NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

REGINA JONES, Appellant, v. U.S. BANK TRUST, N.A. as Trustee for LSF9 Master Participation Trust, and SEDRIC B. JONES, Appellees.	)	Case No. 2D18-2106

Opinion filed January 31, 2020.

Appeal from the Circuit Court for Hillsborough County; Perry Little, Senior Judge.

Robert E. Biasotti of Biasotti Law, Saint Petersburg, for Appellant, Regina Jones.

David Rosenberg, Cynthia L. Comras, and Jarrett Cooper of Robertson Anschutz & Schneid, P.A., Boca Raton, for Appellee, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust.

No appearance for remaining Appellee.

LUCAS, Judge.

Regina Jones, a homeowner, prevailed at trial in a residential mortgage foreclosure action brought by U.S. Bank Trust, N.A., as Trustee for LSF9 Master

Participation Trust (U.S. Bank). The trial court granted Ms. Jones' motion for involuntary dismissal at the conclusion of U.S. Bank's case, apparently agreeing with Ms. Jones that the plaintiff did not have standing to foreclose her mortgage. Having won at trial, Ms. Jones now hopes to recover her attorney's fees.

As brief backdrop, the promissory note Ms. Jones had executed was payable to Morrison Home Funding, LLC d/b/a Taylor Morrison Home Funding. An allonge affixed to that note purported to transfer the note from Morrison Home Funding to SunTrust Mortgage, Inc. (the original plaintiff for whom U.S. Bank was later substituted), but that allonge was apparently executed by a "warehouse line operations supervisor" of SunTrust under an alleged power of attorney for Morrison Home Funding that SunTrust could not prove it had. At trial, U.S. Bank also offered into evidence certain "assignments of mortgage," which purported to transfer the recorded mortgage but not the note. But U.S. Bank abandoned whatever importance it thought those assignments had by the time its lawyer presented his argument in response to Ms. Jones' motion for involuntary dismissal.[1] Thus, it appears that the note was not properly negotiated to U.S. Bank, and the trial court granted Ms. Jones' motion for involuntary dismissal.[2]

Ms. Jones filed a timely motion to recover her attorney's fees pursuant to paragraph 18 of the recorded mortgage that U.S. Bank had unsuccessfully sought to

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[1]After they were admitted into evidence, the assignments of mortgage were never mentioned again in any meaningful sense throughout the proceedings below.

[2]U.S. Bank did not appeal the trial court's involuntary dismissal of its complaint.

foreclose. In a handwritten order, the trial court denied her motion, clarifying that its ruling was "based on the court finding Plaintiff did not have standing." Ms. Jones appeals that order.

There is presently a dispute among the district courts of appeal over whether a defendant in a residential mortgage foreclosure case who prevails because the plaintiff fails to establish its standing to foreclose the mortgage is nevertheless entitled to recover attorney's fees under a prevailing party attorney's fee provision. Compare Harris v. Bank of New York Mellon, 44 Fla. L. Weekly D141, D143 (Fla. 2d DCA Dec. 28, 2018) ("[T]he requirements of section 57.105(7) are satisfied where it can be established that the prevailing party and its opponent are both parties to a contract that contains a prevailing party fee provision. Accordingly, Harris is entitled to an award of attorney's fees from the Trust pursuant to the mortgage contract and section 57.105(7). . . . [T]he 2012 assignment that transferred the note and mortgage to the Trust was direct evidence that the Trust was a party to the mortgage contract regardless of the fact that the Trust failed to establish its standing to bring the foreclosure action."), and Madl v. Wells Fargo Bank, N.A., 244 So. 3d 1134, 1138 (Fla. 5th DCA 2017) ("Because there was a contractual relationship between the parties and Appellants are the prevailing parties, they are entitled to attorney's fees in accordance with the mortgage and section 57.105(7).") review dismissed SC18-966, 2019 WL 5963521 (Fla. Nov. 12, 2019), with Nationstar Mortg. v. Glass, 219 So. 3d 896, 899 (Fla. 4th DCA 2017) (holding that "[a] party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a provision in that same contract"); Bank of N.Y. Mellon Tr. Co., N.A. v.

Fitzgerald, 215 So. 3d 116, 121 (Fla. 3d DCA 2017) ("Because Fitzgerald successfully obtained a judgment below that the Bank lacked standing to enforce the mortgage and note against her, we find that no contract existed between [the parties] that would allow Fitzgerald to invoke the mutuality provisions of section 57.105(7).").

