Dismiss and Order of Dismissal

Fla. R. Civ. P. 1.070(j)

YOU ARE HEREBY NOTIFIED that upon the Court's motion the above styled cause has been set for hearing in that is does not affirmatively appear that a summons has (have) been served on the defendant(s) within 120 days pursuant to Fla. R. Civ. P. 1.070(j).

Therefore, it is ADJUDGED as follows:

1. Plaintiff shall show good cause why service has not been perfected within 120 days of the date of the filing of the complaint. Said showing shall be in writing and filed with the Clerk of Court at least (5) days before the hearing date referenced in paragraph 2. A courtesy copy also must be delivered to: Service Calendar, _____ at least (5) days before the hearing date referenced in paragraph 2.

2. If a showing of good cause is timely filed, you must appear at the hearing which shall be held on the _____ day of _____, _____ at _____ a.m. The hearing shall take place at _____, _____ in Room No. _____ before the Honorable _____

3. Failure to timely file a showing of good cause will result in this action being dismissed without further Order on the date specified in paragraph 2. Said dismissal shall be without prejudice.

4. The Clerk of Court will record this Order of Dismissal after the hearing date in paragraph 2.

DONE AND ORDERED in chamber at _____ County, Florida this ____ day of April, 2008.

_____
CIRCUIT COURT JUDGE

cc:

IN ACCORDANCE WITH THE AMERICANS WITH DISABILITIES ACT OF 1990, PERSONS NEEDING SPECIAL ACCOMIDATIONS TO PARTICIPATE IN THIS PROCEEDING SHOULD CONTACT THE COURT ADA COORDINATOR NO LATER THAN 7 DAYS PRIOR TO THE PROCEDDING AT (_____ (VOICE) OR _____(TDD) AND (_____FOR FAX, WITHIN TWO (2) WORKING DAYS OF YOUR RECEIPT OF THIS DOCUMENT. TDD USERS MAY ALSO CALL 1-800-955-8771, FOR THE FLORIDA RELAY SERVICE.

Copies mailed and certified to:

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
STATE OF FLORIDA, IN AND FOR _____ COUNTY
CIRCUIT CIVIL DIVISION ____
DISMISSAL DOCKET & CASE MANAGEMENT SCHEDULING ORDER

STYLE	CASE NUMBER	ATTORNEY/PRO SE PARTY

ORDER TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED FOR FAILURE TO SERVE WITHIN 120 DAYS AND SCHEDULING CASE MANAGEMENT CONFERENCE

NOTE: HEARING MAY BE CANCELLED IFCOURT RECEIVES COPY OF VOLUNTARY DISMISSAL, SUGGESTION OF BANKRUPTCY OR RETURN OF SERVICE PRIOR TO ABOVE DATE

PLEASE BE ADVISED that, pursuant to Florida Rules of Civil Procedure Rule 1.070 and Rule 1.200(a), the cases above listed will be called up for Case Management Conference at _____ _____, Florida, before the Honorable _____. Rule 1.070 provides when service of the initial process and initial pleading is not made upon a defendant with 120 days after the filing of the initial pleading directed to that defendant, the court shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party. The court may extend the time for service for an appropriate period if the plaintiff shows good cause or excusable neglect for the failure. Wherefore, Plaintiff, individually or through counsel if represented is hereby ordered to appear and show cause on the date listed below as to why the case, as listed above, should not be dismissed.

HEARING DATE: _____

Attorneys must be present in person before the Court at this hearing. Incarcerated parties without legal counsel may contact the court at _____ no later than 48 hours prior to the hearing to arrange a telephonic appearance. Inmates will not be transported.

ON FAILURE OF THE PARTIES OR COUNSEL TO ATTEND THE CONFERENCE, THE COURT MAY DISMISS THE ACTION WITHOUT PREJUDICE AS PROVIDED IN RULE 1.070 (j).

THIS CASE MANAGEMENT CONFERENCE MAY ONLY BE CANCELLED WITH THE COURT'S PRIOR WRITTEN PERMISSION.

DONE AND ORDERED in _____, _____ County, Florida this day of , 20____.

