

Third District Court of Appeal

State of Florida

Opinion filed December 18, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-2318 & 3D18-1649
Lower Tribunal No. 14-18881

The Bank of New York Mellon, etc.,
Petitioner,

vs.

Carlos Figueroa, et al.,
Respondents.

Writs of Certiorari to the Circuit Court for Miami-Dade County, Spencer Eig, Judge.

Liebler, Gonzalez & Portuondo, and Adam J. Wick, for petitioner.

Jacobs Legal, PLLC, and Bruce Jacobs; Wasson & Associates, Chartered, and Roy D. Wasson, for respondents.

Before FERNANDEZ, LOGUE and SCALES, JJ.

FERNANDEZ, J.

In case number 3D18-2318, the Bank of New York Mellon (“BNYM”) petitions this Court for a writ of certiorari to review the trial court’s October 17, 2018 order requiring BNYM to produce certain discovery in the underlying residential mortgage foreclosure case filed by BNYM against the respondents, Carlos and Adreina D. Figueroa (“the Figueros”). In case number 3D18-1649, BNYM petitions this Court for a writ of certiorari to review the trial court’s July 12, 2018 discovery order, which is also related to BNYM’s foreclosure case against the Figueros.¹ We have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(b)(2)(A) and grant the petition in case number 3D18-2318. In case number 3D18-1649, we grant the petition in part and deny it in part.

Both petitions stem from the same underlying facts in the mortgage foreclosure case before the trial court. On December 23, 2004, the Figueros executed a promissory note for \$462,000.00 in favor of Countrywide Home Loans, Inc. (“Countrywide”). The Figueros also executed a mortgage in favor of Countrywide dated December 23, 2004, and recorded on January 7, 2005, in Official Records Book 22982, Page 1327, of the Public Records of Miami-Dade County, Florida. The Figueros defaulted on the note and mortgage by failing to make the payment due on October 1, 2012, and all subsequent payments.

¹ Both cases were consolidated under case number 3D18-2318 for all purposes.

BNYM then filed its Verified Complaint to Foreclose Mortgage on July 18, 2014. The complaint attached as an exhibit a copy of the note, indorsed in blank by David Spector, the managing director of Countrywide. BNYM contends that it acquired status as the holder of the note and mortgage before the Verified Complaint was filed.

On November 7, 2014, through their counsel, the Figueroas filed their Answer, Affirmative Defenses, and Demand for Jury Trial. Thereafter, they filed their Amended Counterclaims on October 14, 2016, asserting causes of action against BNYM for civil conspiracy to commit fraud and violation of Florida's Racketeer Influenced and Corrupt Organizations Act ("RICO"). On April 3, 2017, BNYM responded with its Answer and Affirmative Defenses to the Figueroas' Amended Counterclaims, denying the allegations and asserting affirmative defenses.

On October 30, 2017, the Figueroas filed their Amended Request for Production to Plaintiff Re: Specific Standing Evidence, wherein they requested fourteen documents ("Request for Production"). They also served their Notice of Taking Videotaped Deposition Duces Tecum ("Notice of Deposition") on November 7, 2017. The Request for Production and the Notice of Deposition contain the same fourteen requests for documents. The Notice of Deposition contained eight additional requests. On April 20, 2018, BNYM filed its

Objections, Responses and Motion for Protective Order regarding the Figueras' discovery requests dated October 30, 2017, and November 7, 2017. The trial court held a hearing on July 12, 2018, on BNYM's motion for protective order, after which the trial court overruled BNYM's objections in part and ordered BNYM to produce the requested documents within thirty days. BNYM then filed a petition for writ of certiorari on August 13, 2018, in case number 3D18-1649, regarding the trial court's July 12, 2018 discovery order.

Thereafter, on November 27, 2017, the Figueras filed another Request for Production to Plaintiff which contained seven requests for documents concerning the "original notes identified in Exhibits B and C." However, no exhibits were attached. Then on December 8, 2017, the Figueras filed an Amended Request for Production to Plaintiff with the exhibits attached. Exhibit B consisted of a chart containing the case style, case number, and county for each of the eighteen cases listed. The Figueras were not parties in any of the cases. Exhibit C referred to another case filed in the 11th Judicial Circuit in Miami-Dade County, Florida, also to which the Figueras were not parties.

