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

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

MARIA CORTORREAL-POCHE,

Appellant,

v. Case No. 5D19-3419

FEDERAL NATIONAL MORTGAGE
ASSOCIATION AND ENGLEWOOD PARK
NEIGHBORHOOD ASSOCIATION, INC.,

Appellees.
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Opinion filed December 11, 2020

Appeal from the Circuit Court
for Orange County,
Lisa T. Munyon, Judge.

Andrew B. Greenlee, of Andrew B. Greenlee, P.A., Sanford, and Anthony N. Legendre, II, of Law Offices of Legendre & Legendre, PLLC, Maitland, for Appellant.

Nancy M. Wallace, of Akerman, LLP, Tallahassee, William P. Heller, of Akerman, LLP, Fort Lauderdale, and Eric M. Levine, of Akerman, LLP, West Palm Beach, for Appellee, Federal National Mortgage Association.

No Appearance for Appellee, Englewood Park Neighborhood Association, Inc.

ORFINGER, M.S., Associate Judge.

Maria Cortorreal-Poche ("the homeowner") appeals a final judgment of foreclosure in favor of Federal National Mortgage Association ("Fannie Mae") following a non-jury

trial. The homeowner argues that Fannie Mae failed to prove that the original plaintiff, Aurora Loan Services, LLC ("Aurora"), had standing to sue at the inception of the case. We agree and reverse.

Aurora filed the underlying action in November 2009 against the homeowner and her husband, Andres Poche ("Andres").[1] Aurora alleged that on November 14, 2006, Andres executed and delivered a promissory note, and that Andres and the homeowner executed and delivered a mortgage to Mortgage Electronic Registration Systems Incorporated ("MERS") as nominee for First Magnus Financial Corporation ("First Magnus"). The complaint alleged that MERS subsequently assigned the mortgage to Aurora. The promissory note and mortgage were attached to the complaint, together with an assignment of both the note and mortgage from MERS as nominee for First Magnus to Aurora. MERS executed this assignment on October 6, 2009, a few weeks before Aurora filed suit.

Aurora alleged that it had standing to sue as the servicer of the loan and the holder of the note. It further alleged that Fannie Mae owned the note and that Fannie Mae had authorized Aurora to bring the lawsuit. However, nothing in the loan documents attached to the complaint supported these allegations. The note was not indorsed to Aurora, nor was it indorsed in blank. The assignment from First Magnus purported to vest ownership of the note and mortgage in Aurora, but made no mention of Fannie Mae whatsoever. Aurora failed to attach to the complaint a power of attorney or any other documentation

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[1] The trial court dismissed Andres as a party to the case in October 2015 based upon Fannie Mae's failure to effect timely service of process on him. In August 2016, Fannie Mae moved for and was granted leave to file an amended complaint. The amended complaint dropped Andres as a party because he was deceased and added the homeowner's unknown spouse as a defendant.

suggesting either that it was acting on Fannie Mae's behalf or that Fannie Mae had authorized it to do so.

In February 2010, about three months after filing suit, Aurora filed the original note and a now-recorded assignment of mortgage with the clerk. In August 2010, Aurora moved to substitute Fannie Mae as the proper party plaintiff, which the trial court granted without a hearing. Attached to this motion was an unrecorded assignment of the note and mortgage from Aurora to Fannie Mae, executed on the same date as the assignment from First Magnus to Aurora.

Almost seven years later, in January 2017, Fannie Mae moved for leave to file a second amended complaint, stating that its prior pleading did not attach a complete copy of the promissory note. Fannie Mae attached to its proposed second amended complaint a copy of the note with an additional page containing a blank and undated indorsement from First Magnus. The trial court denied the motion to amend "on the basis of laches since the original [complaint] was filed in 2009."

At trial, Fannie Mae argued that it had standing to sue because Aurora had standing as a holder of the note at the inception of the case. It relied upon the assignment of note and mortgage from First Magnus to Aurora, and to the original note bearing an undated blank indorsement on the back of one of its pages. The homeowner argued that the absence of an indorsement on the copy of the note attached to the original complaint was fatal to Aurora's claim of standing as a holder, and that Fannie Mae could not claim holder status because its standing derived from that of Aurora. The homeowner further argued that the assignment of the note and mortgage to Aurora would be relevant only if

Aurora had claimed to be a non-holder in possession with the rights of a holder, a status Aurora had not alleged.

The trial court entered a post-trial order containing detailed findings of fact and conclusions of law. It found that although Aurora, the original plaintiff, alleged it was the holder and servicer of the note, the copy of the note attached to the original complaint did not match the original note offered into evidence because the original note had a blank indorsement not present on the copy. Thus, comparing the two did not "conclusively establish" that the blank indorsement was on the note when Aurora filed suit. However, the trial court found that based on the testimony of Fannie Mae's witness, Fannie Mae owned the note when the complaint was filed and Aurora was the servicer and in possession of the note. The trial court found this conclusion was bolstered by the recorded assignment of note and mortgage from First Magnus to Aurora dated October 6, 2009. From this, the trial court concluded that Aurora had standing to foreclose at the time it filed suit.[2] It likewise found that Fannie Mae had standing to foreclose at the time of trial, and entered a foreclosure judgment in Fannie Mae's favor.