_____
CIRCUIT JUDGE

Copies Provided to Counsel

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator, _____, FL _____, phone number _____ within 2 working days of your receipt of this Order Scheduling Case Management conference; if you are hearing impaired, call _____; if you are voice impaired, call _____.

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
STATE OF FLORIDA, IN AND FOR _____ COUNTY
CIRCUIT CIVIL DIVISION _____

NOTICE OF LACK OF PROSECUTION AND

CASE MANAGEMENT SCHEDULING ORDER

STYLE	CASE NUMBER	DATE AND TIME

NOTICE OF LACK OF PROSECUTION

PLEASE TAKE NOTICE that it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months immediately preceding service of this notice, and no stay has been issued or approved by the court. Pursuant to rule 1.420(e), if no such record activity occurs within 60 days following the service of this notice, and if no stay is issued or approved during such 60 day period, this action may be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing scheduled below on the motion why the action should remain pending.

ORDER SCHEDULING CASE MANAGEMENT CONFERENCE

NOTE: HEARING MAY BE CANCELLED IFCOURT RECEIVES COPY OF VOLUNTARY DISMISSAL, SUGGESTION OF BANKRUPTCY OR UNIFORM ORDER SCHEDULING TRIAL PRIOR TO ABOVE DATE

PLEASE BE ADVISED that, pursuant to Rule 1.200(a), Fla. R. Civ. Proc., the cases above listed will be called up for Case Management Conference at the _____, Florida, before the Honorable _____. Rule 2.250 of the Florida Rules of Judicial Administration prove time standards which are presumptively reasonable for the completion of cases. In civil cases, jury cases are to be disposed within 18 months of filing and non-jury cases are to be disposed within 12 months of filing. The Court records reveal either that the above-styled cause has exceeded these standards or there are other compelling reasons for case management.

HEARING DATE:

Matters to be considered at the Case Management Conference include matters that may aid in the disposition of the action including, but not limited to:

1. Schedule or reschedule trial or additional case management conference;
2. Schedule or reschedule the service of motions, pleadings and other papers;
3. Coordinate the progress of the action if complex litigation factors are present;
4. Limit, schedule, order or expedite discovery;
5. Schedule disclosure of expert witnesses are discovery of facts known and opinions held by such experts;
6. Schedule time to hear motions in limine;
7. Require filing of preliminary stipulations if issues can be narrowed;
8. Possibilities of settlement;
9. Dismissal without prejudice.

Attorneys must be present in person before the Court at this hearing. Incarcerated parties without legal counsel may contact the court at _____ no later than 48 hours prior to the hearing to arrange a telephonic appearance. Inmates will not be transported.

ON FAILURE OF THE PARTIES OR COUNSEL TO ATTEND THE CONFERENCE, THE COURT MAY DISMISS THE ACTION, STRIKE PLEADINGS, LIMIT PROOF OR WITNESSES OR TAKE ANY OTHER APPROPRIATE ACTION AS PROVIDED IN RULE 1.200 (c).

THIS CASE MANAGEMENT CONFERENCE MAY BE CANCELLED

WITH THE COURT'S WRITTEN PERMISSION.

STIPULATIONS TO CONTINUE WILL BE GRANTED ONLY UPON A SHOWING OF GOOD CAUSE

DONE AND ORDERED in _____, _____ County, Florida this day of , 20____.

_____
CIRCUIT JUDGE

Copies Provided to Counsel and Pro Se Parties

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the ADA Coordinator, _____, FL_____, phone number _____ within 2 working days of your receipt of this Order Scheduling Case Management conference; if you are hearing impaired, call _____

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
STATE OF FLORIDA, IN AND FOR _____ COUNTY
CIRCUIT CIVIL DIVISION _____

ORDER FOLLOWING COURT SCHEDULED CASE MANAGEMENT

STYLE	CASE NUMBER	ATTORNEY/PRO SE PARTY

ORDER OF DISMISSAL WITHOUT PREJUDICE

THIS CAUSE came before the court for purpose of Case Management, pursuant to the Florida Rules of Civil Procedure as provided in Rule 1.200 either due to failure to serve on a timely basis as provided by Rule 1.070 or lack of prosecution as provided by Rule 1.420 (e). Reasonable notice and opportunity to be heard was provided to plaintiff and all served parties at the address(es) listed on pleadings. The order scheduling case management provided notice that when a party or its counsel fails to attend a court scheduled case management conference, the court may dismiss the action without prejudice. The Court finds that:

_____ 1 (a) **FAILURE TO SERVE:** No response was filed to demonstrate good cause or excusable neglect for the failure to serve on a timely basis and a return of service has not been filed. Cf. Fla.R.Civ.P. 1.070. **OR**

_____ 1. (b) **LACK OF PROSECUTION:** No written response was filed to demonstrate good cause why the action should remain pending. Cf. Fla.R.Civ.P. 1.420 (e).

