Third District Court of Appeal

State of Florida, July Term, A.D. 2012

Opinion filed November 28, 2012.
Not final until disposition of timely filed motion for rehearing.

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No. 3D11-554
Lower Tribunal No. 07-46216

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Rogelio Vargas, et al.,
Appellants,

vs.

Deutsche Bank National Trust Co., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

John Herrera, for appellants.

Van Ness Law Firm, P.A., and Katherine J. Walke (Deerfield Beach), for appellees.

Before WELLS, C.J., and ROTHENBERG and LAGOA, JJ.

WELLS, Chief Judge.

Rogelio Vargas appeals from an order approving a general magistrate's report and recommendation on his post-final judgment "Motion to Enforce Loan Modification Agreement Entered into in Open Court." We affirm for three reasons: first, because the court below was without authority to entertain Vargas' multiple motions to force or enforce a loan modification agreement after a foreclosure judgment became final; second, because there is no evidence that the lender bank agreed to a modification of the underlying loan on the foreclosed property "in open court" at a post-judgment hearing; and third, because Vargas' claim that he entered into a modification of his loan agreement "in open court" is barred by the applicable statute of frauds.

On July 28, 2006, Vargas and his wife borrowed nearly a quarter of a million dollars—$232,000—from First NLC Financial Services, LLC. As a condition of receiving this substantial sum of money, Vargas and his wife executed a promissory note, agreeing to repay the loan on a monthly basis. Vargas and his wife simultaneously executed a mortgage securing repayment.[1]

After complying with their obligations under the note and mortgage for little more than a year, Vargas and his wife failed to make any promised payments after September 1, 2007. On December 21, 2007, Deutsche Bank brought suit to

[1] The note and mortgage are currently owned and held by Deutsche Bank National Trust Company. No issue has been raised here regarding Deutsche Bank's entitlement to collect on the debt or to foreclose the mortgage at issue.

foreclose the mortgage. Mrs. Vargas failed to answer and a default was entered against her. Mr. Vargas answered and raised four affirmative defenses, none of which have been argued here.[2]

On March 20, 2008, Deutsche Bank's motion for summary judgment was heard. At that time, the original promissory note was surrendered to the lower court; and, based on the uncontroverted affidavits submitted by Deutsche Bank, a final judgment of foreclosure was entered. The foreclosure judgment set the public sale of the property for June 18, 2008.

At Deutsche Bank's request, the sale date was twice reset, the last setting for November 19, 2008. In the interim, Ocwen Loan Servicing, LLC (apparently the servicing agent for this loan) offered to modify the Vargases' loan, providing them with a written modification agreement, dated October 1, 2008. Importantly, the cover letter attached to the offered loan modification provided that the Vargases must accept the offer by October 24, 2008, as the offer expired on that date:

> The U.S. Government has recently introduced many new programs designed to help homeowners like you who are struggling to make their monthly mortgage payments.

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[2] Vargas' first defense was that his monthly payments had been misapplied and that he was not in "arrears to the extent alleged"; his second defense was that the note at issue was not attached to the complaint; his third defense was that a deficiency judgment could not be entered because the value of the property exceeded the amount due; and his fourth defense was that all conditions precedent to collection on the note and foreclosure of the mortgage had not been satisfied. These defenses apparently were abandoned below and have not been asserted here.

> Ocwen is not only cooperating with the Government, we are attempting to exceed expectations. . . .
>
> . . . .
>
> You have been selected to receive a special "STREAMLINED LOAN MODIFICATION" that will lower your mortgage payment. . . .
>
> . . . .
>
> ACT NOW because this offer is part of a specialized initiative program that ends on October 24, 2008. There are other options that are part of this initiative program, but ***the KEY IS TO ACT NOW, because all of the options are tied to the initiative program, and it ends October 24, 2008.***
>
> What you should do.
>
> To take advantage of this offer you must read, understand and sign the attached agreement. You must also send us the first month's payment. A loan modification changes the original terms of your mortgage, so please make sure you read and understand all the new terms.

(Emphasis added).

The unsigned agreement attached to the cover letter stated the principal balance due on the loan ***as modified*** would be $267,939.14, an amount greater than both the principal amount due on the original now defaulted loan ($230,596.06) and the total amount due under the foreclosure judgment ($248,840.88), which had been accruing interest since the lower court entered the final judgment on March 20, 2008. The modification agreement also contained a waiver and release of all claims against the lender:

LOAN MODIFICATION AGREEMENT

Ocwen Loan Servicing, LLC ("Ocwen") is offering you this Loan Modification Agreement ("Agreement"), dated October 1, 2008 which modifies the terms of your home loan obligations as described in detail below:

. . . .

Pursuant to our mutual agreement to modify your Note and Mortgage and in consideration of the promises, conditions, on terms set forth below, the parties agree as follows:

1. ***In order for the terms of this modification to become effective, you promise to make an initial down payment ("Down Payment") of $1,207.38 on or before October 24, 2008*** and 2 equal monthly payments of principal and interest in the amount of $1,207.38 to Ocwen ("Trial Period") beginning on December 1, 2008, and thereafter due on the 1st day of each succeeding month.

2. If you successfully complete the Trial Period, your loan will automatically be modified pursuant to the terms of this Agreement . . . .

3. You agree that, at the end of the Trial Period, ***the new principal balance due under your modified Note and Mortgage will be $267,939.14***. . . .

. . . .

