A Compendium of Mortgage Cases

Prepared by Matthew D. Weidner, Esq.
A graduate of the Florida State University and the Florida State University College of Law, Mr. Weidner first served as counsel to several statewide professional organizations before entering private practice in Jacksonville, Florida. A partner in the firm, Weidner, Bowden & Weidner, P.A. his scope of practice included administrative law, civil litigation and real estate litigation and where he represented individuals and corporations in a wide range of complex legal matters. Mr. Weidner was admitted to the Florida Bar in 1999 and is admitted to practice in the Federal Court, Middle District of Florida, Northern District of Florida and the United States Court of Appeals for the Federal 11th Circuit in Atlanta, Georgia. Mr. Weidner has been practicing civil litigation since 1999 and has represented clients in foreclosure, consumer and commercial finance transactions and civil litigation since that time.

BAC F

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 Page 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. Cmty. Builders, Inc. v. Mitchell*, **528 So. 2d 979**, **980** (Fla. 2d DCA 1988) (holding that when plaintiffs move for summary 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.

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

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. Page 940

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

CHEMICAL RESIDENTIAL MTG. v. RECTOR, 742 So.2d 300 (Fla.App. 1 Dist. 1998)

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 and 98-432.

District Court of Appeal of Florida, First District.

Opinion Filed October 7, 1998.

An appeal from the Circuit Court for Duval County, Judge Karen K. Cole.

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, C.J.

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 Page 301 of the mortgage in order for the appellant to maintain the foreclosure action.

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.

[fn1] See, Warren v. Seminole Bond & Mortgage Co., **172 So. 696** (Fla. 1937); Johns v. Gilliam, **184 So. 140** (Fla. 1938); American Central Ins. Co. v. Whitlock, **165 So. 380** (Fla. 1936); Collins v. W.C. Briggs, Inc., **123 So. 833** (Fla. 1929); Drake Lumber Co. v. Semple, **130 So. 577** (Fla. 1930).

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.

Johns, et ux., v. Gillian, et al., 134 Fla. 575 (1938)

JOHNS, ET UX., v. GILLIAN, ET AL., 134 Fla. 575 (1938)

184 So. 140

J.J. JOHNS, *et ux.,* v. SAM GILLIAN, CHARLES L. BROWN, *et ux.,* JUDITH BROWN,

a minor, heirs at law of PEARL M. BROWN, deceased, and all unknown heirs,

devisees, grantees or other claimants of the said PEARL M. BROWN deceased.

Supreme Court of Florida.

Opinion Filed October 15, 1938.

Rehearing Denied November 14, 1938.

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[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.] Page 577

An appeal from the Circuit Court for Broward County, George W. Tedder, Judge.

G.H. Martin, for Appellants;

Robert J. Davis, 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 $400.00 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 Page 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. Apellants J.J. Johns and Rachel Johns, his wife, appeared and upon their amended answer the issues were made up and the cause proceeded.

"In witness whereof, we have hereunto set our hands and seals, the 17th day of February, in the year one thousand nine hundred -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 acknowledged before Page 580 me that they executed the same for the purposes therein expressed."

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
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. Farmer's 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 Mon. 421, 65 P. 428; Combe's Case, 9 Co. Rep. 75 (a), 76 (b), 77 Reprint 843, 847; Brinley v. Mann, 2 Cushing (Mass.) 337, 48 Am. Dec. 669; Notes to Am. Dec., Vol. 7, page 450. See also Campbell v. McLaurin Investment Co., 74 Fla. 501, 77 So. 277. However, it has frequently been held

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 of the debt, unless there be some plain and clear agreement Page 581 to the contrary, if

98 Fla. 422, **123 So. 833**; Miami Mortgage & Guaranty Co. v. Drawdy, **99 Fla. 1092**, **127 So. 323**.

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.

Although the assignment of the mortgage from Everglade Lumber
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. 571. 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.* (N.J.), 38 A. 202.

"The transfer of the note or obligation evidencing the debt being as a general rule the equi 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.

Collins v. W.C. Briggs, Inc.,

"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 Page 582 intended owner of the mortgage with the equitable title thereto." 41 C.J., Mortgages, Sec. 691, pp. 677.

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 to foreclose in equity upon proof of his purchase of the debt. Pease v. Warren, 29 Mich. 9, 18 Am. Rep. 58.

In the foreclosure proceedings appellee Gillian gave the following testimony in regard to the transfer of the debt owed 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 Page 583 have a deed to the property from the Browns or 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 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 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.

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 Page 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

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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.

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 the 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, J.J., concur.
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JPORGAN CHASE v. NEW MILLENNIAL, 6 So.3d 681 (Fla. 2 D)

Appellant, v. NEW MILLENNIAL, LC; B Branch Banking & Trust Company,

Successor by merger to RepubliBank; W. Jahren T(enan)5(t)] TJ ET BT 0 0 1 468.55 578

claiing t(o)-5(9ha) any interest in the property herein

described, Appellees.

No. 2D07-5937

District Court of Appeal of Florida, Second District.

M 18 2009.

Appeal from the Circuit Court Pinellas County; W. Douglas Baird Pe (6)7(2)] TJ ET BT 0 0 1 419.11 349.85 Tm [( )

Lauderdale, for Appellant.

A. Christopher Kasten of Bush Ross, P., Tampa, fo Appellees N Brankin & Trust Company.

No appearance for remaining Appellees.