_____ 2. **FAILURE TO APPEAR:** No one appeared at the hearing. Cf. Fla.R.Civ.P. 1.200 (c).

It is therefore, **ORDERED AND ADJUDGED** this matter is dismissed without prejudice.

DONE AND ORDERED in _____, _____ County, Florida this _____ day of _____, 20_____.

_____
CIRCUIT JUDGE

Copies Provided:

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
STATE OF FLORIDA, IN AND FOR _____ COUNTY
CIRCUIT CIVIL DIVISION _____

STYLE	CASE NUMBER	ATTORNEY/PRO SE PARTY

CASE MANAGEMENT CONFERENCE ORDER

THIS CAUSE came before the court for a case management, pursuant to the Florida Rules of Civil Procedure as provided in Rule 1.200. The order scheduling case management provided notice that when a party or its counsel fails to attend a court scheduled case management conference, the court may dismiss the action without prejudice. It is therefore, **ORDERED AND ADJUDGED**:

_____ 1 (a) **FAILURE TO SERVE**: This case is dismissed without prejudice. No response was filed to demonstrate good cause or excusable neglect for the failure to serve on a timely basis and a return of service has not been filed. Cf. Fla.R.Civ.P. 1.070. **OR**

_____ 1. (b) **LACK OF PROSECUTION**: This case is dismissed without prejudice. No written response was filed to demonstrate good cause why the action should remain pending. Cf. Fla.R.Civ.P. 1.420 (e).

_____ 2. **FAILURE TO APPEAR:** This case is dismissed without prejudice. No one appeared at the hearing. Cf. Fla.R.Civ.P. 1.200 (c).

_____ 3. **RESCHEDULED:** The case management conference is continued and reset for _____, 20 ___, at _____ A.M./P.M. All provisions in the order scheduling case management conference remain in force and effect.

_____ 4. **PENDING MOTIONS SCHEDULED FOR HEARING:** (All pending) (The following motions: _____
_____)
are scheduled for hearing on _____, 20 ___, at _____ A.M./P.M.

_____ 5. **MEDIATION:** The parties shall schedule mediation and complete on or before _____
_____, 20 ___.

_____ 6. **TRIAL:** Counsel for _____ (select party) shall submit a uniform order scheduling trial and pretrial conference within _____ days.

_____ 7. **OTHER:** _____

_____

_____

_____

It is therefore, **ORDERED AND ADJUDGED** this matter is (dismissed without prejudice) (continued as provided above).

DONE AND ORDERED in _____, _____ County, Florida this _____ day of _____, 20_____.

_____
CIRCUIT JUDGE

Copies Provided:

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA
CIVIL DIVISION

Plaintiff(s) CASE NO.:

VS.

DIVISION:

Defendant(s)

----------/

ORDER REMOVING CASE FROM PENDING STATUS

This cause came before the court ex parte as part of the Court's ongoing responsibilities concerning case management and, based on a review of the pleadings, it appears to the Court that this case is not currently "pending." It is therefore,

ORDERED and ADJUDGED

_____ A dismissal has been filed and this case is concluded.

_____ The Defendant has filed **BANKRUPTCY**. Therefore the Clerk of the Circuit shall **REMOVE THIS CAUSE FROM ACTIVE PENDING.**

_____ The Parties have agreed to a **SETTLEMENT**. Therefore the Clerk of the Circuit Court shall **REMOVE THIS CAUSE FROM ACTIVE PENDING.** If this cause goes into Default, the Plaintiff may reinstate the matter and move forward with their case.

_____ Other.

DONE and ORDERED in Chambers, _____, _____ County, Florida this _____ day of _____, 20_____.