10. BY EXECUTING THIS MODIFICATION, YOU FOREVER IRREVOCABLY WAIVE AND RELINQUISH ANY CLAIMS, ACTIONS OR CAUSES OF ACTION, STATUTE OF LIMITATIONS OR OTHER DEFENSES, COUNTERCLAIMS OR SETOFFS OF ANY KIND WHICH EXIST AS OF THE DATE OF THIS MODIFICTION, WHETHER KNOWN OR UNKNOWN, WHICH YOU MAY NOW OR HEREAFTER ASSERT IN CONNECTION WITH THE MAKING, CLOSING, ADMINISTRATION, COLLECTION OR THE ENFORCEMENT

> BY OCWEN OF THE LAON DOCUMENTS, THIS MODIFICAITON OR ANY OTHER RELATED AGREEMENTS.

(Emphasis added).

Vargas did not accept the offer. He neither executed the agreement by October 24, 2008, nor made the initial payment required by that date. Instead, on November 5, 2008—well after the loan modification offer had expired—he filed a motion styled "Motion to Stay Foreclosure Sale and to Compel Reasonable Forbearance Agreement," in which he acknowledged his refusal to accept the offer in its current form and requested the trial court to compel an offer that Vargas would accept:

> **<u>MOTION TO STAY FORECLOSURE SALE AND TO COMPEL REASONABLE FORBEARANCE AGREEMENT</u>**
>
> The Defendant, ROGELIO VARGAS, by and through his undersigned counsel, hereby files this Motion to Stay Foreclosure Sale and Compel Reasonable Forbearance Agreement, and in support thereof state[s] as follows:
>
> 1. An Order granting Plaintiff's Motion for Summary Final Judgment of Foreclosure was entered by this Court on March 20, 2008. According to this Order, within sixty (60) days, the bank was to provide the Defendant a Forbearance package.[[3]]
>
> 2. On October 1, 2008, more than sixty (60) days after this Court's Order, the Plaintiff provided a Loan Modification Agreement to the Defendants. . . .

[3] There is no such provision in the final judgment of foreclosure or any other order in the record before us.

> 3. The aforesaid Loan Modification Agreement is unreasonable and the ***Defendant cannot enter into such an agreement*** unless modifications are made to the unreasonable terms contained therein.
>
> 4. Pursuant to paragraph 3 of the Loan Modification Agreement "the new principal balance due . . . will be $267,939.14[."]
>
> 5. Under the Final Judgment of Foreclosure, the grand total set forth in said judgment is $248,840.88. This means the loan modification is approximately $19,000.00 more than the amount set forth in the Summary Judgment Order and is unreasonable.
>
> . . . .
>
> 7. Pursuant to paragraph 10 [of the Loan Modification Agreement], the Defendants are waiving any and all rights and claims that may rise in connection with the mortgage or loan modification agreement, which in effect serves to release the Plaintiffs from any and all liability in the event they engage in some wrong doing concerning this matter. This is an unreasonable term ***for the Defendant to accept and agree.***
>
> . . . .
>
> WHEREFORE, the Defendant, ROGELIO VARGAS, respectfully requests that his Honorable Court enter an Order Staying the Foreclosure sale that is currently set for November 19, 2008 and compel the parties herein to negotiate a loan modification agreement that is acceptable to both parties within thirty (30) days of this Order . . . .

(Emphasis added).

The foreclosure sale was reset for February 12, 2009. On January 14, 2009, Vargas filed a second post-judgment motion, styled "Second Motion to Stay Foreclosure Sale and to Compel Reasonable Forbearance Agreement." In that motion, he again acknowledged his refusal to accept the now-expired loan

modification offer and again asked the trial court to compel Deutsche Bank to offer him a better deal. This motion, using identical language, lodged the same objections that his first post-judgment motion had raised about the terms of the October 1, 2008 offer to modify his loan. The motion additionally claimed that Vargas' counsel had "diligently attempted to obtain a reasonable forbearance agreement but to no avail." As of the filing of this motion, Vargas had made no payments to Deutsche Bank for at least sixteen months; the mortgage on his home already had been foreclosed for almost a year; and, he ***concededly*** had been unable to reach an agreement with the bank to modify his loan.

On January 29, 2009, Vargas' second motion to postpone the February 12th public sale and to compel what he deemed a "reasonable" settlement was heard. The lower court summarily denied the motion, ordering the public sale to proceed as scheduled on February 12. Eleven days later, just three days before the scheduled sale, Vargas filed an unverified "Emergency Motion to Postpone Sale" in which he represented that at the January 29th hearing on the second motion to postpone sale, the "Parties' respective counsels [a]greed in open Court to the terms of the Loan Modification Agreement, offered to the Defendant's [sic] on October 1, 2008," with the only pending issue being "whether to apply the first payment to the first of March or upon receipt." Vargas further alleged that he "had signed the October 1, 2008 agreement as stipulated to in Open Court and attached payment as

instructed." Two days later, and without a ruling on his latest attempt to postpone the foreclosure sale, Vargas filed for Chapter 11 Bankruptcy protection, thereby automatically postponing the foreclosure sale that was to take place the next day.

Thereafter, and while the bankruptcy was pending, Vargas sent checks each month to Ocwen in the amount stated in the October 1, 2008 modification offer. Ocwen accepted some checks, and then returned others with notices that the checks sent did not cure Vargas' default. Ultimately, Ocwen returned all of the checks following termination of the bankruptcy proceeding.[4]

In early July 2009, apparently with the bankruptcy proceeding and the accompanying stay of the foreclosure sale terminated, Vargas filed yet another post-judgment motion, styled "Motion to Enforce Loan Modification Agreement Entered into in Open Court." Therein, Vargas sought to enforce the modification agreement which he claimed was entered into at the January 29th hearing and which only he had signed. The motion was referred to a general magistrate for the purpose of determining whether the parties had "entered into a valid and binding Loan Modification Agreement in open court during the course of the January 29, 2009 hearing."

