

This memorandum opinion was not selected for publication in the New Mexico Appellate Reports. Please see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions. Please also note that this electronic memorandum opinion may contain computer-generated errors or other deviations from the official paper version filed by the Court of Appeals and does not include the filing date.

1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **THE BANK OF NEW YORK MELLON,**  
3 **F/K/A THE BANK OF NEW YORK, AS**  
4 **TRUSTEE FOR THE HOLDERS OF**  
5 **THE CERTIFICATES, FIRST**  
6 **HORIZON PASS-THROUGH**  
7 **CERTIFICATES SERIES FHAMS 2006-**  
8 **AA6, BY FIRST HORIZON HOME**  
9 **LOANS, A DIVISION OF FIRST**  
10 **TENNESSEE BANK NATIONAL**  
11 **ASSOCIATION, MASTER SERVICER,**  
12 **IN ITS CAPACITY AS AGENT FOR**  
13 **THE TRUSTEE UNDER THE**  
14 **POOLING AND SERVICING**  
15 **AGREEMENT,**

16           Plaintiff-Appellee,

17 v.

**No. 33,208**

18 **FLORIANA VENETICO,**

19           Defendant-Appellant.

20 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

21 **Sarah M. Singleton, District Judge**

22 Calvin & Ingram, P.A.

23 Stephen D. Ingram

24 Albuquerque, NM

25 for Appellee

1 Richard S. Mackenzie  
2 Santa Fe, NM

3 for Appellant

4 **MEMORANDUM OPINION**

5 **VIGIL, Chief Judge.**

6 {1} This is a mortgage foreclosure action in which Defendant, Floriana Venetico  
7 (Homeowner), appeals from the district court order granting summary judgment in  
8 favor of Plaintiff. Homeowner argues for the first time on appeal that Plaintiff lacked  
9 standing to bring the foreclosure suit. We conclude that Homeowner may raise the  
10 issue for the first time on appeal and reverse.

11 **I. BACKGROUND**

12 {2} Homeowner obtained a mortgage loan on May 20, 2005. The promissory note  
13 is made payable to First Horizon Home Loan Corporation (the Loan Corporation), and  
14 the mortgage securing the note is in favor of Mortgage Electronic Registration  
15 Systems, Inc. (MERS), as nominee for the Loan Corporation. Alleging that  
16 Homeowner defaulted on the promissory note and failed to cure the default after being  
17 given notice to do so, Plaintiff filed this mortgage foreclosure action. Plaintiff is First  
18 Horizon Home Loans (Plaintiff or First Horizon).

19 {3} First Horizon filed a motion for summary judgment, which the district court  
20 granted, and Homeowner appeals. Because this is a memorandum opinion and the

1 parties are familiar with the facts and procedural history of the case, we only discuss  
2 additional facts as are necessary to our disposition of the case.

## 3 **II. DISCUSSION**

### 4 **A. Preservation of Standing Issue**

5 {4} Homeowner argues on appeal that the summary judgment must be reversed  
6 because First Horizon lacked standing. Because this argument was not made to the  
7 district court, First Horizon argues that the issue was waived. We therefore proceed  
8 to determine whether standing in a mortgage foreclosure case is an issue that can be  
9 raised for the first time on appeal.

10 {5} In *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 14, 320 P.3d 1, the  
11 argument was advanced that the defendants waived their challenge to the bank’s  
12 standing to bring its foreclosure action. Our Supreme Court responded, “We have  
13 recognized that the lack of standing is a potential jurisdictional defect which may not  
14 be waived and may be raised at any stage of the proceedings, even sua sponte by the  
15 appellate court.” *Id.* ¶ 15 (alteration, internal quotation marks, and citation omitted).

16 {6} Based on the foregoing language in *Romero*, we have stated in three different  
17 cases that standing is a jurisdictional prerequisite to bringing a foreclosure action. *See*  
18 *Flagstar Bank, FSB v. Licha*, 2015-NMCA-086, ¶ 13, 356 P.3d 1102; *Bank of N.Y.*  
19 *Mellon v. Lopes*, 2014-NMCA-097, ¶ 7, 336 P.3d 443; *Deutsche Bank Nat’l Trust Co.*

1 *v. Beneficial N.M. Inc.*, 2014-NMCA- 090, ¶ 8, 335 P.3d 217. We have also repeated  
2 that a jurisdictional prerequisite, such as standing “ ‘may not be waived and may be  
3 raised at any stage of the proceedings, even sua sponte by the appellate court.’ ”  
4 *Licha*, 2015-NMCA-086, ¶ 13 (quoting *Romero*, 2014-NMSC-007, ¶ 15).

5 {7} In accordance with the foregoing authorities, we address Homeowner’s  
6 argument, raised for the first time on appeal, that First Horizon failed to establish it  
7 had standing to bring the action and conclude that summary judgment must therefore  
8 be reversed.