On December 15, 2017, the Figueras filed a Notice of Taking Videotaped Deposition Duces Tecum, which consisted of the same seven requests for documents they asked for in the Amended Request for Production to Plaintiff, in addition to five areas of inquiry for testimony. Four out of the five areas of inquiry

again directed to the loans also referenced in Exhibits B and C (the “Notice of Deposition”). The other remaining area of inquiry referenced Exhibit A, titled “Instructions” and did not mention any “original notes”. The seven document requests and five areas of inquiry are identical to the requests in the Figueras’ Amended Request for Production filed October 30, 2017, and Notice of Deposition on November 7, 2017. However, the documentation and testimony the Figueras were requesting now related to loans and lawsuits to which the Figueras were not parties.

Thereafter, on January 12, 2018, BNYM filed its Objections, Response and Motion for Protective Order as to Defendants’ Discovery Dated November 27, 2017, December 8, 2017, and December 15, 2017, to which the Figueras did not respond. On October 17, 2018, at a hearing before the trial court, BNYM argued that the discovery the Figueras were requesting was “irrelevant, overbroad, and confidential” because it was directed to other loans and lawsuits not involving the Figueras. The day after this hearing, the trial court issued its order overruling BNYM’s objections and denying its motion for protective order. BNYM now seeks certiorari review of this October 17, 2018 discovery order, under appellate case number 3D18-2318

“The standard of review on a petition for writ of certiorari is whether the trial court departed from the essential requirements of law.” Baptist Hosp. of

Miami, Inc. v. Garcia, 994 So. 2d 390, 393 (Fla. 3d DCA 2008), cert. denied, 980 So. 2d 488 (Fla. 2008). To obtain a writ of certiorari, the petitioner must establish that the discovery order was a departure from the essential requirements of law resulting in a material injury that will affect the remainder of the proceedings below and the injury cannot be corrected on appeal. Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94-95 (Fla. 1995). Addressing first the petition in case number 3D18-2318, BNYM has made this showing.

3D18-2318:

In this case, production of the confidential documents cannot be undone once made, as BNYM contends, because the Figueroas have requested documents and testimony relating to nineteen completely unrelated loans and lawsuits from their loan and lawsuit. Banc of Am. Inv. Servs., Inc. v. Barnett, 997 So. 2d 1154, 1155-57 (Fla. 3d DCA 2008). In Barnett, this Court explained that Florida Statutes section 655.059(2)(b) (2007), “deems confidential books and records of deposit accounts at any financial institution and further states that such documents ‘shall not be released except upon express authorization of the account holder.’” Id. at 1157 (quoting § 655.059(2)(b), Fla. Stat. (2007)). Section 655.059(2)(b), Florida Statutes (2018), states:

The books and records pertaining to trust accounts and the deposit accounts and loans of depositors, borrowers, members, and stockholders of any financial institution shall be kept confidential by the financial institution and its directors, officers, and employees and

may not be released except upon express authorization of the account holder as to her or his own accounts, loans, or voting rights.

The Figueroas have not provided consent from the parties of the nineteen other loans and lawsuits to release their financial information. “[T]he disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant.” Friedman v. Heart Inst. of Port St. Lucie, Inc., 863 So. 2d 189, 194 (Fla. 2003), quoting Straub v. Matte, 805 So. 2d 99, 100 (Fla. 4th DCA 2002). The Florida Supreme Court in Friedman further stated that the law “strikes the proper balance between allowing appropriate discovery and protecting litigants’ privacy and equitable interests.” Friedman, 863 So. 2d at 194. Thus, BNYM’s disclosure of these other account holders’ confidential financial information would cause irreparable harm to BNYM, as section 655.059(2)(c) makes it a felony for any person wrongfully to disclose this confidential information. In addition, BNYM’s disclosure would cause irreparable harm to the account holders’ themselves.

The trial court’s action compelling production also departs from the essential requirements of law. “Discovery is limited to those matters relevant to the litigation as framed by the parties’ pleadings.” Rouso v. Hannon, 146 So. 3d 66, 69 (Fla. 3d DCA 2014). “The burden to prove the information is relevant or reasonably calculated to lead to the discovery of admissible evidence is on the

party seeking the information.” Rowe v. Rodriguez-Schmidt, 89 So. 3d 1101, 1103 (Fla. 2d DCA 2012).

