DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JUSTIN FRIEDLE and **SANDRA FRIEDLE,**
Appellants,

v.

THE BANK OF NEW YORK MELLON, f/k/a THE BANK OF NEW YORK, as successor-in-interest to JPMORGAN CHASE BANK, N.A., as trustee for STRUCTURED ASSET MORTGAGE INVESTMENTS II INC., BEAR STEARNS ALT-A TRUST, MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2005-10,
Appellee.

No. 4D15-1750

[May 24, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Kathleen D. Ireland, Judge; L.T. Case No. CACE12-32115.

Thomas Erskine Ice of ICE Appellate, Royal Palm Beach, for appellants.

William L. Grimsley and N. Mark New, II of McGlinchey Stafford, Jacksonville, for appellee.

WARNER, J.

Appellant challenges a final judgment of foreclosure, contending that the Bank failed to prove standing. We reverse, agreeing that the evidence was insufficient. Although a copy of the promissory note secured by the mortgage was attached to the complaint, it was not in the same condition as the original filed with the court and accepted into evidence at the trial. Because the appellee did not otherwise prove that the Bank had possession of the note and was thus a holder at the time of the filing of the complaint, we reverse.

The standard of review in determining whether a party has standing to bring an action is de novo. *Boyd v. Wells Fargo Bank, N.A.*, 143 So. 3d 1128, 1129 (Fla. 4th DCA 2014). To prove standing in a mortgage foreclosure case, the plaintiff must prove its status as a holder of the note

at the time of the filing of the complaint as well as at trial. *See Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012). In this case, the foreclosing bank's witness could not testify that the Bank had possession of the note prior to filing the complaint. The Bank conceded that it presented no testimony that its present servicer or its prior servicer had possession of the note at the inception of the foreclosure action. It relied on the fact that a copy of the promissory note with the blank endorsement included was attached to the complaint when filed. Although a copy of the note with a blank endorsement was attached, it was not in the same condition as the original note introduced in evidence at trial. In *Ortiz v. PNC Bank, National Assoc.*, 188 So. 3d 923 (Fla. 4th DCA 2016), we said:

> [I]f the Bank later files with the court the original note *in the same condition* as the copy attached to the complaint, then we agree that the combination of such evidence is sufficient to establish that the Bank had actual possession of the note at the time the complaint was filed and, therefore, had standing to bring the foreclosure action, absent any testimony or evidence to the contrary.

Id. at 925 (emphasis added). Here, the note attached to the complaint had no loan numbers on it, yet the original note filed with the court has loan numbers. Because the original note was not *in the same condition* as the copy attached to the complaint, the evidentiary inference that we indulged in *Ortiz*, that the Bank had actual possession of the note at the filing of the complaint, does not arise. Although the lack of the numbers may seem a minor difference, *Ortiz* infers possession at the time of filing suit where the copy attached to the complaint and the original are *identical,* as the copy must have been made from the original note *at the time* that the complaint was filed, without evidence to the contrary. Where the copy differs from the original, the copy could have been made at a significantly earlier time and does not carry the same inference of possession at the filing of the complaint.

The Bank cites to the Pooling and Service Agreement ("PSA") as providing other evidence of standing. That document purports to show the transfer of the mortgage loan to the Bank as trustee. Appellant objected to the admission of this evidence, which the court allowed on the ground that it was self-authenticating under section 90.902, Florida Statutes (2016). While it was certified by the Securities and Exchange Commission ("SEC") as being filed with that agency and thus was self-

authenticating, there is a difference between authentication and admissibility. Charles Ehrhardt explains the difference:

> Documents must be authenticated before they are admissible evidence . . . . Even after a document is authenticated, it will not be admitted if another exclusionary rule is applicable. For example, when a document is hearsay, it is inadmissible even if it has been properly authenticated.

C. Ehrhardt, Florida Evidence § 902.1, (2016 Edition). Here, the PSA, which is unsigned, purportedly establishes a trust of pooled mortgages, but this particular mortgage was not referenced in the documents filed with the SEC. Appellant objected that the document was hearsay, as none of the exceptions to the hearsay rule were established. The Bank did not present sufficient evidence to admit this unsigned document as a business record, as under cross examination, the Bank's witness admitted that the PSA was not in the records of the servicer but came directly from the SEC. Therefore, it could not be admitted as a business record of the plaintiff.

While the witness testified that a mortgage loan schedule, which listed the subject mortgage, was part of the business records, that schedule showed only that the subject mortgage loan was supposed to be one of the loans subject to the PSA. Moreover, the Mortgage Loan Schedule ("MLS") does not purport to show that the actual loan was physically transferred. And it is clear from the testimony that the witness had no knowledge of the workings of the PSA or MLS.

Nevertheless, even if the PSA were admissible, it does not assist in proving standing. Section 1.01 of the PSA provides that the Bank as Trustee acknowledges receipt and declares that it holds the mortgage loans included in the pool. Yet that declaration is conditioned on the Trustee reviewing each mortgage file to certify that the necessary documents, including notes, are contained in those files and issuing an Interim Certification. The Bank did not admit into evidence any certification with respect to this mortgage that the Trustee had checked the file and that all the loan documents were present. Therefore, even if admissible, the PSA does not provide evidence that *this* mortgage note was within the possession of the Bank as Trustee.

Because the Bank failed to prove its standing at the filing of suit, the court erred in entering the final judgment of foreclosure. We reverse and

remand for vacation of the final judgment and entry of an involuntary dismissal of the complaint.

TAYLOR and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.