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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WILMINGTON SAVINGS FUND SOCIETY FSB, d/b/a CHRISTIANA TRUST, as Owner Trustee of the Residential Credit Opportunities Trust III, Appellant, v. HENRY A. MORRONI; UNKNOWN SPOUSE OF HENRY A. MORRONI; JOHN DOE; JP MORGAN CHASE BANK as successor by merger with BANC ONE FINANCIAL SERVICES, INC.; BRYNWOOD HOMEOWNERS ASSOCIATION, INC.; CHELSEA A. MORRONI; TRISTAN A. MORRONI; and CHLOE T. MORRONI, Appellees.	)	Case No. 2D20-3085

Opinion filed May 28, 2021.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Lee County; Joseph C. Fuller, Judge.

Jonathan Mann, Robin Bresky, and Jennifer Fox of the Law Offices of Robin Bresky, Boca Raton, for Appellant.

Linda K. Yerger of Yerger Law, Naples, for Appellee Henry A. Morroni.

No appearance for remaining Appellees.

LaROSE, Judge.

Wilmington Savings Fund Society FSB appeals the trial court's "Order Denying Plaintiff's Motion to Return Original Loan Documents," following an unsuccessful foreclosure action against Henry A. Morroni.[1] We reverse.

Background

Wilmington filed a foreclosure lawsuit against Mr. Morroni, alleging that it held the note and mortgage. Wilmington attached to its complaint a copy of a note executed by Mr. Morroni's deceased wife, together with several allonges.

At a nonjury trial, Wilmington presented the trial court with what it contended were the original note and allonges. Mr. Morroni presented the expert testimony of a forensic document examiner, who opined that the signature on the note and one of the allonges was a photocopy. Thus, Mr. Morroni contended that Wilmington lacked standing to foreclose. The trial court rejected the expert's testimony and entered a foreclosure judgment in favor of Wilmington.

On appeal, we reversed, explaining that "the trial court erred in rejecting . . . expert testimony and that this error was the only way it could have ruled in

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[1]Alternatively, Wilmington petitions for a writ of mandamus directing the trial court clerk to return the "original note and mortgage." Our jurisdiction lies under Florida Rule of Appellate Procedure 9.030(b)(1)(B) which furnishes us with jurisdiction to review nonfinal orders, as well as rule 9.130(a)(3)(C)(ii), which confers upon us the authority to review nonfinal orders "determin[ing] . . . the right to immediate possession of property." See, e.g., MTGLQ Invs., L.P. v. Merrill, 46 Fla. L. Weekly D227, D229 (Fla. 1st DCA Jan. 25, 2021) ("We have jurisdiction over the order denying MTGLQ's motion to remove the original note and mortgage from the court file." (citing Fla. R. App. P. 9.130(a)(3)(C)(ii))). Because Wilmington is entitled to the relief it seeks under this rule, we decline to address its alternative basis for redress pursuant to this court's original jurisdiction. See Fla. R. App. P. 9.030(b)(3) ("District courts of appeal may issue writs of mandamus . . . ."); 9.100(a) (enumerating under our original jurisdiction "those proceedings that invoke the jurisdiction of the courts described in rule[] 9.030 . . . (b)(3)").

Wilmington's favor on the standing question." Morroni v. Wilmington Sav. Fund Soc'y FSB, 292 So. 3d 514, 518 (Fla. 2d DCA 2020) (Morroni I). "Wilmington bore the burden of proving that it had standing at trial and failed to rebut expert testimony on that subject or otherwise to prove that the note and allonges it tendered at trial were in fact originals." Id. at 519. We remanded for entry of a judgment in favor of Mr. Morroni. Id.

The trial court entered the mandated final judgment. Then, Wilmington moved for entry of an order directing the clerk to return the loan documents. Mr. Morroni objected. The matter proceeded to a hearing, where the trial court denied Wilmington's motion. The trial court explained that because "the note that was previously found to be not an original signature . . . my concern [is] about releasing that, that particular document, back in to the stream of commerce because there's no telling what [problems] could [result]."

On appeal, Wilmington argues that it is entitled to return of its loan documents. Although there may be a dispute as to the provenance of the note, no court has determined that the note was not an original. Nor has any court cancelled the note. Wilmington contends that the trial court mistakenly read Morroni I as concluding that the loan documents were not originals. Wilmington suggests, instead, that we merely concluded that it failed to meet its burden of proving at trial that the note was the original for standing purposes.

Analysis

We review Wilmington's claims de novo. See Grand Palace View, LLC v. 5 AIF Maple 2, LLC, 276 So. 3d 927, 930 (Fla. 3d DCA 2019) ("The trial court's order would result in the immediate transfer of possession and ownership of the subject

property, even though issues remain on the foreclosure claim. Because the issue presented is purely one of law, the correct standard of review is *de novo*.").