Ms. Jones' argument on appeal pursues a somewhat unique tack. She maintains that the recorded mortgage itself, separate and distinct from the promissory note, offers its own independent basis for her to recover her attorney's fees from the unsuccessful plaintiff in her case. Thus, notwithstanding U.S. Bank's lack of standing, she argues she is entitled to recover her attorney's fees under the mortgage U.S. Bank tried to foreclose. As Ms. Jones puts it, "[m]ortgages and [a]ssignments of [m]ortgage are valid, stand-alone contracts." Since, she contends, the evidence below proved the mortgage had been assigned to U.S. Bank (even if the note had not), and since that mortgage contains a prevailing party attorney's fee provision in favor of the mortgagor, she is entitled, under section 57.105(7), Florida Statutes (2012) to recover her attorney's fees against U.S. Bank.[3]

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[3]Section 57.105(7) provides:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

As we explained in Harris,

> In order to obtain prevailing party fees pursuant to section 57.105(7), the moving party must prove (1) that the contract provides for prevailing party fees, (2) that both the movant

Although we very much question the premise of Ms. Jones' argument—that a mortgage is a "stand-alone contract"[4]—to definitively address that issue here would require this court to resolve a legal issue that was not presented below and make

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> and opponent are parties to that contract, and (3) that the movant prevailed.

44 Fla. L. Weekly at D142 (citing Glass, 219 So. 3d at 898).

[4]While it may contain contractual covenants and conditions that pertain to the loan or monetary obligation it secures, a mortgage, properly understood, is simply a lien on real property. See § 697.02, Fla. Stat. (2012) ("Nature of a mortgage — A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession."); Oates v. N.Y. Life Ins. Co., 178 So. 570, 577 (Fla. 1937) ("A mortgage does not possess the negotiable character of a promissory note, and neither the payee, mortgagee, or assignee of such mortgage may accept the same as a courier without luggage."); Peters v. Bank of N.Y. Mellon, 227 So. 3d 175, 180 (Fla. 2d DCA 2017) (observing that a mortgage "is but an incident to the debt, the payment of which it secures" and "ownership [of the mortgage lien] follows the assignment of the debt—not the other way around" (quoting Johns v. Gillian, 184 So. 140, 143 (Fla. 1938))); 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))); cf. Restatement (Third) of Property (Mortgages) § 1.2 (1997) ("[S]ince a mortgage is merely security, it is generally enforceable only to the extent that the underlying obligation is enforceable.").

It is true that Florida courts (like many others) have at times used shorthand nomenclature when referring to the contractual agreement that is secured by a residential mortgage. Ms. Jones believes this language demonstrates her "stand-alone contract" concept of a mortgage. But phrases like "mortgage contracts," "mortgage agreements," "separate agreements," and the like, that are sometimes found within our foreclosure case law, see, e.g., Harris, 44 Fla. L. Weekly at D143; Madl, 244 So. 3d at 1139; Liberty Home Equity Sols., Inc. v. Raulston, 206 So. 3d 58, 61 (Fla. 4th DCA 2016); OneWest Bank, FSB v. Nunez, 193 So. 3d 13, 16 (Fla. 4th DCA 2016); Haber v. Deutsche Bank Nat. Tr. Co., 81 So. 3d 565, 565 (Fla. 4th DCA 2012), should be read as a way of conveniently expressing the more technically correct (but obviously more clunky) idea of "the entirety of the contractual covenants and conditions set forth under the promissory note and related mortgage lien instrument." We suspect these phrases are simply meant to economize words in describing a heavily regulated real property financing transaction that typically spans numerous, multi-page documents—not upend the very nature of a mortgage lien and long-standing precedent.

findings about the assignments of mortgage that were never requested below. Other than being offered into evidence, no one before the trial court said anything at all about these assignment of mortgage documents. As an appellate court, we are not permitted to make initial determinations about their factual effect and importance. See Farneth v. State, 945 So. 2d 614, 617 (Fla. 2d DCA 2006) ("A fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact."); Douglass v. Buford, 9 So. 3d 636, 637 (Fla. 1st DCA 2009) ("Sitting as an appellate court, we are precluded from making factual findings ourselves in the first instance."); cf. Bayview Loan Servicing, LLC v. Dzidzovic, 249 So. 3d 1265, 1268 (Fla. 2d DCA 2018) (reversing trial court's order vacating a final judgment of foreclosure based on an alleged loan modification agreement and observing, "Bayview argues that the parties never entered [into] a loan modification agreement. Be that as it may, we are without authority to make such a finding."). Nor do we ordinarily address a novel legal issue that was never raised or ruled upon in the trial court. See Miller v. Miller, 709 So. 2d 644, 645 (Fla. 2d DCA 1998) ("We cannot address on appeal an issue not ruled upon by the circuit court." (citing McGurn v. Scott, 596 So. 2d 1042, 1043 (Fla. 1992); Sierra v. Pub. Health Tr. of Dade Cty., 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995))); P & O Ports Fla., Inc. v. Cont'l Stevedoring & Terminals, Inc., 904 So. 2d 507, 511 (Fla. 3d DCA 2005) ("Prudence alone suggests that an appellate court should not resolve a complex case, such as this one, on an issue that was not addressed by the litigants and not ruled upon below. Judicial restraint requires it.").

Since judicial restraint precludes us from resolving Ms. Jones' argument, we affirm the order below.

Affirmed.

KELLY and SMITH, JJ., Concur.