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[4] The general magistrate made this finding in her report and recommendation, and Vargas does not challenge it. See Edge v. Edge, 69 So. 3d 348, 349 (Fla. 3d DCA 2011) ("Findings for which a timely exception has not been lodged are deemed waived.").

On February 1, 2010, the general magistrate conducted an evidentiary hearing on the matter. No transcript of the January 29, 2009 hearing was filed or introduced at that hearing, and only Vargas testified. The totality of Vargas' testimony was that, at the January 29th hearing: ***he*** had agreed to accept the then long-expired October 1, 2008 loan modification offer; ***he*** had stricken out that portion of paragraph 1 of the proposed agreement which required him to make his initial payment by October 24, 2008; ***he*** had signed the agreement; and ***he*** had begun sending in monthly checks. There was no testimony that Ocwen had agreed to renew its previous offer; that Ocwen had agreed to modify its loan as of January 29, 2009 for $267,939.14, the same amount it had been willing to modify it for on October 24, 2008, essentially forgoing any additional costs it had incurred, and all additional interest that had accrued since October 2008; or that Ocwen had agreed to strike the October 24th payment date contained in paragraph 1 of the agreement:

> BY MR. HERRERA [COUNSEL FOR VARGAS]:
>
> Q. Mr. Vargas, on January 29th, were you present before Judge Silverman in his courtroom?
>
> A. Yes.
>
> Q. Was the purpose of your presence in the courtroom related to the foreclosure on your property?
>
> A. Yes.
>
> . . . .

Q. When you sat before Judge Silverman with counsel for the Plaintiff in front of you[] did you have the opportunity to accept the loan modification agreement?

A. Yes.

Q. And did you in fact accept that modification agreement?

A. Yes.

Q. Have you made payments based on your acceptance of that modification agreement?

A. Yes.

Q. Is the payment history what has been demonstrated to the Court along with the letters of $1,207.38 per month?

A. Yes.

Q. Have you made those payments pursuant to your agreement entered into in open court on January 29th every month?

A. Yes.

MR. HERRERA: I have no further questions.

GENERAL MAGISTRATE: Okay. Ms. Walke.

CROSS EXAMINATION

BY MS. WALKE [COUNSEL FOR DEUTSCHE BANK]:

Q. Mr. Vargas, do you have any written – do you have any written terms of this settlement agreement?

A. Well, he has it because I received the agreement and everything that I received from the people, I gave it to my attorney.

Q. When you were in front of Judge Silverman and you entered into this proposed agreement, do you have anything in writing from that day?

A. Like I said, the agreement is what I have.

Q. Are you referring to the loan modification agreement, let's see, dated October 1st, 2008? I'll hand you a copy. Is that the agreement in writing that you're referring to?

A. That one, and I think we have another one.

MR. HERRERA: Let me see.

BY MS. WALKE:

Q. Can you ask your counsel if you have another agreement that's in writing?

GENERAL MAGISTRATE: Communications between a client and counsel typically are privileged. So what's the October 1st, 2008 copy of the agreement?

MR. HERRERA: Your Honor, I think it would have been easier for a setup of initial argument before Mr. Vargas started his testimony.

GENERAL MAGISTRATE: Okay. I have that, that's attached as Exhibit A.

MS. WALKE: Correct.

BY MS. WALKE:

Q. Mr. Vargas, can you explain, do you have any other written agreements to modify the loan except for this loan modification agreement dated October 1st, 2008? I'll hand you the agreement so you can look it over again.

A. This one, this one.

MR. HERRERA: Right.

BY MS. WALKE:

Q. The one that you're pointing to, is that the same agreement as the October 1st, 2008 agreement with the exception of paragraph one that has a strike through the October 24th, 2008 due date?

A. Right.

Q. That's correct?

A. Right.

. . . .

MS. WALKE: That's all I have for now, Your Honor.

. . . .

REDIRECT EXAMINATION

BY MR. HERRERA:

Q. Mr. Vargas, was it your understanding at the hearing where you agreed to the loan modification that it was from that point forward?

A. Yes.

Q. Is that the reason we crossed out the date of October 24, 2008?

A. Yeah, that's it.

MR. HERRERA: No further questions.

GENERAL MAGISTRATE: Okay. That's the sum total of the Defendant's testimony?

MR. HERRERA: That's it, that's all.

On February 18, 2010, the magistrate issued a seven-page report and recommendation, concluding that there was no credible evidence to support Vargas' claim that the parties had agreed to a loan modification at the January 29, 2009 hearing:

> 6. In support of their Motion to Enforce, Defendants assert that at the time of the January 29, 2009, hearing, Mr. Vargas executed the Loan Modification Agreement "in open Court" and that the Agreement was accepted by Plaintiff's counsel. However, ***Mr. Vargas offered no testimony that he signed the Loan Modification Agreement in the presence of Judge Silverman or that the Court observed his signing the Agreement or observed some sort of a settlement. Mr. Vargas offered no testimony as to what, if anything, was said by Plaintiff's counsel and did not testify as to what actions by Plaintiff's counsel he relied upon to believe that Plaintiffs had accepted an OCWEN form Loan Modification Agreement that by its terms expired on October 24, 2008***.
>
> 7. On February 5, 2009, Defendants' counsel's employee, Irene Viera, sent an e-mail to OCWEN employee Cindy White. Following the salutation, Ms. Viera's e-mail states, "As per the request of the Judge Scott J. Silverman, attached please find the Modification Agreement of the above mentioned borrower our client." However, Ms. Viera's e-mail also acknowledged that ". . . this agreement is expired. I spoke w/Sachin Timple from Ocwen and he stated that there is no record of such in the system." Ms. Viera's letter also acknowledged that the foreclosure sale date remained scheduled for February 12, 2009.
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> 8. On February 6, 2009, Defendants' counsel sent a letter to OCWEN which enclosed Defendants' executed Loan Modification Agreement and first payment and represented "***[m]y clients have accepted said modification and we have stipulated to this in open court before Honorable Scott J. Silverman on January 29, 2009***." In his letter, Defendants' counsel stated that he had made numerous but unsuccessful efforts to resolve the question of whether to apply Defendants' payment to the new date of March 1 or immediately upon