VILLANTI, Jud

JPorgan Chase (JP Morgan) appeals an ordgrantin summary jugment in faor of New Millen L.C. Bran Bankin & BB &. The appeal arises 4(fr)13(o)5(m)-4(a)] TJ ET BT 0 0 1 371.23 188.81 Tm [( )] TJ JPorgan agai Millen BB & T. J P Morgan souh foreclose two mortgages which originate 2(d)3(in fa)131vor of AmSouk and were subsequently 4(as)11(sig)5.no JP Mrgan. Because the assigents from AmSou to JPrgan were not recorded trial cougranted summary judgment against Page 683 Morgan in favor of NM ill BB & T, finding that New Millial was a subsequent purchaser and BB & T was a subsequent creditor for valuable cnderatio ouotice 9] TJ ET BT 0 0 1 72.024 108 Morgan. Because the trial court erred in so holding under the

FACTS

In 2000, Ross W. Jahren obtained two mortgages from AmSouth in connection with the purchase of real property located in Pinellas County. The two mortgages in favor of AmSouth were recorded in the public records of Pinellas County. In 2004, AmSouth assigned the mortgages to JP Morgan, but this assignment was not recorded in the public records.

In 2006, Jahren entered into an agreement to sell the property to New Millennial. BB & T financed New Millennial's purchase. As part of the sales process, New Millennial's closing agent performed a title search on the property and discovered the two recorded AmSouth mortgages, which were reflected as still outstanding. Chicago Title Insurance Company then issued a Commitment for Title Insurance indicating that it would issue title insurance upon receipt of the "cancelled note[s] and satisfaction[s] or release[s]" for the two mortgages executed by Jahren in favor of AmSouth. New Millennial's closing agent failed to obtain the cancelled notes and satisfactions or releases requested by Chicago Title. Instead, the closing agent contacted AmSouth by telephone and was allegedly told by an unidentified[fn1] AmSouth representative that the loans were paid off and that written confirmation of this fact would be provided. On April 24, 2006, someone on behalf of AmSouth faxed to the closing agent two computer screen printouts styled "Installment Loan Account Profile," which reflected that the loans had a "close date" of June 30, 2004, and had a current balance of $0. The documents also stated "*PD OFF." Jahren and New Millennial finalized the sale of the property without obtaining the cancelled notes and satisfactions or releases specifically requested by Chicago Title.

The AmSouth mortgages were never satisfied, and JP Morgan began foreclosure proceedings as AmSouth's assignee. Importantly, New Millennial and BB & T did not defend by arguing that the two notes had been paid off and the mortgages satisfied.[fn2] Rather, they defended by arguing that the mortgages were ineffective and unenforceable against them because JP Morgan had not recorded the assignments received from AmSouth, as required by section 701.02, Florida Statutes (2004). Both sides filed motions for summary judgment. On September 11, 2007, the trial court denied JP Morgan's motion for summary judgment and granted New Millennial and BB & T's motion, finding:

1. AmSouth Bank assigned the two mortgages at issue in this case to JP Morgan Chase ("**Assignments**"). The Assignments were not recorded in accordance with § 701.02, *Florid Statutes.* Page 684

2. New Millennial is a subsequent purchaser for valuable consideration, *was without notice of the Assignments*, and is protected by § 701.02, *Florida Statutes.*

3. BB & T is a subsequent creditor for valuable consideration, was *without notice of the Assignments*, and is protected by § 701.02, *Florida Statutes.*

4. The mortgages being foreclosed by JP Morgan Chase in this case are ineffective and unenforceable against New Millennial and BB & T[.]

(Underline emphasis added.) The court subsequently denied JP Morgan's motion for rehearing or reconsideration, stating:

Moreover, the Court finds that the Defendant New Millennial was a subsequent purchaser for valuable consideration, who *had no knowledge or notice of the mortgages at issue here.* Rather, New Millennial made a diligent inquiry to determine whether any amounts were due on the AmSouth mortgage and

they were advised that the loan in question was paid in full. Moreover Defendant BB & T is a subsequent creditor for valuable consideration with *no knowledge or notice of the mortgages at issue.* Accordingly, pursuant to section 701.02, *Florida Statutes*, the mortgages at issue are not effective or enforceable against New Millennial or BB & T.

(Underline emphasis added.) This appeal followed.

ANALYSIS

We review de novo an order granting summary judgment. *Knowles v. JPMorgan Chase Bank, N.A.*, 994 So.2d 1218, 1219 (Fla. 2d DCA 2008). Summary judgment should be granted "only if (1) no genuine issue of material fact exists, viewing every possible inference in favor of the party against whom summary judgment has been entered, and (2) the moving party is entitled to a judgment as a matter of law." *Id.* (citations omitted).

Chapter 701, Florida Statutes (2004), is entitled "**ASSIGNMENT AND CANCELLATION OF MORTGAGES.**" Section 701.01 states:

Assignment. — Any mortgagee may assign and transfer any mortgage made to her or him, and the person to whom any mortgage may be assigned or transferred may also assign and transfer it, and that person or her or his assigns or subsequent assignees may lawfully have, *take and pursue the same means and remedies which the mortgagee may lawfully have, take or pursue for the foreclosure of a mortgage and for the recovery of the money secured thereby.*

(Underline emphasis added.) Section 701.02 provides, in relevant part:

Assignment not effectual against creditors unless recorded and indicated in title of document. —

(1) No assignment of a mortgage upon real property or of any interest therein, shall be good or effectual in law or equity, against creditors or subsequent purchasers, for a valuable consideration, *and without notice*, unless the assignment is contained in a document which, in its title, indicates an assignment of mortgage and is recorded according to law.

(2) The provisions of this section shall also extend to assignments of mortgages resulting from transfers of all or any part or parts of the debt, note or notes secured by mortgage, and none of same shall be effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration without notice, unless a duly executed assignment be recorded according to law.