9 **B. Standard of Review**

10 {8} “We review a district court’s order granting summary judgment de novo.”  
11 *Licha*, 2015-NMCA-086, ¶ 12. Summary judgment is proper when “there are no  
12 genuine issues of material fact and the movant is entitled to judgment as a matter of  
13 law.” *Lopes*, 2014-NMCA-097, ¶ 6 (internal quotation marks and citation omitted).  
14 The movant for summary judgment must “establish that no genuine issue of material  
15 fact exists for trial and that the movant is entitled to judgment as a matter of law.”  
16 *Licha*, 2015-NMCA-086, ¶ 12 (internal quotation marks and citation omitted).

17 **C. Standing**

18 {9} A plaintiff must demonstrate that it had standing at the time it filed the  
19 complaint. *Romero*, 2014-NMSC-007, ¶ 17. To establish standing for a foreclosure

1 case, a plaintiff needs to show that it has the right to enforce the note and the mortgage  
2 lien upon the debtor’s property at the time the complaint was filed. *Lopes*, 2014-  
3 NMCA-097, ¶ 8.

4 {10} “To establish the right to enforce [the h]omeowner’s note under the [Uniform  
5 Commercial Code], the [b]ank was required to prove that at the time suit was filed, it  
6 was: ‘(i) the holder of the instrument, (ii) a nonholder in possession of the instrument  
7 who has the rights of a holder, or (iii) a person not in possession of the instrument who  
8 is entitled to enforce the instrument.’ ” *Id.* ¶ 9 (quoting NMSA 1978, § 55-3-301  
9 (1992)). A “holder” is defined as “the person in possession of a negotiable instrument  
10 that is payable either to bearer or to an identified person that is the person in  
11 possession[.]” NMSA 1978, § 55-1-201(b)(21)(A) (2005).

12 {11} The note in this case is made payable to the Loan Corporation. However, the  
13 complaint was not filed by the Loan Corporation; it was filed by First Horizon. First  
14 Horizon nevertheless contends that it has standing to enforce the note as the holder of  
15 the note because ‘a person entitled to enforce a note as a holder of the instrument  
16 includes a person in possession of the instrument payable to that person.’” To support  
17 this contention, First Horizon relies exclusively on an assertion that it is the  
18 “successor-by-merger” to the Loan Corporation and as such, the payee, and therefore  
19 holder because in a merger the surviving corporation automatically succeeds to the

1 rights of the merged corporations to enforce their contract rights. *See Romero*, 2014-  
2 NMSC-007, ¶ 21 (“The payee is always a holder if the payee has possession.”  
3 (internal quotation marks and citation omitted)). The record, however, is void of any  
4 evidence of a merger. First Horizon’s sole support offered to show merger are  
5 unpublished foreign opinions containing footnoted merger information involving  
6 these entities. In effect, First Horizon asks us to take judicial notice of these facts on  
7 appeal. We decline to do so. *See State v. Torres*, 1999-NMSC-010, ¶ 41, 127 N.M. 20,  
8 976 P.2d 20 (“The matter of which a court will take judicial notice must be a subject  
9 of common and general knowledge. The matter must be known, that is well  
10 established and authoritatively settled.” (internal quotation marks and citation  
11 omitted)).

12 {12} First Horizon had the burden to establish, that at the time the complaint was  
13 filed, it had a right to enforce the promissory note. The citation to unpublished cases  
14 fails to do so. *See Romero*, 2014-NMSC-007, ¶ 17 (“If the entity was a successor in  
15 interest to a party on the contract, it was incumbent upon it to prove this to the court.”  
16 (alterations, internal quotation marks, and citation omitted)). Further, First Horizon  
17 asserts that the caption demonstrates the merger and it did not need to provide a  
18 corporate history to prove standing. Yet, it does not cite any authority as to whether

1 the caption alone proves a fact or whether such a caption can even be considered  
2 evidence at all.

3 {13} First Horizon did not produce admissible evidence to create even a prima facie  
4 case that it was a holder of the note when suit was filed. It's evidence through affidavit  
5 that it possessed the original of the note was insufficient for a case of standing, given  
6 the lack of evidence that it possessed the note through merger. Accordingly, First  
7 Horizon lacks standing to enforce the note. It is therefore not necessary to address  
8 whether First Horizon demonstrated that at the time the complaint was filed it also had  
9 standing to enforce the mortgage.

### 10 **III. CONCLUSION**

11 {14} For the foregoing reasons, we reverse the district court order granting Plaintiff  
12 summary judgment and remand to the district court for further proceedings consistent  
13 with this Opinion.

14 {15} **IT IS SO ORDERED.**

15  
16 

---

**MICHAEL E. VIGIL, Chief Judge**

17 **WE CONCUR:**

18  
19 

---

**JONATHAN B. SUTIN, Judge**

1

2 **LINDA M. VANZI, Judge**