receipt with both "your local counsel and the attorney of record on the case, "but to no avail." The Magistrate finds it significant that neither Plaintiffs counsel nor OCWEN's counsel were copied on Defense counsel's letter to OCWEN.

9. Three days later, on February 9, 2009, Defendants filed their (third) Emergency Motion to Postpone Sale in which they argued that the parties' counsel "[a]greed in open Court to the terms of the Loan Modification Agreement" and that "[t]he only pending issue was whether to apply the first payment to the first of March or upon receipt." Two days later, on February 11, 2009, the Defendants filed their Chapter 11 Bankruptcy Proceeding which automatically stayed the February 12, 2009, foreclosure sale as a matter of law.

10. Thereafter Defendants' counsel sent a series of letters to OCWEN enclosing Defendants' payments, often referencing or implying that Judge Silverman had approved the loan modification in open court, and seeking to resolve any outstanding problems. The Magistrate finds that while OCWEN did accept some payments made by the Defendants during the period of their bankruptcy, once their bankruptcy proceeding was either discharged or dismissed, all of the Defendants' payments were returned. On December 12, 2009, Defendants' counsel again wrote to OCWEN enclosing payments from May 2009 through December 2009 which had been "mistakenly returned" by OCWEN and a payment for January 2010. As was the case with his April 2009 letter, Defendants' counsel did not copy Plaintiff's counsel or OCWEN's counsel on the May through December 2009 letters.

11. The only exhibit which appears to support Defendants' argument of a settlement is an OCWEN Account Statement dated October 19, 2009, which reflects a monthly payment due of $1,207.38. However, this document also states "Our records indicate that ***your loan is in foreclosure.***["] Accordingly, this statement may be for informational purposes only.[] (Emphasis supplied)

12. Based upon the preceding findings, the Magistrate denies Defendants' Motion to Enforce the Loan Modification Agreement under circumstances where the Court's January 29, 2009, Order denied Defendants' Second Motion to Stay Foreclosure Sale and

> expressly held, "Sale shall proceed February 12, 2009." Defendants' actions seeking bankruptcy protection and their counsel's employee's e-mail which acknowledged the pending sale date are consistent with an understanding that no enforceable settlement of the foreclosure action had ever been reached.
>
> 13. The Magistrate finds that there is no evidence of a meeting of the minds upon an agreement to modify the Defendants' loan, either orally (under circumstances which require modification of the loan agreement in writing) or in writing. ***The fact that Mr. Vargas[] executed and delivered an expired Loan Modification Agreement and the insistence of Defendants and their counsel that the agreement had been entered into in open court and that their written communications were somehow based upon the request or instructions of Judge Silverman manifest an attempt to create the appearance of an agreement where none ever existed or to create the circumstances to support a defense of equitable estoppel***. Whether Defendants' creation of a self-serving paper trail flowed from misguided optimism or resulted from a deliberate attempt to manipulate the system is immaterial. Simply stated, because there is no credible evidence of a modification of Defendants' loan on January 29, 2009, "in open court" or thereafter, Defendants' Motion to Enforce Loan Modification Agreement Entered Into in Open Court is denied.

(Emphasis added).

Vargas' exceptions to this report and recommendation were denied and it was ratified by the trial court.

Our standard of review on Vargas' appeal from the trial court order is abuse of discretion. See Collado v. Pavlow, 951 So. 2d 69, 70 (Fla. 5th DCA 2007) (finding that "in reviewing a trial court's adoption and ratification of a general magistrate's report and recommendation, the standard of review is abuse of discretion"); see Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)

(confirming that discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, in other words where no reasonable person would take the view adopted by the trial court). Based on controlling law and the record before us, we find no abuse of discretion in the trial court's order and affirm for a number of reasons.

First, the court below had no authority to consider any of Vargas' post-judgment requests to compel Deutsche Bank either to offer a modification agreement or to enforce any purported post-judgment modification. The final judgment entered below is a standard foreclosure judgment. It determines the amount of principal and interest due through the date of the judgment; it determines the amounts due to cover other costs associated with the property and the foreclosure action; and, it orders the property sold to satisfy the total amount due at a public sale to occur no sooner than ninety days from the date of entry of the judgment. This judgment ***does not*** mention a forbearance package, much less require Deutsche Bank "within sixty (60) days . . . to provide [Vargas with] a Forbearance package," as Vargas alleged in both of his "Motion[s] to Stay Foreclosure Sale and to Compel Reasonable Forbearance Agreement."

