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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHAEL C. SCOTT and JENNIFER T. SCOTT, Appellants, v. STRATEGIC REALTY FUND and DIXIE G. SCOTT, Appellees.	)	Case No. 2D18-3839

Opinion filed May 13, 2020.

Appeal from the Circuit Court for Pinellas County; Jack R. St. Arnold, Judge.

Michael Alex Wasylik of Ricardo & Wasylik, PL, Dade City, for Appellants.

Roger A. Kelly of Rush, Marshall, Jones and Kelly, P.A., Orlando, for Appellee Strategic Realty Fund.

No appearance for remaining Appellee.

LaROSE, Judge.

Michael and Jennifer Scott appeal a foreclosure judgment entered in favor of Strategic Realty Fund (SRF). We have jurisdiction. See Fla. R. App. P.

9.030(b)(1)(A). Because the trial court erred in entering summary judgment as to the issue of standing, we reverse.[1]

Background

In September 2007, the Scotts borrowed money from SunTrust Mortgage to purchase real property. They signed a promissory note; a mortgage secured repayment of the debt.

Over the years, the note, the mortgage, or sometimes both, were assigned as asset-backed securities to a variety of entities. For purposes of this appeal, we detail the mechanics of one particular assignment.

In September 2007, soon after the Scotts executed the note and mortgage, SunTrust Mortgage assigned both to MTGLQ Investors, LP (MTGLQ). Thereafter, in September 2010, MTGLQ and Resi Whole Loan III LLC (Resi) executed an "Assignment of Mortgage," which, as the name suggests and the body of the instrument confirms, assigned the mortgage to Resi. The assignment made nary a mention of the note.

In March 2015, an entity calling itself "CV XXVII, LLC" (CV) sued to foreclose the mortgage. CV claimed standing to sue because it owned and held the note and mortgage.[2] CV attached to its March 2015 amended foreclosure complaint a " 'Corrective' Assignment of Mortgage," executed by an individual named "J. Weston Moffett." The corrective assignment failed to describe (Mr. or Ms.) Moffett's role or title

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[1]We find no merit in the Scotts' remaining issues.

[2]CV alleged that it received the note and mortgage by way of a January 2014 assignment from Greenwich Investors XLIII Trust 2013-1. Greenwich had received the note and mortgage from Resi in January 2013.

with MTGLQ. The document, dated January 30, 2015, stated that it was "intended to amend and replace" an earlier assignment of mortgage, with a retroactive effective date of September 20, 2010. The corrective assignment purported to "assign and transfer all beneficial interest under that certain mortgage, together with the certain note(s) described below."

In May 2017, the trial court substituted SRF as plaintiff. SRF proceeded on a second amended complaint, contending that it owned and held the note and mortgage through a chain of assignments. Yet, the note attached to the pleading was payable to the original lender, SunTrust Mortgage, and bore no indorsement. The Scotts challenged SRF's "standing at inception."

SRF moved for summary judgment, declaring that it was the "owner and non-holder in possession" of the note. The motion also acknowledged that "through inadvertence" the September 2010 mortgage assignment from MGTLQ "failed to specify that the ownership of the note was also intended to be transferred to Resi." The affidavit of Millie Garcia, an SRF "Foreclosure Bankruptcy Coordinator," averred that "the intent of MTGLQ . . . in executing the Assignment of Mortgage to Resi . . . was to assign its complete interest in the account. However, through inadvertence, the Assignment of Mortgage failed to specify that the ownership of the Note was also intended to be transferred to Resi . . . ."[3]

[3]This language is almost identical to that contained in an affidavit in support of an earlier summary judgment motion filed by a predecessor-in-interest to SRF. However, the earlier motion includes an additional averment, not included in Ms. Garcia's affidavit, proclaiming that such assignment language "is standard practice in the mortgage industry when selling a mortgage account."

The Scotts objected to SRF's summary judgment motion, arguing that SRF's evidence as to standing was hearsay. The Scotts also asserted that "[t]he Note is not conveyed in each and every Assignment of Mortgage."

Following an August 30, 2018, hearing, for which we have no transcript, the trial court entered judgment for SRF.

