IN THE CIRCUIT COURT OF THE 9TH JUDICIAL
CIRCUIT, IN AND FOR ORANGE COUNTY,
FLORIDA. CIVIL DIVISION

CASE#

CHASE HOME FINANCE, LLC
Plaintiff
Vs.

Defendant(s)

MOTION FOR SUMMARY JUDGMENT

The Defendant, , pursuant to Fla.R.Civ.P. 1.510(b), moves for summary judgment in this matter. For the motion would show that:

1. There are no material facts in dispute. The facts are taken from the complaint. The uncontroverted portions of the complaint must be taken as undisputed, and we have no information controversy.

2. The Defendant, is entitled to judgment as a matter of law, as is more fully explained in the memorandum included with this motion. The substantial matters of law to be discussed are whether compliance is necessary prior to bringing suit, whether Plaintiff have established standing to sue and if the Plaintiffs have stated a cause of action.

4. The Plaintiff filed suit on September 29, 2008 without the Defendant ever receiving a notice of default for the Bank. There is no allegation of any other notice – and – cure letter, from which we can infer that there is none.

The Mortgage and Note both require notice and opportunity to cure. We prefer such notice and opportunity when it would be meaningful, which is to say when a homeowner has a real chance of being able to comply, rather than months later after the suit is filed. However, this Court's

question is not whether a post –suit opportunity is meaningful; a due process discussion is not helpful. Rather, the question is whether Plaintiff gave such an opportunity before filing suit, as is required by the Mortgage and Note.

4. Defendant, moves the Court for Final Summary Judgment due to Lack of Standing, this Courts lack of subject matter jurisdiction, Plaintiffs failure to state a cause of action, Plaintiffs are not the real party of interest, and genuine issues that cannot be resolved.

Wherefore, as more fully discussed in the memo following, requests this court enter summary judgment in her favor and against Plaintiff.

Memorandum in Support of Summary Judgment

Summary judgment is appropriate when there are no material facts in dispute, and the moving party is entitled to prevail as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130* (Fla. 2000). There are no disputed facts here; most of the facts are taken from the complaint [ref. *Comp-l-*]; and the remainder from the uncontroverted affidavit's of Michal Cordero.

A Defendant may move for summary judgment at any time. *Coffman Realty, Inc., v. Tosohatchee Game Preserve, Inc., 381 So.2d 1164, 1165* (Fla. 5th DCA 1980) (six days before ptf filed amended complaint). It is, however, necessary that the hearing date be set at least twenty days out from the filing of the motion. Id. at 1166.

The burden of proof is normally on the Plaintiff to make his case. *Cheryl McKenna v. Camino Real Village Association, Inc., 877 So.2d 900, 901* (Fla. 4th DCA 2004). However, when a Defendant is moving for summary judgment, he is the movant and must come forward with some evidence. *Gardner v. Sabal Point Properties,Inc., 616 So.2d 1111, 1112* (Fla. 5th DCA 1993).

Once a movant has done so, the other side must offer evidence to survive summary judgment. *Benjamin E. Wright v. Albert Yurko, 446 So.2d 1162, 1166* (Fla. 5th DCA 1984).

Facts

Plaintiff sued for foreclosure filing an unverified complaint. *Compl.* The basis of the suit is an alleged breach of contract, to wit, default in performance of some note. *Compl.*-1- 5. Plaintiff is not the mortgagee on the Mortgage. Instead, the mortgagee is Mortgage Electronic Registration Systems, or MERS. (Mortgage, Definitions, (C)). Neither is Plaintiff the payee on the Mortgage attached. The original payee is DHI MORTGAGE COMPANY, LTD (mortgage, § 1),(mortgage, Definitions, (D)), not ''CHASE HOME FINANCE, LLC''.