Trial courts do, of course, have the authority to enter orders to enforce to their judgments. See Nieves v. Crawford, 20 So. 3d 874, 876 (Fla. 3d DCA 2009) (recognizing that the trial court has the inherent authority to enforce its previously

entered order); Spencer v. Spencer, 898 So. 2d 225, 227 (Fla. 2d DCA 2005) (providing that the lower court "has the inherent jurisdiction to enforce its previously entered orders, even in the absence of an express reservation of jurisdiction in a final judgment"). They do not, however, have the power, absent an appropriate motion under Florida Rules of Civil Procedure 1.530 or 1.540, to modify a judgment once it becomes final. See Levy v. Levy, 900 So. 2d 737, 745 (Fla. 2d DCA 2005) ("Trial courts have no authority to alter, modify, or vacate a final judgment except as provided in Florida Rules of Civil Procedure 1.530 and 1.540."); Harbor Bay Condos., Inc. v. Basabe, 856 So. 2d 1067, 1069 (Fla. 3d DCA 2003) ("A trial court does not retain the authority to amend or modify a final judgment, absent a rule or statute providing otherwise."); Frumkes v. Frumkes, 328 So. 2d 34, 35 (Fla. 3d DCA 1976) ("The court retains the power to modify by subsequent order the time and manner of the enforcement of a final judgment after it becomes final, but it does not retain the power, unless provided by statute or rule, to amend, modify or alter the provisions of a final judgment.").

Because the judgment at issue here does not mention a loan modification agreement or a forbearance package, much less obligate Deutsche Bank to provide them to Vargas, there was nothing for the court below to enforce regarding the offer, terms, or acceptance of any modification agreements or forbearance packages. Nor was an appropriate motion under Rules 1.530 or 1.540 ever filed to

modify the final foreclosure judgment. Further, because Vargas raised no issues regarding either the pending sale of the subject property or his ownership rights, there was nothing for the lower court to consider once this judgment became final.[5] See § 45.031, Fla. Stat. (2012) (governing judicial sales procedure); § 45.0315, Fla. Stat. (2012) (governing the right of redemption); § 45.032, Fla. Stat. (2012) (governing disbursement of surplus funds following a judicial sale); § 45.033, Fla. Stat. (2012) (governing the sale or assignment of rights to surplus funds in property subject to foreclosure); § 45.034, Fla. Stat. (2012) (governing qualifications and appointment of a surplus trustee in foreclosure actions); § 45.035, Fla. Stat. (2012) (governing clerk's fees in judicial sales). In sum, the court below should never have considered Vargas' motions to compel or to enforce this non-existent agreement because it was without authority to grant him the relief requested. He was, therefore, entitled to no relief below and is entitled to no relief here.

Second, the order must be affirmed because, as the general magistrate aptly found, there is no evidence that the parties ever reached a binding agreement. See Ward v. Dones, 90 So. 3d 826 (Fla. 3d DCA 2012) ("[T]he trial court is bound by the general [magistrate]'s factual findings unless they are not supported by competent substantial evidence." (quoting Robinson v. Robinson, 928 So. 2d 360, 362 (Fla. 3d DCA 2006))). Deutsche Bank's servicing agent, Ocwen, offered to

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[5] No appeal was prosecuted from the final judgment of foreclosure.

modify Vargas' loan before a scheduled foreclosure sale date. That offer was conveyed by a cover letter, dated October 1, 2008, which clearly and unequivocally explained that Vargas qualified for a "specialized initiative program" which was only available for a limited time. The letter twice informed Vargas that he needed to "ACT NOW" and that the initiative program "ends October 24, 2008." The attached loan modification agreement, also dated October 1, 2008, among other things, increased the principal amount of the loan to almost $268,000[6]; required Vargas to waive any and all claims against Ocwen/Deutsche Bank; and mandated acceptance of its terms by making an initial payment by October 24, 2008. Vargas intentionally allowed the loan modification offer to expire without making an initial payment by October 24th, the time at which the "specialized initiative program" ended.

Under basic contract law, after the loan modification offer expired, nothing existed for Vargas to accept. See Sullivan v. Econ. Research Props., 455 So. 2d 630, 631 (Fla. 5th DCA 1984) ("There can be no question that when an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding. Any offer without consideration may be withdrawn at any time before acceptance; and an offer which in its terms limits the time of acceptance is

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[6] As nearly as we may discern, the principal amount stated in the modification agreement is comprised of the final judgment grand total, $248,840.88, plus interest and costs from the date of the judgment through October 24, 2008.

withdrawn by the expiration of the time. (quoting Waterman v. Banks, 144 U.S. 394, 430 (1892))); Weiner v. Tenenbaum, 452 So. 2d 986, 987 (Fla. 3d DCA 1984) ("The communication required in order to effect acceptance of an offer to buy is not satisfied where the document which constitutes the sole means of acceptance is still in the hands of the [offeree] after the time for acceptance has expired."). And, even if there had been no time limit for acceptance thereof, Vargas twice made an outright rejection of the offer in his two "Motion[s] to Stay Foreclosure Sale and to Compel Reasonable Forbearance Agreement," wherein he asserted that he could not "enter in to such an agreement unless modifications are made to the unreasonable terms contained therein." See Ribich v. Evergreen Sales & Serv., Inc., 784 So. 2d 1201, 1202 (Fla. 2d DCA 2001) (stating that "an acceptance of an offer must be absolute and unconditional, identical with the terms of the offer and in the mode, at the place and within the time expressly or impliedly required by the offer").

Yet, Vargas claims that when he appeared at the January 29, 2009 hearing on his second post-judgment motion to compel, he and Deutsche Bank agreed to go through with the October 1st loan modification agreement, leaving open only the issue of when to apply his first payment. Not only is this claim unsupported by any evidence, as the general magistrate found, it also makes no sense.