In effect, the trial court denied Wilmington's motion for return of its loan documents based upon "a prior finding" that they were not the originals. This "prior finding" refers to Morroni I. The problem is that we said no such thing. Quite simply, we did not conclude that the note and allonge were not the originals. Instead, we stated the following:

> We agree with Mr. Morroni that the trial court erred in rejecting [the forensic document examiner]'s expert testimony and that this error was the only way it could have ruled in Wilmington's favor on the standing question. Although a trial court is free to reject an unrebutted expert opinion when it decides a case, it is not free to do so arbitrarily. . . . There was no reasonable explanation for the trial court's rejection of [the forensic document examiner]'s unrebutted testimony here.

Morroni I, 292 So. 3d at 518 (citations omitted). Based upon the record then before us, we stated that it "appear[ed] that the trial court rejected [the forensic document examiner]'s testimony because it believed that because Mr. Morroni had not paid his mortgage, he should not be permitted to prevail. . . . [T]hat is not a reasonable explanation for rejecting an expert's testimony about whether a document is an original." Id. at 519. We concluded that "Wilmington bore the burden of proving that it had standing at trial and failed to rebut expert testimony on that subject or otherwise to prove that the note and allonges it tendered at trial were in fact originals." Id.

Thus, our holding was two-fold. First, the trial court erred in arbitrarily rejecting the expert's testimony. Second, mistakenly doing so "was the only way [the trial court] could have ruled in Wilmington's favor on the standing question." Id. at 518;

see also Black's Law Dictionary 731 (6th ed. 1990) (defining "holding" as "[t]he legal principle to be drawn from the opinion (decision) of the court").

We made no factual determination as to whether the loan documents were originals. Of course, it would have been improvident for us to do so. 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."); e.g., Bayview Loan Servicing, LLC v. Dzidzovic, 249 So. 3d 1265, 1268-69 (Fla. 2d DCA 2018) ("Bayview argues that the parties never entered a loan modification agreement. Be that as it may, we are without authority to make such a finding. The trial court, as fact-finder, must make that determination." (citations omitted)); Salazar v. Hometeam Pest Defense, Inc., 230 So. 3d 619, 622 (Fla. 2d DCA 2017) ("[T]he trial court's order is devoid of any findings of fact. The trial court must make these findings."). Rather, we concluded that Wilmington failed to carry its burden of proof that they were the originals. In short, the trial court's reading of Morroni I was mistaken and offered no sound basis to deny Wilmington's motion for return of its loan documents.

Moreover, there was no judgment cancelling the note. See Johnston v. Hudlett, 32 So. 3d 700, 704 (Fla. 4th DCA 2010) ("[O]riginal mortgages and promissory notes . . . are not merely exhibits but instruments which *must be surrendered* prior to the issuance of a judgment. The judgment takes the place of the promissory note. Surrendering the note is essential so that it cannot thereafter be negotiated. The judgment cancels the note. The clerk cannot return these instruments to the parties [following entry of a final foreclosure judgment]."). Absent such a judgment, Wilmington

is entitled to the return of its property. Cf. MTGLQ Invs., L.P. v. Merrill, 312 So. 3d 986, 990-91 (Fla. 1st DCA 2021) ("Significantly, notes are different from most documents in court files, because notes are negotiable instruments. Notes do not belong to the court, nor do they belong to the borrower." (footnote omitted) (citation omitted)). Whether Wilmington established standing to foreclose is a separate issue from Wilmington's ownership of the note and allonges.

In a recent spate of cases, Florida's appellate courts have held, in analogous circumstances, that a foreclosure plaintiff is entitled to the return of its original loan documents in the absence of a final judgment cancelling the note. See, e.g., id. at 992-93 ("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."); Santiago v. U.S. Bank Nat'l Ass'n as Tr. for Banc of Am. Funding Corp., 257 So. 3d 1145, 1147 (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."); U.S. Bank Nat'l Ass'n v. Rodriguez, 256 So. 3d 882, 884 (Fla. 4th DCA 2018) (holding 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"); Kajaine Ests., LLC v. U.S. Bank Nat'l Ass'n, 198 So. 3d 1010, 1011 (Fla. 5th DCA 2016) (requiring the trial court to release the original note to plaintiff that had failed to prove predecessor's standing because "[t]he issue of whether Kondaur could establish standing to foreclose

is distinct from whether it owned the note"). These cases persuade us that Wilmington is entitled to relief.

Conclusion

We reverse the trial court's order and remand with instructions that the trial court direct the clerk to release the loan documents in question to Wilmington.

Reversed, and remanded, with instructions.

KELLY and SMITH, JJ., Concur.