(Underline emphasis added.)

JP Morgan first argues that the trial court misapplied section 701.02 when Page 685 it held that New Millennial was a subsequent purchaser and BB & T was a subsequent creditor for valuable consideration and without notice of the assignments. JP Morgan's position is that section 701.02(1) only applies to estop an earlier purchaser/assignee of a *mortgagee*"the person or entity that loaned the money involved in the mortgage and obtained a security interest on the piece of property — from claiming priority in the same mortgage chain as against a subsequent assignee of the same mortgage when the earlier *mortgagee* fails to record the earlier assignment of the mortgage. In other words, if the original

(Underline emphasis added.) The plain effect of the above provision is to enable the closing agent to timely obtain a satisfaction of mortgage if it remits to the mortgagee the amount set forth in an estoppel letter. In this case, the title search reflected two recorded mortgages on the property. In an affidavit signed by Jahren on May 8, 2006, before closing on the transaction, he stated that the property was free and clear of all encumbrances, *except* those which were shown on the Title Insurance Commitment issued by Chicago Title. By so qualifying his affidavit, Jahren thereby acknowledged the debt with AmSouth was still outstanding as of that date. Yet, neither Jahren nor New Millennial nor its agents made a *written* request for an estoppel letter related to the two recorded mortgages, as required by section **701.04**(1). Instead, they proceeded to closing even though there was no recorded instrument acknowledging satisfaction of [the] mortgage, lien, or judgment . . . *duly entered of record in the book provided by law for such purposes in the proper county.*" § **701.04**(1) (emphasis added). The computer printouts faxed by AmSouth to the closing agent pursuant to a telephone inquiry were, at best, a red flag that raised the questions: (1) Did the printouts mean that the mortgages and notes were satisfied *two years prior* or were the notes "closed out" because they and the mortgages were transferred to or purchased by a third party?;**[fn4]** and (2) Given that section **701.03** requires that the mortgagee cancel a fully paid mortgage "within 60 days" of payment, why was there no satisfaction of the mortgages on record *two years* after the debt was allegedly Page 688 satisfied? Thus, the printout screens obtained by New Millennial and BB & T could not be viewed as an estoppel letter, nor could they serve as substitute for duly recorded satisfactions of mortgage documents. Under any interpretation of the undisputed facts, the continued existence and validity of the mortgages and notes was never explained away so as to establish New Millennial's and BB & T's status as bona fide purchaser and creditor for value.

CONCLUSION

"[I]t is the debt and not the mere evidence of it which is secured." *Drake Lumber Co. v. Semple*, **100 Fla. 1757**, **130 So. 577**, **581** (1930). Under the circumstances of this case, in the absence of cancelled notes or recorded satisfactions of the two mortgages, the trial court could not legally declare the loans "ineffective and unenforceable" as against New Millennial and BB & T. To do so deprived JP Morgan of its right to pursue the means and remedies of foreclosure, which are legal attributes of the mortgages it purchased. Hence, we reverse the summary judgment. Because the record is clear that JP Morgan's priority was not impugned vis-à-vis the Appellees, we remand for the trial court to vacate the summary judgment and reinstate the foreclosure proceedings with the priority status established as set forth in this opinion.**[fn5]**

Reversed and remanded with directions.

ALTENBERND and DAVIS, JJ., Concur.

[fn1] The closing agent did not obtain the name of the AmSouth representative who provided this information.

[fn2] Although Jahren is a nominal party to this appeal and did not file an appearance, we note that his defenses below did not create a disputed issue of material fact as to whether the two AmSouth notes had been paid off and the mortgages satisfied. He did not attach proof of payment, such as checks showing that the two AmSouth notes had been paid off and the mortgages satisfied. Rather, he filed

copies of the same two computer screen printouts discussed above. As discussed herein, these documents did not demonstrate that the mortgages had been satisfied.

[fn3] Our opinion should not be viewed as condoning JP Morgan's failure to record the assignment. Rather, we simply conclude that the failure to record the assignment here was not fatal to JP Morgan's right as a matter of law to pursue the remedy of foreclosure. Obviously, a large part of the underlying litigation would have been avoided if the assignment had been duly recorded, as is typically done.

[fn4] In opposition to New Millennial and BB & T's motion for summary judgment, JP Morgan filed the affidavit of Brian

Mortgage Elec. v. Azize, 965 So.2d 151 (Fla. 2nd DCA 2007)

MORTGAGE ELEC. v. AZIZE, 965 So.2d 151 (Fla.App. 2 Dist. 2007)

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellant, v. George AZIZE; Unknown Spouse Of George Azize; John Doe, Jane Doe as Unknown Tenant(s) In Possession of the Subject Property # 1; John Doe, Jane Doe as Unknown Tenant(s) In Possession of the Subject Property # 2, Appellees.

No. 2D05-4544.

District Court of Appeal of Florida, Second District.

February 21, 2007.

Appeal from the Circuit Court, Pinellas County, Walt Logan, J.

Robert M. Brochin of Morgan, Lewis & Bockius LLP, Miami, for Appellant.

No appearance for Appellees.

John R. Hamilton of Foley & Lardner, LLP, Orlando, for Amicus Curiae Federal National Mortgage Association.

Elliot H. Scherker of Greenberg Traurig, P.A., Miami, for Amicus Curiae Chase Home Finance LLC.
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William P. Heller of Akerman Seuterfitt, Fort Lauderdale, for Amicus Curiae Countrywide Home Loans, Inc.

