IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

May 1, 2020

ELIZON DB TRANSFER AGENT, LLC, Appellant, v. IVY CHASE APARTMENTS, LTD., a Florida limited partnership; GAIL CURTIS, as personal representative of the estate of John Curtis, deceased; and GAIL CURTIS, an individual, Appellees.	)	Case No. 2D19-1853

BY ORDER OF THE COURT:

Appellant's motion for clarification is granted. The prior opinion dated March 25, 2020, is withdrawn, and the attached opinion is issued in its place. No further motions for rehearing or clarification will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ELIZON DB TRANSFER AGENT, LLC, Appellant, v. IVY CHASE APARTMENTS, LTD., a Florida limited partnership; GAIL CURTIS, as personal representative of the estate of John Curtis, deceased; and GAIL CURTIS, an individual, Appellees.	)	Case No. 2D19-1853

Opinion filed May 1, 2020.

Appeal from the Circuit Court for Pasco County; Declan P. Mansfield, Judge.

David B. Weinstein and Joseph H. Picone of Greenberg Traurig, P.A., Tampa, and Kimberly S. Mello of Greenberg Traurig, P.A., Orlando, for Appellant.

Ian C. White and Gerald B. Curington of Ausley McMullen, Tallahassee, for Appellees.

SILBERMAN, Judge.

Elizon DB Transfer Agent, LLC (Elizon), seeks review of an order that dismissed its mortgage foreclosure action based on its failure to prove that the original plaintiff had standing at the time of filing of the complaint. The court based its decision on the date difference between the copy of an allonge attached to the complaint and the

original, stating that Elizon did not prove that the allonge took effect prior to filing. We conclude that the difference between the copy and the original allonge is immaterial and was explained at trial without contradiction. Thus, the court erred in dismissing the complaint for lack of standing on that basis. Accordingly, we reverse.

Wells Fargo Bank, N.A., filed the foreclosure complaint against Ivy Chase Apartments, Ltd., and John and Gail Curtis (together Ivy Chase) in December 2011. The complaint alleged that Wells Fargo was the owner and holder of the pertinent notes, mortgages, guarantees, assignment documents, and allonges. Wells Fargo attached to the complaint, among other things, a copy of a note with a 2011 allonge that indorsed the note to Wells Fargo from LSREF2 Baron Trust 2011 (Baron Trust). After filing, the Ivy Chase loan was transferred several additional times and each transferee was substituted as the plaintiff in turn, with Elizon being the assignee/plaintiff at the time of trial.

A key issue at trial related to a difference between the execution date on the copy of the allonge attached to the complaint and the original allonge, which was presented at trial. Both contain the same signed indorsement to Wells Fargo, but the copy attached to the complaint shows the execution date as "September __, 2011." The allonge presented at trial had the blank filled in and reflects the execution date as "September 20, 2011." Although both were signed, Ivy Chase asserted that Elizon lacked standing due to the date difference between the copy and the original.

Elizon called two witnesses at trial to establish that, notwithstanding the difference between the copy and the original, the allonge was executed and effective prior to filing of the complaint. Summer Trejo was the senior vice president and in-

house counsel at Hudson Advisors, LP, f/k/a Hudson Americas, LLC, the loan servicer and administrator of the Baron Trust. Through Ms. Trejo, multiple documents were admitted establishing the transfer of the Ivy Chase Loan from LAREF2 Baron, LLC (Baron LLC), and Baron Trust to Wells Fargo on September 20, 2011. Among those documents was an assignment agreement between the entities dated September 20, 2011, the original note and allonge, and the copy of the note and allonge that was attached to the complaint. Ms. Trejo testified that she was personally involved with the transfer of the Ivy Chase loan.

As to the discrepancy between the copy of the allonge attached to the complaint and the original allonge, Ms. Trejo said that the original "would have been signed with all of the other documents in September of 2011" when the Ivy Chase loan was transferred from Baron LLC and Baron Trust to Wells Fargo. Ms. Trejo explained that the documents and signature pages "would've been signed by Baron, LLC, and Baron Trust, and then provided to Wells Fargo['s] counsel . . . and they would've been held in escrow pending closing."

Deborah Cussen, the attorney who represented Wells Fargo in the transfer of the Ivy Chase loan, testified that when she received the original allonge for escrow it was in the same condition as the copy attached to the complaint. She explained that the normal procedure was for the assignor to sign the documents and then her firm "would hold the documents undated and then date them when we knew the exact closing date." She confirmed that the transaction closed on September 20, 2011, and said she had no reason to believe that the normal procedure was not followed to date the documents.