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[2] The homeowner pointed to the unrecorded assignment of the note and mortgage from Aurora to Fannie Mae, executed on the same date as the assignment from First Magnus to Aurora, as evidence that Aurora did not have standing when the complaint was filed in November 2009. The trial court sustained Fannie Mae's hearsay objection to introduction of the assignment into evidence, rejecting the homeowner's argument that the assignment was admissible as a verbal act. But see, e.g., Green Tree Servicing, LLC v. Atchison, 230 So. 3d 635, 636 (Fla. 5th DCA 2017); Holt v. Calchas, LLC, 155 So. 3d 499, 502 n.2 (Fla. 4th DCA 2015). The trial court reasoned, "Even if considered competent evidence, the unrecorded assignment shows assignment from Aurora to Federal National Mortgage Association on October 6, 2009. This assignment would be in keeping with the allegations of the complaint that FNMA owned the Note and Mortgage, but Aurora was the servicer and had possession of the Note." However, this overlooks that Aurora alleged not that it had mere possession of the note, but that it was actually the holder of the note.

The sole issue on appeal is whether Aurora, the original plaintiff, had standing to sue at the time it filed suit. "Because standing is a pure question of law, the standard of review is de novo." Elman v. U.S. Bank, N.A., 202 So. 3d 452, 455 (Fla. 4th DCA 2016). When reviewing a trial court's factual findings, including those pertaining to standing, the standard of review is whether those findings are supported by competent, substantial evidence. Id.

"A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose." Bank of N.Y. as Tr. v. Calloway, 300 So. 3d 220, 223 (Fla. 4th DCA 2020) (citations and internal quotations omitted). See also PMT NPL Fin. 2015-1 v. Centurion Sys., LLC, 257 So. 3d 516, 518 (Fla. 5th DCA 2018) ("A foreclosure plaintiff must have standing both at the time the foreclosure complaint is filed as well as when judgment is entered."). When, as in the instant case, the plaintiff at trial is not the original plaintiff, the substitute plaintiff stands in the shoes of the original plaintiff and acquires the original plaintiff's standing at the time the case was filed. Id.; Nationstar Mortg., LLC v. Bo Chan, 226 So. 3d 330, 332 (Fla. 5th DCA 2017).

Aurora's complaint alleged that it was both the holder of the note and the servicer of the loan. The "holder" of a promissory note is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." § 671.201(21)(a), Fla. Stat. (2009). Because Aurora was not the named payee, it had to prove that the note was payable to bearer at the inception of the case. A note is "payable to bearer" if it so states, if it does not identify a payee, or if it otherwise indicates that it is not payable to a specific person. § 673.1091(1), Fla. Stat.

(2009). Thus, a note bearing a blank indorsement from the original payee is payable to bearer. See § 671.201(5), Fla. Stat. (2009).

Although the trial court found that Aurora had possession of the original note at the time suit was filed, and the original note filed with the clerk some three months later was indorsed in blank, Fannie Mae failed to prove when the blank indorsement was placed on the note. The indorsement itself is undated, and thus it was incumbent on Fannie Mae to offer testimony or some other competent evidence to establish that the indorsement was on the note when Aurora filed suit. Because Fannie Mae offered no such evidence, it failed to prove that Aurora had standing to sue as a holder of the note. See Rodriguez v. Wells Fargo Bank, N.A., 178 So. 3d 62, 64 (Fla. 4th DCA 2015).

The assignment of the note and mortgage from First Magnus to Aurora could not establish Aurora as a holder of the note. Rather, "ownership, assignment, or transfer of the note is important to the analysis of standing only when the plaintiff is a nonholder in possession with the rights of a holder." Angelini v. HSBC Bank USA, N.A., 189 So. 3d 202, 203 (Fla. 4th DCA 2016) (quoting Rodriguez, 178 So. 3d at 67 (Conner, J., concurring) (emphasis added)); see also Green v. Green Tree Servicing, LLC, 230 So. 3d 989, 990 (Fla. 5th DCA 2017) ("[A] person entitled to enforce the note and foreclose on a mortgage is the holder of the note, a non-holder in possession of the note who has the rights of a holder, or a person not in possession of the note who is entitled to enforce . . . ." (quoting Gorel v. Bank of N.Y. Mellon, 165 So. 3d 44, 46 (Fla. 5th DCA 2015))). However, Aurora did not plead standing as a nonholder in possession with the rights of a holder. Further, our review of the trial transcript satisfies us that this issue was not tried by consent.

"A servicer that is not the holder of the note may have standing to commence a foreclosure action on behalf of the real party in interest, but it must present evidence, such as an affidavit or a pooling and servicing agreement, demonstrating that the real party in interest granted the servicer authority to enforce the note." Rodriguez, 178 So. 3d at 63. In this case, Aurora presented no such evidence. While Aurora alleged it was the servicer of a loan owned by Fannie Mae, it failed to allege by what authority it purported to act or even that it was authorized to bring suit on Fannie Mae's behalf. See Russell v. Aurora Loan Servs., LLC, 163 So. 3d 639, 643 (Fla. 2d DCA 2015).

Nor did Fannie Mae introduce testimony or documentary evidence establishing Aurora's authority. Its sole witness, Dan Cummins, was an employee of the current loan servicer, Nationstar Mortgage LLC d/b/a Mr. Cooper ("Nationstar"). He testified that Nationstar began servicing the loan when it acquired the prior servicer, Seterus, Inc., which took over servicing the loan from Aurora. Cummins never testified, however, that Fannie Mae either authorized Aurora to foreclose or ratified Aurora's effort to do so.

Because Fannie Mae failed to prove that Aurora had standing to foreclose at the inception of the lawsuit, the trial court reversibly erred in entering a final judgment of foreclosure. We therefore reverse the final judgment of foreclosure and remand for the entry of an involuntary dismissal of this action.

REVERSED AND REMANDED.

WALLIS and SASSO, JJ., concur.