First District Court of Appeal State of Florida

No. 1D21-1552

Deutsche Bank National
TRUST COMPANY, as Trustee under Pooling and Servicing Agreement Dated as of May 1, 2003 Morgan Stanley ABS Capital I Inc. Trust 2003-NC5,

Appellant, v.

CLAUDE RUSSELL; JEFFERY RAMSEY; SUSIE RAMSEY; DONALD WHITAKER; UNKNOWN TENANT #1; and UNKNOWN TENANT #2,
Appellees.

On appeal from the Circuit Court for Duval County in Jacksonville appeals attorney at Brownstone Law. Bruce Anderson, Judge.
July 27, 2022

Osterhaus, J.
The borrowers in this foreclosure case stopped paying on their promissory note in 2003, within months of signing the note and mortgage agreement on a Jacksonville house. Deutsche Bank National Trust Company (DBNTC) filed a foreclosure case in late 2003. But the case languished for more than 15 years after a

bankruptcy and other fits and starts. When the case ultimately went to trial, the borrowers together with subsequent owners and interest-holders in the property challenged DBNTC's standing to foreclose. The trial court agreed with them and dismissed DBNTC's foreclosure case. We reverse, however, because the pooling and servicing agreement (PSA) evidence put forth by DBNTC proved its standing to foreclose in 2003 when the Complaint was first filed.

I.

Jeffrey and Susie Ramsey entered a loan agreement to buy a house in Jacksonville in February 2003. Jeffery Ramsey executed a Promissory Note in the amount of $68,000.00 to New Century Mortgage Corporation. The Note was secured by a Mortgage executed the same day by both Jeffery and Susie Ramsey, husband and wife.

By August 2003, the Ramseys stopped paying on their loan. In response, DBNTC filed a foreclosure complaint in November 2003 alleging default and seeking to foreclose on the mortgage. Its Complaint included an action to reestablish a lost promissory note. The note attached to the Complaint lacked indorsements demonstrating that the note had been transferred to DBNTC. DBNTC's lost note affidavit attested that the original promissory note was not in its custody, that the attached copy of the note was true and correct, and that DBNTC possessed and was entitled to enforce the note when the loss occurred. An assignment of Mortgage was also attached to the Complaint showing a conveyance from New Century to DBNTC, dated February 12, 2003. Contemporaneous with filing the Complaint, DBNTC filed a notice of lis pendens.

Shortly after the 2003 Complaint was filed, the original borrower was declared bankrupt and the foreclosure action was stayed. Years later—in December 2011—DBNTC filed a second foreclosure complaint. The sole count of the 2011 Complaint was for mortgage foreclosure. The Complaint asserted that Appellant was the owner and holder of the mortgage and note; the Mortgage was in default as of January 1, 2004; the full amount payable

under the note was due and owing; and Jimmy Russell was the new record owner of the subject property via quitclaim deed.

Unlike the original complaint, the 2011 Complaint did not mention a lost note and attached the same copies of the note and mortgage that had been attached to the 2003 Complaint. The 2011 Complaint captioned the parties differently as "Deutsche Bank National Trust Company, as Trustee under Pooling and Servicing Agreement Dated as of May 1, 2003 Morgan Stanley ABS Capital I Inc. Trust 2003-NC5 vs. Jimmy Russel; Jeffrey Ramsey; [et al.]." In 2013, Appellant filed a copy of the note bearing an undated special indorsement from New Century to Morgan Stanley Mortgage Capital Holdings LLC (successor-in-interest by merger to Morgan Stanley Mortgage Capital Inc.), and an undated allonge with a special indorsement from Morgan Stanley Capital Holdings LLC to DBNTC.

In August 2015, Appellant filed a motion to re-open the 2003 case. Its motion explained that the federal bankruptcy proceedings involving Ramsey had been dismissed and the automatic stay lifted. Appellant filed motions to consolidate the 2003 and 2011 cases, which the trial court granted in March 2016. The action then proceeded under the 2003 case number, with the 2011 Complaint treated as an operative amended complaint.

A non-jury trial was eventually set for October 2020. The primary issue at trial was whether Appellant had standing to foreclose. DBNTC provided the original note and mortgage bearing identical indorsements as the copies filed in 2013, along with a copy of a PSA from May 2003 and corresponding mortgage loan schedule identifying the subject mortgage as one of a group of loans included in the Trust Fund established by the PSA. The PSA named DBNTC as Trustee. The PSA was signed by the parties "as of [May 1, 2003]," with DBNTC signing "solely as Trustee and not in its individual capacity."