Analysis

A. Standard of Review & Summary Judgment

We review the trial court's ruling de novo. St. Clair v. U.S. Bank Nat'l Ass'n, 173 So. 3d 1045, 1046 (Fla. 2d DCA 2015) ("This court reviews issues of standing in foreclosure cases using the de novo standard of review."). Similarly, "[w]e review the grant of summary judgment de novo." Griffin v. ARX Holding Corp., 208 So. 3d 164, 168 (Fla. 2d DCA 2016) (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)).

"Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Dewar v. Dough Boy Pizza, Inc., 184 So. 3d 1169, 1170 (Fla. 2d DCA 2015) (citing Cook v. Bay Area Renaissance Festival of Largo, Inc., 164 So. 3d 120, 122 (Fla. 2d DCA 2015)); see Fla. R. Civ. P. 1.510(c) (stating that a movant is entitled to summary judgment "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

"In determining whether a genuine issue of material fact exists, this court must view 'every possible inference in favor of the party against whom summary

judgment has been entered.' " Estate of Githens ex rel. Seaman v. Bon Secours–Maria Manor Nursing Care Ctr., Inc., 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Maynard v. Household Fin. Corp. III, 861 So. 2d 1204, 1206 (Fla. 2d DCA 2003)); see Pasco v. City of Oldsmar, 953 So. 2d 766, 769 (Fla. 2d DCA 2007) ("On appeal from a summary judgment, all facts and inferences are viewed in the light most favorable to the nonmoving party." (citing Valk v. J.E.M. Distribs. of Tampa Bay, Inc., 700 So. 2d 416, 419 (Fla. 2d DCA 1997))). The burden rests with the summary judgment movant "to prove the nonexistence of genuine issues of material fact." Estate of Githens, 928 So. 2d at 1274. "Once the moving party meets its burden, then the party opposing entry of a summary judgment must prove the existence of genuine triable issues." First N. Am. Nat'l Bank v. Hummel, 825 So. 2d 502, 503 (Fla. 2d DCA 2002). "[T]he merest possibility of the existence of a genuine issue of material fact precludes the entry of final summary judgment." Nard, Inc. v. DeVito Contracting & Supply, Inc., 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000).

B. Lack of a Hearing Transcript

We do not subscribe to SRF's argument that the lack of a hearing transcript precludes our review. After all, "a hearing transcript is usually 'not necessary for appellate review of a summary judgment.' " Kamin v. Fed. Nat'l Mortg. Ass'n, 230 So. 3d 546, 548 n.2 (Fla. 2d DCA 2017) (quoting Houk v. PennyMac Corp., 210 So. 3d 726, 730 (Fla. 2d DCA 2017)). We can review the pleadings, affidavits, and other record evidence to ascertain whether any unresolved genuine issues of material fact remain. See Gonzalez v. Chase Home Fin. LLC, 37 So. 3d 955, 958-59 (Fla. 3d DCA 2010) (holding that it was unnecessary "to procure a transcript of the summary

judgment hearing" where the summary judgment evidence—"in the form of the pleadings, [the defendant's] affidavit, and the county records"—demonstrated that genuine issues of material fact remained in dispute (quoting Seal Prods. v. Mansfield, 705 So. 2d 973, 975 (Fla. 3d DCA 1998))). Plainly, the absence of a transcript is not fatal to an appeal in which the issue "concern[s] the sufficiency of the summary judgment evidence before the trial court." Johnson v. Deutsche Bank Nat'l Tr. Co. Ams., 248 So. 3d 1205, 1210 (Fla. 2d DCA 2018).

C. Standing

The plaintiff must have standing to foreclose a mortgage. To have standing, the plaintiff must be legally entitled to enforce the note to which the mortgage relates. See, e.g., Geweye v. Ventures Trust 2013-I-H-R, 189 So. 3d 231, 232-33 (Fla. 2d DCA 2016). Thus, SRF "had to prove either that it was the holder or the owner of the note." See Peters v. Bank of N.Y. Mellon, 227 So. 3d 175, 178 (Fla. 2d DCA 2017) (citing Sorrell v. U.S. Bank Nat'l Ass'n, 198 So. 3d 845, 847 (Fla. 2d DCA 2016)). Proving standing, however, becomes more complicated when, as in this case, two additional considerations are at play.