Despite the introduction of this evidence, the trial court entered an order involuntarily dismissing the complaint for lack of standing based on the date discrepancy. The court found that Elizon's witnesses lacked personal knowledge of when the 2011 allonge was actually dated. The court reasoned as follows:

> By providing a dated version of the allonge, the Plaintiff himself has now called into question the authenticity of the allonge. If a Plaintiff is unable to establish that an allonge took effect prior to the filing of a complaint, that Plaintiff lacks standing to bring the foreclosure action. The evidence submitted at trial clearly demonstrates that the purported original allonge introduced at trial is not in the same condition as the allonge attached to the complaint.
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> An allonge becomes part of the promissory note. There is a presumption of standing if the copy of the note attached to a complaint is in the same condition as the original. Ortiz v. PNC Bank, National Ass'n, 188 So. 3d 923 (Fla. 4th DCA 2016). However, if the copy of the note attached to a complaint is not in the same condition as the original, the copy "does not carry the same inference of possession at the filing of the complaint." Friedle v. Bank of New York Mellon, 226 So. 3d 976 (Fla. 4th DCA 2017).
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> It is the Courts position that the Plaintiff has failed to meet its burden of proof and thus has failed to establish Plaintiff's standing.[1]

A plaintiff is required to prove standing as a holder both at the time of filing and at the time of trial. See Russell v. Aurora Loan Servs., LLC, 163 So. 3d 639, 642 (Fla. 2d DCA 2015). If the plaintiff acquires the note after the complaint is filed, the plaintiff must prove that the original plaintiff held the note at filing and that the substitute

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[1]Following the involuntary dismissal, Elizon filed a timely motion for rehearing that was subsequently amended. In the amended motion for rehearing, Elizon asserted for the first time that the assignment agreement admitted into evidence was sufficient to establish Wells Fargo's standing to foreclose notwithstanding the difference between the copy of the allonge and the original. Elizon also challenges the court's denial of this motion on appeal. However, we need not reach the issue based on our conclusion that the trial court erred in rejecting the standing argument Elizon made at trial.

plaintiff held the note at the time of trial. Id. To prove standing as a holder, the plaintiff must establish both possession of the original note and that the plaintiff is a payee, the note is indorsed in favor of the plaintiff, or the note is indorsed in blank. Id. In cases involving an indorsed note, the plaintiff must establish the indorsement was made prior to filing of the lawsuit in order to establish standing at filing. See id.

As Elizon correctly asserts, it was not required to prove exactly when the allonge in favor of Wells Fargo was executed. See Peuguero v. Bank of Am., N.A., 169 So. 3d 1198, 1202-03 (Fla. 4th DCA 2015). "A plaintiff need not prove the exact date of a necessary [i]ndorsement to show standing at the inception of the foreclosure action." Id. The plaintiff need only present evidence that the indorsement was made before the filing of the complaint. Id.

Elizon asserts that it satisfied its burden of proof on this issue in two ways. Elizon first asserts that, contrary to the trial court's finding, it was entitled to a presumption of standing under Ortiz v. PNC Bank, National Ass'n, 188 So. 3d 923, 923 (Fla. 4th DCA 2016). Elizon also argues that, even without the presumption, the witness testimony it presented in conjunction with the original and copy of the allonge was sufficient to establish that the allonge was executed prior to filing.

In Ortiz, the Fourth District created a presumption of standing at the time of filing if the plaintiff presented an original note at trial that was "in the same condition as the copy attached to the complaint." Id. at 925. The Ortiz presumption also applies when there is a court-accepted explanation for a minor difference between the original and the copy. See Kronen v. Deutsche Bank Tr. Co., 267 So. 3d 447, 448 (Fla. 4th

DCA 2019) (applying the Ortiz presumption when the original and copy of the note were the same except for the redaction of a loan number on the copy).

Here, Ms. Cussen explained that the normal procedure was for the assignor to sign the documents and then her firm "would hold the documents undated and then date them when we knew the exact closing date." No evidence was presented to challenge Elizon's position that the allonge was dated consistent with the routine practices of documents being signed, delivered, held in escrow by Wells Fargo's counsel, and then dated to reflect that actual closing date. Under these circumstances, the trial court erred in refusing to apply the Ortiz presumption of standing.

