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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **THE BANK OF NEW YORK MELLON**
3 **f/k/a THE BANK OF NEW YORK AS**
4 **TRUSTEE FOR THE CERTIFICATE**
5 **HOLDERS OF THE CWABS, INC.,**
6 **ASSET-BACKED CERTIFICATES,**
7 **SERIES 2005-9,**

8 Plaintiff-Appellee,

9 v.

NO. 33,988

10 **KENNETH BORREGO AND THE**
11 **UNKNOWN SPOUSE OF KENNETH**
12 **BORREGO, IF ANY,**

13 Defendants-Appellants.

14 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**
15 **Raymond Z. Ortiz, District Judge**

16 Rose L. Brand & Associates, P.C.
17 Eraina Edwards
18 Albuquerque, NM

19 for Appellee

20 Joshua R. Simms, P.C.

1 Joshua R. Simms
2 Albuquerque, NM

3 for Appellants

4 **MEMORANDUM OPINION**

5 **WECHSLER, Judge.**

6 {1} Defendant Kenneth Borrego (Homeowner) appeals from the district court’s
7 entry of “summary judgment, decree of foreclosure, and appointment of special
8 master” [RP 214] in favor of Plaintiff Bank of New York Mellon (the Bank). We
9 issued a notice of proposed disposition proposing to affirm, and Homeowner has
10 responded with a memorandum in opposition. We have carefully considered the
11 arguments raised in that memorandum; however, for the reasons stated in the notice
12 of proposed disposition and below, we continue to believe that summary affirmance
13 is appropriate in this case. We therefore affirm the district court’s decision.

14 {2} Our notice proposed to hold that the Bank established its standing as a holder
15 in due course of the note at issue on the basis that it had possession of the original
16 note, indorsed in blank, at the time of the filing of the complaint. [RP 9, 22, 224-26]
17 Further, we proposed to reject Homeowner’s challenge to the Bank’s standing based
18 on the validity of a mortgage assignment by Mortgage Electronic Registration
19 Systems, Inc. (MERS), based on our recent decision in *Flagstar Bank, FSB v. Licha*
20 (*Flagstar I*), ___-NMCA-___, ¶ 18, ___ P.3d ___ (No. 33,150, Feb. 18, 2015). We do

1 not reiterate our analysis here; instead, we focus on Homeowner’s arguments in his
2 memorandum in opposition.

3 {3} In response to our notice, Homeowner makes two arguments. First, he claims
4 that the Bank “may be the holder of the note, but has not established it is the owner
5 of the note.” [MIO 2] Second, Homeowner concedes that with respect to the
6 assignment of the mortgage, this issue has been resolved by our case law, but asks this
7 Court to reconsider the issue. [MIO 2-5] We reject Homeowner’s first argument
8 because we perceive no distinction in this context between the words “holder” and
9 “owner.” We acknowledge Homeowner’s citation to *Bank of New York v. Romero*,
10 2014-NMSC-007, ¶ 17, 320 P.3d 1, [MIO 2] wherein our Supreme Court held that a
11 party attempting to enforce a note has the “the burden of establishing timely
12 ownership of the note and the mortgage to support its entitlement to pursue a
13 foreclosure action.” (Emphasis added). However, when read in context, it is clear that
14 this statement in *Romero* was simply another way of saying that the party must be
15 entitled to enforce the note. See *Flagstar Bank, FSB v. Licha (Flagstar II)*, ___-
16 NMCA-___, ¶ 13, ___ P.3d ___ (No. 33,150, June 4, 2015) (citing paragraph in
17 *Romero* containing “ownership” language Homeowner relies on for the proposition
18 that plaintiffs in foreclosure actions “must demonstrate that they had the right to
19 enforce the note” at the time the action is filed). Being a “holder,” as defined by

1 NMSA 1978, Section 55-3-301 (1992), is one way of showing entitlement to enforce
2 a note. *Romero*, 2014-NMSC-007, ¶¶ 20-21. In other words, being the “owner” is not
3 a different or additional requirement of establishing the authority to enforce a note.
4 *See Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-097, ¶¶ 9-10, 336 P.3d 443
5 (explaining that “‘holder’ is a term of art” and carries with it the authority to enforce
6 a note).

7 {4} As for Homeowner’s second argument, we acknowledge that this Court
8 partially granted a motion for rehearing in *Flagstar I* and recently issued a different
9 opinion in place of the opinion filed February 18, 2015. Nonetheless, the modification
10 of the *Flagstar I* opinion does not change the outcome of this case. In this Court’s
11 opinion filed on June 4, 2015, we again rejected the homeowner’s argument that the
12 plaintiff lacked standing to enforce the note at issue because MERS lacked the
13 authority to assign the note. *Flagstar II*, ___-NMCA-___, ¶ 17. As in *Flagstar II*,
14 Homeowner’s failure to “distinguish[] MERS’ role in this case from MERS’ role in
15 *Romero*, does not undermine the Bank’s standing in this case. *See Flagstar II*, ___-
16 NMCA-___, ¶ 17. In short, there are no material distinctions to remove this case from
17 the control of our opinion in *Flagstar II* and we therefore reject Homeowner’s
18 challenge to Plaintiff’s standing based on the validity of a mortgage assignment by
19 MERS.

1 {5} Based on the foregoing as well as the discussion in the notice of proposed
2 disposition, we affirm the district court's decision in this case.

3 {6} **IT IS SO ORDERED.**

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JAMES J. WECHSLER, Judge

6 **WE CONCUR:**

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MICHAEL D. BUSTAMANTE, Judge

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JONATHAN B. SUTIN, Judge