_____
CIRCUIT JUDGE

Copies Furnished To:

IN THE CIRCUIT COURT
STATE OF FLORIDA
COURT OF GENERAL CIVIL JURISDICTION

_____,

Plaintiff, **CASE NO.:**

vs.

DIVISION

_____,

Defendant.

_____/

CASE MANAGEMENT ADMINISTRATIVE ORDER

RESIDENTIAL MORTGAGE FORECLOSURE

THIS CAUSE came before the Court on the Court's own motion for purpose of entry of a case management order to govern the conduct of this case. Compliance with the provisions of this order is mandatory unless waived in writing by the court after a hearing with notice to all parties of an appropriate motion.

TIME STANDARDS

Counsel for the plaintiff will be responsible for compliance with the time standards set forth below. A failure to comply with any portion of this order which is found attributable to deliberate delay on the part of any party will be grounds for dismissal or other sanctions as deemed appropriate by the court.

IF UNOPPOSED and after compliance with the Administrative Order No. _____ (which provides for case management of residential foreclosure cases and mandatory referral of mortgage foreclosure cases involving borrower-occupied residence to mediation),the presumptive date to complete this cause is no later than _____ days from the date that all defendants have been served as required by law and the case is at issue.

IF OPPOSED and any defendant files a good faith intent (defined herein) to participate in voluntary dispute resolution/mediation, then the presumptive date for completion of voluntary dispute resolution/mediation is _____ days from the date of the filing of the good faith compliance with an additional _____ days to complete a contested proceeding following mediation if the case is not settled.

PROCEDURE

1. **HOME OCCUPIED BY BORROWER:** the case shall proceed as provided in Administrative Order _____.

2. **HOME VACANT OR OCCUPIED BY TENANTS:** Upon a return of service indicating that the home is vacant or is being occupied by tenants, the Plaintiff shall set the cause for a motion for final summary judgment within _____ days of the cause being at issue.

RESPONSIVE PLEADINGS:

1. **MOTION TO DISMISS:** A motion to dismiss must be set for hearing within _____ days of filing. If a defendant fails to set the cause for hearing, then the Plaintiff must do so. The hearing may not be continued or cancelled without prior consent of the Court.
2. **ANSWER:** Upon the filing of an answer, the Plaintiff shall immediately submit an order referring the parties to mediation within _____ days.

MOTIONS TO WITHDRAW: Special appearances by defense counsel are not permitted. No motion to withdraw will be granted, absent good cause shown and a hearing held on said motion, when there is a motion filed by such attorney pending in the cause.

MOTIONS TO AMEND PLEADINGS/VOLUNTARY DISMISSAL: When Plaintiff has filed a count to reestablish a lost note and thereafter discovers that the note is in its possession, counsel for the plaintiff must immediately notify in writing all parties who have filed responsive pleadings of the discovery of the original note and file a copy of such correspondence with the court.

VOLUNTARY DISPUTE RESOLUTION: Plaintiff will engage in voluntary dispute resolution as provided in Administrative Order _____. In all other cases, parties must attend mediation prior to non-jury trial unless otherwise ordered by the court.

HEARINGS:

1. **SCHEDULING:** Counsel for plaintiff may not schedule a hearing on a motion for summary judgment unless the motion with the supporting affidavits has been filed.
2. **CERTIFICATE OF COMPLIANCE WITH FORECLOSURE PROCEDURES:** (form available on circuit website) must be filed contemporaneously with the notice of hearing.
3. **CONTINUANCES:** Motions for continuance must be filed in writing supported by good cause. If parties jointly stipulate to a continuance, a copy of the joint stipulation accompanied by an order must be submitted to the court _____ days prior to the scheduled hearing.

FINAL JUDGMENTS: The Final Judgment or Final Summary Judgment of Foreclosure shall be in the model form provided and shall not include any costs not actually incurred and must be supported by sworn testimony or affidavit (if summary judgment).

SALES: The Clerk's sale shall be conducted as provided by law and may include such other method of sale employing electronic media as determined by the Clerk of Court and permitted by law.

DONE AND ORDERED this _____ day of _____, 200____, in

_____, _____ County, Florida.

_____
Chief Judge

Notes

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Notes

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Notes