Even without the Ortiz presumption, the witness testimony Elizon presented in conjunction with the original and copy of the allonge was sufficient to establish that the allonge was actually executed prior to Wells Fargo filing the complaint. Testimony from a competent witness may be used to prove that an entity had the right to enforce the note on the date of filing. See Sorrell v. U.S. Bank Nat'l Ass'n, 198 So. 3d 845, 847 (Fla. 2d DCA 2016); OneWest Bank, FSB v. Cummings, 175 So. 3d 827, 829 (Fla. 2d DCA 2015); Stone v. BankUnited, 115 So. 3d 411, 413 (Fla. 2d DCA 2013).

Elizon argues that its witnesses established that the allonge was signed in favor of Wells Fargo before closing, that the closing occurred on September 20, 2011, and that the blank was filled in on the allonge, documenting the actual closing date, in accordance with the standard practice. Indeed, the Fourth District has considered testimony regarding the servicer's routine business practices to establish that an indorsement was effectuated prior to filing. See Peuguero, 169 So. 3d at 1203; see also Wells Fargo Bank, N.A. v. Ayers, 219 So. 3d 89, 93 (Fla. 4th DCA 2017) (relying on

testimony regarding the servicer's routine business practices to establish that the servicer provided evidence in support of its lost note claim).

We recognize that the trial court found that neither of Elizon's witnesses had personal knowledge of when the date was placed on the original allonge. However, Ms. Cussen represented Wells Fargo in the transaction, she described the routine business practices that would be used for the transaction, and she confirmed that she had no reason to believe the routine practices were not followed in this instance. While her testimony did not directly affirm that she knew the routine business practices were followed, the evidence was undisputed that the documents, including the allonge, had been prepared, signed, and held in escrow pending closing and that the closing took place on September 20, 2011.

Guzman v. Deutsche Bank National Trust Co., 179 So. 3d 543 (Fla. 4th DCA 2015), is instructive by way of contrast. There, the copy of the note attached to the complaint did not have any allonges or indorsements. Id. at 546. However, the copy of the note attached to the amended complaint that was subsequently filed contained an allonge with an undated special indorsement to a different bank and an undated blank indorsement from that bank on the back page of the note. Id.

The plaintiff there presented the testimony of a loan analyst for its servicer to establish that the servicer had possession of all loan records. But the analyst was unable to provide dates as to when the allonge was created or the indorsement placed on the note. Id. at 545. When the analyst was asked if the blank indorsement was placed on the note prior to filing the original complaint, the analyst testified as follows: "There is no evidence to indicate to the contrary. I mean it has always been part of the

trust. This one has always been part of the trust. . . ." Id. at 546. The plaintiff's counsel conceded "that he could not prove that the allonge and the blank [i]ndorsement predated the filing of the initial complaint." Id. at 545. The district court concluded that the evidence was insufficient to meet the plaintiff's burden of proof. Id. at 547.

Unlike the situation in Guzman, in this case both the allonge attached to the complaint and the one presented at trial included the signed indorsement to Wells Fargo. There was no evidence disputing that the allonge had been executed prior to closing and was held undated pending closing, which occurred on September 20, 2011, prior to the filing of the complaint. As a result, the trial court erred in determining that because of the date issue, Elizon did not establish standing.

In summary, the trial court erred in granting dismissal based on the date difference between the copy of the allonge attached to the complaint and the original. Elizon was not required to prove exactly when the allonge was executed. Elizon was only required to present evidence that the allonge had been executed before Wells Fargo filed the complaint. Elizon carried this burden. Because the difference between the copy and the original allonge is immaterial and was explained at trial without contradiction, the court erred in dismissing the complaint for lack of standing.

Finally, the record reflects several orders entered by the trial court prior to trial. In one, the court stated that based on its previous rulings the only two material issues that remained in dispute for trial concerned standing. Our decision resolves the issue of standing in Elizon's favor, and the parties have not challenged any other rulings of the trial court in this appeal. However, Elizon acknowledges that issues concerning damages and attorney's fees remain to be resolved. In light of the trial court's orders

and Elizon's acknowledgment, on remand the trial court shall conduct such further proceedings as are necessary to resolve all remaining issues not previously determined by the trial court or in this appeal, including damages and attorney's fees.

Reversed and remanded.

BADALAMENTI and ROTHSTEIN-YOUAKIM, JJ., Concur.