While CHASE HOME FINANCE, LLC alleged in its unverified complaint that it was the holder of note and mortgage, the copy of the mortgage attached to the complaint lists "MERS" as the "mortgagee" and "DHI MORTGAGE COMPANY, LTD" as the Lender and since there was no copy of the Note attached we can assume there is not note. When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint. *Hunt Ridge at Tall Pines, Inc. v. Hall, 766 So. 2d 399, 401* (Fla. 2d DCA 2000) Where complaint allegations are contradicted by exhibits attached to the complaint, the plain meaning of the exhibits controls and may be a basis for a motion to dismiss. *Blue Supply Corp. v. Novos Electro Mech., Inc., 990 So. 2d 1157, 1159* (Fla. 3rd DCA 2008) *Fladell v. Palm Beach County Canvassing Board, 772 So.2d 1240* (Fla. 2000); *Greenwald v. Triple D Properties, Inc., 424 So. 2d 185, 187* (Fla. 4th DCA 1983); *Costa Bella Development Corp. v. Costa Development Corp., 441 So. 2d 1114* (Fla. 3rd DCA 1983).

A Plaintiff must also have standing to sue. *Jeff–Ray Corp. v. James Cary Jacobson, 566 So.2d 885, 886* (Fla. 4th DCA 1990) (ptf who does not hold note lacks standing); *Mortgage Electronic Registration Systems, Inc., v. George Azize, 965 So.2d 151, 153* (Fla. 2d DCA 2007).

The Plaintiffs have failed to attach documentation evidencing the Plaintiffs right to bring this action, by their own admission no less, evidencing any assignment of right to the Plaintiff to file

this action. Therefore the Plaintiffs do not have standing to bring a foreclosure action against Defendant and are a stranger to this Court and the Defendant.

Complaint line 3, states that Federal National Mortgage Association is the owner of the Note, and the Plaintiff has authorization to present this action yet fails to attach documents delegating said authority.

For that matter the Defendant can claim that Federal National Mortgage Association has given Defendant authority not to foreclose and it would be just as meaningless as the Plaintiffs allegations. Neither statement would hold any substance!

Standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being the real party in interest entitled to bring the claim. This entitlement to prosecute a claim in Florida Courts rests exclusively in those persons granted by substantive law, the power to enforce the claim. *Kumar Corp v. Nopal Lines Ltd., et al, 462 So.2d 1178* (Fla. 3rd. DCA 1985). The Plaintiffs have failed to produce a single document into evidence that would show they have exclusive power to enforce this claim.

Plaintiff is the wrong party to bring this action. A party needs standing in order to foreclose based on failure to perform on a note. Possession of the note, following an exchange of consideration, will give that necessary standing. *WM Specialty Mortgage, LLC, v. Alan F. Salomon, 874 So.2d 680, 682* (Fla. 4th DCA 2004); *J.J. Johns v. Sam Gillian, 184 So. 140, 143* (1938).

Plaintiffs *Count I, line 2*, claims that the *"Defendant on August20 th, 2007 executed and delivered a promissory note and delivered a purchase money mortgage securing a payment of the note then owned by and in possession of said mortgagor"*, which would be DHI MORTGAGE COMPANY, LTD and MERS not the Plaintiff or FNMA. This is clearly a misleading statement and the Plaintiffs have not submitted a single document into evidence that would substantiate their claim. In fact the opposite is obvious to this Court and Defendant. Once

again, this is an unsworn statement by the Plaintiffs and their attorney, unsworn statements do not establish facts in the absence of stipulation and Trial judges cannot rely upon these unsworn statements as a basis for making factual determinations when the evidence clearly shows the opposite. . *LOEON SHAFFER GOLNICK ADVERTISING, INC., v. Jerry Cedar, 423 So.2d 1015,1017* (Fla. 4th DCA 1982). The Plaintiffs have yet to state a cause of action and remain a stranger to the action.

Unfortunately for Plaintiff, its own complaint shows that it lacks standing. The complaint says clearly that Plaintiff does not own the Note. The attachments to the complaint failed to include said copy of Note, Fla.R.Civ.P. 1.130(a) requires and the Courts have affirmed that failure to attach the required documents, in this case, the "Assignment ", "Title Papers" , or the Note itself, that would show the Plaintiff would have interest in the mortgage and note are not attached therefore they Plaintiffs have failed to show a cause of action, lack standing, and the complaint is fatally defective. *Telephone Utility Terminal Co. v. EMC Industries, Inc., 404 So.2d 183 (Fla 5th DCA 1981).*

Where the complaining party cannot prove the existence of the note, then there is no note. To recover on a promissory note, the plaintiff must prove: (1) the existence of the note in question; (2) that the party sued signed the note; (3) that the plaintiff is the owner or holder of the note; and (4) that a certain balance is due and owing on the note. Since no one is able to produce the "instrument" there is no competent evidence before this Court that any party is the holder of the alleged note or the true holder in due course with proper enforcement rights under law. Therefore, the Plaintiff has no standing.

