FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2682

MTGLQ INVESTORS, L.P.,

Appellant,

v.

JAMES COLLIER MERRILL,

Appellee.

On appeal from the Circuit Court for Escambia County.
Gary L. Bergosh, Judge.

January 25, 2021

KELSEY, J.

The issue before us is whether Appellant MTGLQ Investors can retrieve the original note and mortgage from the court file of a foreclosure action the trial court dismissed without a merits disposition. MTGLQ was an assignee and substituted plaintiff in that action, and moved for release of the documents, but the trial court denied the motion. We hold that on the facts presented, MTGLQ can retrieve the original note and mortgage.

I. Foreclosure Proceedings.

Appellee, the Borrower, entered into a $417,000 purchase-money mortgage and note in June 2007, securing his acquisition of a residential condominium in Pensacola. He defaulted on his payments less than two years later, failing to make the April 2009 payment or, as far as our record shows, any other payments in the

nearly twelve years since. The original lender sued for foreclosure in 2009, but dismissed that proceeding without resolution.

JPMorgan Chase Bank filed the present foreclosure action in 2013, alleging a default date of April 1, 2009 and ongoing default thereafter. The complaint alleged that the Federal National Mortgage Association (FNMA) owned the note, and that JPMorgan as the loan servicer and holder was authorized to bring the foreclosure action. JPMorgan filed the original note and mortgage in 2013. The original note had an allonge with a blank indorsement.

In 2014, JPMorgan filed a verified motion to substitute FNMA as plaintiff. This motion asserted that JPMorgan had transferred to FNMA the right to enforce the subject loan, FNMA was the real party in interest, and no party would be prejudiced. Borrower did not object, and the trial court granted the motion.

In 2016, FNMA assigned to MTGLQ the mortgage and "the certain note(s) described therein." FNMA recorded the assignment. FNMA also executed a power of attorney giving MTGLQ "full power and authority" to take any action that FNMA could take with respect to "mortgage loans, deeds of trust, promissory notes and allonges."

In 2018, MTGLQ moved to substitute itself as plaintiff in the foreclosure action, attaching a copy of the recorded assignment from FNMA. Again, Borrower did not object to the substitution of plaintiff, and the trial court granted this motion.

The trial court initially scheduled trial for August 13, 2018; then continued it to December 3, 2018. MTGLQ amended its witness list five days before trial, asserting that the witnesses who would testify had changed (though the testimony would not). Although Borrower had not deposed the earlier-named witnesses, the trial court dismissed the case with prejudice after the late amendment.[1]

[1] Whether that dismissal was appropriate is academic. MTGLQ filed an appeal, but did not pursue it. That does not preclude future foreclosure actions based on other dates of default.

Early in 2019, MTGLQ filed a motion and then an amended motion to retrieve from the court file the original mortgage and the original note with its allonge, citing Florida Rule of Judicial Administration 2.430(h). This rule provides that courts have ongoing authority "to release exhibits or other parts of court records that are the property of the person or party initially placing the items in the court records." MTGLQ argued that it was entitled to the original note and mortgage on two grounds. The first was its status as substituted plaintiff in the foreclosure action. The second was the September 8, 2016 assignment from FNMA reciting that it assigned the mortgage to MTGLQ "together with the certain note(s) described therein."

Borrower argued that no right to enforce the note survived this Court's dismissal of MTGLQ's appeal from the trial court's order dismissing the foreclosure action. Borrower also argued that MTGLQ could not obtain the note in any event because it was not the original plaintiff and could not establish a chain of ownership. Borrower argued that a substituted plaintiff does not necessarily own the note or have standing to enforce it.

The trial court held a telephonic hearing, and orally denied MTGLQ's motion. No court reporter recorded the hearing. MTGLQ moved for reconsideration, noting the court's oral denial.

See PNC Bank, N.A. v. Neal, 147 So. 3d 32, 32 (Fla. 1st DCA 2013) (holding that not even a dismissal *with* prejudice of a foreclosure action precludes a mortgagee "from instituting a new foreclosure action based on a different act or a new date of default not alleged in the dismissed action"); *Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009, 1019 (Fla. 2016) (holding a new cause of action arises with each default, starting a new five-year limitations period within which a new foreclosure action may be filed); *see also Nationstar Mortg., LLC v. Brown,* 175 So. 3d 833, 834 (Fla. 1st DCA 2015) ("[A] note securing a mortgage creates liability for a total amount of principal and interest, and . . . the lender's acceptance of payments in installments does not eliminate the borrower's ongoing liability for the entire amount of the indebtedness.") (quoted with approval in *Bartram*, 211 So. 3d at 1018).