Michael Ray Gordon and Kenton W. Hambrick, McLean, VA, for Amicus Curiae Federal Home Loan Mortgage Corporation.

W. Bard Brockman of Powell Goldstein, LLP, Atlanta, GA, for Amicus Curiae Mortgage Bankers Association.

April Carrie Charney, Jacksonville, for Amicus Curiae Jacksonville Area Legal Aid, Inc.

DAVIS, Judge.

Mortgage Electronic Registration Services, Inc. (MERS), appeals the trial court's dismissal with prejudice of its complaint seeking reestablishment of a lost note and the foreclosure of a mortgage. The trial court

This court reviews a trial court's decision to dismiss a complaint de novo. *Trotter v. Ford Motor Credit Corp.*, 868 So.2d 593 (Fla. 2d DCA 2004). Similarly, this court reviews findings regarding standing de novo. *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, 801 So.2d 175 (Fla. 5th DCA 2001). In most circumstances, the trial court's dismissal of a complaint for failure to state a cause of action should be without prejudice to the plaintiff's amendment of the complaint to cure the deficiencies. *See Wittington Condo. Apartments v. Braeinar Corp.*, 313 So.2d 463, 466 (Fla. 4th DCA 1975) (stating that a pleading's failure to allege the proper representation is not a basis for a final dismissal until an opportunity to amend has been granted).

The trial court's decision, as reflected in its general order, is based on its finding that MERS could never, under any circumstances, be the proper plaintiff to bring the foreclosure action. Specifically, the trial court found that because MERS was not the owner of the beneficial interest in the note, even if the lost note was reestablished and MERS proved that it was the owner and holder of the note, MERS could not properly bring the foreclosure action.

We disagree. The holder of a note has standing to seek enforcement of the note. *See Troupe v. Redner*, 652 So.2d 394 (Fla. 2d DCA 1995); *see also Philogene v. ABN Amro Mortgage Group, Inc.*, 948 So.2d 45, 45 (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."). Furthermore, standing is broader than just actual ownership of the beneficial interest in the note. "The Florida real party in interest rule, Fla.R.Civ.P. 1.210(a), permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest." *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So.2d 1178, 1183 (Fla. 3d DCA 1985).

Here, MERS's counsel explained to the trial judge at the hearing that, in these transactions, the notes are frequently transferred to MERS for the purpose of foreclosure without MERS actually obtaining the beneficial interest in the note. Although Page 154 the complaint does not allege how or why MERS came to be the owner and holder of the note, the trial court's dismissal was not based on this deficit.[fn2] Rather, the trial court found that even if MERS was the holder of the note based on a transfer by the lender or a servicing agent, MERS could never be a proper plaintiff because it did not own the beneficial interest in the note.[fn3] This was an erroneous conclusion.

MERS alleged that it is the owner and holder of the note and mortgage, and that allegation has not been contested by responsive pleading. Assuming that the complaint properly states a cause of action to reestablish the note and that MERS can show prima facie proof of such allegations, MERS would have standing as the owner and holder of the note and mortgage to proceed with the foreclosure. We also note that the trial court's conclusion that MERS further lacked standing because one corporation cannot serve as the agent for another corporation is incorrect. *See* 2 Fla. Jur.2d *Agency and Employment* § 3 (2005). Although the trial judge was particularly concerned about MERS's status as nominee of Aegis, in light of the allegations of the complaint, the language contained in the note and mortgage, and Azize's failure to contest the allegations, the issue of MERS's ownership and holding of the note and mortgage was not properly before the trial court for resolution at this stage of the proceedings. Accordingly, we reverse the dismissal and remand for further consideration.

Reversed and remanded.

NORTHCUTT and SILBERMAN, JJ., Concur.

[fn1] The same trial court order of dismissal was filed in twenty separate mortgage foreclosure actions.

[fn2] Since the trial court did not base its ruling on this issue, we offer no opinion as to whether the complaint fails to properly plead a cause of action without this information being alleged.

[fn3] MERS's counsel explained to the trial court at the hearing that notes such as the one executed in this case are frequently sold on the secondary mortgage market and then often sold again to investors, such as insurance companies or mutual funds. As such, technically, there may be several owners of the beneficial interest in a note. Additionally, to facilitate the handling of these transactions, the owners contract with a servicing agent to collect the payments and distribute the proceeds to the owners. MERS's counsel advised the court that such collection agents have been determined to have standing to seek enforcement of such notes for the benefit of the owners. *See Greer v. O'Dell*, 305 F.3d 1297(11th Cir.2002).

requirement for finding collateral estoppel. In either case, the essential issue is whether the lost note is legally enforceable.

The 2003 version of section 673.3091, which we apply here, required a person seeking to enforce a lost note to have been in possession of the instrument when it was lost.[fn1] Effective March 29, 2004, the section provides that a person seeking to enforce a lost note must show only that the person was entitled to enforce it when it was lost. The earlier version provides that "a person not in possession of an instrument is entitled to enforce the instrument if: *The person was in possession of the instrument* and entitled to enforce it when loss of possession occurred[.]" § 673.3091(1)(a), Fla. Stat. (2003) (emphasis added).

The 2003 version of section 673.3091 provides, in pertinent part:

(1) A person not in possession of an instrument is entitled to enforce the instrument if:

(a) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred;

(b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

§ 673.3091, Fla. Stat. (2003). Thus, it is MERS' burden to prove State Street's possession. This, however, was resolved by the reinstatement of the note in *Badra I*, thus, placing the note, as of that time, in the possession of State Street. Once the note was re-established and that ruling not appealed, it was effectively in the possession of State Street and subject to assignment. Certainly, it should not be the duty of an assignee of the mortgage securing a re-established note to independently reestablish the note once again in order to declare it in default. Any such need to do so is mooted by our conclusion that collateral estoppel applies to that aspect of the judgment in *Badra I.* We can discern no basis for requiring that that issue be re-litigated once resolved.