In addition to the note, another element of proof is necessary—an accounting that is signed and dated by the person responsible for the account. Claim of damages, to be admissible as evidence, must incorporate records such as a general ledger and accounting of an alleged unpaid promissory note, the person responsible for preparing and maintaining the account general ledger must provide a complete accounting which must be sworn to and dated by the person who maintained the ledger and the record is void of all requirements.

We do not know who possesses the Note. It could be almost anyone. The only certainty is that Plaintiff does not possess it; they are the one entity on the planet who have clearly lacking the note and therefore lack standing.

Fla.R.Civ.P. 1.130(a) requires that all documents on which an action may be brought be attached to the pleadings. Without these documents Plaintiffs will fail to state a cause of action because the essence of his action is omitted

Even if Plaintiff were to somehow come up with the note, assignment or proof of debt after filing suit, it would be too late. A Plaintiff cannot simply file suit and hope to accrue a cause of action later. If less than all the requisite elements of the cause of action are present at the time of bringing suit, a Plaintiff cannot prevail. Rolling Oaks at 688. *BAC FUNDING CONSORTIUM INC. v. US BANK* (Fla. 2ND DCA, FEB, 12TH, 2010) .

Neither plaintiff nor any predecessor in interest furnished a notice of assignment showing that the debt was transferred to Plaintiff let alone sold to FNMA.

The Plaintiffs lack of standing at the inception of the case cannot be cured by the acquisition of standing after the case is filed. *McGrath Community Chiropractic v. Progressive Express Insurance Company* (Fla. 2nd DCA 2005) The Plaintiffs have yet to state a cause of action and are not the real party in interest.

Fla. Stat. § 673.3091(1) requires facts showing entitlement to enforce; all we have is the legal conclusion entirely bereft of facts, without factual allegations, the Defendant should prevail without question and Judgment should be granted to the Defendant as a matter of law!

It's a clear cut that you must have a valid assignment or proof of purchase of the debt, and not just being in possession of the note and here the Plaintiffs have failed to show proof of purchase of the debt and valid assignments and therefore the complaint is fatally defective and does not establish a cause of action.

Under Florida Law, a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note, unless the Plaintiff actually **holds** and **owns** the original note. *Your Construction Center, Inc. v. Gross, 316 So.2d 596* (Fl.4th DCA 1975), *Overseas Development, Inc. v. R.A. Krause, 323 So.2d 679* (Fla. 3d DCA 1975) *Lawyers Title Insurance Company, Inc. v. Novastar Mortgage, Inc.*, *862 So. 2d 793* (Fla. 4th DCA 2003) and see: *Booker v. Sarasota, Inc., 707 So.2d 886* (Fla. 1st DCA 1998).

This Court lacks subject matter jurisdiction, the Plaintiffs failed to state a cause of action and the Defendant is entitled to judgment as a matter of law.

If the Defendant had not brought these genuine issues they might have gotten away with the attempted fraud.

Conclusion

The undisputed facts show that this action is and was not ripe due to failures; lack of standing, failure to state a cause of action and failure evoke this Courts jurisdiction. Even if this action were ripe, Plaintiff would be the wrong party to bring the action.

WHEREFORE, the Defendant must have summary judgment.

I HEREBY CERTIFY copies of the forgoing Motion Summary Judgment, together with Affidavits to herein have been mailed to the parties on the attached Service List this day of March 17th, 2010.

Respectfully Submitted,

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Plaintiff

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Certificate of Service

I certify that a copy hereof has been furnished to all parties listed below by the method indicated for each party.

Done this 18th day of March, 2010
Marshall C. Watson, P.A.,
1800 NW. 49th Street, Suite 120
Fort Lauderdale, FL 33309

Respectfully submitted,

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