First, as frequently occurs in foreclosure litigation, the party plaintiff has changed. Cf. Sorrell, 198 So. 3d at 847 ("Standing to foreclose by one other than the original lender can be established through evidence of an assignment or equitable transfer of the note and mortgage completed before the complaint is filed."). Significantly, a substituted plaintiff must show its predecessor's standing; obviously, "[a] substituted plaintiff acquires only the standing of the original plaintiff." Russell v. Aurora Loan Servs., LLC, 163 So. 3d 639, 642 (Fla. 2d DCA 2015); see Robinson v. Nationstar

Mortg. LLC, 44 Fla. L. Weekly D2889 (Fla. 2d DCA Dec. 4, 2019) (stating that the "successor plaintiff . . . ha[s] the burden to prove that its predecessor . . . had standing to foreclose at the time it filed the complaint").

Consequently, SRF had to establish its right to sue through a valid chain of assignments. See, e.g., Geweye, 189 So. 3d 232-33 (holding that despite original plaintiff's standing at suit's inception, Ventures Trust 2013-I-H-R lacked standing as a substituted plaintiff to foreclose where, despite introducing an assignment of mortgage at trial, "[t]he assignment . . . did not purport to assign any interest in the note"). Quite simply, SRF must "account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it." St. Clair, 173 So. 3d at 1047 (quoting Murray v. HSBC Bank USA, 157 So. 3d 355, 358 (Fla. 4th DCA 2015)); see also Russell, 163 So. 3d at 642 (" 'A plaintiff alleging standing as a holder must prove it is a holder of the note and mortgage both as of the time of trial and also that the (original) plaintiff had standing as of the time the foreclosure complaint was filed.' . . . If the plaintiff is not the payee of the original note, the plaintiff must also prove that the original note contains an indorsement in favor of the plaintiff (special indorsement) or an indorsement in blank. . . . [T]he indorsement must have been made prior to the filing of the lawsuit . . . ." (quoting Kiefert v. Nationstar Mortg., LLC, 153 So. 3d 351, 352-53 (Fla. 1st DCA 2014))); Focht v. Wells Fargo Bank, N.A., 124 So. 3d 308, 310 (Fla. 2d DCA 2013) ("A plaintiff who is not the original lender may establish standing to foreclose a mortgage loan by submitting a note with a blank or special [i]ndorsement, an assignment of the note, or an affidavit otherwise proving the plaintiff's status as the holder of the note."); McLean v. JP Morgan Chase Bank Nat'l Ass'n, 79 So. 3d 170, 173

(Fla. 4th DCA 2012) ("[S]tanding may be established from a plaintiff's status as the note holder, regardless of any recorded assignments. If the note does not name the plaintiff as the payee, the note must bear a special [i]ndorsement in favor of the plaintiff or a blank [i]ndorsement." (citation omitted)). If there are multiple prior transfers, a nonholder in possession of the note "must prove each prior transfer." Murray, 157 So. 3d at 358 (quoting Anderson v. Burson, 35 A.3d 452, 462 (Md. 2011)).

Second, when mortgage-backed securities are bought and sold with frequency, the proliferation of instruments documenting these transactions grows correspondingly. And, attendant to the escalating number of transfers is, to use the parlance advanced by SRF, a corresponding likelihood of "inadvertence," resulting in errors, misstatements, omissions, or oversights in preparing the assignment documents. See, e.g., Partridge v. Nationstar Mortg., LLC, 224 So. 3d 839, 841-42 (Fla. 2d DCA 2017) (holding that an assignment of mortgage made to loan servicer failed to establish servicer's standing to foreclose where there was no evidence that servicer acquired an interest in the note); Verizzo v. Bank of N.Y. Mellon, 220 So. 3d 1262, 1266 (Fla. 2d DCA 2017) ("[T]he assignments do not purport to transfer the note, and our court has held that an assignment of mortgage that does not also transfer the note, at least standing alone, does not prove that a foreclosure plaintiff has the rights to enforce the note."); Caballero v. U.S. Bank Nat'l Ass'n, 189 So. 3d 1044, 1046 (Fla. 2d DCA 2016) ("[T]he assignment was insufficient to show standing because it only purported to assign the mortgage, not the note."); see also Eaddy v. Bank of Am., N.A., 197 So. 3d 1278, 1280 (Fla. 2d DCA 2016) (holding that plaintiff failed to prove standing where "the

assignment of mortgage attached to [the] amended complaint reflects only the transfer of the mortgage and not the note").