The parties argued their positions at a second, transcribed hearing. Borrower's attorney asserted that he had located a public record in which FNMA rescinded a June 23, 2014 assignment of the mortgage (not the note) to JPMorgan. Borrower did not give MTGLQ prior notice or a copy of this document, and did not enter it into evidence—but he has included it in his appendix here. Borrower argued that to remove the original note and mortgage from the court file and give MTGLQ physical possession of them would make MTGLQ a holder in possession, thus giving MTGLQ more rights than it had during the foreclosure suit. Borrower claimed this would prejudice him. Borrower also argued that it was not necessary to remove the original note and mortgage from the court file, because "someone" who might file another foreclosure action could simply reference the filed documents.

The trial court rendered the unelaborated order on appeal, stating "Plaintiff's Motion to Return Original Loan Documents is DENIED." MTGLQ timely appealed.

II. Legal Analysis.

A. Jurisdiction and Standard of Review.

We have jurisdiction over the order denying MTGLQ's motion to remove the original note and mortgage from the court file. Fla. R. App. P. 9.130(a)(3)(C)(ii) (recognizing jurisdiction to review non-final orders determining the right to immediate possession of property). The issues raised are questions of law, for which our review is de novo. *See Wells Fargo Bank, N.A. v. Ousley*, 212 So. 3d 1056, 1057 (Fla. 1st DCA 2016).

B. Rights of a Substituted Plaintiff.

On appeal, MTGLQ continues to argue it has the right to obtain the original documents, either as substituted plaintiff or as assignee of the note and mortgage. MTGLQ argues it need not prove previous physical possession of the documents. Borrower acknowledges that the court can release the original documents to a substituted plaintiff that is a holder in possession, or a nonholder in possession that has the rights of a holder. Borrower argues that MTGLQ is neither of those, and that MTGLQ's status as substituted plaintiff is insufficient to authorize it to obtain the

original documents from the court file. Borrower further argues that giving MTGLQ the documents will prejudice him. We reject both arguments.[2]

The core issue on appeal is whether an assignee that becomes a substituted plaintiff in a foreclosure action can retrieve an original note and mortgage from the court file after the court dismisses the case without entering a merits judgment. Courts have general authority to "release exhibits or other parts of court records that are the property of the person or party initially placing the items in the court records." Fla. R. Jud. Admin. 2.430(h). We conclude that MTGLQ is entitled to receive the original loan documents from the court file for several reasons.

(1) Negotiability. Significantly, notes are different from most documents in court files, because notes are negotiable instruments. *See* § 673.2011, Fla. Stat. (defining negotiation of instruments).[3] Notes do not belong to the court, nor do they belong to the borrower. *See U.S. Bank Nat'l Ass'n v. Rodriguez*, 256 So. 3d 882, 884–85 (Fla. 4th DCA 2018) (recognizing that original notes remain negotiable instruments after entering court file). In *Rodriguez*, parties to a foreclosure action entered an agreed order to keep the note in the court file after a non-merits dismissal against the original foreclosure plaintiff. 256 So. 3d at 882. Several years later, a substituted plaintiff sought to remove the loan documents. The Fourth District held that because no judgment had cancelled the note or taken it out of the stream of commerce, "it should be returned . . . if judgment is not entered in a foreclosure case, as it does not belong to the court and it remains negotiable and valuable to its holder." 256 So. 3d at 884. Here,

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[2] We reject Borrower's three additional arguments, as explained before the conclusion of this opinion.

[3] *See also* § 673.1091(3), Fla. Stat. (providing that a negotiable instrument is "payable to bearer if it is indorsed in blank pursuant to section 673.2051(2)"); § 673.2051(2), Fla. Stat. (providing that a blank-indorsed instrument "becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed [by an indorsement to an identified person per section 673.2051(1)]").

Borrower's argument against giving MTGLQ the documents would defeat the note's negotiability, since there is no other party to the foreclosure action that could remove them for further negotiation.