It was, therefore, error to enter summary judgment for the Badras and to deny partial summary judgment (as to the lost note) in favor of MERS. We remand for Page 1040 further proceedings consistent with this opinion.

Reversed and Remanded.

GROSS and TAYLOR, JJ., concur.

[fn1] We need not resolve, here, whether the 2004 amendment to section 673.3091 was substantive, as argued by the Badras, and cannot be applied retrospectively to this action, filed in January 2003. *See Serna v. Milanese, Inc.*, 643 So.2d 36, 38 (Fla. 3d DCA 1994).

Progressive Exp. v. McGrath Chiro., 913 So.2d 1281 (Fla. 2nd DCA 2005)

PROGRESSIVE EXP. v. McGRATH CHIRO., 913 So.2d 1281 (Fla.App. 2 Dist. 2005)

PROGRESSIVE EXPRESS INSURANCE COMPANY, Petitioner, v. McGRATH COMMUNITY

CHIROPRACTIC, f/k/a Naples Community Chiropractic, as assignee of Abner

Joseph, Respondent.

No. 2D05-1497.

District Court of Appeal of Florida, Second District.

November 18, 2005.

Appeal from the County Court, Lee County.
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[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.] Page 1283

Valeria Hendricks of Davis & Harmon, P.A., Tampa, for Petitioner.

Jack C. Morgan III of Morgan Law Firm, P.A., Fort Myers, for Respondent.

WALLACE, Judge.

Progressive Express Insurance Company (Progressive) seeks second-tier certiorari review of the appellate decision of the Twentieth Judicial Circuit reversing the Lee County Court's final judgment dismissing a small claims action filed by McGrath Community Chiropractic (the Provider). We grant Progressive's certiorari petition.

BACKGROUND

In May 2001, the Provider filed a small claims action against Progressive in the Lee County Court. The Provider sought the recovery of PIP benefits allegedly assigned to it by Abner Joseph under a policy of insurance issued by Progressive to Mr. Joseph. The Provider alleged in its statement of claim that the policy provided personal injury benefits and/or medical payments coverage and that the policy was required by law to comply with the Florida Motor Vehicle No-Fault Law, sections 627.730—.7405, Florida Statutes (1999) (the No-Fault Law). The Provider alleged further that it had "accepted, from

Thus the assignment of PIP benefits is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place. If the insured has assigned benefits to the medical provider, the insured has no standing to bring an action against the insurer. *Livingston v. State Farm Mut. Auto. Ins. Co.*, **774 So.2d 716**, **718** (Fla. 2d DCA 2000). In this case, the converse is true. If on the date the Provider filed the original statement of claim Mr. Joseph had not assigned benefits to the provider, only Mr. Joseph had standing to bring the action. It follows that the Provider would have lacked standing under these circumstances, and the case should have been dismissed.

In relying exclusively on the "relation back" rule when considering the Provider's standing, the circuit court implicitly affirmed the county court's finding that the Provider did not possess an assignment of benefits when it filed the action. In other words, the Provider was without standing at the time it filed the action, but it offered proof that it acquired standing in Page 1286 the amended statement of claim, which purportedly related back to the original statement of claim. Rule 1.190(c) provides:

Relation Back of Amendments. When the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

This rule does not permit a party to establish the right to maintain an action retroactively by acquiring standing to file a lawsuit after the fact. In this case, if the Provider was without standing when the action was filed, the PIP action was at best premature. *See Livingston*, **774 So.2d at 717**. A new lawsuit must be filed. *See Jeff-Ray Corp. v. Jacobson*, **566 So.2d 885**, **886** (Fla. 4th DCA 1990) (holding that the assignee of a mortgage could not maintain the mortgage foreclosure action because the assignment was dated four months after the action was filed; if the plaintiff wished to proceed on the assignment, it must file a new complaint). In relying on rule 1.190(c) and the "relation back" rule to cure the Provider's lack of standing when it filed the original complaint, the circuit court applied the incorrect law.

B. The Miscarriage of Justice Question

Our conclusion that the circuit court applied the incorrect law requires us to address the separate issue of whether this error has resulted in a miscarriage of justice. In *Department of Highway Safety & Motor Vehicles v. Alliston*, **813 So.2d 141** (Fla. 2d DCA 2002), this court offered the following perspective on the "miscarriage of justice" element:

The more difficult question in this case is whether the circuit court's error rises to the level that can be corrected as a "miscarriage of justice." Despite all of the efforts of the supreme court and the district courts, the test to determine when a "miscarriage of justice" has occurred remains easier to state than to apply. In measuring the seriousness of an error to determine whether second-tier certiorari is available, one consideration is whether the error is isolated in its effect or whether it is pervasive or widespread in its application to numerous other proceedings. Thus, a circuit court order that is particularly fact-specific and fact-dependent, or an order that provides a result without a written opinion and therefore cannot act as precedent in future cases, will generally not merit certiorari review in the district court, even if the district court might disagree with the result.

Id. at 145 (citations omitted). The facts in *Alliston* and two of this court's other decisions provide some guidance pertinent to the facts of this case in determining whether a miscarriage of justice has occurred.

I concur fully in the majority opinion. I write only to note that the record reveals the existence of an issue of fact concerning whether Mr. Joseph had equitably assigned PIP benefits to the Provider before the Provider filed the original statement of claim in May 2001. Both the county court and the circuit court apparently overlooked this fact issue in considering the Provider's claim.