Be that as it may, the September 2010 assignment from MTGLQ to Resi assigned only the mortgage, not the note. In sum, we face a "foreclosure puzzle, [in which] one of the pieces is missing." Murray, 157 So. 3d at 356.

D. The "Corrective Assignment" & Ms. Garcia's Affidavit

SRF attempted to fill the gap with the retroactively effective "corrective assignment," coupled with Ms. Garcia's affidavit addressing MTGLQ's intent to transfer the note and mortgage to Resi. SRF's effort falls short.

Principally, "affidavits must set forth facts based on personal knowledge 'as would be admissible in evidence.' " McNabb v. Taylor Elevator Corp., 203 So. 3d 184, 185 (Fla. 2d DCA 2016) (quoting Fla. R. Civ. P. 1.510(e)). Although Ms. Garcia asserts that her affidavit was made upon her "personal knowledge and on the facts determined from [her] examination of the documents and records of [SRF]," it is entirely unclear how she could possibly glean MTGLQ's intent from those records. She offered no adequate explanation. Cf. Rodriguez v. Avatar Prop. & Cas. Ins. Co., 45 Fla. L. Weekly D128 (Fla. 2d DCA Jan. 15, 2020) ("Ms. Kundrot's affidavit lacks sufficient information to allow us to conclude that she possesses the competency to testify to the matters set forth in her thirty-seven-page affidavit, which includes statements ranging from contract interpretation to trade specialties of plumbing and contracting."). And, beyond dispute, "[a]n affidavit in support of summary judgment may not be based on factual conclusions or conclusions of law." Fla. Dep't of Fin. Servs. v. Associated Indus. Ins., 868 So. 2d 600, 602 (Fla. 1st DCA 2004) (reversing summary judgment where trial

court relied on insufficient affidavit that contained statements not based upon affiant's personal knowledge but on her " 'understanding' of the underlying issues and her 'opinion' of such issues"); see also Johns v. Dannels, 186 So. 3d 620, 622 (Fla. 5th DCA 2016) (reversing summary judgment where "the affidavit failed to provide any predicate to show how Appellee was aware of the asserted facts, which are set forth as mere conclusions"). Thus, Ms. Garcia's affidavit failed to close the standing circle.

Moreover, the corrective assignment was insufficient to support a summary judgment for SRF because "[i]n ruling on the [summary judgment] motion, the trial court is precluded from weighing the evidence." McNabb, 203 So. 3d at 185. A backdated assignment, such as the one offered by SRF, is susceptible of two possible inferences:

> We have held that "two inferences can be drawn from the 'effective date' language." One inference is that ownership of the note and mortgage was equitably transferred to the bank [prior to suit], but another inference is that the parties to the transfer were attempting to backdate an event to their benefit. . . . "Because the language yields two possible inferences, proof is needed as to the meaning of the language, and a disputed fact exists."

Darwiche v. Bank of N.Y. Mellon, 185 So. 3d 1261, 1263 (Fla. 4th DCA 2016) (quoting and citing Vidal v. Liquidation Props., Inc., 104 So. 3d 1274, 1277 n.1 (Fla. 4th DCA 2013)). Because the corrective assignment is equivocal, the trial court could not rule for SRF. See Pasco, 953 So. 2d at 769 ("On appeal from a summary judgment, all facts and inferences are viewed in the light most favorable to the nonmoving party."); Estate of Githens, 928 So. 2d at 1274 ("In determining whether a genuine issue of material fact exists, this court must view 'every possible inference in favor of the party against whom summary judgment has been entered.' " (quoting Maynard, 861 So. 2d at 1206)).

Neither the original assignment nor the corrective assignment could support a summary judgment. The break in the chain of assignments compels reversal.

Conclusion

We reverse the grant of summary judgment because the corrective assignment, and Ms. Garcia's affidavit in support thereof, were insufficient to prove SRF's standing.

Reversed and remanded for further proceedings.

CASANUEVA and SMITH, JJ., Concur.