In the case before us, BNYM’s pleadings consist of a mortgage foreclosure count against the Figuerosas, as well as the Figuerosa’s civil conspiracy and violation of Florida’s RICO Act counts against BNYM. Proof regarding these claims requires the Figuerosas to show that BNYM has standing to foreclose on the mortgage. McLean v. JP Morgan Chase Bank Nat’l Ass’n, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). BNYM alleged it had standing due to its status as the holder of the note indorsed in blank. Any evidence relating to the nineteen other loans and lawsuits is irrelevant to whether the person who indorsed the Figuerosas’ note had authority to do so. Barnett, 997 So. 2d at 1157-58.

Accordingly, because the trial court’s discovery order will cause BNYM irreparable harm that cannot be remedied on appeal and departs from the essential requirements of the law, we grant BNYM’s petition for writ of certiorari in case number 3D18-2318. See also Chetu, Inc. v. KO Gaming, Inc., 261 So. 3d 605, 606 (Fla. 4th DCA 2019); Kobi Karp Architecture & Interior Design, Inc. v. Charms 63 Nobe, LLC, 166 So. 3d 916 (Fla. 3d DCA 2015); Publix Supermarkets, Inc. v. Santos, 118 So. 3d 317 (Fla. 3d DCA 2013). We thus issue the writ of certiorari and quash the trial court’s discovery order entered on October 17, 2018.

3D18-1649:

However, in case number 3D18-1649, we grant the petition in part and deny it in part, as the trial court in its July 12, 2018 order incorrectly ordered that some documents be produced by BNYM. A review of the record shows there is a difference between some of the documents the Figuerosas requested that BNYM produce in the two consolidated cases. Some of the documents and testimony requested by the Figuerosas in case number 3D18-1649 are not related to the Figuerosas' loan and the underlying foreclosure case before the trial court.

As previously stated, the trial court held a hearing on July 12, 2018, on BNYM's objections, response and motion for protective order to the Figuerosas' discovery requests served on October 30, 2017 and November 7, 2017. As to the Figuerosas' "Amended Request for Production to Plaintiff Re: Specific Standing Evidence" dated October 30, 2107, the Figuerosas requested the following:

- a. The DOC 401R, Doc403R and Doc444R and servicing history screenshots for this loan.
- b. All copies of the original note contained in the Document Management Portal with the available date or "available dt" and the "Document List" for the loan, and the metadata showing when the copies of the notes were created.
- c. All copies of any deposition of Michell Sjolander, David Spector, Laurie Meder and Marie Garner given in any case wherein the rubber-stamped endorsements of Michelle Sjolander, David Spector, Laurie Meder were discussed.
- d. Copies of any documents evidencing the contractual relationship between the Plaintiff and Bank of America, including any right of the Plaintiff to obtain documentation under the care, custody or control of Bank of America.
- e. Any policy or authority of MERS to transfer the subject note and mortgage by assignment.

- f. Any document showing the use of rubber stamps during any delinquent note endorsement process.
- g. Copies of any agreements with Sourcecorp related to a “90 Day Delinquent Note Endorsement Process.”
- h. Copies of any instructions to Sourcecorp to purge records related to a “90 Day Delinquent Note Endorsement Process.”
- i. Copies of any tests and/or results of any Independent Foreclosure Review as required by the OCC Consent Judgment of 2001 related to the endorsements of original notes.
- j. Copies of any documents that show the response by Bank of America and its affiliates to the OCC Consent Judgment of 2011.
- k. Any legal disclaimers by MERSlink related to this loan.
- l. The MERS transaction history and/or life of loan history for this loan.
- m. All procedure manuals and servicing history related to the request for, create of, and/or the recording of the assignment of mortgages(s) for this loan.
- n. All documents that show how and when the endorsement(s) found on the subject promissory note were affixed.