Other courts also have held that foreclosure plaintiffs are entitled to remove original loan documents from the court file even without proving entitlement to foreclose. *See, e.g., Santiago v. U.S. Bank Nat'l Ass'n as Tr. for Banc of Am. Funding Corp.*, 257 So. 3d 1145, 1147–48 (Fla. 5th DCA 2018) ("Whether a party is entitled to foreclose the note and mortgage is not relevant to its right to have the note released from the court records."); *Kajaine Estates, LLC, v. U.S. Bank Nat'l Ass'n*, 198 So. 3d 1010, 1011 (Fla. 5th DCA 2016) (requiring trial court to release original note to plaintiff that had failed to prove predecessor's standing, and finding that proof of standing is "not relevant" to releasing the note). The note is property, a valuable negotiable instrument, and MTGLQ as plaintiff is entitled to remove it from the court file.

(2) Transferability and Assignment. Beyond the negotiability problem, Borrower's arguments are contrary to settled principles of transferability and the rights of transferees. The law allows assignment and transfer of both notes and mortgages. *See* § 701.01, Fla. Stat. (authorizing subsequent assignees and transferees of mortgages, as well as original mortgagees, to assign and transfer such mortgages, and providing that all such persons, assigns, and subsequent assignees have all lawful rights of the original mortgagee to foreclose and "for the recovery of the money secured thereby"). MTGLQ filed the assignment and power of attorney documents from FNMA, which on their face gave MTGLQ all of FNMA's rights in the mortgage and note. The court properly substituted MTGLQ as plaintiff based on these documents. *See* Fla. R. Civ. P. 1.260(c) ("In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.").

Borrower as the debtor under a promissory note remains obligated to the party entitled to enforce the note. *See* § 673.4121(1), Fla. Stat. (obligating issuer of a note to pay according to its terms "at the time it first came into possession of

a holder"). On this record, MTGLQ is a "person entitled to enforce" the note under section 673.3011. This section defines that status as including "[t]he holder of the instrument" and "[a] nonholder in possession of the instrument who has the rights of a holder." § 673.3011(1), (2), Fla. Stat. This section also states that a person may be entitled to enforce an instrument without being its owner. § 673.3011, Fla. Stat. Under section 673.2013, MTGLQ is a transferee of the note and mortgage because it received the right to enforce it, which "vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course," absent fraud or illegality. § 673.2031(2), Fla. Stat.

MTGLQ as transferee would not have to prove previous physical possession of the note to have the rights of a holder. Constructive possession in the form of the authority to exercise control is sufficient. *Deutsche Bank Nat'l Tr. Co. v. Noll*, 261 So. 3d 656, 658 (Fla. 2d DCA 2018). MTGLQ therefore has the rights of a holder, and it is entitled to obtain the loan documents from the court file. *See also Kajaine*, 198 So. 3d at 1011 (holding court should release note to transferee under valid assignment).

(3) Standing in the shoes of original plaintiff. In addition, once the court enters an order substituting a new party in the place of the earlier plaintiff, the substituted plaintiff stands in the shoes of the original plaintiff. *See Wilmington Tr. v. Moon*, 238 So. 3d 425, 428 (Fla. 5th DCA 2018) ("In the case of a substituted plaintiff, the substituted plaintiff may rely on the standing (if any) of the original plaintiff at the time the case was filed. . . . Significantly, there is no requirement that a substituted plaintiff must prove its standing at the time of the substitution."); *see also Wilmington Sav. Fund Soc'y, FSB v. Stevens*, 290 So. 3d 115, 118 (Fla. 4th DCA 2020) (noting substituted plaintiff has the right to obtain the original note by moving for its release from the court file); *Spicer v. Ocwen Loan Servicing, LLC*, 238 So. 3d 275 (Fla. 4th DCA 2018) (holding substituted plaintiff had constructive possession of the original note because it was in the court file of the case when the new plaintiff came in, and was necessary for proof of standing at trial).

(4) No prejudice. Borrower nevertheless argues that he will be prejudiced if MTGLQ gets the original note. The Fifth District rejected an argument similar to Borrower's in *PMT NPL Financing 2015-1 v. Centurion System, LLC*, 257 So. 3d 516 (Fla. 5th DCA 2018). Recognizing the right of a substituted plaintiff to have physical possession of original loan documents the original plaintiff had filed, the court aptly observed that a substituted plaintiff inevitably must have physical possession to authenticate the loan documents and enter them into evidence at trial. *See id.* at 518–19. Otherwise, the substituted plaintiff could never meet its obligation to prove standing at enforcement. At a minimum, and in addition to the reasoning already discussed, MTGLQ as substituted plaintiff has the right to possess the note to prove standing if it goes to trial. It receives no greater right upon removing the loan documents from the court file. It can then elect to foreclose again, or to transfer the negotiable instrument to another entity that may foreclose. In either case, Borrower retains his defenses and procedural rights.