After trying the case, the trial court concluded that Appellant lacked standing and entered a final judgment of dismissal. Its rationale stemmed from discounting the PSA evidence, which the court considered unreliable because of the parties' apparent

noncompliance with the PSA's indorsement terms. DBNTC then appealed.

II.

Review of a ruling on a party's standing in a foreclosure action is de novo. Ham v. Nationstar Mortg. LLC, 164 So. 3d 714, 717 (Fla. 1st DCA 2015). To the extent the trial court's ruling involves factual determinations, they will be affirmed if supported by competent, substantial evidence. Citibank, N.A. v. Olsak, 208 So. 3d 227, 229 (Fla. 3rd DCA 2016). Review of the trial court's interpretation of the terms of the PSA contract is also de novo. Cleveland v. Crown Fin., LLC, 183 So. 3d 1206, 1209 (Fla. 1st DCA 2016).

It is necessary in a mortgage foreclosure proceeding that the plaintiff demonstrate standing to foreclose. Seidler v. Wells Fargo Bank, N.A., 179 So. 3d 416, 419 (Fla. 1st DCA 2015). Standing to foreclose is proven by demonstrating entitlement to enforce the note. Id. "A plaintiff who is not the original lender may establish standing to foreclose by submitting a note with a blank or special indorsement, an assignment of the note, or an affidavit otherwise proving his status as holder of the note." Pennington v. Ocwen Loan Servicing, LLC, 151 So. 3d 52, 53 (Fla. 1st DCA 2014) (citing Focht v. Wells Fargo Bank, N.A., 124 So. 3d 308, 310 (Fla. 2d DCA 2013)). Standing must be proven as of the time of the filing the foreclosure action and when a final judgment is entered. Id.

Appellant's standing argument relied upon evidence in addition to the indorsements on the note to demonstrate that it held the note and could foreclose when its case was filed. Appellant wasn't the original lender or holder of the note. And the note did not itself establish Appellant's standing to foreclose because the indorsement was undated and filed after Appellant's two complaints had been filed. See Ham, 164 So. 3d at 718–19 (recognizing that an undated blank indorsement of a note filed after the complaint could not serve as evidence that the blank indorsement was on the note at the time of the complaint). And so, Appellant introduced a May 2003 PSA and mortgage loan schedule through its loan-servicer witness to prove that it held the note prior to filing its case. See Bolous v. U.S. Bank Nat. Ass'n, 210 So.

3d 691, 693 (Fla. 4th DCA 2016) (recognizing that PSAs may be used prove the timing of indorsements); Deutsche Bank Nat'l Trust Co. v. Marciano, 190 So. 3d 166, 168 (Fla. 5th DCA 2016) (same). The PSA and mortgage loan schedule identified the subject mortgage as one of a group of loans placed into a Trust and transferred to Appellant "as of May 1, 2003" (the mortgage itself contained a February 2003 indorsement to Appellant). The PSA evidence thus confirmed that Appellant held the note as trustee with rights of enforcement as of May 2003, at least six months before its initial complaint was filed (and many years before it filed its Amended Complaint in 2011).

The trial court admitted the PSA evidence into the record but rejected it as proof of standing because the parties did not follow the PSA's indorsement-related terms. Specifically, the terms of the PSA required a blank indorsement on the note and delivery to Appellant as trustee. But in Appellant's case the note was specially indorsed to Appellant and, according to a lost note affidavit, Appellant couldn't find the note when it first filed its November 2003 foreclosure complaint. These incongruities with the terms of the PSA left the trial court dismissive of Appellant's attempt to demonstrate its status as holder of the note in 2003.