The trial court overruled all of BNYM’s objections, with the exception of the items requested in “j.” Then, the Figueroas filed a Notice of Taking Videotaped Deposition, dated November 7, 2017, in which they requested the following:

- a. PERSON WITH THE MOST KNOWLEDGE as to when, how and by whom the rubberstamped endorsement found on the original note in this case was affixed.
- b. PERSON WITH THE MOST KNOWLEDGE of the policies of the Mortgage Electronic Registration System (“MERS”) as to whether MERS members are permitted to use the assignment in this case which states MERS assigns the note and mortgage to the plaintiff.
- c. PERSON WITH THE MOST KNOWLEDGE as to the testimony of Michelle Sjolander, David Spector, Laurie Meder and Marie Garner regarding the practice of using rubber stamps to affix endorsements of Michelle Sjolander, David Spector, Laurie Meder on behalf of Countrywide onto original notes.

d. PERSON WITH THE MOST KNOWLEDGE as to the practice of any “delinquent note endorsement process” wherein rubber stamped endorsements were added to original notes and whether this note at issue went through that process.

e. PERSON WITH THE MOST KNOWLEDGE as to the instruction to Sourcecorp to purge images of original notes with rubberstamped endorsements after Sourcecorp was subpoenaed by undersigned counsel for their records.

f. PERSON WITH THE MOST KNOWLEDGE as to the practice of imaging copies of the original note in this case, included but not limited to the “available dt” entry or “Document list” from the document management portal for the subject loan.

g. PERSON WITH THE MOST KNOWLEDGE as to any tests and/or results of any Independent Foreclosure Review as required by the Consent Judgment of 2011 with the Office of the Comptroller of the Currency related to the endorsements of original notes.

h. PERSON WITH THE MOST KNOWLEDGE as to any remediation of endorsements to original notes as a result of the Consent Judgment of 2011 with the Office of the Comptroller of the Currency.

The trial court overruled all of the BNYM’s objections with the exception of the items requested in “c.” The trial court then issued its “Order on Plaintiff’s Objections, Response and Motion for Protective Order as to Defendants’ Discovery Dated October 30, 2017 and November 7, 2017” on July 12, 2018, with its ruling on each item.

With regard to the October 30, 2017 request made by the Figueroas, the specific document requests made by the Figueroas and ordered produced by the trial court that BNYM asserts are the subject of its petition are the requests made in

b, c, e, f, g, h, i, k, and m.² The trial court erred in overruling BNYM's objections to these items. Similarly, with respect to the November 7, 2017 Notice of Taking Videotaped Deposition request made by the Figueroas, the specific areas of inquiry that are the subject of this petition from the trial court's July 12, 2018 order requiring BNYM to produce for deposition are the areas of inquiry in b, d, e, f, g, and h.³ The trial court erred in overruling BNYM's objections to items b, d, e, f, g, and h. In the underlying case, BNYM filed a residential foreclosure action against the Figueroas to enforce a promissory note and mortgage. The Figueroas responded by filing its defenses and counterclaims concerning the same promissory note and mortgage that were the subject of BNYM's action. However, the trial court's July 12, 2018 discovery order is not limited to the Figueroas' promissory note and mortgage. The trial court ordered BNYM to produce and obtain testimony regarding documents related or in the possession of non-parties; produce the internal policies and procedures of certain non-parties; produce deposition transcripts of individuals taken in unrelated cases; as well as produce information regarding compliance by Bank of America with its April 2011

² BNYM's petition for writ of certiorari in case number 3D18-1649 is not directed to the items requested in a, d, j, l, or n in the Figueroas' October 30, 2017 amended request.

³ BNYM's petition for writ of certiorari in case number 3D18-1649 is not directed to the areas of inquiry requested in a or c of the Figueroas' November 7, 2017 Notice of Taking Videotaped Deposition.

settlement with the Office of the Comptroller of the Currency. The discovery order was overbroad and required production of material not relevant to the Figueras' lawsuit, thus warranting certiorari review. Santos, 118 So. 3d at 319. Accordingly, BNYM established that the trial court's July 12, 2018 discovery order, with respect to the specific items discussed in this opinion, was a departure from the essential requirements of law resulting in a material injury that cannot be corrected on appeal. Langston, 655 So. 2d at 94-95. Therefore, in case number 3D18-1649, we grant the petition in part and deny the petition in part.

In sum, the petition for writ of certiorari in case number 3D18-2318 is granted in its entirety, and the trial court's October 17, 2018 discovery order is quashed in full. In case number 3D18-1649, the petition for writ of certiorari is granted in part and denied in part. The trial court's July 12, 2018 order is thus quashed in part as to the specific items listed in this opinion.