In the original statement of claim, the Provider alleged that it had "accepted, from ABNER JOSEPH, a written and/or equitable assignment of rights under the policy." Based on this allegation, the Provider's failure to attach a formal, written assignment to its statement of claim was not fatal. While I do not condone the use of the justly-condemned expression "and/or" in pleadings,[fn2] the claim's allegation that the Provider had accepted an equitable assignment was sufficient to allege the Provider's standing to bring the action.[fn3] Page 1288 *Cf. WM Specialty Mortgage, LLC v. Salomon*, **874 So.2d 680**, **682-83** (Fla. 4th DCA 2004) (holding that a mortgage foreclosure complaint stated a cause of action where a subsequently filed assignment of mortgage executed after the date of the filing of the complaint indicated that the mortgage was physically transferred to the plaintiff before the complaint was filed, raising the possibility of an equitable assignment).

Progressive alleged as an affirmative defense that the Provider did not have standing for lack of an assignment of benefits. Progressive moved for summary disposition of the Provider's claim on this ground. In opposition to summary disposition, the Provider submitted the affidavits of Mr. Joseph and the Provider's office manager, as well as all of the forms signed by Mr. Joseph, including forms acknowledging receipt of specific therapies.

In general, any instruction, document, or act that vests in one party the right to receive funds arguably due another party may operate as an equitable assignment. *McClure v. Century Estates, Inc.*, **96 Fla. 568**, **120 So. 4**, **10** (1928). "No particular words or form of instrument is necessary to effect an equitable assignment[,] and any language, however informal, which shows an intention on one side to assign a right or chose in action and an intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment." *Giles v. Sun Bank, N.A.*, **450 So.2d 258**, **260** (Fla. 5th DCA 1984); *see also WM Specialty Mortgage, LLC*, **874 So.2d 680**. These general rules give rise to two issues concerning an assignment of PIP benefits: (1) the necessity of a writing and (2) the necessity of consideration.

Except where a writing is required by statute, an assignment may be oral and proven by parol evidence. *Blvd. Nat'l Bank of Miami v. Air Metal Indus., Inc.*, **176 So.2d 94**, **97-98**. (Fla. 1965). The affidavits of Mr. Joseph and the office manager are parol evidence that Mr. Joseph had assigned his right to PIP benefits to the Provider at the time he received treatment.

The No-Fault Law, however, appears to require some form of writing. A medical provider's authorization to receive payment directly from the insurer derives from section **627.736**(5)(a), Florida Statutes (1999), which provides in part:

Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge only a reasonable amount for the products, services, and accommodations rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment, if the insured receiving such treatment or his or her guardian has countersigned the invoice, bill, or claim form approved by the Department of Insurance upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian.

[fn3] The Provider would have been well advised to attach to its statement of claim any written documents supporting its cause of action based on an equitable assignment to ensure compliance with Florida Small Claims Rule 7.050(a)(1).

Republic Federal Bank v. Doyle, 19 So.3d 1053 (Fla. 3rd DCA 2009)

REPUBLIC FEDERAL BANK v. DOYLE, 19 So.3d 1053 (Fla.App. 3 Dist. 2009)

REPUBLIC FEDERAL BANK, N.A., Petitioner, v. Joseph M. DOYLE and Blanca

Alicia Doyle, Respondents.

No. 3D09-2405.

District Court of Appeal of Florida, Third District.

September 30, 2009.

Appeal from the Circuit Court, Miami-Dade County, Valerie Manno Schurr, J.

Carlton Fields and Matthew J. Conigliaro, St. Petersburg, and Charles M. Rosenberg, for petitioner.

Barry L. Simons, Miami, for respondents.

Before GERSTEN and LAGOA, JJ., and SCHWARTZ, Senior Judge. Page 1054

SCHWARTZ, Senior Judge.

We treat the petition for writ of mandamus as one for certiorari and deny the petition.

Following a November 4, 2008 final judgment of foreclosure, and after several delays — caused in part by the filing and the dismissal of a frivolous bankruptcy petition on the eve of a previous sale and a foul-up or two in the clerk's office — the trial court on July 29, 2009, entered an order fixing August 27, 2009, as the date of the sale. On motion of the defendants, however, apparently on the basis that in the case, like this one, of the foreclosure of a residence she routinely grants continuances of the sale rather than see "anybody lose their house," the trial judge granted a continuance until October 1, 2009.[fn1] The mortgagee now challenges this ruling. We deny its petition.

Although granting continuances and postponements are, generally speaking, within the discretion of the trial court, the "ground" of benevolence and compassion[fn2] (or the claim asserted below that the defendants might be able to arrange for payment of the debt during the extended period until the sale) does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other, and thus cannot support the order below: no judicial action of any kind can rest on such a foundation. This is particularly true here because the order contravenes the terms-of the statute that a sale is to be conducted "not less than 20 days or more than 35 days after the date" of the order or judgment. § 45.031(1)(a), Fla. Stat. (2008). See also *Kosoy Kendall Assocs., LLC v. Los Latinos Restaurant, Inc.*, 10 So.3d 1168 (Fla. 3d DCA 2009); *Comcoa, Inc. v. Coe*, 587 So.2d 474 (Fla. 3d DCA 1991).