In sum, a substituted plaintiff becomes a holder entitled to receive payments under the note and entitled to pursue remedies for nonpayment, including foreclosure. A substituted plaintiff is not required to prove that it previously had physical possession of the original note, in order to have holder status. Thus, MTGLQ's receipt of the original documents will not add to its rights or prejudice Borrower. If MTGLQ or any other party files a new foreclosure action, or if more than one entity attempts to foreclose on the same note, Borrower's defenses remain intact.

C. Rejecting Borrower's Other Arguments.

(1) The Purported Rescission. Borrower argues FNMA's transfer to MTGLQ was ineffective because FNMA purportedly rescinded assignment of the *mortgage* to JPMorgan, making it impossible for JPMorgan to have assigned the mortgage back to FNMA before FNMA assigned both note and mortgage to MTGLQ. We reject this argument because Borrower failed to prove it.[4] This

[4] Putting aside the fact that the rescinded assignment did not include the note, we also question the logic of this argument. FNMA owned the note, and JPMorgan sued as servicer for FNMA.

case had been set for trial twice, but Borrower raised this argument only orally and for the first time at the reconsideration hearing. He did not give MTGLQ advance notice, and he did not authenticate the document or enter it into evidence. This was improper. A court cannot rely on unsworn argument of counsel and an unauthenticated document to determine the substantive rights of an opposing party—neither is competent evidence. *See, e.g.*, *Shaffer v. Deutsche Bank Nat'l Tr.*, 235 So. 3d 943, 946 (Fla. 2d DCA 2017) (Villanti, C.J., concurring specially) (collecting cases holding that documents not authenticated or entered into evidence are "not properly before the court and cannot constitute evidence" as to a legal issue before the court); *Chase Home Loans LLC v. Sosa*, 104 So. 3d 1240, 1241 (Fla. 3d DCA 2012) ("[U]nsworn representations of counsel about factual matters do not have any evidentiary weight in the absence of a stipulation.").

(2) Lack of a Transcript. We also reject Borrower's argument that we must affirm without addressing the merits because MTGLQ did not get a transcript of the initial telephone hearing. Borrower misplaces his reliance on *Applegate v. Barnett Bank of Tallahassee, Inc.*, 377 So. 2d 1150, 1152 (Fla. 1979). *Applegate* holds that lack of a transcript *can* prevent meaningful appellate review. It does not mean that absence of a transcript is always fatal to an appeal. Instead, the issue is whether the appeal turns on dispositive questions of fact that were, or could have been, established only in the proceedings not transcribed. That is not the case here, where Borrower does not assert that any dispositive question of fact was resolved at the initial, untranscribed telephonic hearing. To the contrary, Borrower's counsel stated at the transcribed hearing on MTGLQ's motion for reconsideration that "there is not anything that's been presented new from the

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FNMA retained the right to assign the note, and assigned it to MTGLQ. The mortgage follows the note. *See, e.g., Houk v. PennyMac Corp.*, 210 So. 3d 726, 732 (Fla. 2d DCA 2017) ("The mortgage follows the assignment of the promissory note, but an assignment of the mortgage without an assignment of the debt creates no right in the assignee." (quoting *Tilus v. AS Michai LLC*, 161 So. 3d 1284, 1286 (Fla. 4th DCA 2015))). Borrower did not object to substituting MTGLQ as plaintiff.

prior hearing." While that comment referenced legal arguments, Borrower also did not identify then, and has not identified here, any relevant and dispositive evidence or question of fact presented solely at the earlier untranscribed hearing. The absence of that transcript is irrelevant.

(3) Procedural Objections to Reconsideration. We likewise reject Borrower's argument that we must affirm because MTGLQ's motion for reconsideration was untimely or improper. Borrower did not raise these arguments below, and the trial court did not address them. Without deciding that Borrower's arguments would have had any merit, we find that his participation in the hearing without objection constituted a waiver. *See Correa v. U.S. Bank N.A.*, 118 So. 3d 952, 954 (Fla. 2d DCA 2013) (finding waiver of procedural objections where party proceeds at hearing without objection).

III. Conclusion.

We hold that MTGLQ as assignee and substituted plaintiff is authorized to receive the original note and mortgage from the court file. We therefore reverse the order on appeal, and remand with instructions that the clerk of the lower tribunal securely transmit those original documents to counsel of record for MTGLQ.

REVERSED and REMANDED with instructions.

OSTERHAUS and NORDBY, JJ., concur.

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

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