The only testimony on this issue came from Vargas, who testified that on January 29th, "he" agreed to accept, and accepted, the previously rejected October 1st loan modification offer; that based on his agreement, he understood that the loan would be modified as per the October 1st agreement from January 29th forward; and that, based on that understanding, he and his attorney struck through that portion of the October 1st offer mandating acceptance as of October 24, 2008. While this may prove that on January 29th (with the February 12th foreclosure sale looming) Vargas finally decided to accept the offer he had previously rejected, it does not prove that Deutsche Bank agreed to or was bound by any such deal. To the contrary, by January 29, 2009, the October 1, 2008 offer to modify Vargas' loan had long expired and there is no evidence that on January 29th Deutsche Bank or Ocwen agreed to re-assert that offer. There certainly is no evidence that Deutsche Bank or Ocwen was willing to modify its loan as of January 29th for either the same principal amount as that offered in October of the prior year (especially given that additional interest had been accruing since the October 1st offer was made), or on the same terms as those detailed in the original offer (given that the "special initiative program" on which the October 1st offer was premised had ended).

That Vargas had started making payments to Ocwen only days before securing a bankruptcy stay of the foreclosure sale also does not prove that an

agreement existed. To the contrary, as the general magistrate found, the record shows, at best, that Ocwen initially accepted some checks from a borrower who owed it a substantial amount of money; that Ocwen returned some of these checks at once; and that, after the bankruptcy proceeding ended, Owcen returned all of these payments. And, other than self-serving statements set forth by Vargas' counsel in letters to Ocwen—letters which were not copied to counsel for Deutsche Bank, the actual party in this foreclosure proceeding—there is no evidence that Ocwen or the bank ever knew about, much less agreed to, a new loan modification agreement. On this record, the magistrate and the court below were correct in concluding that no meeting of the minds had occurred and in rejecting Vargas' unsupported argument that a loan modification agreement was reached at the January 29th hearing.

The order on appeal must be affirmed for yet a third reason: the applicable statute of frauds. Section 687.0304(2) of the Florida Statutes (2012) expressly provides that a "debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor."[7] For the purposes of this

[7] At the hearing before the general magistrate, Deutsche Bank's counsel argued that the oral agreement suggested by Vargas was a "modification of a mortgage on real property" that "has to be in writing." The general magistrate's report and recommendation similarly stated that "there is no evidence of a meeting of the minds upon an agreement to modify the Defendants' loan, either orally (under

statute, a credit agreement is defined as "an agreement to lend or forbear repayment of money . . ., to otherwise extend credit, or to make any other financial accommodation." § 687.0304(1)(a), Fla. Stat. (2012). The loan modification agreement at issue here is both an agreement which extends credit and which makes a financial accommodation. See Brake v. Wells Fargo Fin. Sys. Fla., Inc., No. 8:10-cv-338-T-33TGW, 2011 WL 6719215, at *7 (M.D. Fla. Dec. 5, 2011) (confirming that an oral promise to modify a "mortgage loan on more favorable terms is a credit agreement subject to Florida's banking statute of frauds because it is an agreement to make a financial accommodation. § 687.0304(1), (2), Fla. Stat."); Fenn v. Litton Loan Servicing LP, No. 6:10-cv-965-Orl-28DAB, 2010 WL 8318866, at *2 (M.D. Fla. Dec. 10, 2010) (stating that a loan modification agreement is an agreement "to lend money and extend credit" under section

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circumstances which require modification of the loan agreement in writing) or in writing." Beyond these statements, it does not appear that section 687.0304 was expressly mentioned or considered in the lower proceedings. Even if not, we nonetheless may consider it here. See Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999) (finding that "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."); see also Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla., 37 Fla. L. Weekly S407 (Fla. June 7, 2012) ("[A]n appellate court should affirm a trial court that 'reaches the right result, but for the wrong reasons' if there is 'support for the alternative theory or principle of law in the record before the trial court'" (quoting Robertson v. State, 829 So. 2d 901, 906-07 (Fla. 2002))); State Farm Mut. Auto. Ins. Co. v. Curran, 83 So. 3d 793, 795 n.1 (Fla. 5th DCA 2011) ("We may affirm the trial court under the 'tipsy coachman' doctrine even where the lower court's reasoning is incorrect or when the basis of our affirmance was not argued.").

687.0304); Brisbin v. Aurora Loan Servs., LLC, 679 F.3d 748 (8th Cir. 2012) (rejecting the notion that a promise to postpone a foreclosure sale is not a "financial accommodation" within the meaning of Minnesota's credit agreement statute of frauds[8]). Because the alleged January 29th agreement is not signed by Deutsche Bank or Ocwen, it cannot be enforced.

Likewise, Vargas' unilateral partial performance of what he contends was a loan modification agreement between the parties will not remove it from the statute of frauds in this case so as to make it enforceable. Even in those instances where partial performance has been found to remove an oral contract from the statute of frauds—an issue which need not be decided in this case—the acts done in furtherance of partial performance must be referable ***exclusively*** to the oral contract sought to be enforced and nothing else:

> The rule is that in addition to establishing the oral contract under which the vendee claims, the acts claimed to have been done thereunder in order to meet the Statute of Frauds must be ***referable exclusively to the contract***; the act or conduct relied on as constituting part performance of the contract must have special reference to it and nothing else.

[8] Florida's banking statute of frauds is based on Minnesota's credit agreement statute of frauds. See Brenowitz v. Cent. Nat'l Bank, 597 So. 2d 340, 342 (Fla. 2d DCA 1992). Minnesota's statute similarly provides that "a debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." Minn. Stat. § 513.33, subdiv. 2 (2012).

Miller v. Murray, 68 So. 2d 594, 596 (Fla. 1953); Elliott v. Timmons, 519 So. 2d 671, 672 (Fla. 1st DCA 1988).