The continuance thus constitutes an abuse of discretion in the most basic sense of that term. As the Court stated in *Canakaris v. Canakaris*, **382 So.2d 1197**, **1203** (Fla. 1980):

The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness. In this regard, we note the cautionary words of Justice Cardozo concerning the discretionary power of judges:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. Page 1055 He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

B. Cardozo, The Nature of the Judicial Process 141
(1921).

See *Storm v. Allied Universal Corp.*, **842 So.2d 245**, **246** n. 2 (Fla. 3d DCA 2003) (trial judge refused to preclude plaintiff, who misled and deceived the defendants, the jury and the trial court, from further litigation "to

Riggs v. Aurora Loan Services, 4D08-4635 (Fla. 4th DCA 4-21-2010)

RIGGS v. AURORA LOAN SERVICES, 4D08-4635 (Fla.App. 4 Dist. 4-21-2010)

JERRY A. RIGGS, SR., Appellant, v. AURORA LOAN SERVICES, LLC,

Appellee.

No. 4D08-4635

District Court of Appeal of Florida, Fourth District.

April 21, 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.

STEVENSON, J.

Aurora Loan Services, LLC, filed a mortgage foreclosure action against Jerry Riggs, Sr., alleging that it was the "owner and holder" of the underlying promissory note. Aurora filed a copy of the mortgage and a copy of the promissory note, which named Riggs as the mortgagor and First Mangus Financial Corporation as the mortgagee. The promissory note reflected an "endorsement in blank," which is a stamp with a blank line where the name of the assignee could be filled in above a pre-printed line naming First Mangus. Aurora moved for summary judgment, and, at the hearing, produced the original mortgage and promissory note reflecting the original endorsement in blank. The trial court granted summary judgment in favor of Aurora over Riggs' objections that Aurora's status as lawful "owner and holder" of the note was not conclusively established by the record evidence. We agree with Riggs and reverse the summary judgment.

The Second District confronted a similar situation in *BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936 (Fla. 2d DCA 2010), when the trial court granted alleged assignee U.S. Bank's motion for summary judgment. In order to establish its standing to foreclose, U.S. Bank filed an assignment of mortgage, which, as described, is comparable to the endorsement in blank in the instant case. *Id.* at 937. That court reversed because, *inter alia*, "[t]he 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." *Id.* at 939. The court in *BAC Funding* Page 2 *Consortium*, properly noted that U.S. Bank was "required to prove that it validly held the note and mortgage it sought to foreclose." *Id.*

In the instant case, the endorsement in blank is unsigned and unauthenticated, creating a genuine issue of material fact as to whether Aurora is the lawful owner and holder of the note and/or mortgage. As in *BAC Funding Consortium*, there are no supporting affidavits or deposition testimony in the record to establish that Aurora validly owns and holds the note and mortgage, no evidence of an assignment to Aurora, no proof of purchase of the debt nor any other evidence of an effective transfer. Thus, we reverse the summary judgment and remand for further proceedings. We find no merit in any of the other arguments raised on appeal.

Reversed and remanded.

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

Not final until disposition of timely filed motion for rehearing. Page 1

Safeco Ins. Co. of America v. Ware, 401 So.2d 1129 (Fla. 4th DCA 1981)

SAFECO INS. CO. OF AMERICA v. WARE, 401 So.2d 1129 (Fla.App. 4 Dist. 1981)

SAFECO INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLANT, v. LAWRENCE AARON WARE, APPELLEE.

No. 80-2119.

District Court of Appeal of Florida, Fourth District.

July 1, 1981.

Rehearing Denied August 26, 1981.

Appeal from the Circuit Court, Broward County, W. Clayton Johnson, J. Page 1130

Michael B. Davis of Walton, Lantaff, Schroeder & Carson, West Palm Beach, for appellant.

K. Jack Breiden of Law Office of E. Louis Fields, P.A., Fort Lauderdale, for appellee.

DOWNEY, Judge.

The trial court struck as frivolous appellant's motion to dismiss, which was directed to appellee's complaint, and entered a default judgment against appellant. This appeal involves the propriety of that judgment.

Appellee sued appellant and others for damages arising out of an automobile accident. Appellant initially moved for an enlargement of time within which to plead. While that motion was pending, but as yet unheard because of calendar problems, appellant filed a motion to dismiss or abate the action, essentially contending that the cause of action against appellant was based upon an insurance contract which, according to the allegations of the complaint, was not attached to the complaint because the policy was in the exclusive possession of the appellant. The motion states that appellant has furnished appellee a certified copy of the policy and suggests appellee should be required to attach to the complaint the policy he relies upon. Thereafter appellee filed a motion for final default judgment against appellant, contending that the motion to dismiss was a sham and frivolous and should be stricken and final default judgment entered. Appellant subsequently filed a motion attacking appellee's complaint on various grounds.

In due course, a hearing was had on all of the pending motions; after the hearing the trial court struck appellant's motion to dismiss as frivolous and entered a final default judgment against appellant.

Florida Rule of Civil Procedure 1.130 provides that contracts "upon which action may be brought or defense made" or copies thereof "shall be incorporated in or attached to the pleading." One of the ways

Sobel v. Mutual Development, Inc., 313 So.2d 77 (Fla. **1st DCA 1975**)

SOBEL v. MUTUAL DEVELOPMENT, INC., 313 So.2d 77 (Fla.App. 1 Dist. 1975)

THEODORE SOBEL, AS TRUSTEE, APPELLANT, v. MUTUAL DEVELOPMENT, INC., A

FLORIDA CORPORATION, ET AL., APPELLEES.

No. Y-26.

District Court of Appeal of Florida, First District.

June 3, 1975.

Appeal from the Circuit Court for Alachua County, R.A. Green, Jr., J. Page 78

Jonathan F. Wershow of Wershow, Burwell, Carroll & Wershow, Gainesville, and Herbert C. Zemel of Sparber, Zemel, Roskin, Heilbronner & Karp, Miami, for appellant.