But whether Appellant and the other parties stuck strictly to the PSA's indorsement terms is not important for purposes of establishing Appellant's standing to foreclose. Appellees were not parties to or beneficiaries of the PSA, so they cannot avoid foreclosure by citing to potential breaches of the PSA. See, e.g., Deutsche Bank Tr. Co. Americas as Tr. for Residential Accredit Loans, Inc. v. Harris, 264 So. 3d 186, 190 (Fla. 4th DCA 2019) (noting that "where the borrower is neither a party to nor a third-party beneficiary of the trust, the borrower lacks standing to raise an issue as to the Bank's compliance with its pooling and servicing agreement when it took possession of the original note and mortgage"). "Indeed, the interests of the defaulting borrowers are adverse to the interests of the parties to the Agreement." HSBC Bank USA, Nat'l Ass'n v. Buset, 241 So. 3d 882, 890 (Fla. 3d DCA 2018). Whether Appellant received the note via a special indorsement or blank indorsement makes no difference to its note- holding status, nor to the critical indorsement-timing question here. Indeed, the terms of the PSA itself provided no basis for

nullifying the pooled status of particular mortgages based on their mode of indorsement. Note holders may enforce a note if it bears either "a special endorsement in favor of the plaintiff or a blank endorsement." See, e.g., McLean v. JP Morgan Chase Bank Nat'l Ass'n, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). And here, the PSA evidence demonstrated that Appellant's rights as trustee were established by May 2003, at the latest, because the PSA identified and included the subject loan amongst the pool of loans assigned to Appellant as trustee, which was many months before Appellant filed its foreclosure action.

We recognize further the trial court's other concerns related to the PSA, including the passage of the note and mortgage through different indorsing/assigning entities and Appellant's initial lost note-related assertions. But these factors also don't preclude Appellant's standing to foreclose. First, as to the different entity indorsements/assignments on the note and mortgage, the note governs standing to foreclose; the mortgage follows the note. First Nat. Bank of Quincy v. Guyton, 72 So. 460, 460 (1916) (noting that "when a note secured by mortgage is transferred, the mortgage follows the note as an incident thereto"); Chem. Residential Mortg. v. Rector, 742 So. 2d 300, 300–01 (Fla. 1st DCA 1998) ("Because the lien follows the debt, there was no requirement of attachment of a written and recorded assignment of the mortgage in order for the appellant to maintain the foreclosure action."). The fact that the mortgage was assigned directly to Appellant, instead of through Morgan Stanley, which was the note's indorsement path, is superfluous. See Buset, 241 So. 3d at 891.

Second, Appellant's initial lost note assertions in 2003 didn't preclude it from proving standing using the PSA. In fact, these allegations were abandoned with the filing of the operative Amended Complaint in 2011. Long before trial, whatever problem Appellant experienced locating the note initially when filing its 2003 Complaint was solved in the interim, many years before trial. Ultimately, the note, complete with its special indorsement to Appellant, was entered as record evidence, which the PSA-timing evidence bolstered in proving that Appellant possessed standing to foreclose.

Finally, Appellee's claim that this action involved two separate complaint-filing Deutsche Bank entities and that trustee standing on the day of trial wasn't established cannot be reasonably drawn from the record evidence. Appellant's loan-servicing witness testified at trial that DBNTC and DBNTC "as Trustee" were the same entity. Moreover, the 2011 Complaint was treated as an amendment to the 2003 Complaint. This filing bore the DBNTC "as Trustee" caption, which stuck for the remainder of the proceedings. See generally Arch Specialty Ins. Co. v. Kubicki Draper, LLP, 137 So. 3d 487, 490 (Fla. 4th DCA 2014) (discussing the liberal allowance in the Florida Rules of Civil Procedure for amendment of pleadings to change the name of the party in the caption, so long as the effect was not that new parties were introduced). Appellant's standing to foreclose remained in place until the trial per the note's special indorsement to DBNTC "as Trustee." See Dickson v. Roseville Properties, LLC, 198 So. 3d 48, 50 (Fla. 2d DCA 2015) (recognizing that a plaintiff can establish standing to foreclose at trial by submitting a note with a special indorsement proving the plaintiff's status as the holder). Thus, the conclusion that standing at trial wasn't demonstrated is incorrect. Appellant proved its standing to foreclose at trial with the note bearing the special indorsement to it.

III.

Because Appellant proved its standing to foreclose via a special indorsement on the note and PSA-related indorsement timing evidence, the trial court's final judgment of dismissal is REVERSED and the case is REMANDED with directions that the trial court enter final judgment in favor of Appellant.

RAY and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Gillian D. Williston of Troutman Pepper Hamilton Sanders LLP, Virginia Beach, Virginia, for Appellant.

Antoinette Burgess of Law Offices of Fred Tromberg, Jacksonville, for Appellee.