Here, all documentary evidence in the record indicates that the loan number assigned to the subject loan remained the same at all relevant times. The same loan number appeared on all of the documents evidencing Vargas' original loan; the same loan number appeared on all of the documents related to the October 2008 modification offer which Vargas allegedly accepted; and significantly, the same loan number appeared on all of the checks that Vargas remitted toward payment of the purportedly modified loan. Thus, the remittance made by Vargas following the January 29th hearing could not refer ***exclusively*** to the modification agreement as alleged. Rather, the evidence is that the remitted checks pertained to the existing note and mortgage that had been foreclosed, as evidenced by Ocwen's multiple letters returning Vargas' payments stating that "[t]hese funds are being returned, as they are not sufficient to satisfy the reinstatement of your account"; that "[t]hese funds are being returned, as they are ***not sufficient to satisfy the defaulted amount of your loan*** and no alternative payment arrangements have been agreed to"; and that "payments that are less than the amount required to reinstate the mortgage loan will be returned and ***will not stop any foreclosure proceedings that have begun***." (Emphasis added).

For these reasons, we find that the trial court did not abuse its discretion in affirming the magistrate's report and recommendation and affirm the order on appeal.

LAGOA, J., concurs.

ROTHENBERG, J. (dissenting).

The defendants, Rogelio Vargas, et al. (collectively, "the Vargases"), appeal from an order overruling exceptions and ratifying the general magistrate's report and recommendation. Based on the following, I would reverse and remand. I, therefore, respectfully dissent from the majority opinion.

The Vargases have lived in their home since 1971, over forty years. On July 28, 2006, they borrowed $232,000 from First Financial Services, LLC, and executed a mortgage and note securing the payment of the loan, which are currently owned by Deutsche Bank National Trust Co. ("Deutsche Bank"). On December 21, 2007, after three missed payments, Deutsche Bank filed a foreclosure action against the Vargases. A final foreclosure judgment was ultimately entered in Deutsche Bank's favor, and the sale of the property was scheduled and then rescheduled twice at Deutsche Bank's request.

In the interim, Deutsche Bank's servicing agent, Ocwen Loan Servicing ("Ocwen"), forwarded a loan modification package to the Vargases, offering to modify the loan from its then balance of $230,596.06 to $267,939.14, and setting the monthly payments at $1,207.38. The proposal contained an acceptance date of October 24, 2008. The Vargases did not initially accept the offer, which would

have substantially increased their balance, and instead, sought to compel a more reasonable forbearance agreement.

On January 29, 2009, the trial court denied the Vargases' motion to compel a more reasonable offer and to stay the scheduled February 12, 2009, sale of the property. The Vargases claim that at this January 29, 2009, hearing, they accepted Deutsche Bank's loan modification proposal and signed the agreement in open court. Although there is no transcript of the hearing, it is undisputed that the Vargases tendered a payment of $1,207.38 at the hearing, the amount requested by Deutsche Bank, and that Deutsche Bank accepted the payment.

The following week, on February 5, 2009, an email from the Vargases' counsel's office to Ocwen reflects that the only pending issue was the start and expiration dates of the loan modification agreement. The following day, the Vargases' counsel sent a letter to Ocwen, stating, in part, as follows:

> The only matter remaining unsettled at that time was whether to apply Mr. and Mrs. Vargas's payment to a new date of March 1st or immediately upon receipt. Your local counsel stated that she would have that answer for us that same afternoon. To this date, no such answer has been provided.

The Vargases sent a second payment to Ocwen which was returned with a letter stating the funds were insufficient to satisfy the **reinstatement** amount. The letter, however, did not state the amount that was necessary. In response, the Vargases' counsel sent a letter to Ocwen's president, explaining that Deutsche

Bank's local counsel agreed to the modification in open court before Judge Silverman, and, therefore, there appeared to be some sort of "miscommunication between your counsel, local counsel and your office as the second payment has been returned." The Vargases' counsel further stated:

> Therefore, enclosed please find the monthly payments for March (which was mistakenly returned) and April 2009 to be credited to my clients' above referenced loan, as per the Agreement. . . . Should you wish to discuss this matter, please do not hesitate to contact my office at your earliest convenience.

These payments were accepted by Ocwen without any further communication.

After accepting the March and April payments, however, Ocwen inexplicably returned the May 2009 payment to the Vargases. Thereafter, the Vargases' counsel re-tendered the May 2009 payment and tendered the June 2009 payment. Ocwen returned both payments, stating that "they are not sufficient to satisfy the defaulted amount of your loan." In response to these returned payments, the Vargases filed a "Motion to Enforce Loan Modification Agreement Entered Into In Open Court" ("Motion to Enforce"), asserting that at the January 29, 2009, hearing conducted before Judge Silverman, Deutsche Bank's counsel agreed in "open court" to the terms of a loan modification agreement with the Vargases. However, after accepting several payments from the Vargases and sending the Vargases an account summary and a payment coupon stating that the Vargases payment of $1,207.38 was due on December 16, 2009, Deutsche Bank

refused to accept further payments. The Vargases requested that the trial court order Deutsche Bank to comply with the agreement. Judge Silverman referred the Motion to Enforce to a general magistrate.

Despite these facts, which were considered at the hearing, the general magistrate issued her report and recommendation denying the Vargases' Motion to Enforce, finding that "there is no evidence of a meeting of the minds upon an agreement to modify [the Vargases'] loan, either orally (under circumstances which require modification of the loan agreement in writing) or in writing." Thereafter, the Vargases filed exceptions to the report and recommendation, asserting that the general magistrate ignored evidence demonstrating that Deutsche Bank consummated the loan modification. Although Judge Silverman was familiar with the action, Judge David C. Miller heard, and later denied, the Vargases' exceptions, and ratified the general magistrate's report and recommendation. The Vargases' appeal followed.