Henry L. Gray, Jr., of Chanler, O'Neal, Avera, Gray, Lang & Stripling, James S. Quincey of Clayton, Duncan, Johnston, Clayton, Quincey, Ireland & Felder William B. Watson, III, of Watson, Watson & Steadham, Gainesville, Brooks P. Hoyt of MacFarlane, Ferguson, Allison & Kelly, Tampa, and P. Ause Brown, Gainesville, for appellees.

BOYER, Acting Chief Judge.

A detailed recitation of the facts surrounding the intricate and complicated mobile home park financing and operation transactions which form the basis of the suit giving rise to this interlocutory appeal would serve no purpose except to lengthen this opinion. By the order here appealed the learned trial judge granted a defense motion to strike portions of a third amended complaint. Although several points have been raised by the parties in their briefs; the issue, the resolution of which is dispositive of this appeal, is whether the pledge[fn1] of a mortgage without reference to the note or obligation secured vests any right in the pledgee. The law seems to be well settled that it does not.[fn2] A mortgage is a mere incident of, and ancillary to, the note or other obligation secured thereby, and an assignment of the pledge of the mortgage without an assignment of the pledge of the note or obligation secured thereby creates no right in the assignee or pledgee.[fn3]

The instrument by which the pledge sub judice was granted is a "wrap around" mortgage executed by appellant Sobel in favor of appellee Mutual Development, Inc. which mortgage secured two promissory notes from Sobel to Mutual, the pertinent portion of which mortgage provides as follows:

"If at any time there occurs a default by the mortgagee (Mutual) with respect to this mortgage or any of the other agreements incorporated herein, the mortgagor (Sobel) maintains the express right to set-off against any monies payable hereunder by it. It is agreed by and between the parties hereto that this

mortgage is expressly pledged to satisfy any such obligations if and whenever such a default occurs." (Emphasis added)

It is readily apparent from the above quoted provision of the mortgage that no reference is made to the notes secured by the mortgage, the mortgage being Page 79 the instrument which is "expressly pledged". The parties agree that neither the pledged mortgage nor the notes secured thereby were ever physically transferred to the pledgee nor was there any other written assignment or pledge thereof.

Appellant urges that the trial judge should have looked to the entire transaction to determine the true intent of the parties and that upon his failure so to do we should now do so; it being the contention of appellant that the "wrap around" mortgage is but a minute fragment of the entire complicated transaction and that all of the instruments involved in the transaction should be examined and considered as an integral part of the mortgage which contains the recitation providing for an express pledge of that mortgage.

We do indeed find that there were numerous other documents which apparently were executed incident to the transaction in which the above mentioned mortgage was executed. In fact, immediately preceding that portion of the mortgage which is hereinabove quoted, and as part of the same paragraph, we find the following recitation:

"Contemporaneously with the execution of the mortgage the parties hereto have entered into various other agreements pertaining to the acquisition, development, and operation of the encumbered premise as a mobile home park. Such agreements designated as the Sale and Purchase Agreement, Lease Agreement, Management Agreement and Supervision Agreement, provide for certain rights on the part of the Mortgagor with respect to payments thereunder, and for that purpose such agreements are incorporated herein by reference thereto."

However, appellant has not cited to us any portion of such other instruments which recite or necessarily imply a pledge of the notes secured by the pledged mortgage, nor has our examination thereof revealed any.

Appellant urges that the parties intended that the expressed pledge of the mortgage included the notes secured thereby. If such be the case appellant's remedy is in an action for reformation, but the trial court in the action giving rise to this appeal was without authority, in the absence of appropriate pleadings, to make such reformation and we are equally bound by the pleadings before us.

Having determined that the pledge of the mortgage without reference to the notes secured thereby vested no right of the pledgee and it further appearing that the notes have never been physically delivered into the possession of the pledgee of the mortgage (since the date of that pledge) we do not find it necessary to determine whether a pledge recited in a mortgage signed only by the pledgee (mortgagor) is sufficient, in the absence of delivery of possession, to create a valid and legal pledge.[fn4]

It logically follows from that which we have above stated that the learned trial judge was eminently correct under the status of the pleadings before him when he struck that portion of the complaint by which the plaintiff sought a judicial sale of the "wrap around" mortgage and the notes secured thereby. This interlocutory appeal is therefore dismissed.

It is so ordered.

JOHNSON and MILLS, JJ., concur.

[fn1] Guaranty Mortgage and Insurance Co. v. Harris, Fla.App.1st 1966, 182 So.2d 450.

[fn2] Vance v. Fields, Fla.App.1st 1965, 172 So.2d 613 and the authorities therein cited.

[fn3] Vance v. Fields, supra.

[fn4] Please see F.S. 679.203 and 25 Fla.Jur., Pledge and Collateral Security, Section 8 Page 80

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.

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).

Rule 1.510(c) requires that the movant "serve the motion at least 20 days Page 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.

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.

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

WM SPECIALTY MORTGAGE v. SALOMON, 874 So.2d 680 (Fla.App. 4 Dist. 2004)

WM SPECIALTY MORTGAGE, LLC, Appellant, v. ALAN F. SALOMON and FRANCES SALOMON, et al., Appellees.

Case No. 4D03-3318.

District Court of Appeal of Florida, Fourth District.

Opinion filed May 26, 2004.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County, J. Leonard Fleet, Judge, L.T. Case No. 02-22566 CACE.

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 S

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 intention 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 Page 683 Specialty's 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.

[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.