The Vargases contend the trial court erred by denying the exceptions and ratifying the general magistrate's report and recommendation where the finding that there was "no meeting of the minds" is not supported by competent substantial evidence. I agree.

"Where a general [magistrate] has been appointed for fact-finding and to recommend disposition of pending issues, the trial court is bound by the general

[magistrate's] factual findings unless they are not supported by competent substantial evidence or are clearly erroneous." Robinson v. Robinson, 928 So. 2d 360, 362 (Fla. 3d DCA 2006) (quoting Garcia v. Garcia, 743 So. 2d 1225, 1226 (Fla. 4th DCA 1999)); see also Ferraro v. Ferraro, 971 So. 2d 826, 828 (Fla. 3d DCA 2007) (citing Robinson, 928 So. 2d at 362); Cerase v. Dewhurst, 935 So. 2d 575, 578 (Fla. 3d DCA 2006). **The record reflects that the only witness who testified at the evidentiary hearing**[9] **before the general magistrate was Mr. Vargas**, who testified that on January 29, 2009, he agreed to the loan modification terms presented by Deutsche Bank and tendered the payment to Deutsche Bank's counsel in open court as requested. Additionally, it is undisputed that the Vargases signed the loan modification agreement prepared by Deutsche Bank and it was sent to Deutsche Bank for signature. It is also undisputed that the Vargases made the payments specified in the loan modification agreement timely each month and when Deutsche Bank began refusing the payments, they were deposited in the Vargases' counsel's trust account. **Deutsche Bank offered no witnesses, submitted no affidavits, and offered no evidence to refute the evidence submitted by Mr. Vargas; and the general magistrate found Mr. Vargas' testimony to be credible**.

[9] We note that although Deutsche Bank claimed it was not aware that the two-hour specially set hearing before the general magistrate was to be an evidentiary hearing, it did not request a continuance or additional time to present any evidence, even though the general magistrate did not enter a ruling at the conclusion of the hearing, and instead, took the matter "under advisement."

I would, therefore, find that the general magistrate's conclusion that there was no meeting of the minds to modify the loan was unsupported by competent substantial evidence. The only evidence presented was that the Vargases accepted and signed the loan modification agreement prepared by Deutsche Bank; the Vargases tendered the requisite payments timely; and the only unresolved question was whether the first payment tendered by the Vargases and accepted by Deutsche Bank was to apply to the February 2009 or March 2009 payment. Deutsche Bank therefore wrongfully rejected the Vargases' payments, and the trial court erred in overruling the Vargases' exceptions and ratifying the general magistrate's report and recommendation.

The majority claims that the only evidence introduced at the hearing was Mr. Vargas' testimony that "he" agreed to accept, and ultimately accepted, the October 2008 loan modification offer, and "[t]here certainly is no evidence that Deutsche Bank or Ocwen" was still willing to modify the loan on January 29, 2009, at the terms offered three months earlier. The majority is incorrect. It is undisputed that **Deutsche Bank accepted** the Vargases' check for $1,207.38, the amount it demanded at the January 29, 2009, hearing, which Mr. Vargas testified was the date the loan modification agreement was entered into. It is also undisputed that Deutsche Bank or Ocwen initially accepted further monthly payments by the Vargases in the modified amount, and that **Ocwen sent the Vargases an account**

summary well after the claimed loan modification, and a payment coupon stating that the $1,207.38 payment (which is the modified monthly payment amount) was due on December 16, 2009. And, neither Ocwen nor Deutsche Bank offered any evidence disputing the Vargases' claim that the loan modification was accepted by the Vargases and agreed to by counsel for Deutsche Bank in open court at the January 29, 2009, hearing. Importantly, local counsel, whom the Vargases and the Vargases' counsel insist agreed to the loan modification on January 29, 2009, has never submitted an affidavit refuting their claim, and did not testify at the hearing. Thus, the Vargases' claim remains unrefuted. The Vargases' claim is also supported by the letters submitted at the hearing. The letters sent by the Vargases' counsel demonstrate that following the hearing, the issue was no longer whether the parties would enter into a loan modification agreement, but rather whether the first payment the Vargases tendered and Deutsche Bank accepted at the January 29, 2009, hearing would be treated as payment for the month of February or March. If Deutsche Bank's counsel had not agreed to the loan modification on January 29, 2009, then the communications would have reflected requests by the Vargases for a modification of the loan and Deutsche Bank's position on the modification. Instead, the Vargases first payment was accepted, additional payments were initially accepted, and a statement and payment coupon were sent to the Vargases.

I also disagree with the majority's decision to affirm on grounds not relied on by the trial court or argued on appeal—that the statute of frauds, section 687.0304(2), Florida Statutes (2012), requires that "an agreement to lend or forbear repayment of money . . . , to otherwise extend credit, or to make any formal financial accommodation" must be in writing. Because this issue was not relied on below, nor argued on appeal, we are in no position to consider the merits of such an argument, especially since the loan modification offered by Deutsche Bank **was in writing**, and was accepted by and executed by the Vargases, and the posture of the proceedings was a motion by the Vargases to compel Deutsche Bank to execute the agreement it allegedly agreed to honor.

Accordingly, I would reverse the trial court's order overruling the Vargases' exceptions and ratifying the general magistrate's report and recommendation, and remand for an evidentiary hearing to determine the intent of the parties as to the start date of the loan modification agreement. As the record demonstrates that the Vargases attempted to the make payments due under the loan modification agreement, but Deutsche Bank wrongfully rejected the payments, Deutsche Bank is not entitled to any late fees or penalties. I, therefore, dissent from the majority opinion concluding otherwise.